IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 12-cv-03095-MSK

PIKES PEAK JUSTICE & PEACE COMMISSION,
STAR BAR PLAYERS,
GREENPEACE, INC.,
THE DENVER VOICE,
JAMES BINDER,
RONALD MARSHALL,
LAUREL ELIZABETH CLEMENTS MOSLEY, and
ROGER BUTTS,

Plaintiffs,

vs.

CITY OF COLORADO SPRINGS, COLORADO,

Defendant.

REPORTER'S TRANSCRIPT
RULING ON MOTION FOR PRELIMINARY INJUNCTION

Proceedings before the HONORABLE MARCIA S. KRIEGER, Judge, United States District Court for the District of Colorado, commencing at 4:00 p.m., on the 18th day of December, 2012, in Courtroom A901, United States Courthouse, Denver, Colorado.

THERESE LINDBLOM, Official Reporter
901 19th Street, Denver, Colorado 80294
Proceedings Reported by Mechanical Stenography
Transcription Produced via Computer

APPEARANCES

MARK SILVERSTEIN and SARA RICH and REBECCA WALLACE, Attorneys at Law, American Civil Liberties Union, 303 East 17th Street, Denver, Colorado, 80203, appearing for the Plaintiffs.

DANIEL J. DUNN and DAVID DeMARCO, Attorneys at Law, Hogan Lovells, 1200 17th Street, Suite 1500, Denver, Colorado, 80202, appearing for the Defendant.

CHRISTOPHER J. MELCHER, City Attorney, and ANN TURNER, Assistant City Attorney, Colorado Springs City Attorney's Office, 30 South Nevada Avenue, Colorado Springs, Colorado, 80901, appearing for the Defendant.

* * * * *

P R O C E E D I N G S

THE COURT: Court is convened this afternoon in Case No. 12-cv-3095. It is encaptioned Pikes Peak Justice and Peace Commission, Star Bar Players, Greenpeace, Inc., the Denver Voice, James Binder, Ronald Marshall, Laurel Elizabeth Clements Mosley, and Roger Butts as plaintiffs v. the City of Colorado Springs, Colorado.

We're convened for purposes of an oral ruling on the plaintiffs' motion for preliminary injunction.

Could I have entries of appearance, please.

MR. SILVERSTEIN: Good afternoon, Your Honor. Mark Silverstein for the plaintiffs. Closest to me at counsel table

is Sara Rich, and Rebecca Wallace.

THE COURT: Good morning and welcome.

MS. RICH: Good afternoon.

MR. DUNN: Good afternoon, Your Honor. Dan Dunn with Hogan Lovells. On my right is Ann Turner with the city attorney's office; immediately on my left is my colleague, Dave DeMarco; and next to him is the city attorney, Chris Melcher.

We're convened for purposes of an oral ruling on the plaintiffs' motion for preliminary injunction.

THE COURT: Good morning and welcome.

MS. RICH: Good afternoon.

MR. DUNN: Good afternoon, Your Honor. Dan Dunn with Hogan Lovells. On my right is Ann Turner with the city attorney's office. Immediately on my left is my colleague, Dave DeMarco, and next to him is the city attorney, Chris Melcher.

THE COURT: Good morning and welcome.

This matter is before the Court on the plaintiffs' motion for preliminary injunction that was filed at Docket No. 6, and I've considered that motion, the City's response at Docket No. 16, the stipulated facts that were filed by the parties at Docket No. 21, the testimony, exhibits, submissions and arguments that were made at the evidentiary hearing on December 13, and the parties' post-hearing submissions found at Docket Nos. 27 and 28.

Let me begin by thanking counsel for your presentation and for your professionalism in that presentation.

In this action, the plaintiffs have challenged the constitutionality under both the federal and state constitutions of an ordinance passed by the City of Colorado Springs. This ordinance prohibits all forms of solicitation within a specifically described geographical area. The Complaint, found at Docket No. 1, asserts several different theories as to why the challenged ordinance is unconstitutional, including that it violates the United States Constitution's First Amendment guarantee of freedom of speech, and the Fourteenth Amendments' guarantee of equal protection.

For purposes of the instant matter, however, this motion, the plaintiffs, consistent with the Court's order, have focused their request for injunctive relief on the claim that the ordinance on its face violates the United States Constitution First Amendment.

