**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

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

DEBRA BROWNE,

MARY JANE SANCHEZ,
CYNTHIA STEWART,
HUMANISTS DOING GOOD,
ERIC NIEDERKRUGER,

Plaintiffs,

and

GREENPEACE, INC.,

Plaintiff-Intervenor,

v.

CITY OF GRAND JUNCTION, COLORADO,

Defendant.

---

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

---

Plaintiffs and Plaintiff-Intervenor (hereinafter "Plaintiffs"), by and through their undersigned counsel, hereby submit Plaintiffs' Motion for Summary Judgment, and in support thereof state as follows:

## INTRODUCTION

The City of Grand Junction 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. 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.[1] Plaintiffs mount a facial challenge to this overbroad ordinance.[2]

Five of the Plaintiffs are solicitors, each of whom ask for donations in a polite, non-aggressive, non-threatening manner, some by simply displaying a sign asking for help; but the challenged ordinance as originally enacted, as amended, and/or as the Chief of Police plans to enforce it, prohibits them from engaging in their peaceful solicitation speech in a variety of different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 In response, the City repealed or revised some of the challenged provisions, all the while vehemently defending the constitutionality of the original ordinance.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. Not so. The only reasonable reading of the consent provision is that it requires Plaintiffs to ask for and receive permission before approaching and requesting a donation. In public spaces, the First Amendment does

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

[2] Plaintiff Stewart also brings an as-applied claim for nominal damages.

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 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 is patently unable to survive. Defendant cannot provide evidence, as it must, 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 Grand Junction does not have an aggressive panhandling problem of consequence, just as it does not have a public safety problem related to panhandling. Instead, the evidence shows that the "problem" that Grand Junction sought to address with its panhandling ordinance is public discomfort with the presence of visibly impoverished beggars. By silencing their solicitation speech, Grand Junction hoped to decrease their presence in public places. Such a censorial motive is anathema to First Amendment principles.

## FACTUAL AND PROCEDURAL BACKGROUND

On February 19, 2014, Grand Junction adopted Ordinance No. 4618, "An Ordinance Prohibiting Activities Relating to Panhandling." Plaintiffs' Appendix (hereinafter "Pls.' Appx.") pp. 1-6, Ord. 4618. Before the ordinance's effective date, Plaintiffs filed a Complaint and Motion for Temporary Restraining Order and Preliminary Injunction.[3] Compl., ECF Doc. 1; Mot. for TRO and Prelim. Inj., ECF Doc. 6. Five of the Plaintiffs remaining in this case are solicitors (three of them needy individuals, two non-profit organizations) who have requested donations, and wish to continue to request donations, in a manner or situations that violate the ordinance as written, as amended, and/or as Chief Camper plans to enforce it. *See* ECF Doc. 1 at ¶¶ 28-37, 42-48; Compl. in Intervention Greenpeace, ECF Doc. 36 at ¶¶ 10-21; Proposed Second Supplemental Complaint, ECF Doc. 66-1 at ¶¶ 23-25. The sixth Plaintiff, Eric Niederkruger, wishes to receive communications that the ordinance prohibits. ECF Doc. 1 at ¶¶ 48-51. 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. *See* ECF Doc. 6; Mot. to Clarify Relief, ECF Doc. 17 at ¶ 3.

On March 21, 2014, Judge Brimmer heard argument on Plaintiffs' request for a TRO and issued a written order, granting, in part, Plaintiffs' request. Order, ECF Doc. 15. Plaintiffs' request for a preliminary injunction remained pending, and the TRO was set to expire on April 4, 2014. ECF Doc.15 at p. 9. On March 28, 2014, Defendant filed

[3] Since the filing of the initial pleadings, the Court has accepted complaints in intervention by Greenpeace, Inc. and Alexis Gallegos. Both intervenors wished to solicit donations in a manner and in situations that violate Grand Junction's restrictions. *See generally* ECF Docs. 36, 41. On January 9, 2015, the parties filed a stipulated motion to dismiss Plaintiff Steve Kilcrease. ECF Doc. 72. On January 20, 2015, the Court granted Plaintiff's motion to dismiss Plaintiff-Intervenor Gallegos. ECF Doc. 78.

a joint motion requesting that the Court vacate a scheduled hearing on Plaintiffs' motion for preliminary injunction. ECF Doc. 21. Defendant explained that the Chief of Police had committed to suspend enforcement of Ordinance 4618 until a ruling on the merits. ECF Doc. 21 at ¶ 7. The Court granted the motion, deeming Plaintiffs' motion for preliminary injunction withdrawn. ECF Doc. 22.

On April 2, 2014, the Grand Junction City Council unanimously enacted Ordinance No. 4627, amending Ordinance 4618 on a "special emergency" basis. Pls.' Appx. pp. 10-11, Ord. 4627, Sections 9.05.010(g) and 9.05.030. While the amended ordinance repeals or revises some of the prohibitions Plaintiffs challenge, other challenged restrictions on communicative activity 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.[4] Pls.' Appx. p. 10, Ord. 4627, Section 9.05.030.

On May 19, 2014, Defendant filed a motion to dismiss Plaintiffs' claims, which is now fully briefed. ECF Docs. 46 (Mot.), 49 (Resp.), 52 (Reply).

On August 19, 2014, the Court granted Plaintiffs' unopposed motion to file a supplemental complaint on behalf of Cynthia Stewart. ECF Docs. 61, 62. Ms. Stewart requests nominal damages because the challenged provisions of the ordinance, as originally adopted and as amended, caused her to refrain from engaging in constitutionally-protected solicitation that she wanted to carry out.

[4] At some point later in the litigation, Plaintiffs learned that Chief Camper had committed to also delay enforcement of Ordinance 4627 while this case is pending before this Court.

On November 21, 2014, Plaintiffs moved to file a second supplemental complaint. ECF Doc. 66. The motion is based on an October 21, 2014 deposition of Chief of Police John Camper, wherein he detailed his plan to enforce the challenged ordinance. ECF Docs. 66, 66-1. The proposed supplemental complaint adds claims against Chief Camper aimed at enjoining his plan to enforce the ordinance against Plaintiff Deborah Browne, an impoverished solicitor who asks for donations by displaying a sign, and Plaintiff Cynthia Stewart, a poor solicitor who often approaches people and politely asks for a donation. ECF 66-1. The motion is fully briefed and currently pending before this Court. ECF Docs. 69 (Resp.), 70 (Reply). The instant Motion for Summary Judgment seeks resolution of all of Plaintiffs' claims, including those claims put forth in the proposed second supplemental complaint.

## I. The Definition of "Panhandling"

Central to this case is the ordinance's definition of "panhandle/panhandling." The City'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 person's consent**, whether by spoken words, bodily gestures, written signs or other means, for money, employment or other thing of value.

Pls.' Appx. p. 10, Ord. 4627, Section 9.05.020.

## II. The Challenged Prohibitions on "Panhandling"

Plaintiffs challenge the following specific prohibitions of the originally enacted ordinance (Pls.' Appx. p. 3, Ord. 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);[5]
- 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.[6]

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* Pls.' Appx. pp. 11-12, Ord. 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* Pls.' Appx. p. 11, Ord. 4627, Sections 9.05.040 (g) and (i). All other challenged provisions remain unaltered, including the blanket ban on nighttime panhandling.[7] Violation of the challenged ordinance, as enacted and as amended, is a criminal offense, carrying a penalty of up to a year in jail. *See* Pls.' Appx. pp. 4, 12, Ord.

[5] 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. Pls.' Appx. p. 2, Ord. 4618, Section 9.05.020, Definitions.

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

[7] To be clear, Plaintiffs challenge the following provisions of the amended ordinance (Pls.' Appx. p. 11, Ord. 4627): Section 9.05.040 (a) (prohibiting panhandling one half hour after sunset to one half hour before sunrise); (e) (prohibiting a repeated solicitation 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 a public parking facility); and (j) (prohibiting panhandling from people at outdoor cafes or waiting in line).

4618, Section 9.05.060; Ord. 4627, Section 9.05.060; Pls.' Appx. p. 683, GJMC § 1.04.090.

## STATEMENT OF UNDISPUTED FACTS[8]

**All Plaintiffs wish to continue carrying out nonaggressive communications prohibited by the challenged ordinance and/or Chief Camper's enforcement plan**

1. Debra Browne has politely solicited in Grand Junction by silently displaying a sign inviting a donation while she sits near bus stops and ATMs on Main Street. Pls.' Appx. pp. 27-31, Browne Decl. ¶¶ 3, 7, 8, 12, 14-18; Pls.' Appx. pp. 442-45, Browne Interrog. Resp. 1, 2, 4.

2. Mary Jane Sanchez has politely solicited in Grand Junction by flying a sign asking for assistance while standing next to streets that are state highways, within 20 feet of ATMs and bus stops, and sometimes after dark. Pls.' Appx. pp. 45-47, Sanchez Decl. ¶¶ 1, 6-13; Pls.' Appx. pp. 489-93, Sanchez Interrog. Resp. 1-4.

3. Cynthia Stewart politely approaches people in Grand Junction and asks for a donation in a variety of situations, including after dark, within 20 feet of bus stops and ATMs, on school campuses, on public buses, and in parking lots. Pls.' Appx. pp. 48-50, Stewart Decl. ¶¶ 4-10, 13; Pls.' Appx. pp. 505-10, Stewart Interrog. Resp. 1-4.

4. Eric Niederkruger, a disabled long-time resident of Grand Junction and advocate for the homeless, wants to receive the messages that the ordinance, as originally enacted, as amended, and/or as Chief Camper plans to enforce it, prohibits homeless and needy people from communicating to him in public places in Grand Junction. Pls.' Appx. pp. 39-41, Niederkruger Decl. ¶¶ 1, 2, 7-9; Pls.' Appx. p. 43,

[8] Additional undisputed facts are cited in the legal analysis of Plaintiffs' claims for relief, *infra*.

