IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. _____

ABBY LANDOW,
JEFFREY ALAN,
SUSAN WYMER,
LAWRENCE BEAL,

individually and on behalf of
others similarly situated,

GREENPEACE, INC.,
NANCY YORK,

Plaintiffs,

v.

CITY OF FORT COLLINS,

Defendant.

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

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Plaintiffs Abby Landow, Jeffrey Alan, Susan Wymer, Lawrence Beal, Greenpeace, Inc., and Nancy York move the Court pursuant to Federal Rule of Civil Procedure 65 for a temporary restraining order and preliminary injunction enjoining Defendant City of Fort Collins from enforcing various provisions of Section 17-127 of the Fort Collins Municipal Code, titled "Panhandling" (hereinafter, "Panhandling Ordinance" or "Ordinance"); and prohibiting Fort Collins from relying on the challenged provisions of the Ordinance as grounds for issuing citations or orders to move on to persons who are soliciting passively by means of a sign or other indication that donations are invited.[1]

INTRODUCTION

The City of Fort Collins is engaged in a campaign to stop poor persons from asking for charity on the sidewalks, streets, and other public places in the city. Although City officials acknowledge that solicitation is speech that is protected by the First Amendment, Fort Collins is nevertheless actively and vigorously enforcing an unconstitutional ordinance—section 17-127 of the Fort Collins Municipal Code, titled "panhandling"—that turns constitutionally-protected expression into a crime. (*Exhibit 1*, Fort Collins Mun. Code § 17-127.) While the Panhandling Ordinance was adopted in 1995, police enforcement of the Ordinance is on the rise. In recent years, police officers have issued dozens and dozens of citations for alleged violations, and the city attorney's office actively prosecutes and obtains convictions in the Fort Collins Municipal Court. The number of police-issued citations is dwarfed by countless additional oral warnings

[1] Pursuant to Local Rule 65.1, Plaintiffs have included an Information for Temporary Restraining Order (attached as Exhibit A) in which Plaintiffs' counsel certifies that, before filing this Motion, Plaintiffs provided Defendant actual notice of the filing, and with all pleadings and documents filed in the case. A Proposed Temporary Restraining Order is also attached to this Motion for the Court's convenience.

and directives that police have issued, ordering persons to cease their solicitation communications and "move on."

For years, the targets of this enforcement campaign have overwhelmingly been poor persons who are engaged in solicitation that is courteous, polite, nonthreatening and nonaggressive, such as the solicitation that Plaintiffs Abby Landow, Jeffrey Alan, Susan Wymer and Lawrence Beall carry out. Their requests for charity pose no risk to public safety, and their communications requesting assistance are squarely protected by the First Amendment. Yet, Ms. Landow and Ms. Wymer have each been warned by the Fort Collins police that they were violating the Panhandling Ordinance when they solicited charity by silently displaying a sign requesting help. The police ordered Ms. Landow and Ms. Wymer to "move-on" and, in one instance, issued a ticket to Ms. Landow.

Until recently, the City has looked the other way when canvassers for a recognized nonprofit organization—Greenpeace, Inc.—have stopped pedestrians to solicit contributions. That has now changed. Fort Collins police recently warned Greenpeace that its canvassing activities in downtown Fort Collins violate the City's Panhandling Ordinance. Because of this warning, Greenpeace is now refraining from canvassing in downtown Fort Collins. Greenpeace and the other solicitor Plaintiffs, each of whom fears being ticketed for engaging in peaceful, nonthreatening communicative activities, are in urgent need of interim relief from this Court.

Plaintiffs ask this Court for an emergency temporary restraining order and preliminary injunction on their first (First Amendment) and second (Due Process) claims for relief.[2] This

[2]. *See* Class Action Complaint, filed February 10, 2015.

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 Fort Collins.

STATEMENT OF FACTS

The Text of the Challenged Ordinance

The Panhandling Ordinance consists of two parts. In subsection (a), "Panhandle" is defined as "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 a gift of money or thing of value." (*Id.*)

Subsection (b) makes it unlawful for any person to "panhandle" in any of eleven circumstances:

1. Any time from one-half (1/2) hour after sunset to one-half (1/2) hour before sunrise;

2. In a manner that involves the person panhandling knowingly engaging 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;

3. In a manner that involves the person panhandling knowingly directing fighting words to the person solicited;

4. In a manner that involves the person panhandling knowingly touching or grabbing the person solicited;

5. In a manner that involves the person panhandling knowingly continuing to request the person solicited for a gift of money or thing of value after the person solicited has refused the panhandler's initial request;

6. In a manner that involves the person panhandling knowingly soliciting an at-risk person;[3]

[3] Subsection (a)(1) defines an "at-risk person" as:

> [A] natural person who is sixty (60) years of age or older, under eighteen (18) years of age, or who is a person with a disability. A *person with a disability* shall mean, for purposes of

7. On a sidewalk or other passage way in a public place used by pedestrians and is done in a manner that obstructs the passage of the person solicited or that requires the person solicited to take evasive action to avoid physical contact with the person panhandling or with any other person;

8. Within one hundred (100) feet of an automatic teller machine or of a bus stop;

9. On a public bus;

10. In a parking garage, parking lot or other parking facility; or

11. When the person solicited is entering or exiting a parked motor vehicle, in a motor vehicle stopped on a street, or present within the patio or sidewalk serving area of a retail business establishment that serves food and/or drink.

(*Id.* § 17-127(b).) Section 1-15 of the Fort Collins Municipal Code provides that violation of the Panhandling Ordinance is a misdemeanor punishable by imprisonment up to 180 days and a fine of up to $2,650. (*Exhibit 2*, Fort Collins Municipal Code, Section 1-15.)