On or about November 20, 2012, the City Council of Colorado Springs passed the ordinance. It was numbered 12-100. And it defined a no solicitation zone, which I'm going to refer to as the zone. The zone is comprised of a 12-block area of downtown Colorado Springs. Within that zone, all forms of solicitation are prohibited at all times. For purposes of the ordinance, solicitation is defined to include, one, seeking to obtain orders for the purchase of goods and services; two,

selling goods or services of any kind, including subscriptions to publications; three, seeking to obtain gifts or any other thing for any reason; and, four, placing or carrying any sign for the purpose of accomplishing any of the categories of solicitation.

The City will begin enforcing the ordinance on -- in January of 2012, but has stated that its attempts to educate the public will occur December 19, 2012 or thereafter.

Prior to passage of the ordinance, the city law prohibited aggressive solicitation, a phrase that included, among other things, soliciting from a person after the person had rejected the solicitor's request, intentionally touching the person being solicited without that person's consent, intentionally blocking or obstructing the passage of a pedestrian or a vehicle during solicitation, following a person who has refused solicitation, and so on.

Although the record indicates that the current no solicitation ordinance was under informal discussion earlier, the subject first came before the City Council formally on August 27, 2012. A representative statement of the issue made by the city attorney, including the issue at a September 10, 2012 council meeting, reads as follows:

Quote, Why do we need something more than -- with reference to the aggressive solicitation ordinance? What we need more than that is an outright ban on solicitation within a

key economic zone. The reason for that is that the conduct of the panhandler that does not fall within the aggressive solicitation definition is currently not covered. So sitting 6 feet and 6 inches away from the door of a business is not covered. Sitting and asking repeatedly or asking someone, the answer is no, asking the next person, the next person, the next person, just sitting there all day requesting money is not covered under the ordinance. Sitting with a sign is not covered under the ordinance. The behavior we see or that the downtown businesses see that they believe is negatively impacting tourism and their business is not currently covered by the aggressive solicitation ban. That's the same experience that we've seen in a number of cities across the country. The non-aggressive solicitation, non-aggressive panhandler is still a hindrance to economic activity and to tourism, so that's the reason for this ordinance, unquote.

The City Council held additional meetings and public discussions on the issue in the following weeks. And it's not necessary for purposes of this ruling to extensively summarize the contents of those discussions or comments. It is sufficient to note that the justification for the current no solicitation ordinance remained primarily focused on the negative effects that the sheer number of solicitors within the zone, almost all always described as panhandlers or sometimes described as the homeless, had in discouraging residents and

tourists from being willing to patronize businesses within the zone.

A representative example of the City's justification was given by the city attorney in a presentation to the City Council on November 12, 2012. Quote, I have observed it personally. We have anywhere from 20 to 30 to 40 individuals every day downtown sitting on a corner, sitting on a flower box, sitting in front of the Starbucks at Bijou and Tejon, sitting in a variety of places around the downtown that are not aggressively panhandling, but they are soliciting, and they are passively panhandling. These individuals, that behavior is what is driving a number of shoppers, tourists, and visitors away from downtown, unquote.

Another witness described the problem as being, quote, the persistent, intense contacting of shoppers and customers, unquote. Again, making clear that the primary issue the City was attempting to address was the frequency with which solicitors engaged pedestrians in the zone.

From the Court's review of the record, there was no discussion at any of the City Council meetings about complaints relating to solicitations by organized charities or by vendors of products or services. In his testimony at the hearing, Mayor Bach testified that he had also received complaints from residents about the actions of charitable solicitors, but he acknowledged that he did not describe these complaints to the

City Council during its debates on the ordinance.

City Council member Merv Bennett testified at the hearing that panhandling was not the only solicitation issue the council was concerned about, making a non-specific reference to, quote, issues from groups such as Greenpeace that were on our streets in the downtown area asking for money, unquote. But the records of the City Council meetings concerning the ordinance make no such reference nor contain any discussion of that issue.

Moreover, the record reflects that none of the debates before the City Council referred to any complaints about solicitation by street performers. Indeed, several council members and the city attorney repeatedly expressed a desire to actually encourage street performers and frequently discussed the possibility of exempting them from the ordinance through a permitting scheme.