Niederkruger Supp. Decl. ¶¶ 1-3; Pls.' Appx. pp. 182,184, 187, Niederkruger Dep. 57:20-24, 66:5-21, 78:12-80:18.

5. Two Plaintiffs are non-profit organizations – Humanists Doing Good and Greenpeace – whose representatives have politely solicited in Grand Junction in ways that violate the ordinance as originally enacted, as amended, and/or as Chief Camper plans to enforce it. Pls.' Appx. pp. 14-19, HDG Decl. ¶¶ 1, 3, 6, 8-12, 14-19; Pls.' Appx. pp. 474-78, HDG Interrog. Resp. 1-4; Pls.' Appx. pp. 32-34, Greenpeace Decl. ¶¶ 1, 2, 4, 5-10; Pls.' Appx. pp. 458-61, Greenpeace Interrog. Resp. 1-4.

6. Each of the Plaintiffs who solicits does so in a peaceful, non-aggressive manner. Pls.' Appx. pp. 215, 217, Stewart Dep. 30:10-21, 39:11-40:14; Pls.' Appx. pp. 161-62, HDG Dep. 55:19-59:1; Pls.' Appx. pp. 191-92, Browne Dep. 31:5-34:2; Pls.' Appx. p. 204, Sanchez Dep. 21:5-18; Pls.' Appx. pp. 233-34, Greenpeace Dep. 16:15-17:7; see also Pls.' Appx. pp. 72, 85, Camper Dep. 46:24-47:5, 97:4-9; Pls.' Appx. p. 142, Cohn Dep. 77:16-78:17.

7. Each of the Plaintiffs who solicits wants to continue to peacefully request donations as they have in the past, but the ordinance, as originally enacted, as amended, and/or as Chief Camper plans to enforce it, forbids them from doing so. Pls.' Appx. pp. 30-31, Browne Decl. ¶¶ 17-18; Pls.' Appx. pp. 44, 47, Sanchez Decl. ¶¶ 1, 12, 13; Pls.' Appx. p. 50, Stewart Decl. ¶ 13; Pls.' Appx. pp. 14-15, 17, 19, HDG Decl. ¶¶ 3, 8, 15, 18, 19; Pls.' Appx. pp. 33-34, Greenpeace Decl. ¶¶ 8, 10; Pls.' Appx. pp. 444-45, 449, Browne Interrog. Resp. 4, 10; Pls.' Appx. pp. 491-93, Sanchez Interrog. Resp. 4; Pls.' Appx. pp. 507-10, Stewart Interrog. Resp. 3, 4; Pls.' Appx. pp. 474-78, 481, HDG Interrog. Resp. 2, 4, 10; Pls.' Appx. pp. 460-61, 464, Greenpeace Interrog. Resp. 4, 10.

8. Ms. Stewart, who seeks nominal damages, refrained from panhandling for approximately two months after passage of Ordinance 4618 and 4627, because she did not want to break the law and was afraid of getting ticketed and/or arrested. *See* ECF Doc. 62, Supp. Compl., ¶¶ 9, 13-15; Pls.' Appx. p. 224, Stewart Dep. 67:1-15; Pls.' Appx. pp. 507-08, Stewart Interrog. Resp. 3.

**The City does not have an appreciable problem with aggressive solicitation**

9. The City's primary stated goal in considering and ultimately adopting the ordinance and amended ordinance is to protect public safety by curbing aggressive panhandling. *See* Pls.' Appx. pp. 1-2, Ord. 4618, Recitals and Section 9.05.010; Pls.' Appx. pp. 7-10, Ord. 4627, Recitals and Section 9.05.010.

10. Grand Junction residents have a mistaken perception that homeless and transient people pose a danger to them. Pls.' Appx. pp. 260-61, 266-67, 2013-07-31 GJ Workshop Tr. 10:19-11:11, 16:17-17:1; Pls.' Appx. pp. 67-68, Camper Dep. 28:25-31:6. Generally, homeless panhandlers are not a safety threat to housed residents of Grand Junction. Pls.' Appx. p. 67, Camper Dep. 28:9-13; Pls.' Appx. pp. 265-67, 2013-07-31 GJ Workshop Tr. 15:25-17:10. The Grand Junction Police Department has received very few reports of Grand Junction residents being victimized by homeless people. Pls.' Appx. pp. 260-61, 266-67, 2013-07-31 GJ Workshop Tr. 10:19-11:11, 16:17-17:1; Pls.' Appx. p. 67-68, Camper Dep. 28:25-31:6.

11. 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* Pls.' Appx. pp. 1, 7-9, Ords. 4618 and 4627, Recitals. Yet, the City Council heard remarkably little evidence that Grand

Junction faces a serious or escalating problem with aggressive or dangerous panhandling.[9]

12. The only data provided to City Council supposedly reflecting a problem with aggressive panhandling was noted in the recitals – 377 calls complaining of "panhandling" within the city limits. Pls.' Appx. p. 1, Ord. 4618, Recitals; Pls.' Appx. p. 92, Camper Dep. 125:18-126:8. The Council received no additional data even purporting to document a problem with aggressive panhandling. Pls.' Appx. p. 92, Camper Dep. 125:18-126:8.

13. The 377 "complaints" provide the most reasonably complete information regarding the types of complaints about panhandling received by the Grand Junction Police Department. Pls.' Appx. pp. 530-31, Def's Interrog. Resp. 5.

14. Discovery has revealed that the vast majority of the 377 complaints were actually calls by the public concerning homeless persons, rather than panhandling.[10] Pls.' Appx. pp. 558-629, Loiter Calls; Pls.' Appx. pp. 651-52, 2014-03-21 Camper-Wilson Email; Pls.' Appx. pp. 92-94, Camper Dep. 128:15-19, 132:25-133:12.

15. Even by the City's own analysis, which it undertook only after passage of the ordinance, only 76 of the 377 calls even related to panhandling, and – of those 76

[9] Public discussions of the challenged ordinance took place during City Council Workshops on July 31, 2013 and February 3, 2014 and at the February 19, 2014 meeting of the City Council, at which the ordinance was adopted. Pls.' Appx. pp, 270-78, 282-87, 324, 2013-07-31 GJ Workshop Tr. 20:23-28:4, 32:11-37:1, 74:3-4; Pls.' Appx. pp. 350-84, 2014-02-03 GJ Workshop Tr. 3:5-37:15; Pls.' Appx. pp. 396-99, 402-31, 2014-02-19 GJ City Council Tr. 2:3-5:10, 8:16-37:23.

[10] Indeed, the 377 complaints that Chief Camper cited were actually concerned citizen calls categorized in the City's computer database as related to "loitering," which does not necessarily have any connection to panhandling, much less aggressive panhandling. Pls.' Appx. pp. 558-629, Loiter Calls; Pls.' Appx. pp. 651-52, 2014-02-21 Camper-Wilson Email; Pls.' Appx. pp. 92-94, Camper Dep. 128:15-19, 131:17-22, 132:25-133:12.

calls – the police department identified only 35 as involving aggressive conduct. Pls.' Appx. pp. 715-16, List of Aggressive Loiter Calls; Pls.' Appx. pp. 93-94, Camper Dep. 132:6-134:12; see also Pls.' Appx. pp. 558-629, Loiter Calls.

16. Notably, none of the 76 panhandling-related calls relayed a complaint about solicitation of an at-risk person or a person standing in line, nor did any complain of solicitation on a bus, at a bus stop, near an ATM, or near a school. See Pls.' Appx. pp. 558-629, Loiter Calls. None of the 76 panhandling-related calls identified a specific problem with panhandling at night, or complained of solicitations for employment. See Pls.' Appx. pp. 558-629, Loiter Calls. In fact, prior to passage of the challenged ordinance, the City had no knowledge of any particular complaints about solicitation directed at at-risk individuals (Pls.' Appx. pp. 632-33, 2014-02-17 Camper-Shaver Email; Pls.' Appx. pp. 111-12, Camper Dep. 203:21-205:5), solicitation of employment (Pls.' Appx. p. 113, Camper Dep. 209:1-210:24), nighttime solicitation (Pls.' Appx. p. 113, Camper Dep. 211:22-25), solicitation near bus stops (Pls.' Appx. p. 116, Camper Dep. 224:8-15), solicitation near a school (Pls.' Appx. p. 117, Camper Dep. 225:19-226:19), or solicitation on a public bus (Pls.' Appx. p.117, Camper Dep. 227:3-5). *See also* Pls.' Appx. pp. 527-33, Def's Interrog. Resp. 3-7.

17. The Grand Junction Police Department has a Homeless Outreach Team (HOT Team), which consists of officers dedicated to addressing problems associated with the City's homeless and transient population. Pls.' Appx. pp. 64-65, Camper Dep. 16:20-17:15; Pls.' Appx. p. 153, Krouse Dep. 14:10-15:1.

18. Officer Cindy Cohn is the only member of the HOT Team who has worked full-time in that capacity since 2011 (save a few month period). Pls.' Appx. pp. 124-25,

127, Cohn Dep. 8:15-9:20, 17:16-19. As a HOT Team member, Officer Cohn has had more contact with homeless and transient people than any other officers in the police department. Pls.' Appx. p. 127, Cohn Dep. 17:20-18:6. During every work day, "all day long," Officer Cohn observes homeless and transient individuals soliciting donations on the street. Pls.' Appx. pp. 127, 144, Cohn Dep. 87:22-88:8, 18:7-11. Members of the community report to Officer Cohn their observations about homeless and transient people. Pls.' Appx. p. 127, Cohn Dep. 18:12-15. Officer Cohn has never observed aggressive panhandling in Grand Junction and she has never received a complaint regarding aggressive panhandling. Pls.' Appx. p. 127, Cohn Dep. 19:6-11. Likewise, Officer Cohn has not observed and has no knowledge of an increase in complaints of aggressive panhandling over the last several years in Grand Junction. Pls.' Appx. p. 127, Cohn Dep. 19:25-20:4; see also Pls.' Appx. p.155, Krouse Dep. 21:14-20 (no knowledge of increase in aggressive panhandling complaints in Grand Junction over last several years).