In this action, Plaintiffs challenge Subsections (b) (1), (5), (6), (8), (9), (10) and (11) of the Panhandling Ordinance.[4] Plaintiffs seek relief from the challenged prohibitions of the ordinance as written and also as Fort Collins interprets and enforces those prohibitions.

Plaintiffs

Abby Landow

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this Paragraph (1), a natural person or any age who suffers from one (1) or more substantial physical or mental impairments that render the person significantly less able to defend against criminal acts directed toward such person than he or she would be without such physical or mental impairments. A *substantial physical or mental impairment* shall be deemed to include, without limitation, the loss of, or the loss of use of, a hand or foot; loss of, or severe diminishment of, eyesight; loss of, or severe diminishment of, hearing; loss of, or severe diminishment in, the ability to walk; and any developmental disability, psychological disorder, mental illness or neurological condition that substantially impairs a person's ability to function physically or that substantially impairs a person's judgment or capacity to recognize reality or to control behavior.

[4] Plaintiffs do not challenge subsections (2), (3), (4) or (7).

Plaintiff Abby Landow is a resident of Fort Collins who is homeless and destitute. (*Exhibit 3*, Landow Declaration, ¶ 1.) To get by, Ms. Landow has often solicited charity in downtown Fort Collins where there is significant foot traffic. When she does so, Ms. Landow usually sits on a public bench on a public sidewalk and silently holds a sign asking for help. Her sign usually says something like: "Need help. Anything is a blessing." (*Id*. ¶ 3.) Ms. Landow has solicited in downtown Fort Collins after dark, in well-lit areas, as well as near outdoor seating areas of a restaurant. (*Id*. ¶ 5.)

In early 2014, Ms. Landow started hearing about more and more people getting tickets for panhandling. (*Id*. ¶ 6.) On at least three occasions that year, police intervened to stop Ms. Landow from soliciting. One time, she was displaying a sign while sitting on a public bench on a public sidewalk outside of a restaurant. Fort Collins police officers approached her and told her she was illegally panhandling within 100 feet of an ATM located inside the restaurant. (*Id*. ¶ 7.) Another time, officers approached her and told her that she was illegally panhandling when she was displaying a sign inviting donations from people in vehicles that were exiting a parking lot. (*Id*. ¶ 8.) In both instances, the officers ordered Ms. Landow to move on, and she did so.

In April 2014, Fort Collins police ticketed Ms. Landow for violating the Panhandling Ordinance, because she was silently soliciting donations by displaying her sign while sitting on a public bench within sight of people sitting at an outdoor café. (*Id*. ¶ 9.) With the help of a friend, Ms. Landow fought the ticket, and the prosecutor ultimately dismissed the charge. (*Id*. ¶ 10; *Exhibit 4*, Landow dismissal paper.) However, the prosecutor warned Ms. Landow that if she were ticketed again, she would not avoid prosecution. (Ex. 3 ¶ 10.)

Because of her interactions with the police and prosecutor last year, as well as hearing of others who were ticketed, Ms. Landow has refrained from soliciting donations in Fort Collins on several occasions. (*Id*. ¶ 12.) She wants to be free to resume her peaceful solicitation without fear that police will enforce the Panhandling Ordinance against her.

Jeffrey Alan

Plaintiff Jeffrey Alan is a recent resident of Fort Collins. He is homeless, disabled, and poor. (*Exhibit 5*, Alan Declaration, ¶¶ 1-2.) Mr. Alan was a truck driver for 30 years. (*Id*. ¶ 3.) His career ended abruptly when he began undergoing treatment, including two major surgeries, for lip cancer – which has since spread to his tonsils. Mr. Alan's illness has left him permanently disfigured, disabled, and unable to work. (*Id*. ¶¶ 4-5.) To pay for basic necessities, Mr. Alan sometimes solicits donations from passersby on public sidewalks. (*Id*. ¶¶ 6-7.)

In the past, Mr. Alan has solicited donations by standing on a public sidewalk, and, using his voice to stop passersby, asking if they could spare some change. He was polite and non-aggressive when he asked for money. (*Id*. ¶ 7.)

In the hope of avoiding tickets for a violation of the City's Panhandling Ordinance, Mr. Alan has recently refrained from stopping persons to solicit donations in downtown Fort Collins. Instead, he has silently solicited donations by displaying a sign while sitting on public benches on public sidewalks in downtown Fort Collins. His sign usually says: "Homeless/Have Cancer/Need Help." (*Id*. ¶¶ 9-10.) Even when soliciting by silently displaying his sign, he reasonably fears being ticketed for an alleged violation of the Ordinance. (*Id*. ¶¶ 9, 14.)

Mr. Alan has silently solicited donations in Fort Collins within 100 feet of ATMs and bus stops, as well as after dark. He has also solicited near a restaurant's outdoor seating area and

from people over 60 years of age. Mr. Alan has also solicited donations from people who, like himself, are disabled. Mr. Alan does not want his disability to prevent other people from approaching him and asking him for help. Although he does not have much to give, he wants to be asked. (*Id*. ¶¶ 11-13.)

Mr. Alan was recently sitting on a public bench on a public sidewalk outside of a restaurant in downtown Fort Collins when a restaurant employee threatened to call the police if Mr. Alan did not move away from the restaurant. The employee said Mr. Alan was illegally panhandling near a restaurant and within 100 feet of an ATM. Mr. Alan, who was silently soliciting by displaying a sign, moved away from that location because he feared being ticketed by the police. Mr. Alan wants to be free to continue soliciting as he has in the past, without fear that police will enforce the Panhandling Ordinance against him. (*Id*. ¶¶ 14-15.)