Although the ordinance as written prohibits all acts of solicitation within the zone, the parties have stipulated that the City does not consider the ordinance to prohibit solicitations that ask the listener to donate money at a future time or a different place than where the solicitation occurs. This is set forth in Stipulated Fact No. 11, which states, quote, It is the view of Colorado Springs that the ordinance does not prohibit the distribution of leaflets, pamphlets, or handbills containing information about where or how the

recipient may donate to a solicitor or a solicitor's cause at another time or place, unquote.

Indeed, at -- in her testimony at the hearing, Wynetta Massey, a member of the City Attorney's Office, confirmed that this reflected the City's official interpretation of the ordinance.

In light of the City's objection to inquiry of Ms. Massey as to the particulars of that interpretation, given that the plaintiffs were raising a facial not as applied challenge to the ordinance, the Court advised the parties that it would consider the City's stated interpretation of the ordinance as reflecting the City's purpose in enacting that ordinance.

The testimony at the hearing did not address the reasons for the difference between the ordinance's stated ban of all solicitation and the City's interpretation of that language as applying only to immediate solicitation. The Court addressed that disparity with the City's counsel during closing arguments, stating that it appeared to the Court that the City was attempting to have it both ways, that it promulgated a broadly written ordinance to avoid accusations that the ordinance was content based, and then that it narrowed the ordinance -- the reach of the ordinance through the interpretation in order to avoid accusations that that the ordinance as written was not narrowly tailored.

Counsel for the City was candid in stating that he believed that, quote, that is exactly what has happened here, unquote. The City's counsel proceeded to argue both orally and in a supplemental brief that that was permissible to do.

We turn now to my analysis of this evidence. I start with the preliminary injunction standard. To be entitled to a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure, the burden is on the plaintiffs to show, one, that they will suffer immediate and irreparable injury unless the injunction issues; two, that the threatened injury outweighs whatever damage the injunction will cause to the other party; three, that the injunction if issued will not be adverse to the public's interest; and, four, that the plaintiff has a substantial likelihood of succeeding on the merits.

These four elements are drawn from the Tenth Circuit case of ***Schrier v. University of Colorado***, found at 427 F.3d 1253, a Tenth Circuit 2005 decision.

As noted at the hearing, several cases recognize that in First Amendment challenges the existence of the first three elements, irreparable injury, balance of harms, and public interest, necessarily follow from the establishment of the final element, the likelihood of prevailing on the merits. A couple of these cases are found in the Sixth Circuit, ***Bays v. City of Fairborn***, 668 F.3d 814, Sixth Circuit, 2012 case, citing ***County Security Agency v. Ohio Department of Commerce***,

at 296 F.3d 477, a Sixth Circuit 2002 case.

For example, if the plaintiffs demonstrate that the ordinance is likely to be unconstitutional, they will have also succeeded in demonstrating a potentially irreparable injury. The loss of First Amendment freedoms for even minimal periods of time unquestionably constitute irreparable injury.

Similarly, although there may be a public interest in pedestrians having peaceful enjoyment of the public sidewalks in the zone, there is an equally and arguably if not more important public interest in preserving the First Amendment rights of those who wish to exercise their rights. And, for example, the application of that concept, I would direct your attention to ***Awad v. Ziriax***, a Tenth Circuit 2012 case found at 670 F.3d 1111, where the public has a profound and long-term interest in upholding an individual's constitutional rights.

Thus, for all practical purposes, the outcome of a request for preliminary injunction in this case is dictated by whether the plaintiffs can demonstrate the sole, independent element, likelihood of success on the merits.

Turning to that element, this is a facial challenge to the ordinance. And there are two distinct types of facial invalidity in First Amendment speech contexts. First, a claim that every application of the ordinance bears the unacceptable risk of suppressing valid speech. In other words, these are cases that require the speaker to first obtain a license or

permission to speak, or where no constraints are placed on the discretion of a party authorized to grant permission.

Second, there is an overbreadth claim. And that is where the ordinance is so broadly written that it could impermissibly inhibit the speech of some third parties even though it might validly be applied in other situations. An example of that is in ***Members of the City Council of Los Angeles v. Taxpayers for Vincent***, found at 466 U.S. 789, a 1984 Supreme Court decision.

I understand the plaintiffs' claim to be of the latter variety, that it is not disputing that the ordinance might be constitutionally applied in some circumstances, but that its design permits it to operate unconstitutionally in other circumstances.

