

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

Civil Action No. 14-cv-00809-CMA

DEBRA BROWNE,  
MARY JANE SANCHEZ,  
CYNTHIA STEWART,  
STEVE KILCREASE,  
HUMANISTS DOING GOOD, and  
ERIC NIEDERKRUGER,

Plaintiffs,

v.

CITY OF GRAND JUNCTION, COLORADO,

Defendant.

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**PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION**

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Pursuant to Federal Rules of Civil Procedure 65(a) and (b), Plaintiffs move this Court for entry of a temporary restraining order and for a preliminary injunction.

Mark Silverstein, Legal Director  
Rebecca T. Wallace, Staff Attorney  
Sara R. Neel, Staff Attorney  
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF  
COLORADO  
303 E. 17<sup>th</sup> Ave. Suite 350  
Denver, CO 80203-1256  
Telephone: (303) 777-5482  
Fax: (303) 777-1773  
[msilverstein@aclu-co.org](mailto:msilverstein@aclu-co.org)  
[rtwallace@aclu-co.org](mailto:rtwallace@aclu-co.org)  
[sneel@aclu-co.org](mailto:sneel@aclu-co.org)

**COUNSEL FOR PLAINTIFFS**

**RULE 7.1 CERTIFICATE**

1. Pursuant to D.C.Colo.L.Civ.R. 7.1, Mark Silverstein, counsel for Plaintiffs, conferred with Grand Junction City Attorney, John Shaver, counsel for Defendant, who opposes the relief sought by this Motion.

**NOTICE OF FILING OF MOTION FOR TEMPORARY RESTRAINING ORDER**

2. On March 18, 2014, Counsel for Plaintiffs, Mark Silverstein, contacted John Shaver, Grand Junction City Attorney and counsel for Defendant. Mr. Silverstein informed Mr. Shaver of the filing of the Complaint in this matter and the intended filing of Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.

3. Defendant City of Grand Junction has actual notice of Plaintiffs' Motion and of Plaintiffs' intent to seek a hearing on the Motion at the Court's earliest convenience, and no later than March 21, 2014.

## INTRODUCTION

The City of Grand Junction has adopted an ill-advised ordinance regulating panhandling that effects a broad suppression of First Amendment rights on all public property within the city limits.<sup>1</sup> City officials say they adopted this measure to address both aggressive panhandling that intimidates and harasses pedestrians as well as solicitation to motorists that poses a safety risk. Instead of focusing narrowly on dangerous, threatening or unduly coercive behaviors, Grand Junction has banned a wide swath of solicitation speech that is courteous, polite, nonthreatening, nonaggressive, does not pose a risk to public safety, and is squarely protected by the First Amendment.

While the City's stated goal in passing the Ordinance was to protect public safety by prohibiting aggressive panhandling and dangerous solicitation of motorists, the City's unstated, but quite clear goal was to decrease the presence of visibly impoverished beggars within the city limits. In attempting to achieve this unstated goal, the Ordinance, the City's interpretation of the Ordinance, and the City's enforcement plan cut a convoluted and at times baffling path through First Amendment jurisprudence. The evidence shows that the City seeks to protect types of solicitation of which it approves – including, signature gatherers, street performers, Girl Scouts cookie sellers, Salvation Army bell ringers, and firefighters holding out their boot for a donation – and discourage the types of solicitation of which it disapproves – namely, solicitation by impoverished individuals asking for money for themselves. As written, as interpreted

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<sup>1</sup> See Ex. 1, Ordinance, "An Ordinance Prohibiting Activities Relating to Panhandling," (adding sections 9.05.010 through 9.05.070 to the Grand Junction Municipal Code) (hereinafter "Ordinance").

by the City, and as the City plans to enforce it, the Ordinance is a content-based, overbroad restriction on speech that violates the First Amendment in myriad ways.

In this lawsuit, Plaintiffs mount a facial challenge to this overbroad ordinance. Plaintiffs do not take issue with those few portions of the Ordinance that are narrowly drafted to target threatening, coercive, menacing, or dangerous behavior, although these provisions largely duplicate already-existing law. Instead, Plaintiffs challenge overbroad provisions that criminalize communications that pose no risk to public safety and are non-threatening, nonaggressive, and are often polite and courteous.<sup>2</sup>

Plaintiffs ask this Court for an emergency temporary restraining order on their First Amendment claims before this Ordinance goes into effect on Sunday, March 23, 2014, as well as a preliminary injunction. This interim relief is necessary to preserve their right and the right of others to peacefully and respectfully engage in expressive and communicative activity in the public areas of Grand Junction.

### **STATEMENT OF FACTS**

On February 19, 2014, the Grand Junction City Council adopted the challenged Ordinance. It was officially published two days later, and it becomes effective 30 days after that, on March 23, 2014.

#### **I. The Ordinance was Adopted to Reduce the Visible Presence of Impoverished Panhandlers, While Preserving the Speech of Other Solicitors Whose Message the City Approves**

The City's stated goal in considering and ultimately adopting the Ordinance was to curb aggressive panhandling and improve traffic safety.<sup>3</sup> However, the City Council heard little or no evidence that Grand Junction faces a serious or escalating problem

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<sup>2</sup> Specifically, Plaintiffs challenge the constitutionality of subsections of (a), (e),(f), and (g)-(l) of Section 9.05.040 of the Ordinance, as well as the last sentence of Section 9.05.050

<sup>3</sup> See Ordinance, Recitals and Section 9.05.010, Legislative Declaration.

with aggressive or dangerous panhandling.<sup>4</sup> The introductory recitals of the Ordinance state that panhandling may be creating a safety risk along public roads. Yet, City Council heard no evidence that panhandlers soliciting motorists had been injured, caused injury or even caused traffic congestion. The introductory recitals further state that in 2013, law enforcement authorities received 377 calls complaining of “panhandling activity” in the City. However, Grand Junction Chief of Police John Camper candidly acknowledged that “most” of the 377 calls were not related to aggressive panhandling. Ex. 2, 2014-02-19 City Council Meeting, 2:23-3:6. Indeed, the 377 calls that Chief Camper cited were actually complaints categorized in the City’s computer database as related to “loitering,” which does not necessarily have any connection to panhandling, much less aggressive panhandling. See Ex. 3, 2013 Loitering Calls.<sup>5</sup> The Council received no additional data documenting a problem with aggressive panhandling.

Instead, public discussions provided information to City Council that undercut the view that the City was plagued by an aggressive panhandling problem, including that: (1) Grand Junction’s non-police bicycle patrol has been effective in deterring aggressive panhandling;<sup>6</sup> (2) homeless-related calls for service to the Grand Junction Police Department have remained steady or decreased in recent years;<sup>7</sup> (3) homeless people

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<sup>4</sup> Public discussions of the Ordinance took place during City Council Workshops on July 31, 2013 and February 3, 2014 and at the February 19, 2014 meeting of the City Council, at which the Ordinance was adopted.

<sup>5</sup> Grand Junction produced Ex. 3 in response to a request for open records seeking the underlying data for the 377 complaint calls purportedly related to panhandling.

<sup>6</sup> See, e.g., Ex. 4, 2014-02-03 Workshop Meeting, 21:21-22:1; Ex. 5, 2013-07-31 Workshop Meeting, 28:14-29:7.

<sup>7</sup> Ex. 6, 2013-07-31 GJPD Handout to Workshop, p. 2 (3 Year Comparison of Homeless Related Calls 2011, 2012 and YTD 2013); p. 3 (3 year comparison of homeless related calls by year).

by and large engage in only minor crimes;<sup>8</sup> (4) to the extent the crimes of homeless people have victims, those victims are primarily other members of the homeless community;<sup>9</sup> and (4) the “citizens” of Grand Junction (apparently as distinguished from homeless people living in Grand Junction) have a mistaken perception that homeless people pose a danger to them. As Chief Camper explained:

One of the interesting things about the transient community, we really don't – you know, there is crime and then there is the perception of crime and people are very concerned about safety when they see transients and vagrancy and that kind of thing, but I must tell you that we don't have what—a whole lot of what you'd call crime on, you know, the average citizen by a transient.

Ex. 5, 2013-07-31 Workshop Meeting, 10:19-11:2. Thus, the prohibitions in the Ordinance are apparently prompted in part by City residents' unfounded fear that homeless panhandlers are a threat to their safety.<sup>10</sup>

In truth, the Ordinance is not intended to address an actual problem with aggressive panhandling or traffic safety. Instead, it is designed, interpreted by the City, and will be enforced with the aim of decreasing the visible presence of impoverished beggars in Grand Junction and to discourage City residents from giving money to individual panhandlers. This aim is consistent with earlier City efforts to discourage what the City sees as the misguided compassion of some Grand Junction residents.

