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' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT [DOC. 85]

INTRODUCTION

Defendant's brief purports to "simplfy[] the issues and evidence for the Court's consideration." ECF Doc 91, Def.'s Resp. to Pls.' Mot. for Summ. J. (hereinafter "Def. Resp.") at 2. Unfortunately, Defendant's attempt at simplicity amounts to ignoring, and asking this Court to ignore, the testimony of key City representatives – including Chief of Police John Camper – because that testimony directly undermines Defendant's arguments.

Defendant has much to say about what the ordinance *does not* mean – it does not mean what Chief Camper says it means, nor what homeless outreach officer

Cynthia Cohn says it means, nor what City Manager Richard Englehart says it means. The ordinance does not mean what Plaintiffs understand it to mean, or even what the City Attorney of Grand Junction said it meant before Plaintiffs filed this lawsuit. Defendant has remarkably little to say, however, about what the ordinance *does* mean. The City has refused to provide an authoritative interpretation to clear up the obvious confusion that plagues even the City's own staff regarding the reach and scope of the ordinance. Instead, it appears the City is waiting for this Court to tell the parties, the witnesses and the public what this ordinance means, in the hope that this Court can discern a constitutional path through the morass of confusion over this misguided law.

This Court should decline Defendant's invitation. As Plaintiffs explain in their motion for summary judgement, the challenged ordinance, as adopted, as amended and as Chief Camper plans to enforce it, is plainly unconstitutional – it forbids a wide swath of peaceful solicitation speech that poses no threat to public safety and contains an unprecedented listener's veto that is anathema to First Amendment principles.

I. Reply Regarding Undisputed Facts

A. Plaintiffs rely appropriately on testimony of City representatives

Defendant's response takes great pains to discount the obvious import of the testimony of Chief Camper regarding his understanding of what conduct and speech the ordinance prohibits. Plaintiffs do indeed cite to Chief Camper's testimony throughout their motion for summary judgment. Chief Camper is, after all, the chief law enforcement officer for the City of Grand Junction and the person who created a training

outline and led all of the officer trainings regarding how and under what circumstances the challenged ordinance was to be enforced.[1]

Yet, Defendant would like this Court to disregard the Chief's testimony, at least when that testimony does not support the City's arguments. Notably, in its motion for summary judgment, Defendant explicitly relies on Chief Camper's testimony to establish several facts that Defendant deems "material." *See, e.g.*, ECF Doc. 84, Def.'s Mot. for Summ. J. (hereinafter "Def.'s Mot."), at 7-8, Statement of Undisputed Material Facts 12-18. The bulk of Chief Camper's testimony, however, undermines Defendant's arguments that the amended ordinance permits Plaintiffs' solicitations, and it directly supports Plaintiffs' arguments that they face a risk of enforcement.[2] It is apparently this testimony which Defendant perceives as problematic and wishes this Court to disregard.[3] For instance, Chief Camper testified that several Plaintiffs' peaceful solicitation violates the ordinance. ECF 85. Pls.' Mot. for Summ. J (hereinafter "Pls.

[1] Defendant quibbles, groundlessly, with Plaintiffs' assertion that Chief Camper is responsible for construing the laws he is charged with enforcing. ECF 91, Def. Resp. at 12-13, Fact 23. Chief Camper explained that he is the ultimate decision maker regarding how the Grand Junction Police Department will enforce laws, and that he generally determines what a law means by reading the law. ECF 85, Pls. Mot. at 15, Fact 23. When Chief Camper reads a law and then determines – based on that reading – how his officers are to enforce it, he is certainly "construing" that law for the Grand Junction Police Department.

[2] Defendant suggests that Plaintiffs have mischaracterized Chief Camper's testimony. ECF 91, Def. Resp. at 3. Not so. Plaintiffs included Chief Camper's deposition *in its entirety* in their appendix for this Court's perusal. Pls.' Appx. at 60-121, Camper Dep.

[3] Defendant asks this Court to "disregard the inadmissible portions of Chief Camper's testimony," Def. Resp. at 4, but it wants this Court to accept those portions of Chief Campers' testimony on which Defendant's rely. Defendant does not even identify for the Court which specific portions of the testimony it deems inadmissible. *See Flohrs v. Eli Lilly & Co*., 2013 U.S. Dist. LEXIS 64823, *8 (D. Kan. May 7, 2013) ("It is not the duty of this court [or Plaintiffs' counsel] to scour the record which has not been cited by the parties.").