A party asserting a facial challenge based on an overbreadth theory must do something more than simply demonstrate that the ordinance could be applied unconstitutionally in some circumstance. It must show that the range of circumstances in which the ordinance could operate unconstitutionally is real and substantial in relation to the statute's potentially legitimate sweep. In short, the plaintiffs must show, quote, a realistic danger that the ordinance itself will significantly compromise recognized First Amendment protections of parties not before the Court, unquote.

That quotation is drawn from the United States Supreme

Court decision in ***City Council of Los Angeles v. Taxpayers for Vincent***.

The Supreme Court has repeatedly recognized that a solicitation, whether it is to enter into a sales transaction or a request for a gratuitous gift, is speech that is protected by the First Amendment to the Constitution. It recognized it in ***Heffron v. International Society for Krishna Consciousness***, found at 452 U.S. 640, a 1981 decision, and also in ***United States v. Kokinda***, 497 U.S. 720, a 1990 decision. However, the First Amendment also permits governments to impose reasonable time, place, and manner restriction says on First Amendment speech.

To avoid running afoul of the Constitution, a time, place, or manner restriction must have three elements. First, it must be narrowly tailored to serve a significant governmental interest. Second, it must be content neutral. That means that it must be justified without reference to the content of the speech to be regulated. And, third, it must leave open ample alternative channels for communication of information.

For an example of the application and these particular elements, I turn to ***Ward v. Rock Against Racism***, 491 U.S. 781, a 1989 United States Supreme Court decision. Here, the City bears the burden of proving that its ordinance satisfies each of these elements in accordance with ***Philadelphia Newspapers v.***

Hepps, 475 U.S. 767, a 1986 United States Supreme Court decision.

We turn, first, then, to the issue of whether there is a significant governmental interest that has been established by the City. The first element of the test, whether the ordinance is narrowly tailored to serve a significant governmental interest, entails two inquiries. And the first of these is whether there is a significant governmental interest being advanced by the ordinance. I begin with that question and find that the parties have stipulated that several significant interests at issue here, including promoting the safety and convenience of residents and visitors on public rights of way, and promoting the free flow of traffic on public rights of way, and attracting and promoting and preserving businesses in the zone are significant, important governmental interests.

However, it's not entirely clear that all of these interests are implicated by the problems that have been described in the City Council meetings. There were no concerns as far as I could tell about solicitors obstructing the free flow of traffic on the sidewalks. Indeed, the existing ordinance prohibiting aggressive solicitation appears to promote -- I'm sorry, appears to prohibit any such obstructive conduct.

There was some indication in the transcripts of

concerns about solicitors obstructing entrances to businesses, but it appears that the council addressed that problem by increasing from 6 to 20 feet the distances that persons must maintain from doorways.

With regard to the City's interest in ensuring safety and convenience of its residents, it's necessary to disentangle two concepts, safety and convenience. The record reflects that the City Council herd several residents express concern about their safety around the various solicitors, again, panhandlers, in the zone; but there is no testimony that it was acts of solicitation themselves that posed any safety hazard. Indeed, it's abundantly clear that the existing laws would permit the police to take action against a solicitor whose conduct posed an actual safety hazard to pedestrians.

Rather, it appears that the -- appears to me that the complaints that the City Council was referring to as safety concerns was a shorthand for residents and visitors explaining that they felt uncomfortable about the presence of many homeless people, people who may appear bedraggled or mentally ill, for example, within the zone, regardless of whether these people are actually engaging in solicitation, active solicitation or passive solicitation, or whether they're engaged in any manner of non-solicitation activities.

Without some connection between the actual acts of solicitation and concerns of safety -- and the City has not

pointed to any direct connection -- I cannot conclude that the City's significant governmental interest in preserving the safety of its pedestrians is advanced by the ordinance.

This leaves the issue of convenience of pedestrians and the related concern that pedestrians who are made uncomfortable by solicitation activities will refuse to patronize the zone. There is ample evidence in the record that some pedestrians consider the frequent solicitations they receive to be unwelcome and inconvenient; and as a result, they are less willing to patronize businesses within the zone. The Supreme Court has recognized that acts of active solicitation can have negative effects on the listener that make regulation of solicitation permissible.

And, for example, this is found in ***United States v. Kokenda*** at 497 U.S. 720, a 1990 United States Supreme Court decision, where the court notes, As residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information.