Susan Wymer

Plaintiff Susan Wymer is a resident of Fort Collins. She is disabled and homeless. Ms. Wymer recently lost her Section 8 apartment when it was declared uninhabitable, leaving her presently homeless. (*Exhibit 6*, Wymer Declaration ¶ 1.) Ms. Wymer walks with a cane and – because of her diabetes – suffers from neuropathy in her feet and significant back pain. Her disabilities make her unable to work. (*Id*. ¶ 2.) To get by, Ms. Wymer has often peacefully and politely solicited charity from passersby in Fort Collins. (*Id*. ¶ 3.)

When Ms. Wymer solicits, she sometimes uses her voice to stop passersby and ask them for spare change or leftover food. She has done this in parking lots and on buses in Fort Collins. Ms. Wymer is polite and non-aggressive when she solicits charity. (*Id*. ¶ 9.)

Most often when Ms. Wymer solicits charity, she does so by displaying a sign while sitting or standing on a public sidewalk. The sign usually reads: "Anything will help. God bless you. John 3:16." (*Id*. ¶ 3.) She sometimes sits with her sign in this manner after dark, within 100 feet of an ATM, and/or near outdoor restaurant seating. (*Id*. ¶¶ 5-6.)

On at least two occasions, Fort Collins police intervened to stop Ms. Wymer from soliciting charity. Once, police told her she was illegally panhandling because she was soliciting within 100 feet of an ATM and it was after dark (approximately 6:00 p.m.). The officer told Ms. Wymer to move on, and she did. (*Id*. ¶ 6.) Another time, Ms. Wymer was soliciting silently by displaying her sign on a public sidewalk near her Section 8 apartment. A police officer told her that panhandling was illegal and that breaking the law could mean a $1000 fine. The officer directed Ms. Wymer to move on, and she did. Afterwards, she refrained from soliciting at that location for fear of being ticketed by the police. (*Id*. ¶ 8.)

Ms. Wymer wants to be free to continue her peaceful solicitation without fear that police will enforce the challenged ordinance against her.

Lawrence Beall

Plaintiff Lawrence Beall is a resident of Fort Collins. He is homeless and poor. (*Exhibit 7*, Beall Declaration ¶ 1.) Mr. Beall worked at Safeway for many years and retired with full benefits. (*Id*. ¶ 2.) Those benefits were recently cut in half – so that he now receives about $500 per month. This money is not enough to cover his basic necessities, much less rent. To pay for his basic necessities, Mr. Beall sometimes solicits charity from passersby in downtown Fort Collins. (*Id*. ¶ 4.)

When Mr. Beall solicits charity, he usually walks up to people on public sidewalks and politely asks them for money by saying something like: "I'm down on my luck. Can you spare a couple of quarters?" Mr. Beall does not pressure people for money or get too close to them when approaching them. He thanks each person he asks for money – whether they give to him or not. (*Id*. ¶¶ 6, 8-9.)

Mr. Beall has solicited donations in Fort Collins at night from people leaving bars and restaurants on well-lit sidewalks in downtown Fort Collins. (*Id*. ¶ 11.) Mr. Beall has also solicited money from people leaving their vehicles, sometimes in parking lots. (*Id*. ¶ 12.)

Mr. Beall reasonably fears that if he continues to solicit donations in Fort Collins he will be ticketed by the police. (*Id*. ¶ 13.) He wants to be free to continue his peaceful solicitation without fear that police will enforce the Panhandling Ordinance against him.

Greenpeace, Inc.

Plaintiff Greenpeace, Inc. ("Greenpeace") is a non-profit corporation that uses peaceful protest and creative communication to expose global environmental problems and to promote solutions. (*Exhibit 8*, Flaherty Declaration, ¶ 1.) For approximately nine years, Greenpeace has sent a team of canvassers to solicit donations in downtown Fort Collins on at least a weekly basis. (*Id*. ¶ 2.) Greenpeace chose the downtown area because it has significant foot traffic. Greenpeace views its canvassing operation in Fort Collins to be highly successful, meaning that on average compared with other parts of the country, a relatively high percentage of people in Fort Collins engage in meaningful conversation with canvassers about Greenpeace's mission and choose to become members. (*Id*. ¶ 6.)

Greenpeace canvassers are not aggressive or threatening. They do not block the sidewalk, entrances to buildings, or any pedestrians' right of way. The canvassers initiate conversations with passersby about the environment and the mission and programs of Greenpeace. Typically, canvassers use their voice to stop or attempt to stop passersby by directing a statement like the following to particular individual walking nearby: "Let's have a conversation about Greenpeace's campaign." (*Id*. ¶ 4.)

When a passerby chooses to engage in conversation with a canvasser, the canvasser will spend some time educating the passerby on Greenpeace's mission. Then, the canvasser will encourage the passerby to join Greenpeace, which requires a donation to the organization. If the passerby agrees, the canvasser then calls Greenpeace's phone center and assists that passerby in signing up as a member and paying the membership fee via credit card. The canvasser does not accept any cash donations. The canvasser gives the new member literature about Greenpeace's programs. This literature includes instructions on how the member may increase his or her donation to Greenpeace at a later time. (*Id*. ¶ 5.)

Some of the busy downtown corners where Greenpeace canvassers solicit in Fort Collins are within 100 feet of an ATM, bus stop, and/or outdoor café. Because Greenpeace canvassers do not discriminate on the basis of age or disability, they solicit from passersby who are over 60 and/or who have a disability. (*Id*. ¶ 9.)

In December, 2014, a Fort Collins police officer approached a Greenpeace employee who was canvassing in downtown Fort Collins and warned him that solicitation by Greenpeace violates Fort Collins' Panhandling Ordinance. When the canvasser explained that Greenpeace

does not take actual money, and arranges all monetary transactions over the phone, the police officer said that this form of soliciting donations was still illegal. (*Id*. ¶ 7.)