**Grand Junction has at its disposal obvious and substantially less restrictive alternatives to criminalizing speech**

19. At present, there are a variety of laws available to Grand Junction police that outlaw aggressive and negative conduct that may be associated with panhandling. Pls.' Appx. p. 87, Camper Dep. 108:6-14; Pls.' Appx. pp. 638-39, 2014-02-19 City Council Agenda (excerpt); Pls.' Appx. p. 157, Krouse Dep. 29:6-12.[11]

[11] For example, the Grand Junction police may rely upon the following laws to address aggressive incidents of solicitation: harassment (C.R.S. § 18-9-111); molesting pedestrians upon the street or in other public places by following them on foot (GJMC § 9.04.030(b)); stopping or forcibly hindering the operation of a vehicle (C.R.S. § 18-9-114); obstructing a street, sidewalk, or building entrance (C.R.S. § 18-9-107); course or offensive utterances, gestures or displays in a public place tending to incite imminent

20. In addition, the Grand Junction police may rely on the unchallenged provisions of the City's panhandling ordinance to address aggressive and unsafe solicitation, including a section of the ordinance that prohibits solicitors from "engag[ing] in conduct toward the person solicited that is intimidating, threatening, coercive, or obscene," (Pls.' Appx. p. 11, Ord. 4627, Section 9.05.040(b)), and another that forbids stepping into the street to collect a donation (Pls.' Appx. p. 11, Ord. 4627, Section 9.05.050(a)).

21. Discovery has revealed that, of the 35 calls from 2013 that the City has identified as related to aggressive panhandling (Pls.' Appx. p. 715-16, List of Aggressive Loiter Calls), the vast majority of incidents likely could have been addressed by enforcement of already existing laws[12] or unchallenged provisions of the panhandling ordinance.[13] See generally Pls.' Appx. pp. 98-111, Camper Dep. 152:15-157:04,

---

breach of the peace (C.R.S. § 18-9-106 and GJMC § 9.04.040); placing or attempt to place a person in fear of imminent serious bodily injury by threat or physical action (C.R.S. § 18-3-206); demanding money under threat of harm (C.R.S. § 18-3-207); disturbing the peace (GJMC § 9.04.030); trespass (GJMC § 9.04.080); and nuisances (GJMC, Title 8, Chapter 8). Pls.' Appx. pp. 638-39, 2014-02-19 City Council Agenda; Pls.' Appx. pp. 87-89, 98-111, Camper Dep. 107:11-114:22, 152:15-157:04, 159:11-201:3; *see also* Pls.' Appx. pp. 683-97, Grand Junction Municipal Code.

[12] *See* Pls.' Appx. pp. 99-106, 109-10, Camper Dep. (reviewing purportedly aggressive panhandling incidents that could have been addressed by already existing laws) **harassment**: 153:19-155:3, 171:18-173:25, 177:17-178:9; **trespass**: 160:14-161:24, 162:23-164:22, 164:23-166:5, 178:10-180:6, 182:22-184:3; **harassment and disturbing the peace**: 193:25-195:4; **harassment, disturbing the peace, trespass**: 197:20-199:2; **obstructing traffic**: 199:3-200-2; *see also* Pls.' Appx. pp. 558-629, Loiter Calls.

[13] *See* Pls.' Appx. pp. 99-111, Camper Dep. (reviewing purportedly aggressive panhandling incidents that could have been addressed by unchallenged portions of the ordinance) **intimidating, threatening, coercive conduct**: 164:23-166:5, 168:11-170:1, 170:2-171:1, 171:16-173:25, 174:1-174:16, 177:17-178:9, 180:21-181:22,186:15-187:16,190:5-190:20, 193:25-195:4; **stepping into the street**: 155:4-156:22,159:11-160:24, 161:25-162:22, 188:22-190:1; **stepping into the street and intimidating,**

159:11-201:3 (reviewing all 35 purportedly aggressive panhandling calls); Pls.' Appx. pp. 558-629, Loiter Calls.

**The challenged ordinance prohibits peaceful, non-aggressive solicitation**

22. All of the challenged provisions of the ordinance, as originally enacted and as amended, prohibit solicitation that is not inherently aggressive, meaning the provisions prohibit solicitation that is not inherently threatening, intimidating, coercive or obscene. Pls.' Appx. pp. 69-72, 80, Camper Dep. 36:14-39:18, 44:1-44:25, 47:6-20, 79:12-80:17; Pls.' Appx. p. 671, Training Outline. Specifically, Subsections (a) (nighttime), (e) (repeat solicitation), (f) (obstructing sidewalk), (g) (20 feet of ATM or bus stop), (h) (public bus), (i) (parking lot) and (j) (outdoor café; standing in line) of Section 9.05.040 of the amended ordinance prohibit solicitation that is not inherently intimidating, threatening, coercive or obscene. See Pls.' Appx. p. 72, Camper Dep. 47:6-20; *see also generally*, Pls.' Appx. pp. 69-73, Camper Dep. 36:24-51:18.

**Chief Camper's expectations regarding enforcement of the challenged ordinance**

23. As the chief law enforcement officer for Grand Junction, Chief Camper is responsible for construing and enforcing the laws applicable in the City, including the challenged ordinance. Pls.' Appx. p. 64, Camper Dep. 13:13-14:9. Chief Camper is responsible for training his officers on how to enforce the challenged ordinance. Pls.' Appx. p. 75, Camper Dep. 59:11-18.

24. Chief Camper has a plan to enforce the challenged ordinance. *See* Pls.' Appx. pp. 60-121, Camper Dep. *passim*; Pls.' Appx. p. 78, Camper Dep. 71:4-20; *see* Pls.' Appx. pp. 670-71, Training Outline.

---

**threatening, coercive conduct**: 175:18-176:12, 181:23-182:21, 187:17-188:21, 195:5-196:4, 199:3-200:2, 200:3-201:3; *see also* Pls.' Appx. pp. 558-629, Loiter Calls.

25. Chief Camper led several trainings regarding enforcement of the challenged ordinance. Pls.' Appx. p. 78, Camper Dep. 71:4-72:22; Pls.' Appx. pp. 536-37, Def's Interrog. Resp. 13. At these trainings, Chief Camper instructed officers on what behavior the challenged ordinance prohibits. Pls.' Appx. p. 81, Camper Dep. 83:18-25.

**Because the City has declined to develop an authoritative interpretation of the ordinance, the police can be expected to enforce it in accord with the Chief's own understanding of what it prohibits**

26. The City has not developed any authoritative interpretation of the challenged ordinance, as originally enacted or as amended, to guide Chief Camper or his officers on how to enforce the ordinance or to clarify what conduct the ordinance prohibits. Pls.' Appx. p. 554, Def's Interrog. Resp. 15; Pls.' Appx. p. 134, Cohn Dep. 46:10-14 (statements by counsel for Defendant).

27. Chief Camper expects his officers to enforce the amended ordinance against poor beggars but not against solicitors for non-profit, political or religious organizations. *See, e.g.*, Pls.' Appx. p. 673, GJPD Education Brochure (ordinance "[d]oes not prevent Girl or Boy Scouts, Salvation Army bell ringers, or any other charitable causes from fundraising," "[d]oes not ban street performers," and "[d]oes not ban candidates for political offices from campaigning"); *accord* Pls.' Appx. p. 671, Training Outline; *see also* Pls.' Appx. pp. 405-06, 2014-02-19 City Council Meeting Tr. 11:17-12:20; Pls.' Appx. pp. 73-75, Camper Dep. 51:20-53:7, 55:5-58:6.

28. Chief Camper interprets the challenged ordinance to regulate passive solicitors, including Plaintiff Browne, who silently solicit donations by displaying a sign.

See Pls.' Appx. pp. 84-85, Camper Dep. 95:1-97:3; *accord* Pls.' Appx. pp. 78-79, Cohn Dep. 72:19-75:8.

29. Chief Camper interprets the challenged ordinance to prohibit additional solicitation speech that is not inherently intimidating, threatening, coercive or obscene, including Ms. Stewart's polite requests for donations at bus stops and declarant Alexis Gallegos's polite requests for donations after dark. *See, e.g*., Pls.' Appx. pp. 69-73, 80, Camper Dep. 36:24-51:18, 79:12-80:17; Pls.' Appx. p. 670, Training Outline.

30. Chief Camper's enforcement expectations are that when his officers encounter solicitation that violates the ordinance, but would not cause a reasonable person to feel threatened or fearful, including passive solicitation with a sign, the officers will enforce the ordinance by issuing warnings or move-on orders to the solicitors. Pls.' Appx. pp. 80-81, 83, Camper Dep. 77:5-78:12, 80:18-81:10, 92:7-15; Pls.' Appx. p. 671, Training Outline.

## SUMMARY JUDGMENT STANDARD

Summary Judgment should be granted if the movant shows that there are no material facts in dispute and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "Judgment as a matter of law is appropriate when a nonmoving party has failed to make a sufficient showing on an essential element of his or her case with respect to which he or she has the burden of proof." *Doe v. City of Albuquerque*, 667 F.3d 1111, 1131 (10th Cir. 2012) (quoting *Shero v. City of Grove*, 510 F.3d 1196, 1200 (10th Cir. 2007)). Reasonable inferences from the facts are to be drawn in the light most favorable to the non-moving party. *Doe*, 667 F.3d at 1111 (citing *Commercial Union Ins. Co. v. Sea Harvest Seafood Co.*, 251 F.3d 1294, 1298 (10th Cir. 2001)).

## LEGAL ANALYSIS

Grand Junction, through the prohibitions of the challenged ordinance and Chief Camper's plans to enforce them, violates and threatens to violate rights of Plaintiffs that are guaranteed by the First and Fourth Amendments and the Equal Protection and Due Process Clauses.