Thus, it would seem that the City has satisfied its burden of demonstrating that the ordinance furthers the City's significant interest in ensuring that pedestrians find the zone to be a convenient and comfortable area in which to travel and transact business.

The plaintiffs argue that the City's interest in preserving pedestrians' desire to travel and conduct business in the zone free from solicitation is an impermissible invocation of the unwilling listener doctrine. As a general rule, the First Amendment does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, the burden normally falls on the viewer to avoid further bombardment of his or her sensibilities by simply averting his eyes and, by extension, to shut off discourse by ignoring statements made by persons.

Here, however, the Court does not understand the City to be attempting to silence the solicitors because the words of solicitation are offensive to the pedestrians, as would be required in application of the unwilling listener doctrine. Rather, I understand the City to contend that it is the act of solicitation and, more accurately, the frequency of the act of solicitation that is offensive to pedestrians, regardless of the actual words used. Thus, I do not find the unwilling listener doctrine applicable here.

I think this case is more similar to a case like members of the ***Members of the City Council v. Taxpayers for Vincent*** that I referred to previously. There, the United States Supreme Court upheld a prohibition on the posting of all signs on public property. The stated justification for the law

was that the large number of illegally posted signs constituted a clutter and visual blight that the City was attempting to eliminate. Although acknowledging that the law had an effect of suppressing protected speech, the Supreme Court upheld the law against a First Amendment challenge, noting that, quote, the state may legitimately exercise its police powers to advance aesthetic values, unquote, by removing, quote, intrusive and unpleasant formats for expression, unquote.

I see little difference in a law that seeks to remove, quote, the visual assault on the citizens of Los Angeles presented by an accumulation of signs posted on public property, unquote, and the ordinance here, which seeks to remove the metaphorical assault on pedestrians in the zone by an accumulation of persons engaging in the oral equivalent of those signs.

In both cases, the speakers' ability to communicate his or her message is prevented; but the ordinance survives because it attempts to regulate the frequency and intrusiveness of the expression rather than the content of the expression.

Accordingly, I find that the City has demonstrated a likelihood that at trial it could demonstrate that the prohibition on solicitation advances a significant governmental interest, namely, a concern that repeated and pervasive solicitation was intruding upon the convenience and comfort of the pedestrians and discouraging them from patronizing

businesses found within the zone.

But that is not the end of the inquiry, because we have to look to narrow tailoring. We turn to the second issue that the Court must focus on, and that's the question of whether the ordinance as written is narrowly tailored. The narrow tailoring element requires that the ordinance not be substantially broader than necessary to achieve the governmental interest at issue.

And that standard is recognized in ***Ward v. Rock Against Racism***, the previous Supreme Court decision that I referenced earlier. The City is not required to select the least restrictive means to address the problem, nor is the ordinance rendered invalid simply because the Court might disagree as to whether a more appropriate method might exist to promote the governmental interest. However, the City may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.

Before turning to the narrow tailoring analysis, I have to address the question of which concept of the ordinance should be evaluated: The ordinance as written, which operates to ban all types of solicitation within the zone, or the ordinance as construed by the City, which purports to ban only those forms of solicitation that seek an immediate delivery of money or property to the solicitor.

I find that I must evaluate the ordinance as it is

written, regardless of the interpretive gloss that the City places on it.

A similar situation was presented in -- please excuse my Spanish. It is not nearly as good as my German pronunciation -- ***Comite de Journaleros v. the City of Redondo Beach***, 657 F.3d 396, a Ninth Circuit 2011 case.

There, the City of Redondo Beach passed an ordinance making it unlawful, quote, for any person to stand on the street and solicit employment, business, or contributions from an occupant of any motor vehicle, unquote. At the time of trial, the City argued that notwithstanding the broad language of the ordinance, it applied the ordinance, quote, only as against individuals who caused motorists to stop in traffic, unquote, not as against those whose street-side solicitation activities did not cause the traffic to stop.

The Ninth Circuit acknowledged that in adjudicating a facial challenge to the law, it was required to consider the City's own authoritative interpretation of it, but concluded it was not required to defer to an interpretation of the ordinance that was inconsistent with the plain language of the ordinance.