This recent incident was the first time that Fort Collins police have contacted a Greenpeace canvasser regarding the Panhandling Ordinance. Greenpeace does not want to risk its canvassers being ticketed, fined and/or arrested for doing their jobs. Because of this incident and the need for clarity about the law, Greenpeace canvassers have ceased soliciting donations in downtown Fort Collins. (*Id*. ¶¶ 8,11.) Greenpeace wants to be free to continue its peaceful solicitation of donations without fear that police will enforce the Ordinance against its canvassers.

Nancy York

Plaintiff Nancy York is 76 years old and wants to hear messages of solicitation from poor and homeless people in Fort Collins. Ms. York was born and raised in Fort Collins and owns a small business there. (*Exhibit 9*, York Declaration, ¶¶ 1-2.) Although she is housed and is not poor, she is a community activist on behalf of poor people and homeless people. (*Id*., ¶ 3.) Ms. York's job brings her to downtown Fort Collins on a regular basis, where she is sometimes solicited by poor people and non-profits. (*Id*., ¶¶ 4-5.) The Ordinance prohibits persons from approaching Ms. York and asking for assistance solely because she is over sixty years old. Despite her age, Ms. York is quite capable of making decision for herself about whether or not to make a charitable donation to a person or an organization. (*Id*., ¶¶ 6, 12.)

Ms. York appreciates interaction with solicitors, particularly poor and homeless people. She wants to see their signs of need; she wants to be approached and asked for money so that she

can better know the plight of these people. Ms. York wants to continue receiving messages of solicitation that the Ordinance forbids. (*Id*., ¶¶ 10-11.)

Plaintiffs Face A Credible Threat of Enforcement

Enforcement of the Panhandling Ordinance by the Fort Collins' police is on the rise. (*See* Ex. 3 ¶ 6; Ex. 6 ¶ 11; Ex. 8 ¶ 10; Ex. 9 ¶ 9.) Since August 2012, the Fort Collins police have issued dozens and dozens of citations for violations of the ordinance, as well as countless oral warnings and move-on orders. (*See Exhibits 10-12* (citations by Fort Collins police for violations of the Panhandling Ordinance).) A review of recent citations reflects a sustained effort to invoke the ordinance to push poor beggars out of the downtown area, regardless of how humbly, quietly, or unobtrusively those individuals seek donations.

In the majority of cases, the supposedly criminal behavior that police identify in the citation is nothing more than passively displaying a sign inviting an act of charity from persons passing by. (*See, e.g., Exhibit 13*, Passive Solicitor Citations.) Passive solicitation does not constitute "panhandling" according to the text of challenged ordinance, because passive solicitors do not "approach, accost or stop" the person who is solicited. (Ex. 1, § 17-127(a)(5).) Nevertheless, it is the policy and practice of Fort Collins authorities—including the police, the City Attorney's office, and the Municipal Court—to enforce the Panhandling Ordinance against persons who peacefully and passively invite donations, such as Plaintiffs Landow, Alan, and Wymer.

Additional examples abound. Fort Collins police cited Sterling Lindbloom for sitting on a public bench on a public sidewalk and displaying a sign that said "can you give me a hand up," while leaving out an upturned cap for donations. (*See, e.g.,* Ex. 13, PLFS 000368-70.)

According to the citation, Mr. Lindbloom was cited because he engaged in this passive and peaceful solicitation after dark (6:30 p.m.) and across the street from an ATM. (*Id.*) The officer "explained" that "the combination of the hat out in front of him and the cardboard sign asking for a hand up was effectively the same as directly asking pedestrians for money." (*Id.*, PLFS 000369.) The Fort Collins Municipal Court convicted Mr. Lindbloom for violating the Panhandling Ordinance. (*Exhibit 14*, Passive Solicitor Convictions, PLFS 000362-64, 000368-69; *see also id.* (citations and case files reflecting additional convictions of passive solicitors).)

Ross Bloom, a homeless, destitute resident of Fort Collins, has been repeatedly cited and convicted for violating the Ordinance, solely because he silently displays a sign to passersby asking for help. (*See Exhibit 15*, Bloom Declaration, ¶¶ 2,5,8, 10; Ex. 11, Bloom Citations.) By way of example, one citation lists only the following "Officer's Observations" to support Mr. Bloom's panhandling ticket: "[Defendant] standing on SE corner w[ith] cardboard sign '[$]3.00 for food.' Has been warned twice by me not to panhandle." (Ex. 11, PLFS 000153.) The municipal court, in turn, has repeatedly convicted Mr. Bloom for such passive solicitation, and Mr. Bloom has spent time in jail for these violations. (*See, e.g.*, *Exhibit 16*, Bloom Convictions; Ex. 15, Bloom Declaration, ¶¶ 9-10.)

The Fort Collins police have also issued citations to street musicians for alleged violations of the Panhandling Ordinance. (*See, e.g.*, Ex. 12, Busker Citations.) Fort Collins has ticketed, convicted, and fined buskers simply for playing music on a public sidewalk and passively and symbolically soliciting donations by means of an upturned hat or open guitar case. (*See, e.g.*, Ex. 12, Busker Citations; *Exhibit 17*, Busker Convictions.)