Grand Junction has the burden of production and proof for each of Plaintiffs' twelve claims for relief. "When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *Doe*, 667 F.3d at 1131.

### I. First and Fifth Claims For Relief – *The challenged ordinance violates solicitor-Plaintiffs' First Amendment Right to Free Speech*

Plaintiffs' first claim for relief alleges the challenged ordinance, as originally passed and as amended, violates solicitor-Plaintiffs' rights to free speech.[14] To survive this challenge, the City must prove that its restrictions on expression "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014). The City will be unable to meet its burden.

#### A. Grand Junction cannot show that its restrictions are content-neutral

A regulation of expression is content-based when it "draw[s] content-based distinctions on its face." *McCullen*, 134 S.Ct. at 2531. Thus, a measure is content-based when it requires 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.*

[14] Plaintiffs' fifth claim for relief, under the free-speech clause of the state constitution, mirrors Plaintiffs' first claim for relief. The elements, burden of proof, and supporting facts are the same.

*League of Women Voters of Cal.,* 468 U.S. 364, 383 (1984)). A facially neutral regulation is content-neutral only if it serves purposes unrelated to content and the government justifies it "without reference to the content of the regulated speech." *Id*. (quoting *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)). 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.'" *Id*. at 2531-32 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)). Thus, the prospect that the targeted communications might "cause offense or make listeners uncomfortable" does not provide a content-neutral justification for regulation. *Id*. at 2532. Content-based regulations are "presumptively unconstitutional" and "subject to strict scrutiny," which requires the government to prove that the challenged restrictions are the least restrictive means of furthering a compelling government interest. *McCullen*, 134 S.Ct. at 2530.

The text of the City's ordinance "draw[s] content-based distinctions on its face." *Id*. at 2531. The ordinance regulates based on the particular subject matter of the solicitation. The City targets solicitations seeking money or employment, but it does not target other solicitations, such as those that request signatures, directions, support for a cause, religious conversion, or electoral support**.**

Noting distinctions similar to those made by the challenged ordinance, numerous courts in recent years have ruled that various restrictions on panhandling, begging, or solicitation draw content-based distinctions on their face and must be analyzed under the test of strict scrutiny. *See 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 v. City of Charlottesville*,

708 F.3d 549, 560 (4th Cir. 2013) (ordinance regulating requests for immediate donations, but exempting requests for donations to be made at a later date, is a content-based regulation subject to strict scrutiny); *Berger v. City of Seattle*, 569 F.3d 1029, 1051-53 (9th Cir. 2009) (*en banc*) (holding that a ban on "actively solict[ing] donations" is an invalid content-based regulation of speech); *ACLU of Idaho v. City of Boise*, 998 F. Supp. 2d 908, 916 (D. Idaho 2014) (preliminarily enjoining multiple provisions of ordinance that "suppress[es] particular speech related to seeking charitable donations and treats this speech content different than other solicitation speech"); *Kelly v. City of Parkersburg*, 978 F. Supp. 2d 624, 629-30 (D. W. Va. 2013) (holding that ordinance is content-based because it regulates solicitations for money but not solicitations for votes, to enter raffles, or to register for a church mailing list); *Guy v. Cty of Hawaii*, 2014 U.S. Dist. Lexis 13226, at *6 (D. Hawaii Sept. 19, 2014) (explaining that the ordinance "singles out some solicitation speech for regulation while leaving other solicitation speech untouched"); *see also ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784,794 (9th Cir. 2006) (explaining that ordinance discriminated on the basis of content when handbills containing certain language may be distributed, while handbills requesting financial assistance are prohibited); *Lopez v. Town of Cave Creek*, 559 F. Supp. 2d 1030, 1032-33 (D. Ariz. 2008) (holding that ordinance is content-based because it bans only certain types of solicitation speech).[15]

Judge Brimmer reached the same conclusion in the instant case when analyzing a provision of the original Grand Junction panhandling ordinance:

[15] Two recent decisions, with flawed reasoning that is inconsistent with the Supreme Court's decision in *McCullen*, concluded that ordinances regulating solicitation were content neutral. *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014); *Norton v. City of Springfield*, 768 F.3d 713 (7th Cir. 2014).

> 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 pp. 6-7 (quoting *Berger*, 569 F.3d at 1051).

Grand Junction relies on content to distinguish between prohibited expression and expression that is not regulated. Anyone is free to stop a person walking near a bus stop to ask for directions to a hospital, but if the requester asks for help with cab fare to get there, the ordinance is violated. Nonprofit organizations are free to distribute literature at bus stops about their work, but distributing that literature is forbidden if it includes a pitch for donations. Evangelicals are free to stop passersby near an ATM to ask if they are saved, but not to ask for a donation to a church or charity. Petition circulators seeking to put an education measure on the ballot can stop a parent in the school's parking lot to ask for a signature, but they violate the ordinance if they ask for help in financing the ballot measure. Vendors can approach persons at ATMs and pressure them to buy a product but charitable solicitors must keep their distance.[16] In holding that the ordinance at issue in *McCullen* was content-neutral, the Court explained that a violation turned only on *where* plaintiffs spoke, not on what they said. *McCullen*,

[16] Notably, it is undisputed that City officials regard commercial solicitations as exempted from the definition of panhandle. *See* Pls.' Appx. p. 81, Camper Dep. 82:3-7; *see also*, *e.g.*, Pls.' Appx. p. 671, Training Outline; *see also* Pls.' Appx. p. 664, 2014-02-28 Shaver-ACLU Letter; Pls.' Appx. p. 666, 2014-03-03 ACLU-Shaver Letter. Commercial speech ordinarily receives more limited protection than noncommercial speech. By creating a content-based distinction that favors commercial speech over noncommercial speech, Grand Junction turns the First Amendment on its head. *See, e.g.*, *Berger*, 569 F.3d at 1055 (finding "[t]his bias in favor of commercial speech, is, on its own, cause for the rule's invalidation").

134 S. Ct. at 2531. In contrast, in Grand Junction, whether Plaintiffs violate the ordinance does indeed turn on "*what* they say." *Id*.; *see Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010) (explaining that the challenged statute is content-based because whether plaintiffs violate it "depends on what they say").

The challenged ordinance is content-based for a second reason: the City's underlying purpose behind adopting the ordinance is to reduce the public presence of a particular type of expression that the City disapproves: poor people asking strangers for donations. *See Berger*, 569 F.3d at 1051 (explaining that a regulation is content-based when the "underlying purpose" is to target particular ideas or expression). It is telling that the singular piece of data relied upon by City Council to support the need for the challenged ordinance was the number of calls purportedly related to "panhandling" that the City had received. *See supra* Statement of Undisputed Facts (hereinafter "Undisputed Facts") ¶¶ 12-13. Reliance on this data, rather than on data regarding aggressive solicitation, is indicative of the true target of the ordinance – impoverished beggars. *See* Undisputed Facts ¶¶ 11-15, 27; *see also* Pls.' Appx. p. 92, Camper Dep. 126:9-127:11. Similarly, Chief Camper's statements before and after passage of the challenged ordinance, as well as his training outline, reveal a plan to enforce the ordinance against impoverished panhandlers, but not solicitors for political, non-profit or religious organizations. *See* Undisputed Facts ¶ 27. Because the City's underlying purpose is to target a particular type of expression, the ordinance must be subjected to strict scrutiny, a test the Ordinance cannot survive.

**B. Even if the restrictions were content neutral (and they are not), Grand Junction will be unable to prove that they are narrowly tailored to advance a significant interest**

The narrow tailoring requirement "demand[s] a close fit between ends and means." *McCullen*, 134 S.Ct. at 2534. A regulation cannot "burden substantially more speech than is necessary to further the government's legitimate interests." *Id*. at 2535 (quoting *Ward*, 491 U.S. at 798-99). Put another way, the regulation must "focus[ ] on the source of the evils the city seeks to eliminate . . . and eliminate[ ] them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." *Ward*, 491 U.S. at 799, n.7.

To meet its burden, Grand Junction must provide evidence, not speculation, that the challenged restrictions "serve a substantial state interest in a direct and effective way." *Doe*, 667 F.3d at 1133. Quoting the Supreme Court, the Tenth Circuit explained further:

> 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 regulations will in fact alleviate these harms in a direct and material way.

*Id.* (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)).[17] When regulating in the First Amendment area, Grand Junction "must base its conclusions upon substantial evidence." *iMatter Utah v. Njord*, 2014 U.S. App. LEXIS 24164, at *23 (10th Cir. Dec. 22, 2014) (quoting *Turner Broad. Sys. v. FCC*, 520 U.S. 180, 196 (1997)).

[17] The two decisions referenced in footnote 15, *supra*, which upheld regulations of panhandling, failed to hold the government to this evidentiary burden.

In its Motion to Dismiss, Grand Junction asserted that the challenged ordinance was enacted to address public health and safety concerns raised by aggressive or dangerous panhandling. Doc. 46 at p. 13. Because the challenged ordinance prohibits substantial amounts of speech that pose no threat to public safety, the City will be unable to meet its burden.

As described in more detail above, Grand Junction has no appreciable problem with aggressive panhandling. Undisputed Facts ¶¶ 9-18. The only data relied upon by City Council (and provided by the Grand Junction police) to show that the City faces a problem with aggressive solicitation are the 377 calls referenced in the recitals to Ordinance 4618. Undisputed Facts ¶¶ 12-13. Although the recitals referred to these calls as "complaints" about panhandling, the vast majority had nothing to do with panhandling, much less aggressive panhandling. Undisputed Facts ¶¶ 12-15. The calls related mostly to homeless persons. Undisputed Facts ¶ 14. It appears the City has conflated the challenges it faces associated with its homeless population – which are plainly real – with challenges it faces associated with aggressive solicitation – which are merely conjectural. *See, e.g.*, Pls.' Appx. p. 112-23, 116-17, Camper Dep. 207:25-208:14, 209:24-210:24, 224:3-7, 225:1-7, 226:15-24, 227:13-19 (despite having received no complaints regarding solicitation for employment, of "at-risk" individuals, at night, near bus stops, near a school, or on a public bus, Chief Camper conjectures that solicitation under those circumstances poses a potential threat to public safety). Thus, the City cannot show "that the recited harms are real, not merely conjectural." *Doe*, 667 F.3d at 1133. Grand Junction failed to "base its conclusions upon substantial evidence." *iMatter Utah,* 2014 U.S. App. LEXIS 24164, at *23.