Mot."), at 16-17, Facts 28, 29. Defendant wishes the Court to ignore this testimony. Chief Camper testified that solicitors who seek donations by passively displaying a sign are subject to the restrictions of the ordinance. ECF 85, Pls. Mot. at 16-17, Fact 28. Defendant wishes the Court to ignore this testimony. Chief Camper's testimony supports Plaintiffs' understanding that advance consent is required by the challenged ordinance. ECF 90, Pls.' Resp. to Def.'s Mot. for Summ. J. (hereainafter "Pls. Resp."), at 22 (*citing* Pls.' Appx. p. 77, Camper Dep. 65:23-66:16). Defendant wishes the Court to ignore this testimony. Chief Camper testified that Plaintiffs Browne and Stewart solicit "without consent," in violation of the ordinance. ECF 90, Pls.' Resp. at 10,13-14, Facts 56, 65. Defendant wishes this Court to ignore this testimony. Chief Camper testified that he would expect his officers to enforce the ordinance, even against peaceful solicitors such as Plaintiffs Browne and Stewart, by issuing warnings or move-on orders. ECF 85, Pls. Mot. at 17, Fact 30. Defendant wishes this Court to ignore this testimony.[4]

Defendant argues that this Court should disregard the bulk of Chief Camper's testimony because, Defendant says, he was testifying in response to hypothetical questions seeking legal conclusions. ECF 91, Def. Resp. at 3. Defendant is wrong. First, much of the Chief's testimony that Plaintiffs rely on relates to his understanding of how the ordinance applies to Plaintiffs' actual – not hypothetical – solicitation speech, as detailed in their sworn declarations. *See, e.g.*, ECF 85, Pls. Mot. at 16-17, Facts 28-29; ECF 90, Pls. Resp. at 11, 13-14, 19, Facts 56-58, 65-67, 85. Second, as Magistrate Judge Mix ruled in the context of a discovery dispute in this case, questioning a law

[4] Notably, Chief Camper's testimony on these points was supported by the testimony of one or more additional City officials.

enforcement officer about his or her interpretation of an ordinance that the officer would later be charged with enforcing is "perfectly proper" and goes directly to Plaintiffs' constitutional claims. Pls.' Appx. at 136-37, Cohn Dep. 56:13-57:19 (ruling by Magistrate Judge Mix). [5]

Third, Plaintiffs do not rely on Chief Camper's testimony to establish definitively the legal reach and scope of the ordinance. Instead, Plaintiffs rely on Chief Camper's testimony primarily to establish his plan to enforce the ordinance and to show that the threat of enforcement against Plaintiffs is real, despite Defendant's counsel's protestations to the contrary. ECF 85, Pls. Mot. at 15-17, Fact 23-30. Defendant's counsel argues in the City's motion for summary judgment that Plaintiffs do not have standing to bring this case because they do not solicit "without consent," so they do not violate the terms of the ordinance. ECF 84, Def. Mot. at 15-17. However, Defendant's counsel, who does not enforce the laws of Grand Junction, is the *only* individual who claims Plaintiffs' solicitation is not regulated by the ordinance. Chief Camper's testimony, as well as that of Officer Cohn, make clear that *at least* Plaintiffs Browne and Stewart are subject to enforcement of the ordinance against them for their peaceful solicitation, ECF 85, Pls. Mot. at 16-17, Facts 28-30, regardless of what Defendant's counsel thinks the ordinance prohibits.

Defendant argues that Chief Camper's plan to enforce the ordinance is not definitive or final and might be altered depending on the outcome of this civil action. ECF 91, Def. Resp. at 14, Fact 25. Yet, Defendant has not asserted, or presented any

[5] While Magistrate Judge Mix's ruling was related to questions directed at Grand Junction police officer Cohn, her ruling is even more apropos to questions directed to the chief of police, whose job is to construe and enforce the laws.

evidence to support a finding, that the City will or is even likely to direct Chief Camper to alter his plan of enforcement. In fact, the City has persistently declined to adopt an authoritative interpretation of the ordinance, even in the face of obvious confusion by City officials over the reach and meaning of the ordinance. Defendant's counsel wishes to distance the City from its Police Chief's interpretation and plan to enforce the ordinance. It seems absurd and unfair to ask Plaintiffs and this Court to ignore the testimony of the City's chief law enforcement officer regarding the reach and scope of this ordinance, while offering no alternative authoritative construction of the ordinance. The Chief of Police has testified that he understands that the ordinance regulates passive solicitors, requires something akin to advance consent, and prohibits the peaceful solicitation carried out by Plaintiffs Browne and Stewart. If the City thinks this interpretation is wrong, it is obliged to say so by either issuing an authoritative interpretation or by offering evidence that the law will not be enforced as the Chief of Police intends. The City has done neither.