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<sup>8</sup> See, e.g., Ex. 6, 2013-07-31 GJPD Handout to Workshop, p. 5 (Homeless Arrests by Severity 2011, 2012 and 2013); accord Ex. 5, 2013-07-31 Workshop Meeting, 15:25-17:10.

<sup>9</sup> See, e.g., Ex. 5, 2013-07-31 Workshop Meeting, 15:25-17:10, 16:15-16:22 (When asked by an unidentified female councilmember “How often do they [homeless people] harm a citizen?” Chief Camper responded that the police department gets “very few, very few reports of citizens who aren't homeless being victimized”).

<sup>10</sup> Ex. 5, 2013-07-31 Workshop Meeting, 16:20-25 (Chief Camper reports that while there are “very few reports of citizens who aren't homeless being victimized [by homeless people], . . . the perception . . . is sometimes just as powerful as the reality.”); *id.*, at 26:3-9 (Unidentified representative from the City Attorney's Office: “[I]n 2009, the council considered what we called the aggressive panhandling, but based upon the statistics at that time, council chose not to do that. There, I think is not a huge statistical change, but there may be this again, perception change. . .”).

Several years ago, the City initiated a public education campaign aimed at convincing the people of Grand Junction that giving to individual panhandlers was a bad idea, and that donations for the homeless should go to charitable organizations instead of individuals.<sup>11</sup> As part of this campaign, peppered throughout the City, and particularly on street corners where poor people are known to panhandle, are signs that teach: “Giving Spare Change Won’t Make a Change.”<sup>12</sup>

According to representatives from the Grand Junction Police Department, this campaign – while effective to some degree – did not stop all charitable giving to impoverished panhandlers in Grand Junction. See, e.g., Ex. 5, 2013-07-31 Workshop Meeting, 13:11-15:7.<sup>13</sup> Chief Camper pointed out at a City Council Workshop Meeting that he often sees individuals choosing to give money to panhandlers, and he expressed regret that these individuals think they are being “compassionate.” See Ex. 5, 2013-07-31 Workshop Meeting, 14:7-15:9. The most recent step in the City’s campaign to stop the flow of money from passersby to individual panhandlers is passage of the challenged Ordinance – a law that targets the speech the City does not like: solicitation by impoverished individuals.

The City’s overbroad Ordinance, in conjunction with its interpretation of the Ordinance and its plan of enforcement, provide compelling evidence that the City is

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<sup>11</sup> See, e.g., Ex. 2, 2014-02-19 City Council Meeting, 30:7-20, 32:22-33:4 (Councilperson Doody discussing public education campaign); Ex. 5, 2013-07-31 Workshop Meeting, 14:9-18 (Grand Junction Police Officer from Homeless Outreach Team: “[W]e do a lot of education about where their money goes because a lot of people are like I want to give and so our recommendation is always to if you want to give financially, then it’s best to give to those service providers . . . instead of giving to the homeless . . .”).

<sup>12</sup> To view a photograph of one such sign see: Bobby Magill, *Grand Junction Comes to Terms with Homeless, Solicitation Downtown*, THE COLORADOAN, August 14, 2010, available at <http://www.coloradoan.com/article/20100816/NEWS01/8160302/Grand-Junction-comes-terms-homeless>.

<sup>13</sup> Upon information and belief, the speaker in this portion of the transcript identified as “Cynthia” is Officer Cohn of the Grand Junction Police Department.

targeting solicitation-related speech of which it disapproves while allowing solicitation-related speech that meets its approval.

## **II. The Text of the Ordinance**

The challenged Ordinance has two parts. First, it lays out many specific prohibitions of “panhandling” applicable throughout the City of Grand Junction. Second, it addresses solicitation directed to motorists and bars all solicitation on and adjacent to federal and state highways running through Grand Junction.

### **A. City-Wide Prohibitions of Panhandling**

As defined in the Ordinance, “panhandling,” is:

to knowingly approach, accost or stop another person in a public place and solicit that person, whether by spoken words, bodily gestures, written signs or other means, for money, employment or other thing of value.

Ordinance, Section 9.05.020. Twelve prohibitions on panhandling follow, a few of which target conduct that may be fairly described as threatening and invasive of the rights of others, but the majority of which are so broad that they prohibit communications that are nonthreatening, noninvasive and fall squarely within the protections of the First Amendment. Section 9.05.040 states as follows:

9.05.040 General panhandling and solicitation.

It shall be unlawful for any person to panhandle

- (a) One-half (1/2) hour after sunset to one-half (1/2) hour before sunrise;
- (b) If the person panhandling knowingly engages in conduct toward the person solicited that is intimidating, threatening, coercive or obscene and that causes the person solicited to reasonably fear for his or her safety;
- (c) If the person panhandling directs fighting words to the person solicited that are likely to create an imminent breach of the peace;
- (d) If the person panhandling knowingly touches or grabs the person solicited;



- (e) If the person panhandling knowingly continues to request the person solicited for money or other thing of value after the person solicited has refused the panhandler's initial request;
- (f) If the person panhandling knowingly solicits an at-risk person;<sup>14</sup>
- (g) In such a manner that the person panhandling obstructs a sidewalk, doorway, entryway, or other passage way in a public place used by pedestrians or obstructs the passage of the person solicited or requires the person solicited to take evasive action to avoid physical contact with the person panhandling or with any other person.
- (h) Within one hundred (100) feet of an automatic teller machine or of a bus stop;
- (i) On a public bus;
- (j) In a parking garage, parking lot or other parking facility;
- (k) When the person solicited is present within the patio or sidewalk serving area of a retail business establishment that serves food and/or drink, or waiting in line to enter a building, an event, a retail business establishment, or a theater;
- (l) On or within one hundred (100) feet of any school or school grounds.

Ordinance, Section 9.05.040.<sup>15</sup>

### **B. Regulation of Solicitation Directed at Motorists**

Section 9.05.050 of the Ordinance restricts panhandling and other forms of solicitation directed at motorists. Subsections (a) and (b) respectively limit panhandling and solicitation of "employment, business contributions or sales of any kind" when the solicitor enters a street or highway to "complete the transaction" or when the solicitor is "located such that vehicles cannot move into a legal parking area to safely complete the transaction."<sup>16</sup>

In its final sentence, Section 9.05.050 goes on to establish a complete ban on solicitations directed at motorists traveling on particular roadways:

[I]t shall be unlawful for any person to panhandle or to solicit or attempt to solicit employment, business, or contributions of any kind directly from the

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<sup>14</sup> The Ordinance defines an "at-risk person" as anyone with mental or physical disabilities, and any person who is over seventy or under sixteen years of age. Ordinance, Section 9.05.020.

<sup>15</sup> Plaintiffs do not challenge subsections (b), (c), (d), or (g) of Section 9.05.040.

<sup>16</sup> Plaintiffs do not challenge subsections (a) or (b) of Section 9.05.050.

occupant of any vehicle on any highway included in the interstate or state highway systems, including any entrance to or exit from such highway.

Ordinance, Section 9.05.050.

In Grand Junction, several major streets are included in the highway systems covered by the final sentence of Section 9.05.050. See Ex.7, Map of Grand Junction; see *also, e.g.*, Ex.8 Partial Map of North Avenue/Highway 6. There are numerous locations on these streets where persons could direct solicitations to passing motorists while complying with the requirements of subsections (a) and (b), meaning that the driver of the solicited vehicle could move into a legal parking area to complete the requested transaction.<sup>17</sup> Plaintiffs challenge this complete ban on solicitation dictated by the final sentence of Section 9.05.050.

### **III. Grand Junction's Interpretation of the Ordinance**

The text of the Ordinance and the public discussion before the City Council leading to its passage raise some questions about the scope of the city-wide limitations on panhandling. In an effort to resolve these questions, counsel for Plaintiffs initiated a telephone call with Grand Junction City Attorney John Shaver and Senior City Attorney Shelly Dackonish. The substance of the City's representations regarding the Ordinance during the phone call is memorialized in a February 28, 2014 letter from Plaintiffs' counsel to Mr. Shaver as well as in Mr. Shaver's written response. See Ex. 9, 2014-02-28 Shaver-Silverstein (hereinafter "Feb. 28 Letter"); Ex.10, 2014-03-03 ACLU-Shaver (hereinafter "Mar. 3 Letter"). Mr. Shaver's representations, which follow, reflect the City's interpretation of the Ordinance.

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<sup>17</sup> See, e.g., Ex.15, Stewart Declaration, ¶ 4; Ex.14, Sanchez Decl., ¶¶ 6, 9.