Even if Grand Junction did face a significant problem with aggressive solicitation, the City cannot show that the challenged ordinance addresses the harms "in a direct and material way." *Id*. The City suppresses a substantial amount of speech that is peaceful, non-aggressive and poses no threat to public safety, such as the peaceful solicitation carried out by the Plaintiffs. *See, e.g.*, Undisputed Facts ¶ 22; *see also Loper v. New York City Police Dep't*, 999 F.2d 699, 706 (2d Cir. 1993) ("A verbal request for money for sustenance . . . carries no harms of the type enumerated by the City Police, if done in a peaceful manner."). The City fails the test of narrow tailoring, because it failed to "focus[] on the source of the evils the city seeks to eliminate." *Ward*, 491 U.S. at 799 n.7. Instead, Grand Junction banned "a substantial quantity of speech that does not create the same evils." *Id*.

Two Ninth Circuit decisions illustrate the analysis that shows that Grand Junction fails the test of narrow tailoring. In rejecting a Las Vegas ordinance, the court said:

> The record indicates that aggressive panhandling, solicitation, and handbilling were the problems confronted by the City. Yet the solicitation ordinance targets a substantial amount of constitutionally protected speech that is not the source of the "evils" it purports to combat. The ordinance therefore would fail the time, place, and manner test even if it were content neutral.

*ACLU of Nevada*, 466 F.3d at 796, n.13. In an *en banc* decision, the court invalidated an ordinance that prohibited certain solicitations directed at motorists. The City argued that traffic and safety concerns justified the restrictions. The court explained that the ordinance was not narrowly tailored, because it prohibited a substantial amount of expression that did not cause problems with traffic flow or safety. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 940 948-49

(9th Cir. 2011) (en banc). The same reasoning applies to Grand Junction's ordinance, which prohibits a substantial amount of expression that poses no risk to public safety.

**1. Consent**

Contrary to the City's contention, the post-lawsuit addition of "without the person's consent" to the definition of "panhandle" does not narrow the reach of the challenged prohibitions. Pls.' Appx. p. 10, Ord. 4627, Section 9.05.020. The plain text suggests that, before asking a person for money in the situations and locations regulated by the ordinance, a panhandler must first obtain consent from the person to be solicited. For Plaintiffs, this means that, in order to comply with the law, they must obtain consent before they can ask for a donation. Otherwise, the solicitation occurs "without that person's consent."[18] *See, e.g.*, Pls.' Appx. p. 227, Stewart Dep. 77:2-20; Pls.' Appx. p. 248, Greenpeace Dep. 73:23-74:14. Thus, Plaintiffs are forbidden to approach and solicit persons who may well turn out to be receptive, sympathetic and willing listeners, but who have not provided the advance consent the challenged provision requires.

**2. Less restrictive alternatives**

"To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests." *McCullen*, 134 S. Ct. at 2540; *see U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1238 (10th Cir. 1999) ("an obvious and substantially less restrictive means for advancing the desired government objective indicates a lack of narrow tailoring").

[18] In the alternative, Plaintiffs maintain that the consent provision is unconstitutionally vague. *See* Section III, *infra*.

In *McCullen*, the Supreme Court noted that enforcing already-existing "generic criminal statutes" constituted a less speech-restrictive alternative to the 35-foot buffer zone challenged in that case. 134 S. Ct. at 2538. Similarly, in holding that a regulation was not narrowly tailored, the Ninth Circuit explained that "[i]f the City desires to curb aggressive solicitation, it could enforce an appropriately worded prohibition on aggressive behavior." *Berger*, 569 F.3d at 1053. The same reasoning applies here.

To meet its burden, Grand Junction must show that enforcing already-existing laws, including the portions of the panhandling ordinance that Plaintiffs do not challenge, would fail to address the harms that prompted the challenged ordinance. It is undisputed that Grand Junction has a variety of laws at its disposal, including the unchallenged provisions of its panhandling ordinance, that can address aggressive solicitation without criminalizing speech. Undisputed Facts ¶¶ 19-21. Grand Junction made no effort to assess whether its perceived problems with aggressive solicitation could be addressed by these less restrictive alternatives. Indeed, discovery revealed that the vast majority (if not all) of the complaints the City received regarding purportedly aggressive solicitation could have been addressed by enforcement of already existing laws or the unchallenged provisions of the panhandling ordinance.[19] Undisputed Facts ¶ 21. The City has not met its burden to show that these substantially less restrictive

[19] In addition, the police department's Homeless Outreach Team effectively deters some aggressive solicitation. Pls.' Appx. p. 65-66, Camper Dep. 20:23-21:1; Pls.' Appx. p. 154, Krouse Dep. 19:23-20:1; *see also* Undisputed Facts ¶ 17. This team, however, has been understaffed or completely inactive over the last several years. Pls.' Appx. p. 124, Cohn Dep. 8:19-24; Pls.' Appx. p. 152, Krouse Dep. 9:15-18, 10:22-12:10; *see also* Pls.' Appx. pp. 124-25, Cohn Dep. 8:25-10:20; Pls.' Appx. p. 630, 2013-02-20 Willis-Krouse Email (noting increase in "bad behavior" since the HOT team was pulled onto street patrol). Rather than relying on the less restrictive alternative of fully staffing the HOT team, the City has chosen to criminalize speech.

alternatives would fail to address the harms purportedly targeted by the challenged ordinance.

**3. Each challenged subsection is unduly restrictive of speech**

Each of the challenged subsections of Grand Junction's panhandling ordinance is a content-based regulation of expression that cannot survive strict scrutiny, as each turns on the City's content-based definition of "panhandling." Even if the prohibitions were content-neutral, (and they are not), Grand Junction cannot carry its burden to prove that each restriction is narrowly tailored to address the harms of aggressive panhandling that is intimidating, coercive, or poses a threat of physical harm.

**a. Solicitation after dark**

Perhaps the least tailored of the City's restrictions is the blanket ban on any panhandling anywhere in the city after dark. It is undisputed that nighttime panhandling is not prevalent in Grand Junction. Pls.' Appx. p. 113, Camper Dep. 210:25-211:6. Further, the City has no knowledge of any complaints identifying any specific problem with solicitation at night. Undisputed Facts ¶ 16.

As Chief Camper recognizes, the nighttime solicitation ban prohibits speech that is non-aggressive and non-threatening.[20] Undisputed Facts ¶ 22; *see* Pls.' Appx. 72, Camper Dep. 47:11-20. The blanket city-wide ban applies to areas like where nighttime solicitation does not even arguably pose a unique risk to public safety, such as Main

[20] Plaintiffs Stewart and Sanchez solicit donations at night in a polite, non-aggressive manner, and their solicitation is unreasonably prohibited by the challenged ordinance as originally enacted, as amended, and/or as Chief Camper plans to enforce it. *See* Undisputed Facts ¶¶ 2-3, 6-8; *see also* Pls.' Appx. p. 223, Stewart Dep. 63:10-64:4; Pls.' Appx. pp. 505-10, Stewart Interrog. Resp. 2-4; Pls.' Appx. p. 46, Sanchez Decl. ¶ 9; Pls.' Appx. pp. 204-05, Sanchez Dep. 24:24-25:5; Pls.' Appx. pp. 491-93, Sanchez Interrog. Resp. 4.

Street downtown, which is well-lit, boasts an active nightlife on the weekends, and attracts significant foot traffic after dark.[21] *See, e.g.*, Pls.' Appx. p. 115, Camper Dep. 219:9-18; Pls.' Appx. p. 41, Niederkruger Decl. ¶ 11; Pls.' Appx. p. 223, Stewart Dep. 63:10-64:4.

In 2011, an Arizona court subjected a ban on nighttime solicitation to a careful and critical analysis. In reasoning that applies here, the court held that it failed the test of narrow tailoring. *State v. Boehler*, 262 P.3d 637, 643-44 (Ariz. App. 2001). In response to the assertion that nighttime solicitations 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 or well-lit street corners." *Id*. at 644; *see also* Pls.' Appx. p. 115, Camper Dep. 219:4-8 (acknowledging the Grand Junction's nighttime solicitation ban does not distinguish between solicitation in dark alleys and on well-lit sidewalks). Like the Grand Junction ordinance, the Arizona 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."). Similarly, Chief Camper acknowledged that Grand Junction's nighttime solicitation ban does not distinguish between polite and impolite

[21] The nighttime solicitation ban is especially onerous for solicitors during the winter when the sun sets as early as 4:50 p.m. and rises as late as 7:20a.m. Pls.' Appx. p. 682, GJ Sunrise/Sunset Chart. During that time of year, solicitors are barred from reaching potential contributors during high-traffic rush hours when people are arriving to or leaving from work. The nighttime ban is also particularly unjustifiable during winter, as rush hour is hardly a time when reasonable people would fear for their safety when solicited.

requests for money. Pls.' Appx. p. 115, Camper Dep. 220:3-8. Indeed, he confirmed that a person is subject to enforcement if, after dark, that person approaches a passerby on a well-lit Main Street sidewalk and says: "Excuse me. I'm sorry to bother you, but I'm short a few dollars. Could you help me out?" Pls.' Appx. pp. 70-71, Camper Dep. 40:9-42:14, 43:6-25; *accord* Pls.' Appx. p. 140, Cohn Dep. 69:22-72:18; *see also* Pls.' Appx. pp. 36-37, Gallegos Decl. ¶¶ 4, 7.