Indeed, there is reason to believe that *if* the Chief were to seek guidance from the City Attorney's Office on the proper scope of enforcement, the City Attorney's Office would not disrupt Chief Camper's enforcement plan. After all, several aspects of Chief Camper's plan accord with the City Attorney's interpretation of the originally-challenged ordinance, as explained by the City Attorney's Office in pre-litigation communications with representatives of the ACLU. *See, e.g.*, ECF 90, Pls. Resp. at 42-43; *see also* ECF 66, Pls.' Mot. for Lv. To File Second Supp. Compl. at 3, 7. These representations by the City Attorney's Office, considered together with the City's decision not to issue an authoritative interpretation of the ordinance even after Chief Camper's deposition,

create a strong inference that the City Attorney's Office actually sanctions the Chief's enforcement plan. Therefore, Plaintiffs and this Court have every reason to believe Chief Camper can and will enforce the ordinance as planned.[6]

In addition, as described more fully in Plaintiffs' motion for summary judgment, Plaintiffs rely on Chief Camper's testimony, and the testimony of other City representatives, to show that the ordinance is unconstitutionally vague. ECF 85, Pls. Mot. at 37-40. Defendant wholly ignores legal authority cited by Plaintiffs, including Magistrate Judge Mix's ruling in this very case, that contradictory readings of the same provision of a law by key representatives of the City provide strong evidence of vagueness. *See* ECF 85, Pls. Mot. at 38-40.

Finally, while Chief Camper's testimony does not and cannot establish the legal reach or meaning of the ordinance, his testimony certainly underscores the unreasonableness of Defendant's counsel's varied suggested interpretations of the ordinance, most of which are directly at odds with Chief Camper's understanding of the ordinance.

B. There are no material factual disputes preventing this Court from granting summary judgment in favor of Plaintiffs

Defendant does not argue that there are material factual disputes preventing this Court from granting summary judgment in favor of Plaintiffs. Plaintiffs agree. Further,

[6] Defendant complains that Plaintiffs introduced a handful of facts in the body of their brief and asks the Court to discount any such facts. ECF 91, Def. Resp. at 2-3. No rule requires Plaintiffs to list all relevant facts in one section of the brief. Plaintiffs did include most facts in an introductory section as a matter of convenience for the Court and the parties. Those few facts that Plaintiffs first raised in their legal argument were facts that made little sense out of context of those arguments. *See, e.g.*, ECF 85, Pls. Mot. at 26 (consent argument), 37-40 (vagueness argument). Nothing prevents the Court from considering these facts.

the parties agree that Plaintiffs' solicitation is polite and non-aggressive. *See* ECF 85, Pls. Mot. at 8-9, Facts 1-6; ECF 91, Def. Resp. at 4-5, Facts 1-6. The parties agree that at least Plaintiff Stewart approaches people and then solicits them.[7] *See* ECF 85, Pls. Mot. at 8, Fact 3; ECF 91, Def. Resp. at 4, Fact 3. The Parties disagree as to whether Plaintiffs solicit "without consent" in violation of the ordinance. But resolving this question turns on how this Court interprets the consent provision of the challenged ordinance, not on a factual dispute as to how the Plaintiffs solicit. *See* ECF 90, Pls. Resp. at 20-25.

Defendant admits Facts 12 through 15. ECF 91, Def. Resp. at 8, Facts 12-15; *see also* ECF 85, Pls. Mot. at 11-12, Facts 12-15. Thus, the Parties agree that, in considering the need for this ordinance, City Council considered no data associated with aggressive solicitation. Instead, the only data considered by City Council to support the need for the ordinance was information regarding calls from the public about homeless persons, the vast majority of which had nothing to do with panhandling, much less aggressive panhandling. Regarding Fact 16, Defendant quibbles over whether the City is bound by Chief Camper's testimony that – as Chief of Police – he was unaware of any complaints regarding panhandling at night, for employment, near a bus stop, on a bus, near an ATM, or near a school. ECF 91, Def. Resp. at 8-10, Fact 16. But Defendant presents no evidence suggesting the City has received any such complaints,

[7] The parties' agreement with regard to Plaintiff Stewart is sufficient to dismiss the Defendant's contention regarding standing. While each of the Plaintiffs has standing, ECF 90, Pls. Resp. at 20-25, this Court must reach the merits once it determines that even one plaintiff has standing. *See, e.g.*, *Colo. Cross-Disability Coalition v. Abercrombie & Fitch Co.*, 765 F. 3d 1025, 1212-13 (10th Cir. 2014) (citing cases standing for the proposition that once the court determines one individual plaintiff has standing to maintain suit, the court need not determine whether other plaintiffs have standing).

and it produced no such evidence in discovery despite Plaintiffs' inquiry. *Id*. Thus, Plaintiffs' Fact 16 cannot fairly be deemed disputed.

The City does not and cannot dispute that Chief Camper testified that he interprets the ordinance to regulate passive solicitors, that Plaintiffs Browne and Stewart solicit "without consent" in violation of the ordinance and thus face a real risk of enforcement of the ordinance against them, and that the ordinance prohibits speech that is non-aggressive and non-threatening, including the solicitation speech of Plaintiffs. *See* ECF 85, Pls. Mot. at 15-17, Facts 22, 28-30. Moreover, the City has not produced any evidence that it has taken steps to show the ordinance will not be enforced in accord with Chief Camper's understanding of the ordinance. These undisputed facts, considered together with the text of the ordinance, warrant this Court's award of summary judgment to Plaintiffs.