**A. The Ordinance Regulates Passive Solicitors, Including Silent Sign Holders and Salvation Army Bell Ringers**

At first blush, the text of Section 9.05.050 appears to reach only the conduct of “active” solicitors, meaning individuals who take an affirmative step to initiate contact with another person in order to solicit funds. See Ordinance, Section 9.05.020 (“panhandling shall mean to knowingly approach, accost or stop another person in a public place and solicit that person . . .”). That text could be read to exempt panhandlers, like Plaintiffs Browne, Sanchez, Humanists Doing Good, and Cynthia Stewart, who sit passively with a sign requesting donations. On the other hand, the definition of panhandling is also written to include solicitation carried out by “written signs or other means.” Ordinance, Section 9.05.020. Statements by City Attorney Shaver, Chief Camper and City Council members in public sessions leading to passage of the Ordinance strongly suggested that “passive” solicitors, such as the familiar Salvation Army bell ringers who passively solicit funds by standing and ringing a bell, fit the Ordinance’s definition of panhandling. During the phone call with the City Attorney’s Office, undersigned counsel were informed that the City regarded passive panhandlers, including passive sign holders and Salvation Army bell ringers, to be “panhandlers” as defined in the Ordinance. See Ex. 9, Feb. 28 Letter, p. 1; Ex. 10, Mar. 3 Letter, p. 1.

**B. The Ordinance does not Regulate Passive Solicitation by Buskers**

Most buskers passively and symbolically solicit donations while performing by leaving in front of them a hat or open instrument case, where members of the public are silently invited to place their donations. If the definition of “panhandling” in the Ordinance includes Salvation Army bell ringers and passive holders of signs soliciting donations, it would appear that the definition also included buskers soliciting donations.

However, prior to passage of the Ordinance, the City assured representatives of the Grand Junction Downtown Development Authority that the Ordinance would not restrict passive busking. Ex. 11, 2014-01-23 GJ Downtown Development Authority Meeting Minutes (hereinafter “Jan. 23 DDA Minutes”), p. 2. City Attorney Shaver reiterated this view in conversation with undersigned counsel, explaining that buskers do not meet the definition of “panhandling” under the Ordinance because they provide “consideration” (a performance) for any donation from the public. See Ex. 9, Feb. 28 Letter, p.1; Ex. 10, Mar. 3 Letter, p. 2.

**C. The Ordinance does not Regulate the Solicitation of Signatures**

The text of the Ordinance is arguably unclear as to whether individuals who solicit signatures are engaging in “panhandling” under the Ordinance, because signatures may constitute a “thing of value.” See Ordinance, Section 9.05.020 (defining panhandling as solicitation for “money, employment or other thing of value”). City Attorney Shaver, however, has confirmed that “gathering signatures is not covered” by the Ordinance. See Ex. 10, Mar. 3 Letter, p.2.

**D. The Ordinance Regulates Solicitors who do not Seek an Immediate Donation**

Counsel for Plaintiffs asked the City Attorney if individuals who hand out leaflets soliciting funds to be paid at a later time, as do volunteers for Plaintiff Humanists Doing Good, are “panhandling.” Mr. Shaver indicated that such individuals are “panhandling” as defined in the Ordinance, and are therefore subject to the restrictions on panhandling in the Ordinance. See Ex. 9, Feb. 28 Letter, p. 1; Ex. 10, Mar. 3 Letter, p.2.

### **E. It is Unclear Whether the Ordinance Regulates Vendors**

The definition of “panhandling” in the Ordinance does not distinguish between solicitors who seek pure donations and those who provide goods or services, so it would seem the plain text of the Ordinance dictates limitations on solicitation by vendors. However, undersigned counsels’ conversation with Mr. Shaver left the impression that the City may not view *any* commercial vendors as regulated by the Ordinance. See Ex. 9, Feb. 28 Letter, p.1; Ex. 10, Mar. 3 Letter, p. 2. Mr. Shaver explained that buskers are excluded from the reach of the Ordinance because they provide consideration for the money they might receive. See Ex. 9, Feb. 28 Letter, p.1; Ex. 10, Mar. 3 Letter, p. 2. Likewise, the Grand Junction Police Department’s Training Guide, discussed below, states that the Ordinance “doesn’t restrict” Girl Scout cookie sellers and buskers, in part because “they are offering a product or service.” Ex. 12, GJPD Training Outline, p. 2.<sup>18</sup> While Girl Scout cookie vendors clearly meet the definition of “panhandling” in the Ordinance, City Council members repeatedly requested, and received, assurance that the Ordinance would not be applied to Girl Scouts. See, e.g., Ex. 2, 2014-02-19 City Council Meeting, 4:25-5:9.

### **IV. Grand Junction’s Plan to Enforce the Ordinance**

The Grand Junction Police Department’s plan to enforce the Ordinance provides perhaps the most compelling evidence that the true target of the Ordinance is a narrow population of visibly impoverished people who beg in public places in Grand Junction, rather than all solicitors who violate the letter of the Ordinance. From the earliest discussions of the Ordinance, Chief Camper assuaged City Council members’ concerns

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<sup>18</sup> The City of Grand Junction provided this document to the ACLU in response to an open records requests on March 14, 2014.

that the Ordinance may limit the activities of desirable solicitors, like the Girl Scouts and the Salvation Army, by assuring council members that the police would exercise a great deal of discretion when enforcing the Ordinance.<sup>19</sup>

A document recently created by the Grand Junction Police Department to train police officers on how to enforce the Ordinance provides insight into how that discretion will be exercised. See Ex. 12, GJPD Training Outline. The Grand Junction Police Department will not enforce the Ordinance against Girl Scouts selling cookies, Salvation Army bell ringers, and buskers. *Id.* at p. 2. Additionally, the Ordinance will not be enforced against firefighters holding a boot and political campaign solicitors. *Id.* The Enforcement plan suggests that the Ordinance “doesn’t restrict” these types of solicitors because “[t]hey aren’t *intimidating, threatening, coercive, or obscene*” and/or “they are offering a product or a service.” *Id.* (emphasis in original). This apparently means that the police will be directed not to enforce the ordinance against any of the aforementioned solicitors even if they violate the Ordinance by asking for money within 100 feet of a bus stop, ATM, or school; if they solicit after dark; or if they solicit from persons defined as “at-risk.” Grand Junction’s enforcement plan raises an important question: If passive non-profit solicitors like Salvation Army bell ringers, passive solicitors like buskers, active non-profit solicitors such as firefighters holding an open boot, and non-profit vendors like Girl Scouts selling cookies, as well as any other person offering a product or service are excluded from enforcement of the Ordinance, who are the true targets of the Ordinance? The answer is simple: impoverished panhandlers.

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<sup>19</sup> See, e.g., Ex.2, 2014-02-19 City Council Meeting, 11:21-12:20 (when faced with a question whether the Ordinance would affect bell ringers for the Salvation Army, Chief Camper explained that his officers could be trusted to use their discretion wisely).

## **V. The Need for Interim Injunctive Relief**

All of the Plaintiffs have engaged in peaceful nonthreatening communicative activities in Grand Junction that are prohibited by the text of the challenged Ordinance or the City's interpretation of it. The Plaintiffs wish to be free to continue engaging in these and other peaceful and nonthreatening communicative activities that the Ordinance prohibits. Without this Court's intervention, the Plaintiffs will be forced to choose to either violate the Ordinance or forego their constitutionally-protected communicative activities.

### **A. Plaintiff Debra Browne**

Plaintiff Debra Browne is a resident of Palisade, Colorado who is needy, unable to work, and asks for assistance from people in Grand Junction in order to meet her monthly expenses and pay for her medication. Ex. 13, Browne Declaration, ¶¶ 1-3. Since 2007, when she became unable to work due to medical issues, Ms. Browne has been traveling by bus to Grand Junction in order to politely ask for assistance from others on Main Street. *Id.* at ¶¶ 3, 7.

Ms. Browne suffers from medical issues which make it very painful for her to walk more than a few blocks, so after getting off the bus, she often sits near the bus stop while she crochets or does craftwork and solicits passersby for assistance. *Id.* at ¶¶ 6-9. Ms. Browne generally solicits donations silently by setting a sign next to her that says "Please Help Me." Ms. Browne sometimes exchanges her crafts and artwork for donations. *Id.* at ¶ 8. One of the locations where Ms. Browne often panhandles is in front of the Wells Fargo on Main Street within 100 feet of the bank's ATM and a nearby

bus stop. *Id.* at ¶ 12. Ms. Browne also seeks and accepts donations from people who are elderly and/or disabled. *Id.*

Ms. Browne wants to be free to continue engaging in these peaceful and nonthreatening communicative activities without violating the law. *Id.* at ¶¶ 13-18.