Quote, The plain language of the ordinance, which prohibits solicitation by persons standing on a street or highway, is not reasonably susceptible to the City's narrowing interpretation, unquote, the Court explained. And, quote, We cannot simply presume the City will act in good faith and

adhere to standards absent from the ordinance's face, unquote.

A similar logic has to apply here. Here, as in the Redondo Beach case, the City has passed an ordinance that broadly covers all forms of solicitation that a person could engage in, but has sought to narrow that scope of the ordinance through a self-imposed interpretation that is untethered to any particular limiting language in the ordinance itself. As in the Rodondo case, this Court cannot disregard the ordinance as written and accept the City's own interpretation of it.

There is an additional reason for the Court to disregard the City's narrow interpretation of the ordinance, however. The City has essentially acknowledged that its interpretation of the ordinance is a narrowing of the ordinance in order to fit the constitutional analysis.

The Court respects the City's intellectual candor in acknowledging its attempt to straddle two different constitutional tests that tend to pull in opposite directions, but the Constitution cannot be satisfied with mere rhetorical gymnastics. It is incumbent upon the City to say what it means and to mean what it says. And if it wishes to enforce an ordinance in a particular way, it should promote -- it should promulgate the ordinance consistent with the interpretation it desires. Here, the City has promulgated an ordinance that is broader than the interpretation it seeks to apply.

I find that the City has not demonstrated that the

ordinance as written satisfies the narrow tailoring requirement. The ordinance reaches a broad range of protected speech that does not present the harms, intrusion on the convenience and comfort of pedestrians that the ordinance seeks to prevent.

Once again, it's important to recognize that at least according to the record herein, the only harms that the City Council addressed as justifying the ordinance was the discomfort that pedestrians experienced in being repeatedly solicited by panhandlers. The City has not pointed the Court to anything in the record, and I haven't been able to find anything in the record, to suggest that the City Council was concerned about the presence of persons selling goods or services within the zone, that that was causing pedestrians to experience discomfort or convenience, or that it was concerned with such things as street vendors or musicians performing in the zone.

The absence of alleged harmful effects from sales activities in the zone is suggested by the testimony at the hearing concerning the food vendors. City Attorney Massey testified that she was aware of vendors, such as carts selling hot dogs. She believed that the vendors were in possession of a peddlers permit which would operate to exempt them from the ordinance pursuant to a provision allowing any acts of solicitation conducted pursuant to a city-issued permit or

license. The record doesn't reflect what is required from individuals who wish to obtain a permit, nor does it reflect what obligations a permit holder is required to observe. Although Ms. Massey's testimony appears to suggest that permit holders are not required to stay in a fixed location and are free to sell to anyone -- to sell anywhere in the city right -- of what throughout the City defines as space in which they can sell.

Thus, from a pedestrian standpoint, regarding convenience and comfort, there doesn't appear to be a difference between a permit-holding vendor who has elected to set up shop on a street corner within the zone and a non-permit-holding vendor who has chosen to do so.

It would appear to me that the ordinance's blanket ban on vending activities by solicitors is a restraint on protected speech that is unconnected to any of the significant governmental interests that have been articulated by the City.

The same can be said of solicitors taking the form of street performers. Again, the record doesn't reflect that the City was concerned about the disruptive effect of street performers. Quite to the contrary, there were expressions in the hearings of an interest in obtaining more street performers to increase the ambiance in the zone. The council repeatedly contemplated devising a permit system that would allow them to exempt street performers from the reaches of the ordinance.

The city attorney advised the council that the effect of the ordinance would be to permit any person who wished to perform within the zone for his or her own gratification. But as soon as that performer placed a hat or a jar or an open guitar case on the ground to receive tips, the conduct became impermissible solicitation.

The council did not offer an explanation as to how the simple act of a performer passively soliciting tips presented any of the harms that the ordinance was intended to prevent. Thus, the ordinance's effect is on street performers is another example of the ordinance having the effect of suppressing speech that does not pose any of the harms the City was seeking to prevent.

The same can be said of the ordinance's prohibition against persons soliciting via signs and, more broadly, the effect that the ordinance has on passive solicitation altogether. The parties sometimes distinguish between active solicitation, that is where the solicitor approaches or attempts to converse with a pedestrian, and passive solicitation, in which the solicitor does not attempt to actively converse with a pedestrian, but merely hopes that the solicitor's sign, container, or silent presence will encourage the pedestrian to give.