II. The challenged ordinance discriminates on the basis of content

Grand Junction fails to heed two critical lessons of *McCullen v. Coakley*, 134 S.Ct. 2518 (2014), the Supreme Court's most recent pronouncement on content-neutrality. First, *McCullen* reaffirmed the principle that a regulation of expression is content-based when it "draw[s] content-based distinctions on its face." *Id*. at 2531. Second, *McCullen* made it clear that the prospect that communications might "cause offense or make listeners uncomfortable" does not provide a content-neutral justification for regulating those communications. *Id*. at 2532. Grand Junction ignores both of these critical points.

A. The challenged ordinance draws content-based distinctions on its face

The Grand Junction ordinance draws a very clear content-based distinction on its face by discriminating on the basis of the *subject* of the solicitation. Soliciting for commercial sales,[8] street directions, or signatures on petitions is permitted, but soliciting for donations or employment is not. As *McCullen* explained, such a regulation is "content based [because] it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *Id.* (quoting *F.C.C. v. League of Women Voters*, 468 U.S. 364, 383 (1984)).

Grand Junction fails to acknowledge *McCullen's* discussion of content discrimination. Instead, Grand Junction relies principally, and mistakenly, on *Hill v. Colorado*, 530 U.S. 703 (2000). Defendant relies on *Hill*'s recognition that it is not always improper "to look at the content of an oral or written statement in order to determine whether a rule of law applies to a course of conduct." ECF 91, Def. Resp. at 24, (quoting *Hill*, 530 U.S. at 721). Defendant reads far too much into this quotation. Defendant suggests that *Hill* tacitly reversed the Supreme Court's longstanding principle that regulations are content-based when they require enforcement authorities to "necessarily examine the content of the message that is conveyed." *FCC*, 468 U.S. at 383; *see Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992). Not so. As noted above, the *McCullen* Court clearly reaffirmed that a measure "would be content based if it

[8] Defendant has not denied that the ordinance permits approaching persons and soliciting commercial sales. Nor has Defendant responded to Plaintiffs' argument that favoring commercial solicitations over noncommercial solicitations is itself a reason to invalidate the ordinance. ECF 85, Pls. Mot. at 21, n.16.

required 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." 134 S. Ct. at 2531 (quoting *FCC ,* 468 U.S. at 383). *McCullen* reaffirmed that a law is content-based when the question whether plaintiffs violate it depends "on what they say." *Id*. (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010)). Thus, it is clear that *Hill* did not overturn the longstanding principle that a law like Grand Junction's is content-based when it discriminates on its face on the basis of content.

Plaintiffs cited nine decisions, including Judge Brimmer's ruling in this very case, that held that particular regulations of solicitation are content-based on their face, because they single out certain solicitation speech for regulation while leaving other solicitation speech unregulated. *See* ECF 85, Pls. Mot. at 20-21; *see, e.g.*, *Kelly v. City of Parkersburg*, 978 F. Supp. 2d 624, 629-30 (S.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). Defendant fails to discuss any of these cases.[9] Instead, Defendant notes that its ordinance regulates solicitations not only for money or employment, but also for any "other thing of value." Defendant feebly suggests that it is "certainly conceivable" that the Ordinance "could apply" to solicitations asking for things without monetary value. ECF 91, Def. Resp. at 29-30; *see also*, ECF 52, Def.'s Reply to Mot. to Dismiss at 14, n.1 (suggesting that persons who wish to solicit signatures would consider them to be "things of value").

[9] Defendant introduces its reply with a complaint that Plaintiffs "complicate" this case by citing "non-binding and unpersuasive Ninth Circuit authority." ECF 91, Def. Resp. at 2. Defendant does not explain why it believes that the reasoning of any of the cited authorities, including those that are from the Ninth Circuit, is unsound.

Contrary to Defendant's tacit suggestion, "other thing of value" is not a catch-all that functions to cover any and all solicitations. The plain meaning of "other thing of value" is a thing of *monetary* value. Indeed, at least three courts have held that ordinances that regulate requests for money or any "thing of value" do *not* regulate solicitations for signatures or intangibles such as votes or religious conversion, and they have found these ordinances to discriminate, on their face, on the basis of content. *See ACLU of Idaho v. City of Boise*, 998 F. Supp. 2d 908, 915, 916 (D. Idaho 2014) ("It only restricts solicitation speech for donations of money or property" but "does not restrict solicitation of signatures for petitions . . ., political support solicitation, religious solicitation, etc."); *Guy v. County of Hawaii*, 2014 U.S. Dis. LEXIS 132226 (D. Haw. Sept. 19, 2014) ("Section 14-75 applies only to requests for an immediate donation of money or other thing of value; it thus singles out some solicitation speech for regulation while leaving other solicitation speech untouched."); *accord Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 556 (4th Cir. 2013).[10]