**B. Plaintiff Mary Jane Sanchez**

Plaintiff Mary Jane Sanchez is a resident of Grand Junction who has been homeless off and on over the last several years. Ex. 14, Sanchez Declaration, ¶¶ 1, 4. Although Ms. Sanchez is employed, she sometimes does not have enough money to pay her monthly expenses. *Id.* at ¶ 1. In order to pay her bills and to pay for gas to and from work, Ms. Sanchez has flown a sign seeking assistance. *Id.* at ¶¶ 1, 5. Her signs say things like, “Need gas for work. God Bless.” or “Anything helps. Even a smile.” *Id.* at ¶ 6.

Ms. Sanchez has panhandled on the public sidewalk bordering Horizon Drive at the I-70 off ramp at a spot where it is safe for motorists to stop and give her a donation. *Id.* at ¶¶ 1, 6. She has also panhandled on the public sidewalks throughout Grand Junction, some of which are very near ATMs and bus stops. *Id.* at ¶ 8. Many of the people who have responded to her requests for assistance are people with disabilities and/or elderly people. *Id.* at ¶ 6. Ms. Sanchez has also found it necessary to panhandle very early in the morning – when it is still dark – in order to make sure that she had enough money to pay for gas to get to work in the morning. *Id.* at ¶¶ 9, 11.

Ms. Sanchez wants to be free to continue engaging in these peaceful and nonthreatening communicative activities without violating the law. *Id.* at ¶¶ 10, 12, 13.



**C. Plaintiff Cynthia Stewart**

Plaintiff Cynthia Stewart is a disabled resident of Grand Junction who is needy and wishes to ask for assistance from people in Grand Junction. Ex. 15, Stewart Declaration, ¶¶ 1-2. Ms. Stewart has been unemployed since 2010 and seeks the assistance of others in order to keep a roof over her head and pay her bills. *Id.* at ¶ 4. Ms. Stewart has panhandled by flying a sign on the sidewalk in front of Walmart on North Avenue (Highway 6), and often politely uses her voice to ask for donations at or near bus stops. *Id.* at ¶¶ 4, 7. Ms. Stewart chooses to panhandle on North Avenue because it has the most passersby and it has many places to easily, safely and legally pull out of traffic and park. *Id.* at ¶ 5. Ms. Stewart has received donations from elderly people and people with disabilities while she is panhandling. *Id.* at ¶ 7.

Ms. Stewart wants to be free to continue engaging in these peaceful and nonthreatening communicative activities without violating the law. *Id.* at ¶¶ 8, 13.

**D. Plaintiff Steve Kilcrease**

Plaintiff Steve Kilcrease lives in Grand Junction and is a street musician who regularly plays his music on public property in Grand Junction, generally setting up around the 400-500 blocks of Main Street. Ex. 16, Kilcrease Declaration, ¶¶ 1-3. Mr. Kilcrease plays his guitar and places the guitar case open in front of him as an invitation to the public to donate money. *Id.* at ¶ 4. Mr. Kilcrease receives the most donations while busking at night for the bar crowd on Main Street in Grand Junction. *Id.* at ¶ 6. Mr. Kilcrease silently solicits, and accepts, donations from elderly people who are likely over the age of 70. *Id.* at ¶ 5. Mr. Kilcrease has performed for donations in front of Quincy's, which is a bar that has an ATM located inside. *Id.* at ¶ 7.

Mr. Kilcrease wants to be free to continue engaging in these peaceful and nonthreatening communicative activities without violating the law. *Id.* at ¶¶ 10-11. Based on his reading of the Ordinance, he understands that his busking falls under the definition of panhandling. *Id.* at ¶¶ 8-11. Mr. Kilcrease is not willing to risk having the Ordinance enforced against him by a police officer exercising discretion in enforcement. *Id.* at ¶ 9. Unless and until this Court intervenes, Mr. Kilcrease is chilled and will remain chilled from busking in downtown Grand Junction after dark. *Id.*

#### **E. Plaintiff Humanists Doing Good**

Plaintiff Humanists Doing Good is a non-profit corporation based in Grand Junction whose mission is to do good deeds, establish a sense of fellowship and community, and promote secular education and activism. Ex. 17, Bond Declaration, ¶¶ 1-2.

During the summer, on each Thursday from mid-June through mid-September, Grand Junction holds a Farmers' Market that takes place in the heart of the downtown tourism district on Main Street. *Id.* at ¶ 5. Plaintiff Humanists Doing Good solicits donations at the Farmers' Market. *Id.* at ¶¶ 4-6. Volunteers for the organization place a plastic container at their booth that says "Support us by making a donation." *Id.* at ¶ 9. Volunteers also sometimes verbally solicit donations from passersby and encourage individuals to become a member, which requires a \$30 donation for individuals or a \$50 donation for families. *Id.* at ¶¶ 10-11.

The volunteers have solicited from people over the age of 70 and from people with disabilities. *Id.* at ¶ 15. At the Farmers' Market, the volunteers sometimes do not close up the booth until 9:00 p.m., which means that they have also solicited more than

a half-hour after sunset. *Id.* at ¶ 16. The organization's booth has been located near the Wells Fargo on Main Street, which has an ATM and is very near a bus stop, and near Quincy's Bar, which also has an ATM. *Id.* at ¶ 17. Plaintiff Humanists Doing Good wish to continue these peaceful communicative activities without violating the law. *Id.* at ¶¶ 8, 12, 18, 19.

#### **F. Plaintiff Eric Niederkruger**

Plaintiff Eric Niederkruger is a resident of Grand Junction and an activist who works closely with the homeless community in Grand Junction and is often solicited for money, donations, and other kinds of assistance. Ex. 18, Niederkruger Declaration at ¶¶ 2-4, 7. Although Mr. Niederkruger is very poor himself, he always talks with the people who ask him for help and tries to learn their story to see if there is something he can do to help. *Id.* at ¶ 7. The conversations that he has with local homeless people when they ask him for assistance are important to him. *Id.* at ¶ 7. The information that he learns during those interactions help him to stay on top of the issues that the homeless are facing in Grand Junction. *Id.* Mr. Niederkruger is also sympathetic to homeless and transient people because, although he has a home, he faces many of the same issues they face, including being poor and having a mental illness. *Id.* Plaintiff Niederkruger wants to continue receiving the messages that the homeless and needy will be banned from communicating to him under the Ordinance. *Id.* at ¶ 9.

Mr. Niederkruger suffers from schizoaffective disorder and walks with a cane. *Id.* at ¶ 8. He, therefore, meets the definition of "at risk person" in the Ordinance. Based on his disability, the Ordinance prohibits anyone from approaching him and soliciting

him for money at any time. *Id.* at ¶¶ 8-9. As a person with disabilities, Mr. Niederkruger finds this prohibition discriminatory, condescending and stigmatizing. *Id.* at ¶ 8.

## **ARGUMENT**

### **I. Legal Standard For Interim Injunctive Relief**

The Tenth Circuit applies a four-prong test in evaluating whether an interim injunction is warranted. The moving party must generally demonstrate “(1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant’s favor; and (4) that the injunction is in the public interest.” *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1208 (10th Cir. 2009). The Plaintiffs here easily satisfy this test.<sup>20</sup>

### **II. Plaintiffs are Substantially Likely to Succeed on the Merits of Their Constitutional Claims**

#### **A. Grand Junction Prohibits or Restricts Communications of the Plaintiffs That Are Protected by the First Amendment**

Each of the Plaintiffs engages, and wants to continue engaging, in constitutionally-protected communicative activity in the City of Grand Junction that is forbidden by the terms of the Ordinance and/or the City’s interpretation of it.

Charitable solicitation is unquestionably expression that is protected by the First Amendment. As the Supreme Court explained, solicitation is carried out in conjunction with dissemination of information, expression of views, and advocacy of causes:

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<sup>20</sup> Three types of “disfavored” injunctions require a heightened standard: “(1) preliminary injunctions that alter the status quo, (2) mandatory preliminary injunctions, and (3) preliminary injunctions that give the movant all the relief it would be entitled to if it prevailed in a full trial.” *Id.* at 1208 n. 3. The injunction requested by Plaintiffs does not fall into any of the three disfavored categories. By seeking pre-enforcement relief, Plaintiffs merely seek to preserve the status quo, which is the “last peaceable uncontested status existing between the parties before the dispute developed.” *See Schrier v. University of Colorado*, 427 F.3d 1253, 1260 (10th Cir. 2005). Similarly, the proposed injunction is clearly prohibitory rather than mandatory. Finally, the proposed injunction would not give Plaintiffs all the relief they would be entitled to if they prevail in a full trial: it merely provides temporary protection for their First Amendment rights until this Court can issue a final judgment on the merits. *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1247-48 (10th Cir. 2001).