While the bulk of panhandling tickets issued over the past few years have been to peaceful, passive solicitors who request donations by silently displaying a sign, the police have also ticketed individuals who were engaged in "active" solicitation – meaning the solicitors approached people or used their voice to stop persons and request donations. (*See, e.g.*, Ex. 10, Active Solicitor Citations.) The vast majority of citations issued to active solicitors reflect that the solicitors, while asking for help, did not in engage in conduct that was arguably threatening, intimidating or coercive. (*See id.*) For example, in August 2012, Fort Collins police ticketed Thomas Weiss for violating the Panhandling Ordinance after an officer said he observed Mr. Weiss "mouth the words, 'Can I get a dollar for food?'" to a passerby. (*Id.*, PLFS 000462.) Similarly, in December 2013, the Fort Collins police ticketed Robin Arnold for sitting on a park bench and asking passersby for donations. *See id.*, PLFS 000028. The officer heard Mr. Arnold "offer[] a holiday greeting" to passersby and state to two female pedestrians: "Hello ladies. I accept donations." *Id.* The officer ticketed Mr. Arnold for soliciting after dark (6:18 p.m.) and within 100 feet of an ATM, which was purportedly across the street from the park bench. *Id.*

The Fort Collins Police do not limit their enforcement of the panhandling ordinance to solicitation of money. Poor solicitors who have sought and/or received food or water have also been cited for violation of the challenged Ordinance. (*See e.g.*, *Exhibit 18*, Non-Monetary Solicitor Citations, PLFS 000374 (received food after soliciting by displaying a sign stating "Anything Helps"); PLFS 000215 (asking for food); PLFS 000175 (soliciting donations of food with a sign).) For example, a mother was cited, convicted, and fined after she and her child received "water and something else in a bag" after soliciting donations by displaying a sign. (*Exhibit 19*, Tranca Citation and Case Summary, PLFS 000447-49.)

Numerous citations reflect Fort Collins police officers enforcing the Ordinance as if it were a complete ban on panhandling in the City. In several citations, the description of the allegedly illegal "panhandling" does not reflect any violation of the Ordinance's specific prohibitions regarding time of day, location, or manner of carrying out the solicitation. (*See, e.g.*, *Exhibit 20*, Citations Reflecting No Apparent Violation.) For example, in April 2014, the Fort Collins Police ticketed Wayne Torrey for violating the panhandling ordinance. (*Id.*, PLFS 000446.) The only "Officer's Observations" noted on the citation to support the ticket are: "[Defendant] standing on S/E corner with sign 'Homeless – In Need – Anything Helps.' Taking food from passersby and money." (*Id.*) That same month, the Fort Collins Police ticketed Twila Freel for violating the panhandling ordinance. (*Id.*, PLFS 000222.) The only "Officer's Observations" noted on the citation to explain the ticket are: "I saw male give money to Freel. She had two sign[s] on the side walk in front of her. Freel told me that the male gave her $1.00. She was out in front [of a store]." (*Id.*) These citations appear to reflect a view that the Ordinance renders illegal any and all "panhandling" in Fort Collins, regardless of when, where, or how the panhandling is done. Indeed, one officer who ticketed Mr. Bloom for panhandling noted in the citation that "[Defendant] acknowledged he is aware that panhandling is illegal/prohibited." (Ex. 11, Bloom Citations, PLFS 000154.)

Clearly, the vast majority of the people Fort Collins has targeted for tickets and prosecutions under the Ordinance were engaged in polite, non-threatening, solicitation, and often solicitation that is not even prohibited by the text of the challenged ordinance.

The Need for Injunctive Relief

All of the Plaintiffs have peacefully and politely solicited charity from passersby in Fort Collins in a manner and in situations that violate the Ordinance as written or as Fort Collins interprets and enforces it. Plaintiffs want to be free to continue engaging in these peaceful, nonthreatening communicative activities, but they face a credible threat that Fort Collins police will rely on the Ordinance to issue a citation and/or order them to "move on." Without this Court's intervention, the Plaintiffs will be forced to choose to either violate the challenged ordinance as Fort Collins interprets and enforces it or forego their constitutionally-protected communicative activities.

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.[5]

[5] 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 afford the movant all the relief that it could recover at the conclusion of a full trial on the merits." *Schrier v. University of Colorado*, 427 F.3d 1253, 1259 (10th Cir. 2005). Plaintiffs' proposed injunction is clearly prohibitory rather than mandatory. The proposed injunction would not give Plaintiffs all the relief they would be entitled to if they prevailed in a full trial: it would merely provide 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). Because Greenpeace had been canvassing in downtown Fort Collins for years without police intervention until very recently, providing interim relief preserves the status quo, which is the "last peaceable uncontested status existing between the parties before the dispute developed." *Schrier*, 427 F.3d 1253 at 1260. To the extent that awarding interim relief to other plaintiffs would alter the status quo, this Court must apply "close[] scrutin[y]" and

II. Plaintiffs are Substantially Likely to Succeed on the Merits of Their First Amendment Claim

A. Fort Collins 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 Fort Collins that is forbidden by the challenged Ordinance as written or as Fort Collins interprets and enforces it.

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

> [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.

Plaintiffs must make a "strong showing" that they are likely to succeed on the merits and that the balance of harms favors the requested interim relief. *Id*. at 1261. Plaintiffs meet this heightened standard.

Loper v. New York City Police Dept., 999 F.2d 699, 704 (2d Cir. 1993); *accord Speet v. Schuette*, 726 F.3d 867, 870 (6th Cir. 2013).

In addition, "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 Plaintiffs York and Alan, both willing listeners, to hear the messages of poor persons who ask for assistance.

B. Like Numerous Regulations of Solicitation That Courts Have Rejected in Recent Years, the Fort Collins Ordinance is a Content-Based Regulation of Expression That Cannot Survive Strict Scrutiny

Fort Collins enforces the challenged prohibitions of expression on the streets and sidewalks of the city—traditional public forums where "the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (quoting *Police Dept. of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)).