[10] Underscoring the unreasonableness of the interpretation that Defendant's counsel's tacitly suggests, Chief Camper and Officer Cohn repeatedly testified that they understood "other thing of value" as used in the ordinance to mean only a thing of "monetary value." *See, e.g.,* Pls.' Appx. at 76, Camper Dep., 61:9-16; *accord* Pls.' Appx. at 138-39, Cohn Dep., 64:12-19, 66:1-7; *see also* Pls.' Appx. at 75-76, Camper Dep., 60:15-61:1 (solicitation of signatures not regulated by the challenged ordinance); *accord* Pls.' Appx. at 139, Cohn Dep., 65:1-5; Pls.' Appx. at 667, 2014-03-03 ACLU-Shaver letter; Pls.' Appx. at 75, Camper Dep., 58:7-12 (solicitation of support for a cause not regulated by the challenged ordinance); Pls.' Appx. at 76, Camper Dep., 61:2-8 (solicitation for religious conversion not regulated by challenged ordinance); *accord* Pls.' Appx. at 138, Cohn Dep., 63:11-25 ; Pls.' Appx. at 75, 83, Camper Dep., 60:9-14, 90:14-20 (solicitation of a vote not regulated by challenged ordinance); *accord* Pls.' Appx. at 139, Cohn Depo., 65:9-14.

B. The cases Grand Junction relies on are inconsistent with McCullen's analysis of content discrimination

In arguing the issue of content-neutrality, Grand Junction relies primarily on *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014) and *Norton v. City of Springfield*, 768 F.3d 713 (7th Cir. 2014).[11] Both decisions are inconsistent with *McCullen*'s teachings about content discrimination. Indeed, the principles articulated in *McCullen* show that the ordinances approved in *Thayer* and *Norton* should have been rejected as content-based.

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

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

[11] Defendant's brief refers to *Norton* as *Otterson v. City of Springfield*. ECF 91, Def. Resp. at 25-28.

In justifying the Worcester panhandling ordinance, *Thayer* relies repeatedly on the prospect that listeners may feel uncomfortable, apprehensive, or intimidated by hearing a message of solicitation or even by merely observing someone sitting with a sign. *See*, *e.g.*, *Thayer*, 755 F.3d at 74 (explaining that a solicitor holding a sign within twenty feet "would reasonably give rise to discomfort to someone stuck at a bus stop, and could definitely produce apprehensiveness in someone obviously possessing fresh cash").[12] The Seventh Circuit's decision in *Norton* reflects a similar reliance on listeners' reaction to speech to justify a regulation of solicitation. The Springfield ordinance regulated "oral request[s] for an immediate donation of money." 768 F.3d at 714. Signs requesting money were permitted, as well as oral requests to send money at a later time. *Id*. The court inferred that Springfield "evidently views signs and requests for deferred donations as less impositional than oral requests for money immediately, which some persons (especially at night or when no one else is nearby) may find threatening." *Id; see id.* at 715 (ordinance "permit[s] requests that do not seem threatening"). Thus, the Springfield ordinance was justified in terms of how listeners might react to the solicitation: feeling apprehensive or imposed upon.

Grand Junction invokes similar listener-based rationales in an attempt to justify its restrictions on solicitation. *See, e.g.*, ECF 91, Def. Resp. at 34 (the solicitor "must engage in conduct that, by its very nature, is more likely to cause fear, apprehension, discomfort or annoyance in the person solicited").

[12] *See also Thayer*, 755 F.3d at 73 ("[P]eople can feel intimidated or unduly coerced when they do not want to give to the solicitor standing close to a line they must wait in for a bus or a movie."); *id.* at 69 ("A person can reasonably feel intimidated or coerced by persistent solicitation after a refusal, and can reasonably feel trapped when sitting in a sidewalk café or standing in line waiting for some service or admittance.").

The reasoning of *Thayer* and *Norton* is plainly inconsistent with *McCullen*. The *McCullen* Court reminds us that public streets and sidewalks are a vital and unique venue for speech because speakers can reach audiences that are unable to "turn the page, change the channel or leave the Web site," and because speakers can "confront[]" passersby "with an uncomfortable message" – one passersby "might otherwise tune out." *McCullen*, 134 S. Ct. at 2529. "[T]his aspect of traditional public fora," the Court explained, "is a virtue, not a vice." *Id*.

As *McCullen* explained, the First Amendment requires strict scrutiny when the government prohibits communications on the public sidewalks simply because some listeners may react in the way that *Thayer*, *Norton*, or Grand Junction hypothesize.[13] By relying on the adverse effects of the regulated expression on listeners, these decisions fail to justify their restrictions "without reference to the content of the regulated speech." *Id.* at 2531. On the contrary, they are "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.

A recent decision from the federal district court in Virginia is instructive on this point. In *Clatterbuck v. City of Charlottesville*, the court awarded summary judgment to plaintiffs who challenged a Charlottesville ordinance that prohibits soliciting immediate donations near two streets running through the downtown mall. No. 3:11-cv-00043,

[13] Neither ordinance, nor Grand Junction's, could survive strict scrutiny. This is particularly true when solicitations that are not regulated, like the solicitations of persistent high pressure salespersons or passionate evangelicals pressuring passersby for conversion, are likely to produce the same annoyance, apprehension, or discomfort in the same precise situations. *See Brown v. Entertainment Merchants Ass'n*, 131 S. Ct. 2729, 2740 (2011) ("the regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it").