[C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests--communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes . . . . [S]olicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on . . . social issues, and . . . without solicitation the flow of such information and advocacy would likely cease.

*Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). Courts have recognized that the same reasoning applies to poor persons who seek charity for themselves:

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. We see little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed.

*Loper v. New York City Police Dept.*, 999 F.2d 699, 704-05 (2d Cir. 1993) (holding that a statute prohibiting loitering “for the purpose of begging” violates the First Amendment).

Plaintiff Kilcrease’s busking is also protected expression. See *Berger v. City of Seattle*, 569 F.3d 1029, 1036 n.4 (9th Cir. 2009). Finally, “the First Amendment includes not just a right of free speech, but also a right to receive information.” *Doe v. City of Albuquerque*, 667 F.3d 1111, 1118 (10th Cir. 2012). Thus, the First Amendment protects the right of Plaintiff Niederkruger to hear the messages of poor persons who ask for assistance, as well as his right to hear the music of street musicians who wish to play for tips.

**B. Grand Junction Bears the Burden of Justifying its Restrictions on Expression in a Public Forum**

The challenged Ordinance applies on the streets, sidewalks, and public parks – locations that are regarded as public forums, see *United States v. Grace*, 461 U.S. 171,

177 (1983), where the government's right to limit expressive activity is "sharply circumscribed." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

Grand Junction bears the burden of justifying its regulation of expression. See *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000) ("When the government restricts speech, the government bears the burden of proving the constitutionality of its actions."); *ACORN v. Municipality of Golden*, 744 F.2d 739, 746 (10th Cir. 1984) (When "a law infringes on the exercise of First Amendment rights, its proponent bears the burden of establishing its constitutionality.").

Grand Junction has adopted content-based regulations of expression, which are presumptively unconstitutional and subject to the strictest scrutiny. To justify a content-based regulation, Grand Junction must demonstrate that its regulation is the least restrictive means of furthering a compelling government interest. *Perry*, 460 U.S. at 45.

Even if the challenged Ordinance were content-neutral (and it is not), the City bears the burden of demonstrating that the Ordinance meets the test of intermediate scrutiny: that it is narrowly tailored to further a significant government interest and that it leaves open ample alternative channels of expression. *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

Violation of the challenged Ordinance is a criminal offense, carrying a penalty of up to a year in jail. When regulations of expression carry criminal penalties, they must be scrutinized with "particular care." *City of Houston v. Hill*, 482 U.S. 451, 459 (1987).

As the following sections demonstrate, Grand Junction will be unable to meet its burden of justification.

**C. In This Facial Challenge, Grand Junction Must Justify its Restrictions Not Only on the Plaintiffs' Expression but also its Restrictions on the Expression of Persons Who are Not Before the Court**

Because this is a facial challenge to restrictions of First Amendment rights, Plaintiffs are not limited to argument about the restrictions of their own communications. In this overbreadth claim, Plaintiffs may invoke—and this Court must consider—the First Amendment rights of persons who are not before the Court. *See United States v. Stevens*, 559 U.S. 460, 473 (2010); *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150, 167 n.14 (2002). Thus, in considering the extraordinary reach of the challenged Ordinance this Court must consider that – as the City interprets the Ordinance – it forbids a person to sit quietly with a sign requesting donations at any of the numerous public locations where solicitation will be forbidden, and anywhere in the city after dark. It forbids “flying a sign” along any of the streets within the city that are designated as state or federal highways, even when there are safe places for motorists to stop and make a donation. In every location and situation described in Section 9.05.040, subsections (a), (e), (f), and (h) through (l), the text of the Ordinance forbids peaceful, courteous, nonthreatening, and nonaggressive requests for contributions. Newspaper hawkers soliciting donations for publications like *The Denver Voice* cannot work after dark, near a school, bus stop, parking lot, or ATM, and they cannot offer their papers to persons who are “at risk.” The Ordinance forbids a nonprofit organization to distribute literature at a bus stop or to persons standing in line if it contains a request for a donation. It makes it a crime for the nonprofit to distribute that literature in any public place anywhere in the city to persons over 70, to a person with a disability or to anyone else who fits the broad definition of “at risk” in Section

9.05.020. In the evening hours during Christmas shopping season on the downtown sidewalk, it forbids the Salvation Army from deploying its familiar bell-ringers in Santa costumes.

The ordinance is even broader. The ACLU's Executive Director cannot ask potential donors for a contribution when taking them to lunch at a sidewalk café. A person standing in line cannot ask his companion for change for the parking meter or to cover the cost of a ticket. A person at a bus stop cannot ask a friend for change, either at the bus stop or after boarding the bus. A teenager accompanying his mother to an ATM cannot ask for a few dollars from the withdrawal. Although Grand Junction is unlikely to enforce the Ordinance in these latter situations, the long reach of the prohibitions illustrates that the Ordinance will be routinely violated in normal everyday interactions, including those between friends and family members, yet enforcement and "move on" orders will be reserved for the City's true targets. As the Supreme Court concluded in *Hill*, "[t]he ordinance is susceptible to regular application to protected expression." 482 U.S. at 467. "The ordinance's plain language is admittedly violated scores of times daily . . . yet only some individuals—those chosen by the police in their unguided discretion — are arrested." *Id.* at 466. In such a circumstance, the ordinance does not provide the "breathing space that First Amendment freedoms need to survive." *Id.* at 466-67.

**D. The City Cannot Meet Its Burden of Justifying Its Content-Based Regulation of Constitutionally-Protected Expression in a Public Forum**

In multiple contexts, the Supreme Court has noted that regulations are content-based when they require enforcement authorities to "necessarily examine the content of the message that is conveyed." *F.C.C. v. League of Women Voters of Cal.*, 468 U.S.



364, 383(1984); see *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987); *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992).

In an en banc ruling invalidating restrictions on solicitation, the Ninth Circuit explained that “[a] regulation is content-based if either the underlying purpose of the regulation is to suppress particular ideas . . . or if the regulation, by its very terms, singles out particular content for differential treatment.” *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009) (en banc) (internal citations omitted). In this case, we have both. First, the Ordinance singles out particular content for differential treatment. Second, the City’s sometimes strained interpretation of the Ordinance, as well as City’s the enforcement plan, confirm that the City’s true target is a particular type of solicitation that it disfavors: poor persons asking strangers for donations.

Numerous courts have held that regulations of panhandling, begging, or solicitation are content-based restrictions that must be analyzed under the test of strict scrutiny. See *Speet v. Schuette*, 726 F.3d 867, 870 (6th Cir. 2013) (invalidating anti-begging statute that “prohibits a substantial amount of solicitation . . . but allows other solicitation based on content”); *ACLU of Idaho v. City of Boise*, 2014 U.S. Dist. Lexis 291 (D. Idaho Jan. 2, 2014) (preliminarily enjoining multiple provisions of content-based anti-solicitation ordinance) (attached hereto as Exhibit 25); *Clatterbuck v. City of Charlottesville*, 708 F.3d 549 (4th Cir. 2013) (ordinance regulating requests for immediate donations is a content-based regulation subject to strict scrutiny); *Berger*, 569 F.3d at 1051-53 (holding that a ban on “actively solict[ing] donations” is an invalid content-based regulation of speech); *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784,794 (9th Cir. 2006) (explaining that ordinance discriminated on the basis of content

when handbills containing certain language may be distributed, while handbills requesting financial assistance are prohibited); *Loper*, 999 F.2d 699 at 705 (holding that restriction on “begging” was impermissibly content-based); *Blair v. Shanahan*, 775 F. Supp. 1315, 1325 (N.D. Cal. 1991) (finding a content-based restriction when “only begging . . . is proscribed. One may approach and speak at will to solicit directions or the time of day, request signatures for a petition, or any number of other common occurrences without running afoul of this statute”), *modified on other grounds*, 38 F.3d 1514 (9th Cir. 1994); *Carreras v. City of Anaheim*, 768 F.2d 1039, 1048 (9th Cir. 1985) (“ordinance worked an impermissible content discrimination by singling out for regulation speech that involves soliciting donations”); *Benefit v. City of Cambridge*, 697 N.E.2d 184, 188 (Mass. 1997).

The challenged Ordinance relies on content to distinguish between prohibited expression and expression that is not regulated. Anyone remains free to sit on a downtown sidewalk in the evening with a sign that says “reelect the mayor,” but a person violates the ordinance by sitting with a sign that seeks a contribution. Anyone is free to stop a person walking near a bus stop to ask for directions, but if the requester instead asks for a donation, the ordinance is violated. Nonprofit organizations are free to distribute literature about their work at bus stops, but distributing that literature is forbidden if it includes a pitch for donations. Evangelicals are free to stop passersby 99 feet from an ATM to ask if they are saved, but not to ask for a donation to a church or charity. Petition circulators seeking to put an education measure on the ballot can stop a parent on the sidewalk outside her child’s school to ask for a signature, but they violate the ordinance if they ask for help in financing the ballot measure. Thus, the

ordinance is content-based because “by its very terms, [it] singles out particular content for differential treatment.” *Berger*, 569 F.3d at 1051.