A regulation of expression is content-based when it "draw[s] content-based distinctions on its face." *McCullen*, 134 S. Ct. at 2531. Thus, a measure is content-based when it requires enforcement authorities to "examine the content of the message that is conveyed to determine whether" a violation has occurred. *Id.* (quoting *F.C.C. v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)). A facially neutral regulation is content-neutral only if it serves purposes unrelated to content and the government justifies it "without reference to the content of the regulated speech." *Id*. (*quoting Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)).[6]

[6] The *McCullen* Court explained that a law is not content neutral "if it were concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech.'" 134 S. Ct. at 2531-32 (*quoting Boos v. Barry*, 485 U.S. 312, 321 (1988)). Thus, the prospect

Content-based regulations are "presumptively unconstitutional" and "subject to strict scrutiny." *McCullen*, 134 S. Ct. at 2530.

In this case, the text of the Panhandling Ordinance "draw[s] content-based distinctions on its face." *Id*. at 2531. Fort Collins regulates solicitation based on the particular subject matter of the solicitation. The City targets solicitations seeking a gift of money or things of value, but it does not target solicitations that request, for example, signatures, religious conversion, or electoral support.

Noting similar distinctions, numerous courts in recent years have ruled that various restrictions on panhandling, begging, or solicitation draw content-based distinctions on their face and must be analyzed under the test of strict scrutiny. *See Speet v. Schuette*, 726 F.3d 867, 870 (6th Cir. 2013) (invalidating anti-begging statute that "prohibits a substantial amount of solicitation . . . but allows other solicitation based on content"); *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 560 (4th Cir. 2013) (ordinance regulating requests for immediate donations is a content-based regulation subject to strict scrutiny); *Berger v. City of Seattle*, 569 F.3d 1029, 1051-53 (9th Cir. 2009) (*en banc*) (holding that a ban on "actively solicit[ing] donations" is an invalid content-based regulation of speech); *ACLU of Idaho v. City of Boise*, 998 F. Supp. 2d 908, 916 (D. Idaho 2014) (preliminarily enjoining multiple provisions of ordinance that "suppress[es] particular speech related to seeking charitable donations and treats this speech content different than other solicitation speech"); *Kelly v. City of Parkersburg*, 978 F. Supp. 2d 624, 629-30 (S.D. W. Va. 2013) (holding that ordinance is content-based because it

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that communications prohibited by the challenged ordinance might "cause offense or make listeners uncomfortable" does not provide a content-neutral justification for regulating those communications. *Id*. at 2532.

regulates solicitations for money but not solicitations for votes, to enter raffles, or to register for a church mailing list); *Guy v. Cnty. of Hawaii*, No. 14-00400 SOM/KSC , 2014 U.S. Dist. LEXIS 132226, at *9 (D. Haw. Sept. 19, 2014) (explaining that the ordinance "singles out some solicitation speech for regulation while leaving other solicitation speech untouched"); *see also ACLU of Nev. v. City of Las Vegas*, 466 F.3d 784,794 (9th Cir. 2006) (explaining that ordinance discriminated on the basis of content when handbills containing certain language may be distributed, while handbills requesting financial assistance are prohibited); *Lopez v. Town of Cave Creek*, 559 F. Supp. 2d 1030, 1032-33 (D. Ariz. 2008) (holding that ordinance is content-based because it bans only certain types of solicitation speech).[7]

Judge Brimmer reached the same conclusion when analyzing a provision of a Grand Junction panhandling ordinance last year:

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

Browne v. City of Grand Junction, No. 14-cv-00809-CMA, 2014 U.S. Dist. LEXIS 37515 (D. Colo. Mar. 21, 2014) (citing *Berger*, 569 F.3d at 1051) .

The Panhandling Ordinance at issue here relies on content to distinguish between prohibited expression and expression that is not regulated. Anyone is free to stop a person walking near a bus stop to ask for directions to a hospital, but if the requester asks for help with

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

cab fare to get there, the Ordinance is violated. Nonprofit organizations are free to distribute literature at bus stops about their work, but distributing that literature is forbidden if it includes a pitch for donations. Evangelicals are free to stop passersby 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 in the school's parking lot to ask for a signature, but they violate the Ordinance if they ask for help in financing the ballot measure. 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, as Fort Collins interprets and enforces it, by sitting with a sign that seeks a contribution.

The Ordinance regulates solicitations for a "gift," but leaves solicitations for sales unregulated. Girl Scouts are free to approach persons near ATMs to solicit sales of cookies, but they violate the ordinance if they ask for a donation to their organization. As the Ninth Circuit explained when analyzing a similar privileging of commercial speech in a regulation of solicitation, "[t]his bias in favor of commercial speech, is, on its own, cause for the rule's invalidation." *Berger*, 569 F.3d at 1055.

Fort Collins cannot survive the close and careful strict scrutiny required for a content-based regulation of speech, especially one that carries criminal penalties. As the Supreme Court recently explained, because of "the substantial and expansive threats to free expression posed by content-based restrictions," they have been permitted only "when confined to the few historic and traditional categories of expression long familiar to the bar," such as incitement to illegal activity, child pornography, defamation, and true threats. *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012). To survive strict scrutiny, the City must prove not only that the challenged

restrictions are the least restrictive means of furthering a compelling government interest, *McCullen*, 134 S. Ct. at 2530, but also that the restrictions are "actually necessary" to achieve that interest, *Alvarez*, 132 S. Ct. at 2549. "There must be a direct causal link between the restriction imposed and the injury to be prevented." *Id*. Fort Collins cannot meet this test.

C. Even if the Challenged Restrictions Were Content-Neutral Regulations of Expression (and They are not), They Cannot Survive the Test of Intermediate Scrutiny

Fort Collins will undoubtedly argue that the challenged restrictions are constitutional regulations of the time, place, or manner of expression. To meet its burden, Fort Collins must demonstrate not only that the ordinance is content-neutral, (and it is not), but also that the regulation is "narrowly tailored to serve a significant governmental interest." *McCullen*, 134 S. Ct. at 2534 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)). Fort Collins will be unable to satisfy even this standard of intermediate scrutiny.