The record sufficiently indicates that the council heard complaints that active solicitation was problematic

within the zone, but the record is less clear as to what alleged harms arose from passive solicitation. And, thus, I believe the City has failed to demonstrate a likelihood that it can show on the record currently before the Court that all forms of passive solicitation posed the same sort of harms that repeated instances of active solicitation do.

Perhaps the most cogent example of the ordinance's lack of narrow tailoring is demonstrated by the City's own interpretation of the ordinance. On its face, the ordinance prohibits all forms of solicitation, even requests in which the solicitor invites the listener to make a donation at a future time or place. Although the ordinance as written prohibits such conduct, however, the City has expressly stated that it does not intend to apply the ordinance against such future solicitations. It's not clear from the record why the City concluded that future solicitations would be permissible but instant or contemporaneous solicitations would not.

I necessarily must conclude, however, that by deeming some solicitations to fall outside the scope of the ordinance, the City concedes that future solicitations do not raise the same concerns of pedestrian inconvenience and discomfort that a solicitation for immediate donations does.

Because I must only consider the ordinance as written, I conclude that the ordinance bans these harmless, or potentially harmless, future solicitations and thus restricts

substantially more protected speech than is necessary.

Taken together, then, I find that the City has failed to show a likelihood that it will succeed in demonstrating that the ordinance was sufficiently narrowly tailored such that it does not restrict a significant amount of protected speech that does not pose the type of harm that the City was seeking to prevent.

The City's major argument with regard to the narrow tailoring issue is to point out that its ordinance was derived from -- indeed, it was nearly a verbatim copy of a portion of a no solicitation ordinance passed in Fort Lauderdale, Florida that was upheld by the Eleventh Circuit against a First Amendment challenge in ***Smith v. City of Fort Lauderdale***, found at 177 F.3d 954, a 1999 decision.

I find the Fort Lauderdale decision unpersuasive. There, as here, the City designated a specific business corridor, one heavily trafficked by tourists and residents, as a zone in which all forms of soliciting, betting, and panhandling were prohibited and justified that ordinance as necessary to provide a safe, pleasant environment and to eliminate nuisance activity on the beach that adversely affected tourism.

Reviewing the trial court's grant of summary judgment in favor of the City, the Eleventh Circuit was presented only with an argument on appeal that the ordinance was not narrowly

tailored. All of the other issues were resolved by stipulation. The Court disposed of that argument in, essentially, a single sentence, stating that, quote, Without second-guessing the City's judgment about the impact of begging on tourism, we cannot conclude that banning begging in this limited beach area burdens substantially more speech than is necessary to further the government's legitimate interest, unquote.

I find ***Fort Lauderdale's*** reasoning to be cursory; and because it is so cursory, it is not persuasive. There is no indication as to what, if any, evidence demonstrated that the ordinance reached types of protected speech that did not present the kinds of harms the City described. The decision describes the plaintiffs in that case as, quote, a class of homeless people, unquote, a situation far different from the group of plaintiffs appearing in this action.

In this action, there are complaints that vendors and performers and charities and others whose solicitation activities do not necessarily fall within the common use of the terms like "begging" and "panhandling" and would not be necessarily be considered a nuisance activity are involved. Thus, the Court declined to adopt the conclusion in ***Fort Lauderdale***, based simply upon its brief and cursory reasoning.

For these reasons, I find that the City has not shown that it is likely to succeed on its attempt to demonstrate that

the ordinance as written is sufficiently narrowly tailored. Because the City must prove that element in order to uphold the ordinance, I find that the plaintiffs are likely to succeed on their challenge to the ordinance when the case comes on its merits, thus entitling them to preliminary injunctive relief.

But before I enter an order, I want to touch on one last issue, content neutrality.

It's not necessary for me to reach the question of whether the City can demonstrate that its ordinance is content neutral, but I'm going to pause briefly to address that.

An ordinance that restricts speech based on its content is subject to strict scrutiny, and few survive that exacting examination. As noted by the Supreme Court in ***Pleasant Grove City v. Summum***, at 555 U.S. 460, a 2009 Supreme Court decision, To determine whether an ordinance is content based or content neutral, a court must look to the purpose behind the regulation to ascertain whether the government's justification for the ordinance references the content of the regulated speech. As it is written, the ordinance in question here would appear to be content neutral. The City's justification for the ordinance is ostensibly that all or substantially all acts of solicitation pose the risk of inconvenience and disruption of pedestrians, regardless of the particular words used in the solicitation. Thus, based on what is before the Court right now, the City would likely be able to

demonstrate that the ordinance as written could survive a challenge that it was content based.