The Ordinance is content-based for a second reason: the evidence recounted earlier in the Statement of Facts shows that the City’s overall underlying purpose behind adopting the Ordinance is to reduce the public presence of a particular type of expression that the City disapproves: poor people asking strangers for contributions. Chief Camper’s statements leading up to passage of the Ordinance and his training outline reveals a plan to tell impoverished panhandlers, and no other solicitors, to “move on” whenever they ask for money under circumstances that violate the Ordinance as the City has interpreted it. See, e.g., Ex. 5, 2013-07-31 Workshop Meeting, 22:7-17; Ex. 12, GJPD Training Outline, p. 2. Chief Camper has repeatedly justified such selective enforcement by pointing out that solicitors like the Girl Scouts and the Salvation Army bell ringers, even if they are on public property, are not “aggressive or threatening.” Ex. 2, 2014-02-19 City Council Meeting 4:25-5:9; see also, *id.*, at 11:17-12:20; Ex. 12, GJPD Training Outline.

Yet, it is beyond dispute that many impoverished panhandlers also do not solicit donations in an “aggressive or threatening manner,” particularly those who solicit silently with a sign or cup. Yet, it is readily apparent that the City plans to tell impoverished panhandlers who violate the Ordinance to “move on,” even if the panhandler solicits in as polite and respectful manner as a Salvation Army bell ringer or a firefighter holding out his boot. Ex. 12, GJPD Training Outline, p. 2. On the other hand, should a Salvation Army bell ringer or firefighter with his boot violate the Ordinance, police are advised to use their discretion to ignore the violation. Because

the City's "underlying purpose," *Berger*, 569 F.3d at 1051, is to target a particular type of expression, the Ordinance must be subjected to strict scrutiny, a test the Ordinance cannot survive.

**E. Even If The Challenged Provisions of the Ordinance are Content-Neutral Regulations Of Expression (And They Are Not), They Cannot Survive The Test Of Intermediate Scrutiny**

Grand Junction will undoubtedly argue that the challenged provisions of the Ordinance are constitutional regulations of the time, place, or manner of expression. *Ward*, 491 U.S. at 798. To meet its burden, Grand Junction must demonstrate not only that the ordinance is content-neutral, (and it is not), but also that the regulation is narrowly tailored to advance a significant governmental interest and leaves open ample alternative channels for communication. *Id.* The challenged ordinance cannot satisfy this standard of intermediate scrutiny.

***1. The challenged ordinance fails the test of narrow tailoring because it suppresses substantially more expression than is necessary to further the City's legitimate interests***

"[A] regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests." *Id.* The regulation "need not be the least restrictive or least intrusive means" of achieving the government's goals, but it may not "burden substantially more speech than is necessary." *Id.* at 798-99. Put another way, the regulation must "focus[ ] on the source of the evils the city seeks to eliminate . . . and eliminate[ ] them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." *Id.* at 799 n.7.

The City recognizes that panhandling is protected speech, so it cannot openly acknowledge that its regulation is aimed at restricting and reducing the public presence of poor beggars. Instead, the City's claim to narrow tailoring will be tested by the legitimate concerns the City articulated in the challenged Ordinance. The introductory sections explain the "evils" the Ordinance officially seeks to address. First, the City targets "problems with aggressive panhandling" and "behaviors by individual persons and groups of persons who aggressively panhandle." See Ordinance, Recitals; Section 9.05.010 (c). Second, the City seeks to eliminate a perceived safety risk caused by panhandlers seeking donations from passing motorists. Section 9.05.010(c). To address that safety risk, Grand Junction adopted a separate section, 9.05.050, which is titled "panhandling and solicitation on or near public streets and highways."

i. The City-Wide Prohibitions of Panhandling are Not Narrowly Tailored

Although the "evil" that the City sought to eliminate in Section 9.05.040 was aggressive solicitation that intimidates and poses a risk or fear of physical harm, the challenged Ordinance unreasonably restricts a broad range of peaceful, nonintrusive, nonthreatening, constitutionally-protected expression that does not pose the evil the City sought to address. Thus, the ordinance fails the test of narrow tailoring, because it fails to "focus on the source of the evils" while it also "ban[s] or significantly restrict[s] a substantial quantity of speech that does not create the same evils." *Ward*, 491 at 799 n.7.

The Ninth Circuit's recent application of these principles is instructive. In an en banc decision, the court invalidated a Redondo Beach ordinance that prohibited soliciting or attempting to solicit employment, business, or contributions from the

occupant of any motor vehicle. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 940 (9th Cir. 2011) (en banc). The city argued that its ordinance was narrowly tailored to advance the city's interests in promoting traffic flow and traffic safety. *Id.* at 947. The court explained that the ordinance was not narrowly tailored to promote these legitimate interests, because the ordinance prohibited a substantial amount of expression that did not cause problems with traffic flow or safety. *Id.* at 948-49. The court further explained that the ordinance was also "geographically overinclusive." *Id.* at 949. Although the ordinance applied throughout the city, the city produced evidence of traffic problems only with respect to a small number of major streets and medians. The court noted that the government had the burden of justifying its restrictions, but "[t]he City has offered no evidence to justify extending its solicitation ban throughout the City in such a sweeping manner." *Id.* at 949. Finally, the court explained that the overinclusiveness of the ordinance was particularly significant because there existed less speech-restrictive means of achieving the City's stated goals, including the enforcement of already-existing regulations designed to promote traffic flow and safety. *Id.* at 949-50.

An obvious overreach of the Grand Junction Ordinance is its application of Section 9.05.040 to persons who quietly solicit contributions by holding a sign seeking donations, like Plaintiffs Browne and Sanchez. Persons who silently and passively hold a sign are not being aggressive; they are not intruding; they are not interrupting; they are not intimidating, and they pose no risk of physical harm. Nevertheless, the Ordinance makes it a crime to quietly hold a sign seeking donations anywhere in the city from sunset to sunrise, as Plaintiff Stewart does. The Ordinance makes it a crime

to sit with such a sign 99 feet from a bus stop or ATM, like Plaintiffs Browne, Stewart, Sanchez and Humanists Doing Good. The Ordinance makes it a crime to sit with such a sign 99 feet of a school, or in any of the other public locations where messages seeking donations are now forbidden. The Ordinance also makes it a crime to quietly display such a sign as a person over 70 passes by, or when a person fitting the broad category of “at risk” walks by. The Ordinance is significantly overinclusive, because it prohibits a substantial amount of expression that does not even arguably cause the problems of intimidation and coercion the City purports to address.

Although narrow tailoring does not require that a restriction be “the least restrictive or least intrusive means” of achieving the governmental interest, Grand Junction must show that its regulation does not “burden substantially more speech than is necessary to further the government’s legitimate interests.” *Ward*, 491 U.S. at 798-99. In this case, it is clear that the City burdened “substantially more” speech than necessary. The unobtrusive nonthreatening solicitations described in the previous paragraph cannot qualify as “appropriately targeted evil[s],” *id.*, at 800 (quoting *Frisby v. Schultz*, 487 U.S. 474, 485 (1988)). Banning these peaceful and nonthreatening solicitations burdens substantially more speech than is necessary to further the government’s legitimate interests in targeting the kind of aggressive panhandling that intimidates, coerces, or causes fear of physical harm. This disconnect between the City’s stated goals and the scope of the prohibitions illustrates the absence of the required narrow tailoring. See *Watchtower Bible and Tract Society*, 536 U.S. at 168 (explaining that an ordinance requiring a permit for all door-to-door solicitation was “not tailored to the Village’s stated interests” because even if the interest in preventing fraud

could adequately support the application of the ordinance to commercial transactions and solicitations of funds, “that interest provides no supports for its application to petitioners, to political campaigns, or to enlisting support for unpopular causes” ).<sup>21</sup>

Even if the challenged Ordinance applied only to “active” solicitation, like the face-to-face vocal requests for donations sometimes made by Plaintiffs Stewart and Humanists Doing Good, the Ordinance would fail the test of narrow tailoring. In striking down a regulation that banned “actively solicit[ing] donations,” the en banc court in *Berger* explained that the regulation barred *all* active solicitation and therefore reached “innocuous verbal requests for donations.” *Berger*, 569 F.3d at 1053.

ii. The Regulation of Solicitation Directed at Motorists is not Narrowly Tailored

Similarly, section 9.05.050, which restricts solicitations aimed at motorists, such as the solicitation by Plaintiffs Sanchez and Stewart, also fails the test of narrow tailoring. Here, the City’s legitimate interest is advancing safety. Subsections (a) and (b) restrict the places where solicitation aimed at motorists can occur. They require that the solicitation be carried out only in locations that allow the driver of the solicited vehicle to “move into a legal parking area to safely complete the transaction.” These sections are tailored to the City’s interest in safety. Section 9.05.050 then goes on,

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<sup>21</sup> The Ninth Circuit applied similar reasoning in explaining why a Las Vegas ordinance failed the test of narrow tailoring:

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

*ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784,796 n.13 (9th Cir. 2006).



however, to establish a complete ban on solicitations aimed at “the occupant of any vehicle on any highway included in the interstate or state highway system, including any entrance to or exist from such highway.” This latter provision clearly bans solicitation that does not pose safety risks, and it imposes this complete ban on several major traffic arteries.