2015 U.S. Dist. LEXIS 20097, at *35 (W.D. Va. Feb. 19, 2015). The court invoked *McCullen*'s admonition that the government does not provide a content-neutral justification for a regulation if its rationale relies on listeners' reaction to the regulated speech. Charlottesville justified its regulation as a traffic safety measure, in part on the ground that pedestrians trying to evade panhandlers might stray into traffic. The court held that this was not a content-neutral justification "given that it is based on an expected listener's expected reaction." *Id*. at *36. The court added that "the content-based nature of the ordinance is even clearer when one considers the many forms of communication that are not prohibited by the ordinance, but which a reasonable pedestrian fervently may wish to avoid, such as obnoxious wolf-whistles and catcalls, earnest political entreaties, and the like." *Id*. at **36-37. The same reasoning applies to the rationales that *Thayer* and *Norton* advanced for the ordinances they upheld.

Thayer and *Norton* are both inconsistent with *McCullen*'s teachings about content discrimination. Grand Junction's reliance on these cases is misplaced.[14]

[14] Grand Junction also relies on *Norton*'s discussion of three Supreme Court cases that upheld regulations on solicitation in nonpublic forums. ECF 91, Def. Resp. at 26-27 (citing *Heffron v. Int'l Soc'y for Krishna Consciousness Inc.*, 452 U.S. 640 (1981), *United States v. Kokinda*, 497 U.S. 720, 736 (1990), and *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992)). The Court upheld those regulations under a standard much more lenient than the standard that applies in public forums like the sidewalks of Grand Junction. For example, the Court in *Kokinda* said that a regulation of expression in a nonpublic forum is valid "unless it is unreasonable, or, as was said in *Lehman*, 'arbitrary, capricious, or invidious.'" *Id.* at 725-26 (*quoting Lehman v. City of Shaker Heights*, 418 U.S. 298, 393 (1974)).

Grand Junction also relies on *Norton*'s suggestion that First Amendment doctrines regarding content discrimination should not apply to panhandlers who are not "express[ing] an idea or message about politics [or] the arts . . . ." ECF 91, Def. Resp. at 25-26 (*quoting Norton*, 768 F.3d at 717). On the contrary, the simple plea of "homeless, anything helps" communicates a wealth of information about politics, economics, and social inequality, and it asks passersby personally to take action in the form of a charitable response. *See, e.g.*, *Loper v. New York City Police Dept.*, 999 F.2d

C. By regulating requests for future contributions, the ordinance regulates speech on the basis of content

As Grand Junction acknowledges, when the challenged ordinance applies, it bans not only requests for an immediate donation but also requests that seek a donation that can be delivered at a later time. ECF 91, Def. Resp. at 24. Defendant has been unable to cite a single case that holds that a similar regulation of future contributions is content-neutral.

Cases holding that regulations of requests for immediate donations are content-neutral are informed by Justice Kennedy's concurring opinion in *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) ("ISKCON").[15] 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 immediate payment of money." *Id*. at 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

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699, 703 (2d Cir. 1993) ("Begging frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation. Even without particularized speech, however, the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance."); *accord Speet v. Schuette*, 726 F.3d 867, 874 (6th Cir. 2013). That such messages may make passersby uncomfortable provides no legitimate grounds for suppression.

[15] For example, the California Supreme Court decision Defendant cites, ECF 91, Def. Resp. at 25, relied on the court's earlier decision in *Los Angeles Alliance for Survival v. City of Los Angeles*, 993 P.2d 334, 367-73 (Cal. 2000), which relied heavily on Justice Kennedy's concurrence. *Id*. at 367-73; *see ISKCON of California*, 227 P.3d 395, 399, 402 (Cal. 2010).

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 City's ordinance, which regulates all requests for money or employment, not just requests for an immediate exchange of money, is "a direct content-based restriction of speech." *Id*. at 704. 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 Vega*s, 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. Because the Grand Junction ordinance regulates requests for future donations, it regulates *messages* of solicitation. Thus, the Grand Junction ordinance is a content-based regulation of expression.