But the same cannot necessarily be said as the ordinance is interpreted by the City. As previously explained, the City interprets the ordinance to treat solicitations seeking immediate donations of money or property differently than solicitations that request the listener to donate money or property at another time or place.

I have concerns as to whether the ordinance written to reflect this interpretation could survive a challenge as content based. Such rule would require the police to listen to or read the particular solicitation and make a determination as to whether the speaker was requesting funds. And if so, determine whether that request was to be complied with immediately or at some future point, temporally or geographically. Such determinations necessarily would require the City to discriminate against messages based on the content of the message itself.

It is with that observation that I recognize what the City has attempted to do here, which is have a content-neutral ordinance with a content-specific interpretation designed to meet the narrow tailoring standard.

I am limited to the -- to the ordinance as it is currently framed and find that it is broad enough to escape the strict scrutiny test because it is not content based, but it is

not likely to survive the narrow tailoring test applied under a level of intermediate scrutiny.

Indeed, this is the outcome in the well-reasoned and closely analogous case of ***ACLU v. City of Los Angeles*** at 466 F.3d 784, a Ninth Circuit 2006 decision. There, as here, the City of Los Angeles sought to revitalize its downtown. And in an attempt to protect visitors against disruption and discomfort, prohibited all forms of solicitation within the downtown area. The trial court granted summary judgment to the City on the plaintiffs' First Amendment challenge to the solicitation ordinance, and the Ninth Circuit reversed. The court found that the ordinance was impermissibly content based. The court acknowledged that the City's justification for the ordinance was strictly to control the secondary effects of solicitation, rather than to discourage the homeless or vagrants who were the most common sources of the solicitation, but it concluded that the ordinance's actual language was content based.

The court noted that the ordinance required police to examine the content of handbills that were being distributed to consider whether the words used in the handbills included a request for funds, an act that revealed the ordinance's content-based focus.

I recognize that the City argues that the Las Vegas test for content basis is too strict and that cases such as

Hill v. Colorado, at 530 U.S. 703, a United States Supreme Court decision in 2000, refute the proposition that the police's need to consider and evaluate the content of the speaker's words renders an ordinance content based. I have some doubt that ***Hill***, a case in which the Court upheld as content neutral restrictions on persons coming within certain distance to engage in protest, education, or counseling of individuals entering abortion clinics, is applicable under these circumstances. I have other doubts that it's particularly persuasive because, as the court there believed, the question was whether the speaker was engaging in protest, educational, or counseling could be resolved with a cursory examination of the communication's content.

It's not necessarily clear to me that a cursory examination of an oral or written communication between a solicitor and a listener in this context would resolve the question of whether an exchange of funds will occur or when it will occur or where it will occur.

Fortunately, I'm not called upon at this time to conclusively assess whether the ordinance as written or as interpreted by the City is content based or content neutral. And I offer these observations as dicta, not binding on the decision that I make with regard to the preliminary injunction motion.

The final element that is considered is whether there

are alternative channels of communication. And I need not reach this element. I make no particular findings. It appears from the record that the ordinance leaves available a number of alternative channels in which solicitors can communicate, but I need not determine that issue in light of the prior determinations I have made.

For the reasons I've articulated, I grant the plaintiffs' motion for preliminary injunction. The City of Colorado Springs is enjoined from enforcing ordinance 12-100 pending trial on the merits in this matter.

Any need for clarification or further explanation?

MR. SILVERSTEIN: Not from the plaintiffs, Your Honor.

MR. DUNN: No, Your Honor. Thank you.

THE COURT: Thank you.

I will be referring this matter to a magistrate judge for pretrial scheduling. If you wish to expedite that process, please bring it up with the magistrate judge, and we'll try to accommodate as quickly as you would like having a determination on the merits.

Thank you all for coming back today. I won't see you again before the holidays, so let me wish you all, happy holidays. We'll stand in recess.

(Recess at 4:53 p.m.)

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 20th day of December, 2012.

s/Therese Lindblom

_____

Therese Lindblom,CSR,RMR,CRR