The affected highways that cut through Grand Junction include not only off-ramps to I-70, but also highways 6 and 50, the I-70 business loop (some of which runs concurrent with highways 6 and 50), and state highways 340 and 141. See Ex. 7, Map of Grand Junction. Highway 6, portions of which run concurrent with North Avenue, is a major commercial thoroughfare bisected by dozens of cross streets and numerous traffic lights. See, e.g., Ex. 8, Partial Map of North Avenue/Highway 6. Highway 6 is the location of the only mall in Grand Junction.<sup>22</sup> The portion of Highway 6 that runs concurrent with North Avenue also boasts two Walmart department stores,<sup>23</sup> and countless other retailers. The I-70 business loop, which runs concurrent with portions of Highway 50 and is also covered by Section 9.05.050, cuts through the heart of downtown Grand Junction and boasts significant car and foot traffic. Given the high traffic volume on the affected highways and the ease with which motorists can pull off the road safely, many poor people, (including Plaintiffs Stewart and Sanchez) and some commercial businesses<sup>24</sup> solicit from passing motorists on the I-70 business loop, Highways 6 and 50, and near the traffic lights at off-ramps from I-70. Under the plain text of the Ordinance, all such solicitation is completely banned.

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<sup>22</sup> Mesa Mall is located at 2424 U.S. 6, Grand Junction.

<sup>23</sup> The Walmart stores are located at 2881 North Avenue and 2545 Rimrock Ave. in Grand Junction.

<sup>24</sup> See, e.g., Ex. 19, Liberty Tax Photo (taken on North Avenue near the corner of 2<sup>nd</sup> St. and North Avenue in Grand Junction.).

There are numerous locations on these streets where persons can direct solicitations to passing motorists while complying with the requirements of subsections (a) and (b) of Section 9.05.050, meaning that the driver of the solicited vehicle can move into a legal parking area to safely complete the requested transaction. Despite the availability of sites for safe soliciting, however, Grand Junction has enacted a complete ban on soliciting on those streets. Grand Junction will be unable to justify this complete ban on any and all solicitation directed at motorists traveling on the city streets that are designated as part of the highway systems. Like the Redondo Beach regulation, Grand Junction's regulation fails the test of narrow tailoring. See *Comite del Jornaleros*, 657 F.3d at 947-50.

## **2. Less speech-restrictive alternatives**

The ordinance also fails the test of narrow tailoring because there are obvious and substantially less restrictive alternatives that would address the stated harms while restricting substantially less expression. See *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1238 (10th Cir. 1999) ("an obvious and substantially less restrictive means for advancing the desired government objective indicates a lack of narrow tailoring").

In rejecting an ordinance barring solicitations directed at motorists, a Ninth Circuit en banc decision pointed out that enforcing already-existing ordinances was an obvious and less speech-restrictive means of protecting the City's interest in traffic safety and traffic flow. *Comite de Jornaleros*, 657 F.3d at 949-50. Similarly, a less restrictive alternative available to Grand Junction would be to enforce already-existing laws that address the stated harms that prompted the challenged Ordinance. In a memo to the City Council that accompanied the text of the proposed ordinance, Chief Camper

acknowledged that “there are a variety of laws which outlaw aggressive and other undesirable acts that may be associated with panhandling and vagrancy.” He provided the following examples:

For example, the following aggressive behaviors are already unlawful: touching, following or directing obscene language or gesture at someone with the intent to harass or alarm; molesting pedestrians upon the streets or in other public places by following them on foot; stopping or forcibly hindering the operation of a vehicle; obstructing a highway, street, sidewalk, railway, waterway, building entrance, elevator aisle, stairway or hallway; course [sic] or offensive utterances, gestures or displays in a public place tending to incite imminent breach of the peace; placing or attempting to place a person in fear of imminent serious bodily injury by threat or physical action; demanding money under threat of harm; injuring by threat or physical action; demanding money under threat of harm; injuring, attempting to injure or threatening to injure someone.

Ex. 20, 2014-02-04 City Council Staff Report on Ordinance, p. 4. Rather than relying on the many existing laws to address complaints of aggressive panhandling when they arise, the City crafted a blunt “tool” to allow police to issue “move on” orders to “prevent the [panhandling] activity ahead of time in a proactive manner.” Ex. 2, 2014-02-19 City Council Meeting, 3:14-22.

### **3. *Particular subsections of the Section 9.05.040***

Each of the challenged subsections of Section 9.05.040 is a content-based regulation of expression that cannot survive strict scrutiny, as each turns on the City’s content-based definition of “panhandling.” Even if the prohibitions were content-neutral, and they are not, Grand Junction cannot show that they are narrowly tailored to address the harms of aggressive panhandling that is intimidating, coercive, or poses a threat of physical harm. Additional argument on each of the challenged subsections follows.

i. 9.05.040(a) after dark

Grand Junction will be unable to justify its city-wide prohibition on solicitation after dark. Ordinance, Section 9.05.040 (a). The City of Worcester recently enacted a similar ban on nighttime panhandling. Although a federal district court declined to enter a preliminary injunction, the First Circuit Court of Appeals recently issued an injunction against the nighttime ban pending the resolution of the plaintiffs' appeal. See *Thayer v. City of Worcester*, Case No. 13-2355 (1st Cir. Nov. 22, 2013) (Order attached hereto as Exhibit 21).

The reasoning of an Arizona court analyzing a similar ban is persuasive, regardless of whether the nighttime solicitation ban is deemed to be content-based or content-neutral. The court found that the ban on nighttime solicitation was "not narrowly tailored to the state's interest in promoting safety of public areas after dark because it banned totally innocuous solicitation, including some in well-lit places." *State v. Boehler*, 262 P.3d 637, 644 (Ariz. Ct. App. 2001). The court explained that the regulation is overbroad because it "bars any cash solicitation spoken after dark in any public area without regard to whether it is made in an abusive, aggressive or intimidating manner." The court noted that the overbroad regulation prohibited "both a cheery shout by a Salvation Army volunteer asking for holiday change and a quiet offer of a box of Girl Scout cookies by a shy pre-teen if either were uttered on a street corner after dark." *Id.* at 643-44. The same reasoning applies here. Grand Junction will be unable to justify its blanket ban on nighttime solicitation in the entire city, especially since Main Street downtown is well-lit and boasts an active nightlife with significant foot traffic after dark. This is especially true on summer weekends.

ii. 9.05.040(e) asking for reconsideration

In Section 9.05.040 (e), the Ordinance forbids asking a person to reconsider a request for a donation after an initial rejection. A petition circulator can continue to solicit a signature even after being turned down, but someone turned down for a contribution is forbidden to ask for reconsideration, no matter how courteously, politely, or nonthreatening the request. This obvious discrimination on the basis of content requires analysis under strict scrutiny, which the Ordinance cannot survive. Nor is the Ordinance narrowly tailored, as it bans polite, peaceful, and nonthreatening requests for reconsideration, which do not cause the harms that prompted the Ordinance.

iii. 9.05.040 (f) soliciting at-risk person

Grand Junction will be unable to justify its city-wide prohibition on solicitation of “at-risk” persons, which includes persons over 70 and anyone with a mental or physical disability. As explained in declarations by Randy Chapman, the Director of the Legal Center for People with Disabilities and Older People (“Legal Center”), and Julie Reiskin, the Director of the Cross-Disability Coalition (“CCDC”), the only conceivable rationale for this provision is the erroneous belief that most, if not all, elderly persons and persons with disabilities are incapable of making a sound decision about whether to give money to a solicitor. Ex. 22, Chapman Declaration, ¶ 7; Ex. 23, Reiskin Declaration, ¶ 7. The enforcement of such ill-deserved stereotypes is inappropriate and discriminatory. Ex. 22, Chapman Declaration, ¶¶ 6-7; Ex. 23, Reiskin Declaration, ¶¶ 6-7. Moreover, the Ordinance unduly stigmatizes and isolates persons with disabilities by singling them out for differential treatment by requiring solicitors to scan public spaces for those who appear to be elderly or disabled, and then to avoid those people. Ex. 22,

Chapman Declaration, ¶ 8; Ex. 23, Reiskin Declaration, ¶ 8; see *a/so* Ex. 18, Niederkruger Declaration, ¶¶ 8-9.