When Fort Collins adopted the Panhandling Ordinance in 1995, the City stated that it was targeting only "conduct which threatens the safety and welfare of persons toward whom these [panhandling] activities are directed." (*Exhibit 21*, Ordinance No. 70 (1995) (adding Section 17-127 to the City Code).)

The Tenth Circuit has made it clear that Fort Collins has the burden of production and proof. *See Doe*, 667 F.3d at 1131 ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions."). To meet that burden, Fort Collins must provide evidence, not speculation, that the challenged restrictions "serve a substantial state interest in a direct and effective way." *Id*. at 1133. Quoting the Supreme Court, the Tenth Circuit explained further:

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

Id. (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)).[8] Because the Ordinance, as written and as Fort Collins enforces it, prohibits substantial amounts of speech that poses no threat to public safety, the City will be unable to meet its burden.

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

The narrow tailoring requirement "demand[s] a close fit between ends and means." *McCullen*, 134 S. Ct. at 2534. A regulation cannot "burden substantially more speech than is necessary to further the government's legitimate interests." *Id*. at 2535 (*quoting Ward*, 491 U.S. at 798-99). The government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id*. (*quoting Ward*, 491 U.S. at 799). Put another way, the regulation must "focus[ ] on the source of the evils the city seeks to eliminate . . . and eliminate[ ] them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." *Ward*, 491 U.S. at 799, n.7. To the extent that Fort Collins argues that the "evil" it targets is danger to public safety, the City fails the test of narrow tailoring.

The Ninth Circuit's application of these principles is instructive. In explaining why a Las Vegas ordinance failed the test of narrow tailoring, the court said:

[8] The two decisions referenced in footnote 7, which upheld regulations of panhandling, did not hold the government to this evidentiary burden.

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

ACLU of Nevada, 466 F.3d at796, n.13. In a 2011 *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 promote 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. Similarly, in this case, Fort Collins forbids a substantial amount of expression that poses no danger to persons who are solicited.

An obvious overreach of the Fort Collins enforcement campaign is its targeting of persons who quietly solicit contributions by displaying a sign seeking donations, like Plaintiffs Landow, Alan, and Wymer. Persons who silently and passively hold a sign are not aggressive; they are not intruding; they are not interrupting; they are not intimidating, they are not harassing, and they pose no risk of physical harm. Nevertheless, Fort Collins police regularly issue citations and "move on" orders to passive solicitors (and have already issued a citation to Ms. Landow and "move on" orders to both her and Ms. Wymer). The unobtrusive nonthreatening solicitations of persons who merely display signs cannot qualify as "appropriately targeted evil[s]," *Ward* 491 U.S. at 800. Banning these peaceful and nonthreatening solicitations burdens

"substantially more speech than necessary" to further any arguable legitimate interest of the City. *McCullen*, 134 S. Ct. at 2535.

Even if Fort Collins targeted only "active" solicitation, involving face-to-face vocal requests for donations, the City nevertheless fails the test of narrow tailoring. Many active solicitors, like Plaintiffs Jeffrey Alan, Susan Wymer, Lawrence Beall, and Greenpeace, request donations in a polite, non-aggressive, non-threatening manner. 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 1051-53.

The Fort Collins enforcement campaign unreasonably restricts a broad range of peaceful, nonintrusive, nonthreatening, constitutionally-protected expression that poses no risk to public safety. Thus, Fort Collins fails the legal test, 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 U.S. at 799 n.7.

2. Less speech- restrictive alternatives

"To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests." *McCullen*, 134 S. Ct. at 2540; *see U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1238 n.11 (10th Cir. 1999) ("[A]n obvious and substantially less restrictive means for advancing the desired government objective indicates a lack of narrow tailoring.").

In *McCullen*, the Supreme Court noted that enforcing already-existing "generic criminal statutes" constituted a less speech-restrictive alternative to the 35-foot buffer zone challenged in

that case. 134 S. Ct. at 2538. Similarly, in *Berger*, the Court found: "If the City desires to curb aggressive solicitation, it could enforce an appropriately worded prohibition on aggressive behavior. If necessary, the City can also rely on constitutionally valid nuisance and aggressive panhandling laws to control street performers who will not take no for an answer when asking for money." *Berger*, 569 F.3d at 1053. The same reasoning applies here.

Fort Collins can address any legitimate public safety issues posed by truly aggressive panhandling by enforcing already-existing municipal ordinances that forbid assault, disturbing the peace, disorderly conduct, and harassment. (*See Exhibit 22*, Fort Collins Mun. Code §§ 17-21, 17-121, 17-124, and 17-126.) Fort Collins police can also enforce state statutes that forbid disorderly conduct, harassment, and menacing. *See* Colo. Rev. Stat. §§ 18-9-106, 18-9-111, 18-3-206. Enforcing the subsections of the Panhandling Ordinance that Plaintiffs do not challenge represents an additional less restrictive alternative. *See also Comite de Jornaleros*, 657 F.3d at 949-50 (in rejecting a regulation of solicitation, court explained 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).

3. Particular subsections of the challenged ordinance

Each of the challenged subsections of Fort Collins's Ordinance is a content-based regulation of expression that cannot survive strict scrutiny, as each turns on the City's content-based definition of "panhandling." Even if the prohibitions were content-neutral, and they are not, Fort Collins cannot meet its burden to show that they are narrowly tailored to address legitimate interests such as protecting residents from aggressive solicitation that causes persons to fear for their safety. Additional argument on each of the challenged subsections follows.