As noted earlier, Plaintiffs disagree strongly with the First Circuit's flawed analysis of content neutrality and narrow tailoring in *Thayer*, see footnote 15, supra. Nevertheless, *Thayer* upheld an interim injunction prohibiting the City of Worcester from enforcing a blanket ban on nighttime solicitation. *Thayer*, 755 F.3d at 73, n.7.

**b. Asking for reconsideration**

In Grand Junction, vendors soliciting sales can repeatedly pester a person who turns them down. A petition circulator can repeatedly and aggressively solicit a signature even after being turned down, but someone soliciting charity is forbidden to ask for reconsideration, no matter how courteously, politely, or nonthreatening the request. As Chief Camper recognizes, this provision prohibits solicitation speech that is non-aggressive and non-threatening. Undisputed Facts ¶ 22. This provision unreasonably forbids Greenpeace canvassers to do their jobs pursuant to their training, which encourages canvassers to politely ask again when a passerby initially declines to engage. Pls.' Appx. p. 248, Greenpeace Dep. 75:3-76:7; Pls.' Appx. pp. 709-10, Greenpeace Orientation Training Canvassers.

**c. Proximity to bus stop or ATM**

As originally enacted, the ordinance prohibited "panhandling" within 100 feet of a bus stop or ATM. Pls.' Appx. p. 3, Ord. 4618, Section 9.05.040(h). In the amended ordinance, the bubble has been reduced to 20 feet, but still does not meet the test of narrow tailoring.[22] Pls.' Appx. p. 11, Ord. 4627, Section 9.05.040(g). As Chief Camper recognizes, this provision prohibits solicitation speech that is non-aggressive and non-threatening.[23] Undisputed Facts ¶ 22. The City of Grand Junction has received no complaints of solicitation near bus stops. Undisputed Facts ¶ 16.

Grand Junction presumably plans to argue that soliciting charity from persons patronizing an ATM is inherently threatening and puts people in fear for their safety. The challenged ordinance, however, is not narrowly tailored to protect persons who are patronizing ATMs. The prohibition broadly prohibits approaching anyone who may be passing by a building that houses an ATM, even if the passersby have no plans to enter

[22] Grand Junction has the burden of presenting evidence that justifies the *size* of its 20-foot bubbles. *See iMatter Utah*, 2014 U.S. App. LEXIS at *22 - *23 (In a First Amendment challenge to the state's requirement that parade organizers obtain a $1 million insurance policy, the court said "Utah must offer some evidence that this amount, and not some lesser amount, is necessary").

[23] Plaintiffs Stewart and Browne solicit donations at bus stops in a polite, non-aggressive manner, and their solicitation is unreasonably prohibited by the challenged ordinance as originally enacted, as amended and/or as Chief Camper plans to enforce it. *See* Undisputed Facts ¶¶ 1, 3, 6-8; *see also* Pls.' Appx. pp. 216-17, Stewart Dep. 36:14-37:10; Pls.' Appx. p. 49, Stewart Decl. ¶ 7; Pls.' Appx. p. 51, Stewart Suppl. Decl. ¶ 2; Pls.' Appx. p. 28, Browne Decl. ¶ 7. Plaintiffs Humanists Doing Good, Browne, Greenpeace and Sanchez solicit near ATMs in a polite, non-aggressive manner, and their solicitation is unreasonably prohibited by the challenged ordinance as originally enacted, as amended and/or as Chief Camper plans to enforce it. *See* Undisputed Facts ¶¶ 1-2, 5-7; *see also* Pls.' Appx. p. 165, HDG Dep. 71:5-72:6; Pls.' Appx. p. 28, Browne Decl. ¶ 8; Pls.' Appx. p. 248, Greenpeace Dep. 74:15-25; Pls.' Appx. p. 204, Sanchez Dep. 24:1-18; Pls.' Appx. pp. 45-46, Sanchez Decl. ¶ 8.

and use the ATM and even if the passersby are unaware that the building even houses an ATM.

Last year, a federal district court ruled that a plaintiff was likely to succeed in his challenge to an ordinance that prohibited solicitation within 20 feet of an ATM. *Guy v. Cty of Hawaii*, 2014 U.S. Dist. Lexis 13226, at *6 (D. Hawaii Sept. 19, 2014). Earlier in 2014, another federal court enjoined a Boise ordinance that prohibited requests for donations made within 20 feet of a bus stop or an ATM. *ACLU of Idaho v. City of Boise*, 998 F. Supp. 2d 908, 915, 919 (D. Idaho 2014).

**d. Solicitation on a public bus**

The City of Grand Junction has received no complaints of solicitation on a public bus. Undisputed Facts ¶ 16. Commercial solicitors are permitted to pester bus passengers to buy, yet, the City forbids a nonprofit organization from distributing literature to passengers if the literature requests a donation. *See* ECF Doc. 46 at p. 16 (noting the ordinance applies equally to "solicitations for an immediate donation or for a donation at a later time."). Grand Junction allows a passenger to solicit signatures for a petition but forbids asking for help in financing the cause. It forbids a passenger to ask his companion for change to pay the fare. As Chief Camper recognizes, this provision prohibits solicitation speech that is non-aggressive and non-threatening.[24] Undisputed Facts ¶ 22. Last year, a federal district court ruled that a plaintiff was likely to succeed in his challenge to an ordinance that prohibited solicitation "while in any public

[24] Plaintiff Stewart solicits donations on public buses in a polite, non-aggressive manner, and her solicitation is unreasonably prohibited by the challenged ordinance as originally enacted, as amended and/or as Chief Camper plans to enforce it. Undisputed Facts ¶¶ 3, 6-8; Pls.' Appx. p. 220, Stewart Dep. 50:3-15; *see also* Pls.' Appx. pp. 444-45, Browne Interrog. Resp. No. 4; Pls.' Appx. p. 196, Browne Dep. 50:2-19.

transportation vehicle." *See Guy*, 2014 U.S. Dist. Lexis 13226, at *6; *see also*, *ACLU of Idaho*, 998 F. Supp. 2d at 918 (enjoining similar prohibition).

**e. Solicitation in a parking garage, parking lot, or parking facility**

Subsection (b)(10) forbids soliciting in a parking garage or parking lot, regardless of how courteous, polite and non-threatening the solicitation. As Chief Camper recognizes, this provision prohibits solicitation speech that is non-aggressive and non-threatening.[25] Undisputed Facts ¶ 22. Last year, federal courts in Hawaii and Idaho ruled that plaintiffs challenging a similar provision were likely to succeed on the merits. *ACLU of Idaho*, 998 F. Supp. 2d at 915, 919; *Guy*, 2014 U.S. Dist. Lexis 13226, at *6.

**f. Solicitation to persons waiting in line or seated at a sidewalk café**

As Chief Camper recognizes, this provision prohibits solicitation speech that is non-aggressive and non-threatening.[26] Undisputed Facts ¶ 22. A federal district court preliminarily enjoined a portion of a Boise ordinance that prohibited soliciting a person who was waiting in line, as well as a provision that prohibited solicitation within 20 feet of a sidewalk café or a street vendor. *ACLU of Idaho*, 998 F. Supp. 2d at 915, 919. Similarly, the *en banc* decision in *Berger* invalidated an analogous regulation barring First Amendment activities within 30 feet of "captive audiences," which were defined as persons who were waiting in line or seated at a place serving food or beverages. *See*

[25] Plaintiff Stewart solicits donations in parking lots, in a polite, non-aggressive manner, and her solicitation is unreasonably prohibited by the challenged ordinance, as originally enacted, as amended and/or as Chief Camper plans to enforce it. *See* Undisputed Facts ¶¶ 3, 6-8; Pls.' Appx. p. 223, Stewart Dep. 62:3-63:9; Pls.' Appx. pp. 508-10, Stewart Interrog. Resp. 4.

[26] Plaintiff Stewart solicits donations from people standing in line outside an event, in a polite, non-aggressive manner. *See* Undisputed Facts ¶¶ 3, 6-8; Pls.' Appx. p. 223, Stewart Dep. 63:10-64:4; Pls.' Appx. pp. 508-10, Stewart Interrog. Resp.4.

*Berger*, 569 F.3d at 1053-1057. The court concluded that the regulation failed the test of narrow tailoring, in part because the rule "prohibits both welcome and unwelcome communications." *Id*. at 1056.

**4. The challenged subsections of Ordinance 4618 repealed by Ordinance 4627 are unduly restrictive of speech**

Plaintiffs challenge several provisions of the original panhandling ordinance, No. 4618, that Defendant repealed while this action was pending. These include the ban on soliciting an "at risk" person; the 100-foot "bubble" around school grounds; the 100-foot bubbles around bus stops and ATMs (reduced to 20-foot bubbles in the current ordinance); and the ban on certain solicitation directed at motorists, which Judge Brimmer enjoined after the TRO hearing last year.

Defendant will argue that the challenges to these repealed provisions must be dismissed as moot, but Defendant is wrong, for two reasons. First, the mere repeal of a challenged provision, without more, does not satisfy Defendant's "heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000). This is especially true in a case like this, where the Defendant accompanied the repeal with an emphatic assertion that the repealed provisions were constitutional.[27] As the Tenth Circuit has noted, "a party's vigorous defense of an enjoined law counsels against concluding that a case is moot." *Doe*, 667 F.3d at 1117 n.5 (quoting *DeJohn v. Temple Univ*., 537 F.3d 301, 310 (3d Cir. 2008)). Second,

[27] *See* Pls.' Appx. pp. 7-8, Ord. 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").

Plaintiff Stewart's as-applied claim for nominal damages preserves the challenge to the repealed provisions. *See* ECF Doc. 62, Supp. Compl.