Importantly, CCDC and the Legal Center have received no complaints from persons with disabilities or older persons in the Grand Junction area related to panhandling. Ex. 22, Chapman Declaration, ¶ 9; Ex. 23, Reiskin Declaration, ¶ 9. Grand Junction City Council was presented with no evidence that any “at-risk” persons had complained of panhandling, whether aggressive or otherwise. In fact, Chief Camper admits that he “do[esn]’t recall any particular complaints on behalf of at-risk persons.” Ex. 24, 2014-02-17 Camper Email.

The provision is clearly content-based, as a signature gatherer can ask an “at risk” person to sign a petition but cannot ask for a contribution. The City will be unable to present evidence that justifies this extraordinarily paternalistic and stigmatizing provision under the strict scrutiny or narrow tailoring test.

iv. 9.05.040 (j) soliciting in a parking lot

The Ordinance forbids soliciting in a parking garage or parking lot. The same arguments about content discrimination and lack of narrow tailoring apply. A similar provision in the Boise ordinance was preliminarily enjoined earlier this year. *ACLU of Idaho v. City of Boise*, 2014 U.S. Dist. Lexis 291, at \*8 (D. Idaho, Jan. 2, 2014).

v. 9.05.040(h) and (l): 100-foot bubbles

The ordinance creates several geographical “bubbles” where all panhandling is prohibited. The ordinance prohibits peaceful nonthreatening panhandling within 100 feet of any school grounds, 9.05.040 (l), or 100 feet of any bus stop or any automatic teller machine. 9.05.040 (h). Grand Junction will be unable to present evidence that

justifies its content-based ban of peaceful, courteous, or non-threatening requests for a donation – such as those made by Plaintiffs Browne, Sanchez, Stewart and Humanists Doing Good – within 99 feet of schools, ATMs, or bus stops. Earlier this year, an Idaho court enjoined a less-restrictive Boise ordinance that prohibited requests for donations made within 20 feet of a bus stop or an ATM. *ACLU of Idaho*, 2014 U.S. Dist. LEXIS 291, at \*8 . The Boise ordinance was less restrictive than the Grand Junction ordinance in two significant ways: first, the size of the Boise “bubble” was considerably smaller than Grand Junction’s. Second, the Boise ordinance did not apply to passive panhandlers who silently request donations by holding a sign.

Plaintiffs have not been able to find any case that has considered or upheld a bubble anywhere close to the size of Grand Junction’s. The City will be unable to show that its content-based ban on peaceful nonthreatening solicitation within 100 feet of an ATM or a bus stop meets the test of strict scrutiny or that it is narrowly tailored to advance its legitimate interest in protecting citizens from intimidation, coercion, or threat of physical harm.

vi. 9.05.040 (i) panhandling on a public bus

The ban on solicitation on a public bus is content-based, as it allows a nonprofit organization to distribute literature to passengers, but not if the literature requests a donation. It allows a passenger to solicit signatures for a petition but not to ask for help in financing the cause. Nor is the prohibition narrowly tailored, as it forbids a passenger from asking his companion for change to pay the fare. See *Berger*, 569 F.3d at 1056 (holding that a restriction on solicitation fails narrow tailoring when it “prohibits both welcome and unwelcome communications”).

vii. 9.05.040 (k)—soliciting persons waiting in line or seated at a sidewalk café

Subsection (k) prohibits directing a request for assistance to a person who is seated at a sidewalk café, or waiting in line to enter a building, an event, or a business. A federal district court preliminarily enjoined a portion of a Boise ordinance that prohibited soliciting a person who was waiting in line, as well as a provision that prohibited solicitation within 20 feet of a sidewalk café or a street vendor. *ACLU of Idaho*, 2014 U.S. Dist. LEXIS 291, at \*8. The enjoined Idaho ordinance was narrower than Grand Junction's, as it did not apply to persons quietly holding a sign seeking contributions. Similarly, the en banc decision in *Berger* invalidated an analogous regulation barring First Amendment activities within 30 feet of "captive audiences," which were defined as persons who were waiting in line or seated at a place serving food or beverages. *See Berger*, 569 F.3d at 1053-1057. The court concluded that the regulation failed the test of narrow tailoring, in part because the rule "prohibits both welcome and unwelcome communications." *Id.* at 1056. The same reasoning applies to the Grand Junction provision.

**III. Plaintiffs Will Suffer Irreparable Injury if An Interim Injunction is Denied**

"A plaintiff suffers irreparable injury when the court would be unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain." *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012). When a law chills or suppresses expression protected by the First Amendment, that is a classic example of a case where monetary damages are both inadequate and difficult to ascertain.



In addition, “[w]hen an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary.” *Id.* (quoting *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001)). More specifically, “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir. 2005), quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976); see also *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1190 (10th Cir. 2003) (holding that even a “minimal restriction” on the manner in which dancers may convey their artistic message constitutes irreparable injury). Accordingly, when government action threatens First Amendment rights, as in this case, there is a presumption of sufficient irreparable injury to warrant interim injunctive relief. *Cnty. Communications Co. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981).

The prohibitions of the challenged ordinance will become effective on Sunday March 23, thirty days after the ordinance was officially published.

#### **IV. The Balance of Equities Tips Sharply in Plaintiffs’ Favor**

The challenged ordinance heavily burdens First Amendment rights – a burden that constitutes irreparable injury as a matter of law – and the ordinance is likely unconstitutional. Accordingly, the balance of equities tips sharply in Plaintiffs’ favor. See *Awad*, 670 F.3d at 1131 (“[W]hen the law that voters wish to enact is likely unconstitutional, their interests do not outweigh Mr. Awad’s in having his constitutional rights protected”) *ACLU v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999) (“the threatened injury to Plaintiffs’ constitutionally protected speech outweighs whatever damage the preliminary injunction may cause Defendants’ inability to enforce what appears to be an unconstitutional statute”).

## **V. The Injunction is in the Public Interest**

The temporary injunction Plaintiffs seek, which preserves First Amendment rights, is clearly in the public interest. “It is always in the public interest to prevent the violation of a party’s constitutional rights.” *Awad*, 670 F.3d at 1131. “[A]s far as the public interest is concerned, it is axiomatic that the preservation of First Amendment rights serves everyone’s best interest.” *Local Org. Comm., Denver Chap., Million Man March v. Cook*, 922 F. Supp. 1494, 1501 (D. Colo. 1996); accord *Elam Constr. v. Reg. Transp. Dist.*, 129 F.3d 1343, 1347 (10th Cir. 1997) (“The public interest . . . favors plaintiffs’ assertion of their First Amendment rights”).

## **VI. No Security Should Be Required**

“Trial courts have wide discretion under Rule 65(c) in determining whether to require security,” *RoDa Drilling Co.*, 552 F.3d at 1215 (internal quotations omitted), and may decline to require security in appropriate cases. See, e.g., *Winnebago Tribe of Neb. v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003) (no bond necessary where there was no showing of harm from injunction); *Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (finding no bond necessary where plaintiff had strong likelihood of success on merits).

This is a case in which Plaintiffs have a strong likelihood of success on the merits, and defendant will suffer no harm from an interim injunction. Accordingly, no security should be required.

## **CONCLUSION**

For the foregoing reasons, the motion for interim injunctive relief should be granted. The Court should enjoin Grand Junction from enforcing the challenged

provisions of Ordinance No. 4618 until this Court issues a final judgment on the merits of Plaintiffs' claims.

DATED this 19<sup>th</sup> day of March, 2014.

*s/ Mark Silverstein*

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

ATTORNEYS FOR PLAINTIFFS

**CERTIFICATE OF SERVICE**

I hereby certify that on March 19, 2014, I electronically filed the foregoing **PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** with the Clerk of Court using the CM/ECF system and undersigned counsel will send notification of such filing to the following recipient:

John Shaver  
City Attorney  
City of Grand Junction  
250 N. 5th St.  
Grand Junction, CO 81501  
(970) 244-1503  
[johns@ci.grandjct.co.us](mailto:johns@ci.grandjct.co.us)

*s/ Jessica Howard*

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Jessica Howard  
Legal Assistant