II. Even if the restrictions were content-neutral (and they are not), Defendant has not met its burden to show the ordinance is narrowly tailored

A. Grand Junction relies on stereotypes and overgeneralizations, not evidence

Grand Junction has not met its burden to demonstrate that its ordinance is narrowly tailored. In the same paragraph in which Grand Junction asserts that the ban on nighttime panhandling is narrowly tailored, it cites *Thayer* for support, without noting that *Thayer* upheld a preliminary injunction enjoining enforcement of a blanket ban on nighttime panhandling.[16]

In asserting (without evidence) that the ordinance is narrowly tailored, Grand Junction simply invokes overgeneralized listener-based rationales that are similar or identical to the rationales articulated in *Thayer* and in an earlier decision, *Gresham v. Peterson*, 225 F.3d 899 (7th Cir. 2000). ECF 91, Def Resp. at 33 (stating that a person may reasonably fear for his safety at night); *id* at 34 (stating the solicitor "must engage in conduct that, by its very nature, is more likely to cause fear, apprehension, discomfort, or annoyance in the person solicited") (citing *Thayer*, 755 F.3d at 69). As *McCullen* explained, these listener-based rationales for the ordinance demonstrate that it is content-based and subject to strict scrutiny.

[16] Contrary to Grand Junction's representation, ECF 91, Def. Resp. at 34, the *Thayer* court did not "find" that the Worcester ordinance was narrowly tailored. The *Thayer* court declined to hold the government to its burden of justifying the challenged restrictions of expression, and it did not require the government to demonstrate that the restrictions met the test of narrow tailoring. 755 F.3d at 71-72. Instead, in a ruling without precedent, the court said that plaintiffs seeking interim relief "must show a probability of their ultimate success in demonstrating substantial overbreadth." *Id*. at 72. Thus, *Thayer* did not reach the question whether the ordinance was narrowly tailored; it held that plaintiffs had not made an initial showing of "substantial overbreadth." The *Norton* decision also failed to hold the government to its burden. After concluding (erroneously) that the ordinance was content-neutral, the court disposed of the narrow tailoring inquiry in a single conclusory sentence. 768 F.3d at 717-18.

Nor do these listener-based rationales satisfy the test of narrow tailoring. Even if the First Amendment permitted the government to regulate communications that are "more likely" to make the listener annoyed, uncomfortable, or apprehensive (and it does not), Grand Junction's prohibitions are not narrowly tailored even to those dubious objectives. Grand Junction portrays nighttime solicitation as a scary-looking desperado jumping out of a dark alleyway on an abandoned street, but the ordinance also applies to benign approaches made on a well-lit and heavily trafficked downtown sidewalk. *See* ECF 85, Pls. Mot. at 29-30. The Defendant simply strains credibility when it asserts that its ordinance "does not sweep in any more conduct than is necessary to address the City's legitimate interest in promoting public safety." ECF 91, Def. Resp. at 34.

Similarly, Grand Junction portrays the ATM restriction as protecting persons who are standing at a sidewalk machine with cash still in hand, but the ordinance does not forbid soliciting persons who are *patronizing* ATMs—it applies anywhere within 20 feet of an ATM, even if the person solicited is simply walking nearby, and even if the person solicited is unaware of the ATM's existence. Moreover, even if Grand Junction were able to establish that some sort of "bubble" around ATMs were permissible, it has failed to meet its burden of producing evidence to justify a bubble extending to twenty feet, rather than some lesser distance. *See* ECF 85, Pl. Mot. at 31, n.22 (*citing iMatter Utah*, 774 F.3d 1258, 1269 (10th Cir. 2014)).

B. Defendant has failed to meet its burden to produce evidence to show the ordinance is narrowly tailored

McCullen shows that courts must closely scrutinize the government evidence to ensure that regulations of speech are narrowly tailored to the government's legitimate objectives. For example, the Court noted that the state's evidence of congestion

outside abortion clinics pertained mainly to one Boston clinic on Saturday mornings. *Id.* at 2539. The state presented no evidence to show that persons regularly gathered at other clinics in groups large enough to obstruct access. The Court explained that creating a 35-foot buffer zone at every clinic in the state "is hardly a narrowly tailored solution" for a problem shown to arise only once a week in one city at one clinic. *Id*.

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

Grand Junction says that "the harm to be addressed encompasses aggressive and unsafe solicitation activities." ECF 91, Def. Resp. at 32. As Chief Camper admits, however, the challenged ordinance prohibits a substantial amount of polite, peaceful speech that is neither aggressive nor unsafe, including speech of the solicitor-Plaintiffs. ECF 90, Pls. Resp. at 17-18, Fact 80. Thus, the City has failed to meet its burden, because it failed to "focus[] on the source of the evils the city seeks to eliminate." *Ward*,

491 U.S. at 799 n.7; *see 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."). Instead, Grand Junction banned "a substantial quantity of speech that does not create the same evils." *Ward*, 491 U.S. at 799 n.7.

C. Defendant has not shown that less restrictive alternatives are inadequate to achieve the City's purpose

"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. Defendant has not met its burden.