**a. Soliciting an "at risk" person**

Grand Junction cannot justify its prior city-wide prohibition on solicitation of "at-risk" persons, which includes persons over 70 and anyone with a significant mental or physical disability.[28] The City of has received no complaints of solicitation directed toward at-risk individuals. Undisputed Facts ¶ 16; *accord* Pls.' Appx. p. 54, Chapman Decl. ¶ 9; Pls.' Appx. p. 59, Reiskin Decl. ¶ 9. The only conceivable rationale for this provision is an erroneous and patronizing stereotype that elderly persons and persons with disabilities are incapable of making a sound decision about whether to give money to a solicitor. Pls.' Appx. pp. 53-54, Chapman Decl. ¶ 7; Pls.' Appx. pp. 58-59, Reiskin Decl. ¶ 7. Moreover, the ordinance unduly stigmatizes and isolates persons with disabilities by singling them out for differential treatment by requiring solicitors to scan public spaces for those who appear to be elderly or disabled, and then to avoid those people. Pls.' Appx. p. 54, Chapman Decl. ¶ 8; Pls.' Appx. p. 59, Reiskin Decl. ¶ 8; see also Pls.' Appx. pp. 40-41, Niederkruger Decl. ¶¶ 8-9.

[28] Several Plaintiffs solicit donations from "at-risk" individuals in a polite, non-aggressive manner, and their solicitation was unreasonably prohibited by the challenged ordinance as originally enacted. *See* Pls.' Appx, pp. 17-18, HDG Decl. ¶ 15; Pls.' Appx. pp. 476-78, HDG Interrog. Resp. 4; Pls.' Appx. pp. 460-61, Greenpeace Interrog. Resp. 4; Pls.' Appx. pp. 33-34, Greenpeace Decl. ¶ 9; Pls.' Appx. pp. 29-30, Browne Decl. ¶ 12; Pls.' Appx. pp. 444-45, Browne Interrog. Resp. 4; Pls.' Appx. p. 45, Sanchez Decl. ¶ 6; Pls.' Appx. pp. 491-93, Sanchez Interrog. Resp. 4; Pls.' Appx. p. 49, Stewart Decl. ¶ 6; Pls.' Appx. pp. 508-10, Stewart Interrog. Resp. 4.

**b. 100-foot bubbles around bus stops, ATMs and school grounds**

Just as the City cannot meet its burden of justifying the 20-foot bubbles in the amended ordinance, it will certainly be unable to justify the much larger 100-foot bubbles.[29]

**c. The ban on certain solicitation directed at motorists**

This provision forbids directing solicitations to motorists on streets designated as state or federal highways. Pls.' Appx. p. 4, Ord. 4618, Section 9.05.050(a). Judge Brimmer was correct to enjoin enforcement of this provision.[30] ECF Doc. 15. Grand Junction will be unable to meet its burden to justify this restriction.

## II. Second and Sixth Claim for Relief – *The challenged ordinance violates solicitor-Plaintiffs' right to equal protection under the law*

Plaintiffs' second claim for relief alleges the challenged ordinance, as originally enacted and as amended, violates solicitor-Plaintiffs' right to equal protection, in violation of the Fourteenth Amendment.[31] The elements are met by establishing that the ordinance discriminates on the basis of content, as discussed in section I(A), *supra.*

[29] Plaintiffs Greenpeace and Stewart have solicited donations on school grounds in a polite, non-aggressive manner, and their solicitation was unreasonably prohibited by the challenged ordinance as originally enacted. *See* Undisputed Facts ¶¶ 3, 5, 6-8; *see also* Pls.' Appx. pp. 508-10, Stewart Interrog. Resp. 4; Pls.' Appx. p. 223, Stewart Dep. 64:16-24; Pls.' Appx. pp. 237, 248, Greenpeace Dep. 31:16-21, 74:15-20; Pls.' Appx. p. 33, Greenpeace Decl. ¶ 6; Pls.' Appx. pp. 460-61, Greenpeace Interrog. Resp. 4.

[30] Plaintiff Stewart and Sanchez solicit donations by displaying a sign directed at motorists traveling on state highways, and their solicitation was unreasonably prohibited by the challenged ordinance as originally enacted. *See* Undisputed Facts ¶¶ 2-3, 6-8; *see also* Pls.' Appx. pp. 49-50, Stewart Decl. ¶¶ 5, 8, 13; Pls.' Appx. pp. 508-10, Stewart Interrog. Resp. 4; Pls.' Appx. pp. 44-47, Sanchez Decl. 1, 6, 11, 13; Pls.' Appx. pp. 491-93, Sanchez Interrog. Resp. 4.

[31] Plaintiffs' sixth claim for relief alleges violation of the equal protection component of Article II, section 25 of the Colorado Constitution. The elements, burden of proof, and supporting facts are the same as Plaintiffs' equal protection claim.

*See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 94-96 (1972); *Speet v. Schuette*, 889 F. Supp. 2d at 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).

### III. Third and Seventh Claim for Relief – *The challenged ordinance is unconstitutionally vague*

Plaintiffs' third claim for relief alleges the challenged ordinance, as originally enacted and as amended, is unconstitutionally vague, in violation of the Due Process Clause.[32] To survive a vagueness challenge, a regulation must satisfy two concerns. First, a law must be drafted with sufficient clarity "that will enable ordinary people to understand what conduct it prohibits." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). Second, the law must provide adequate guidance to police in order to prevent arbitrary and discriminatory enforcement. *Id*. When, as here, "speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech." *Id.* In this case, a "more stringent vagueness test" applies, because Plaintiffs challenge a criminal law that regulates expression. *Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 495 (1982).

The ordinance, as passed, as amended, and as Chief Camper plans to enforce it, is impermissibly vague on several fronts. First, the ordinance is 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 as they solicit funds. Pls.' Appx. p. 10, Ord. 4627, Section 9.05.020 ("panhandling shall mean to

[32] Plaintiffs' seventh claim for relief, under the due process clause of the state constitution, mirrors Plaintiffs' third claim for relief. The elements, burden of proof, and supporting facts are the same.

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.*

This potentially confusing text has led key City representatives to take differing stances regarding the application of the challenged ordinance to passive solicitors. When this suit was filed, the Grand Junction City Attorney interpreted the ordinance to apply to passive beggars who silently solicit donations by displaying a sign. Pls.’ Appx. p. 663, 2014-02-28 Shaver-ACLU Letter; Pls.’ Appx. pp. 666-67, 2014-03-03 ACLU-Shaver Letter. Since that time, counsel for Defendant has repeatedly stated the ordinance does not regulate passive solicitation. *See* ECF Doc. 46 at pp. 3, 18, 20. When Chief Camper was deposed on October 21, 2014, however, he was clear that solicitors like Ms. Browne, who silently request donations from passersby by displaying a sign, are subject to the ordinance’s prohibitions. Undisputed Facts ¶ 28. Such contradictory readings of the same provision of the ordinance by key representatives of the City provide strong evidence of vagueness. *See, e.g.*, *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1157 (9th Cir. 2014) (“As shown by the City's own documents, the different ways the ordinance was interpreted by members of the police department make it incompatible with the concept of an even-handed administration of the law to the poor and to the rich that is fundamental to a democratic society.”). Magistrate Judge Mix agreed in an oral ruling during a deposition in this case. Denying Defendant’s motion for a protective order, Judge Mix concluded that questioning an officer about her interpretation of an ordinance she would be charged with enforcing was “perfectly proper” and went directly to Plaintiffs’ vagueness claim by potentially establishing that

"the ordinance is interpreted differently by different people." Pls.' Appx. pp. 136-37, Cohn Dep. 56:13-57:19 (ruling by Magistrate Judge Mix).

Vagueness concerns are also raised by the amended ordinance's consent provision. The most reasonable interpretation of the amended definition of "panhandling" is that solicitors are forbidden to ask for a donation in the regulated situations unless they first obtain the person's consent. *See* section I(B), *supra*. In the alternative, however, there is evidence that the consent provision is unconstitutionally vague. For example, while Defendant's counsel has posited to this Court that the "consent" provision does not forbid an initial request for a donation, *see* ECF Doc. 52 at 16-17, Chief Camper is not so sure. He testified that he does not know by reading the amended ordinance whether the consent provision requires the solicitor to obtain consent before soliciting someone. Pls.' Appx. p. 77, Camper Dep. 67:20-25. Solicitors, too, are unsure of the meaning of the consent provision. Several Plaintiffs, when questioned by counsel for Defendant, expressed confusion over how they are to know, before asking for money, whether a person has consented to the encounter. *See, e.g.*, Pls.' Appx. p. 210, Sanchez Dep. 46:23-47:23; Pls.' Appx. pp. 182-87, Niederkruger Dep. 58:19-59:24, 78:12-79:6; Pls.' Appx. p. 168, HDG Dep. 82:17-83:17; Pls.' Appx. p. 36, Gallegos Decl. ¶ 5; Pls.' Appx. pp. 221-22, Stewart Dep. 56:15-58:12. Either Defendant's counsel has advanced an unreasonable view of the ordinance, or the consent provision is unconstitutionally vague.

Given Chief Camper's myriad points of confusion over the reach and meaning of the challenged ordinance, he expects questions of whether certain solicitations violate the ordinance to be determined on a "case by case basis." Pls.' Appx. pp. 75, 114-115,

Camper Dep. 58:13-59:18, 216:10-217:8. Thus, the reach of the law will be determined by the moment-to-moment judgment of the police officer on the beat. *Morales*, 527 U.S at 60 (emphasizing that a law is unconstitutionally vague when its language "necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat.") (quoting *Kolender v. Lawson,* 461 U.S. 352, 359 (1983)).

Chief Camper's statements, taken together with the representations of the City Attorney and counsel for Defendant, show that the challenged ordinance, as passed and as amended, does not provide a person of ordinary intelligence fair notice of what is prohibited. Likewise, the ordinance does not provide law enforcement the requisite precision and guidance necessary to ensure that enforcement is not arbitrary or discriminatory.