Defendant claims it has tried alternative measures to address the harms the ordinance targets – public safety threatened by unsafe and aggressive solicitation – but those measures have failed. ECF 91, Def. Resp. at 33. However, all the measures Defendant identifies – including an educational campaign aimed at teaching the public to give to homeless providers rather than panhandlers and a homeless campsite "clean up" – have nothing in particular to do with aggressive or unsafe solicitation. Viewed in their best light, these measures were attempts to mitigate the burdens of homelessness. In their worst light, these measures were attempts to reduce the public presence of homeless people and poor beggars in the City.[17] These measures do nothing to meet

[17] Indeed, in Plaintiffs' view, this is precisely the (unstated) goal of the challenged ordinance. *See* ECF 85, Pls. Mot. at 22 (arguing "the City's underlying purpose behind adopting the ordinance is to reduce the presence of a particular type of expression that the City disapproves: poor people asking strangers for donations.").

Defendant's burden of showing that it has tried less speech-restrictive alternatives, and that those alternatives have failed. *See* ECF 85, Pls. Mot. at 26-28.

Defendant provides no evidence and does not assert that the City has tried the most obvious less restrictive alternative – enforcing existing laws, including the unchallenged provisions of the ordinance, to address aggressive and unsafe behavior that may be associated with some solicitation. Defendant acknowledges that the City may rely on unchallenged provisions of the City's panhandling ordinance to address aggressive solicitation, including a section of the ordinance that prohibits solicitors from "engag[ing] in conduct toward the person that is intimidating, threatening, coercive, or obscene," and another that forbids stepping into the street to collect donations. *See* ECF 85, Pls. Mot. at 14, Fact 20; ECF 91, Def. Resp. at 11, Fact 20. Enforcement of these provisions alone may well be sufficient to address the City's stated concerns regarding aggressive or unsafe solicitation.[18]

Additionally, Plaintiffs presented evidence that Defendant has at its disposal already existing laws that the City admits can be used to address incidents of aggressive solicitation. ECF 85, Pls. Mot. at 13-15, Facts 19-21. Defendant admits only "that the referenced statutes exist" and resists acknowledging that the statutes could address the harms that prompted the challenged ordinance. ECF 91, Def. Resp. at 10-11, Fact 19. Such resistance is baseless. A memorandum to the City Council discussing the proposed panhandling ordinance, purportedly authored by City Attorney John Shaver and Chief John Camper, states: "At present there are a variety of laws

[18] Defendant's suggestion that these provisions "could" fail to address all instances of potentially threatening solicitation is pure speculation, ECF 91, Def. Resp. at 32, because the City has never enforced these provisions.

which outlaw aggressive and other undesirable acts that may be associated with panhandling and vagrancy." Pls.' Appx. at 638, 2014-02-19 City Council Agenda (excerpt). The memorandum cites a number of laws the Grand Junction police may rely on to address acts of aggressive solicitation. *Id.* Chief Camper testified that he agreed these laws could indeed by used to address instances of aggressive solicitation.[19] Defendant presents no contrary evidence.

Further, Defendant has proffered no evidence to show the City has exhausted, or even modestly relied upon, these obvious, less restrictive alternatives to attempt to address purported acts of aggressive or unsafe solicitation. Defendant presents no evidence of move-on orders, tickets or prosecutions of aggressive solicitors on the basis of currently existing laws, even as Chief Camper acknowledged that currently existing laws could likely address the few reported incidents of aggressive solicitation. *See McCullen*, 134 S. Ct. at 2539. ("Although respondents claim that Massachusetts 'tried other laws already on the books,' they identify not a single prosecution brought under those laws within the past 17 years."). "In short, the [City] has not shown that it seriously undertook to address the problem with less intrusive tools readily available to

[19] *See* Pls.' Appx. at 87, Camper Dep. 108:6-23:

Q: One sentence I will read into the record is the second sentence, first paragraph: At present, there are a variety of laws which outlaw aggressive and undesirable acts that may be associated with panhandling and vagrancy. Did I read that correctly?

A: Yes ma'am.

Q: Do you agree with that statement?

A: Yes.

Q: And following are examples of several state and local laws that are laws that allow aggressive and other undesirable acts that maybe be associated with panhandling and vagrancy to be addressed, correct?

A: Correct.

Q: And you agree that those laws can be used to address some instances of aggressive panhandling?

A: Yes.

it."[20] *Id.* Defendant has failed to carry its burden to demonstrate that its ordinance satisfies the test of narrow tailoring.

CONCLUSION

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

Respectfully submitted this 27th day of March, 2015.

s/ Mark Silverstein

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[20] Grand Junction asserts that when *McCullen* discussed less restrictive alternatives to the 35-foot buffer zone rejected in that case, the Court gave its approval to a Boston anti-solicitation ordinance. ECF 91, Def. Resp. at 31-32 (citing *McCullen*, 134 S. Ct. at 2538). Not so. The *McCullen* Court expressly stated that it did not "give [its] approval" to any of the less restrictive alternatives discussed in the opinion. *Id*. at 2538 n.8. Moreover, the Boston ordinance that Defendant cites prohibited solicitations that take place in traffic lanes, an issue that is not raised by any of the challenged provisions of the Grand Junction ordinance.

CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2015 I electronically filed the foregoing **PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT [DOC. 85]** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following recipients:

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