## IV. Fourth and Eighth Claims for Relief – *The challenged ordinance violates willing listeners' First Amendment Right to Receive Information*

Plaintiffs' fourth claim alleges that the City violates the First Amendment rights of a willing listener, Plaintiff Niederkruger, to receive communications forbidden by the ordinance, as enacted, as amended, and/or as Chief Camper plans to enforce it.[33] "The First Amendment includes a fundamental right to receive information." *Doe*, 667 F.3d at 1128. In analyzing a right-to-receive-information claim, the Tenth Circuit applied the same test that applies to restrictions of expression in a public forum. The restrictions on receiving information must be control-neutral and must be narrowly tailored to further a significant government interest. *Id*. at 1130-31.

[33] Plaintiffs' eighth claim for relief, under the free speech clause of the state constitution, mirrors Plaintiffs' fourth claim for relief. The elements, burden of proof, and supporting facts are the same.

Because of Mr. Niederkruger's dedication to the cause of helping the homeless and needy in Grand Junction, it is critical that he be able to receive information from and about homeless people. Pls.' Appx. pp. 39-41, Niederkruger Decl. ¶¶ 1-4, 7, 8. Mr. Niederkruger suffers from schizoaffective disorder and walks with a cane and, therefore, met the definition of "at risk person" in the original ordinance, which prohibited anyone from soliciting him for money at any time. Pls.' Appx. p. 3, Ord. 4618, Section 9.05.040(f); Pls.' Appx. p. 40-41, Niederkruger Decl. ¶¶ 8-9. Several provisions of the ordinance as amended also significantly impair Mr. Niederkruger's ability to receive information and communicate with the homeless. These include the ban on panhandling at night, near ATMs and bus stops, and the provision restricting solicitations carried out "without the person's consent." Pls.' Appx. pp. 184, 187, Niederkruger Dep. 66:5-21, 78:12-80:18.

The City restricts Mr. Niederkruger from receiving certain communications but not others, on the basis of content. Even if the restrictions were content neutral (and they are not), the restrictions fail the test of narrow tailoring. In an *en banc* decision, the Ninth Circuit explained that one reason a regulation of expression failed the narrow tailoring test was that it "prohibited both welcome and unwelcome communications." Berger, 569 F.3d at 1056. The same argument applies here, as do all the additional points about lack of narrow tailoring discussed above in conjunction with the First Claim for Relief. *See* section I(B), *supra*.

## V. Ninth and Eleventh Claims for Relief – *Chief Camper's plan to enforce the challenged ordinance against passive solicitors violates Plaintiff Browne's First and Fourth and Fourteenth Amendment rights*

Plaintiffs' ninth claim for relief alleges the challenged ordinance, as Chief Camper plans to enforce it against passive solicitors, violates Ms. Browne's First Amendment rights.[34] The legal standard that applies to this claim is the same that applies to the Plaintiffs' first claim for relief. The same facts, plus the additional facts cited below, support the elements of this claim. *See* section I, *supra*.

Before this case was filed, the Grand Junction City Attorney interpreted the ordinance to regulate solicitation by individuals who request donations by passively displaying a sign. *See* Pls.' Appx. p. 663, 2014-02-28 Shaver-ACLU Letter; Pls.' Appx. pp. 666-67, 2014-03-03 ACLU-Shaver Letter. Although counsel for Defendant later stated that the ordinance does not regulate passive solicitation, ECF Doc. 46 at 3, 18, 20, the Chief of Police has nonetheless made it plain that he plans to enforce the challenged ordinance against passive panhandlers, such as Plaintiff Browne. Undisputed Facts ¶ 28. All the arguments articulated in Section I, *supra*, regarding content discrimination and lack of narrow tailoring, apply with even greater force to Chief Camper's plan to enforce the challenged restrictions against passive solicitors. By suppressing the expression of persons who do not stop, approach or accost passersby but simply display a sign inviting charity, Grand Junction clearly suppresses expression that does not contribute to any perceived problem of aggressive panhandling.

[34] Plaintiffs' eleventh claim for relief, under the free-speech clause of the state constitution, mirrors Plaintiffs' ninth claim for relief. The elements, burden of proof, and supporting facts are the same.

In explaining why the statute in *McCullen* failed the test of narrow tailoring, the Court noted that other jurisdictions had addressed similar problems outside abortion clinics with measures that were less restrictive of expression. 134 S. Ct. at 2537-39. Similarly, many communities have enacted regulations of panhandling that expressly exempt soliciting by means of displaying a sign. See, *e.g.*, Pls.' Appx. pp. 679-81, Colorado Springs Municipal Code, § 9.2.111; Pls.' Appx. p. 676, Boulder Municipal Code, § 5-3-12 (c); *Gresham v. Peterson*, 225 F.3d 899,907 (7th Cir. 2000) ("He may hold up signs requesting money"); *Norton v. City of Springfield*, 768 F.3d 713, 714 (7th Cir. 2014) ("signs requesting money are allowed").[35] The availability of these obvious less restrictive alternatives demonstrates that ordinance as Chief Camper plans to enforce it is not narrowly tailored.

In addition, by planning or threatening to suppress the communications of passive panhandlers, Chief Camper unjustifiably expands the scope of the prohibitions beyond what is actually written in the text of ordinance. Because passive panhandlers do not "approach, accost, or stop" the person solicited, their communications do not fit the definition of "panhandle" in the ordinance.[36] Thus, Chief Camper plans to invoke and rely on the ordinance to forbid communications that the ordinance does not forbid, in violation not only of the First Amendment, but also the Due Process Clause.

Finally, by threatening to enforce the challenged ordinance against persons who do not "approach, stop, or accost," Chief Camper threatens detentions, citations, and

[35] Plaintiffs note these ordinances only to show that other communities have enacted less restrictive alternatives that do not target passive panhandling. Plaintiffs do not suggest that the ordinances are otherwise free of constitutional infirmities. *See McCullen*, 134 S. Ct. at 2538 n.8.

[36] Plaintiffs argue, in the alternative, that the ordinance is unconstitutionally vague as to whether it applies to passive solicitors. *See* section III, *supra*.

arrests without reasonable suspicion or probable cause to believe the ordinance is violated, in violation of the Fourth Amendment.

Based on the foregoing, regardless of how this Court rules on the constitutionality of the challenged ordinance as written, Plaintiffs are entitled to a declaratory judgment that the ordinance does not regulate the conduct of passive solicitors.

## VI. Tenth and Twelfth Claims for Relief – *Chief Camper's plan to enforce the challenged ordinance against peaceful, non-aggressive beggars violates Plaintiffs Browne and Stewart's right to free speech and equal protection*

Plaintiffs' tenth claim for relief alleges the challenged ordinance, as Chief Camper plans to enforce it against peaceful, non-aggressive beggars, violates the right of Plaintiffs Stewart and Browne to free speech and equal protection.[37] The legal standard that applies to this claim is the same that applies to the Plaintiffs' first and second claims for relief. *See* section I and II, *supra*. The same facts, plus the additional facts cited below, support the elements of this claim. *Id.*

Counsel for Defendant has suggested that, by her reading of the challenged ordinance as amended,[38] none of the Plaintiffs' solicitation activities meet the definition of "panhandling" under the ordinance, ECF Doc. 46, p. 20. Even if counsel's textual interpretation were correct (and it is not), Plaintiffs Stewart and Browne still face a credible threat that Grand Junction police will enforce the challenged ordinance against them. After reviewing Plaintiff Stewart's sworn declaration describing her solicitation activities, Chief Camper explicitly affirmed that, when Ms. Stewart approaches people at

[37] Plaintiffs' twelfth claim for relief, under the free speech clause of the state constitution, mirrors Plaintiffs' tenth claim for relief. The elements, burden of proof, and supporting facts are the same.

[38] The City has declined to adopt an official or authoritative interpretation of the ordinance. Undisputed Facts ¶ 26.

bus stops and politely requests a donation, she violates the amended ordinance. Undisputed Facts ¶ 29. Likewise, after reviewing Plaintiff Browne's sworn declaration describing her solicitation activities, Chief Camper explicitly affirmed that Plaintiff Browne violates the ordinance when she sits with a sign and passively panhandles at a bus stop or within twenty feet of an ATM. Undisputed Facts ¶ 28. Further, Chief Camper made clear that he expects his officers to enforce the ordinance against individuals, such as Ms. Stewart and Ms. Browne, who engage in non-aggressive solicitation that violates the ordinance as he understands it, by issuing directives to stop panhandling, warnings, and/or "move-on" orders. Undisputed Facts ¶ 30. Based on these facts, and the analysis and facts in sections I and VI**,** *supra*, this Court must enjoin Chief Camper's plan to enforce the challenged ordinance against peaceful and polite solicitors like Plaintiffs Browne and Stewart.

## CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court GRANT the Motion for Summary Judgment.

Respectfully submitted this 17th day of February, 2015.

*s/ Mark Silverstein*

Mark Silverstein
Rebecca T. Wallace
Sara R. Neel
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO
303 E. 17th Avenue, Suite 350
Denver, Colorado 80203
msilverstein@aclu-co.org
(720) 402-3114

ATTORNEYS FOR PLAINTIFFS

**CERTIFICATE OF SERVICE**

I hereby certify that on February 17, 2015 I electronically filed the foregoing **PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following recipients:

Josh A. Marks
Berg Hill Greenleaf & Ruscitti LLP
1712 Pearl St.
Boulder, CO 80302
(303) 402-1600
jam@bhgrlaw.com

Katherine M.L. Pratt
Berg Hill Greenleaf & Ruscitti LLP
1712 Pearl St.
Boulder, CO 80302
(303) 402-1600
kmlp@bhgrlaw.com

*s/ Jessica Howard*

Jessica Howard
Legal Assistant