Subsection (b)(1): after dark

Perhaps the least tailored of the City's restrictions is the blanket ban on any panhandling after dark. (Ex. 1, Ordinance, Subsection (b)(1).) Fort Collins will be unable to justify its city-wide ban on any and all nighttime solicitation. The City's downtown area, where most panhandling citations are issued, is well-lit and boasts an active nightlife with significant foot traffic after dark. (*See* Ex. 3 ¶ 5; Ex. 6 ¶ 7 Ex. 7 ¶ 11.) On winter nights, the sun sets as early as 4:35 p.m. and rises as late as 7:20 a.m., rendering solicitation illegal during morning and evening rush hour, hardly a time when reasonable people walking or driving home would fear for their safety when solicited.

In 2011, an Arizona court subjected a ban on nighttime solicitation to a careful and critical analysis. In reasoning that applies fully to the Fort Collins ordinance, the court held that the prohibition failed the test of narrow tailoring. *State v. Boehler*, 262 P.3d 637, 643-44 (Ariz. Ct. App. 2011). In response to the assertion that solicitations at night are more likely to prompt fear and intimidation, the court noted that the ordinance "does not distinguish between solicitations that occur in dark alleyways and solicitations that take place in lighted buildings or well-lit street corners." *Id*. at 644. Like the Fort Collins ordinance, the Arizona ordinance also failed to distinguish between harmless nonthreatening requests and those made in an abusive, aggressive, or intimidating manner. *Id*. at 643-44. (The ordinance prohibits "both a cheery shout by a Salvation Army volunteer asking for holiday change and a quiet offer of a box of Girl Scout cookies by a shy pre-teen.") The court further noted that other (unchallenged) ordinances adequately protected residents from truly aggressive panhandling conduct likely to cause fear of bodily harm. *Id*. at 643. Similarly, provisions of the Fort Collins Ordinance that Plaintiffs do

not challenge adequately protect against truly aggressive panhandling that causes persons to fear for their safety. *See, e.g.*, Ex. 1, Ordinance, Subsections (b)(2), (3), (4), and (7).

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

Subsection (b)(5): asking for reconsideration

In Fort Collins, a petition circulator can repeatedly solicit a signature even after being turned down, but someone soliciting charity is forbidden to ask for reconsideration, no matter how courteously, politely, or nonthreatening the request. This obvious discrimination on the basis of content requires analysis under strict scrutiny, which Fort Collins cannot survive. Nor is this provision narrowly tailored, as it bans polite, peaceful, and nonthreatening requests for reconsideration, which do not pose any arguable threat to public safety.

Subsection (b)(6): soliciting an "at-risk" person

Fort Collins will be unable to justify its city-wide prohibition on solicitation of "at-risk" persons, which includes persons over 60 and anyone with a mental or physical disability. As explained in the attached declarations by Randy Chapman, Director of Disability Law Colorado (formerly the Legal Center for People With Disabilities and Older People) and Julie Reisken, Director of the Colorado Cross-Disability Coalition, the only conceivable rationale for this provision for at-risk persons is an irrational stereotype that elderly persons and persons with disabilities are incapable of making a sound decision about whether to give money to a solicitor. (*Exhibit 23*, Chapman Declaration, ¶ 7; *Exhibit 24*, Reiskin Declaration, ¶ 7.) Adopting such

unjustified invidious stereotypes as law is inappropriate and discriminatory. The challenged ordinance unduly stigmatizes and isolates seniors and persons with disabilities by singling them out for differential treatment and requiring solicitors to scan public spaces for those who appear to be older or disabled, and then to avoid them. (Ex. 23 ¶¶ 6-7; Ex. 24 ¶¶ 6-7.)

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 any First Amendment test.

Subsection (b)(8): the 100-foot bubbles

Fort Collins has established two geographical bubbles where all requests for charity are forbidden. Fort Collins will be unable to present evidence that justifies its content-based ban of peaceful, courteous, or non-threatening requests for a donation within 100 feet of ATMs and bus stops. Last year, a federal district court ruled that a plaintiff was likely to succeed in his challenge to an ordinance that prohibited solicitation within 20 feet of an ATM. *Guy*, 2014 U.S. Dist. Lexis 132226, at *6. Earlier in 2014, another federal court enjoined a Boise ordinance that prohibited requests for donations made within 20 feet of a bus stop or an ATM. *ACLU of Idaho*, 998 F. Supp. 2d at 915, 919. The enjoined no-solicitation bubbles in Boise are less restrictive than the Fort Collins bubbles in two significant ways: first, the radius of the Boise bubbles was one-fifth the size of the Fort Collins 100-foot bubbles. Second, the Boise ordinance expressly did not apply to passive panhandlers who silently request donations by holding a sign. *Id*. at 915. In contrast, Fort Collins actively enforces its Ordinance against persons who passively display a sign inviting donations.

While some courts have upheld ordinances that create distance-based no-solicitation bubbles around ATMs, Plaintiffs have been unable to find any case that has considered or upheld a bubble anywhere close to the size of the Fort Collins 100-foot bubbles. The City will be unable to show that its content-based ban on peaceful nonthreatening solicitation within 100 feet of ATMs and bus stops meets the test of strict scrutiny or that it is narrowly tailored to advance its legitimate interest in public safety.

Subsection (b)(9): soliciting on a public bus

Fort Collins forbids a passenger on a public bus to sit quietly with a sign asking for assistance. It forbids a nonprofit organization from distributing literature to passengers if the literature requests a donation. It allows a passenger to solicit signatures for a petition but forbids asking for help in financing the cause. It forbids a passenger to ask his companion for change to pay the fare. This content-based prohibition fails both the test of strict scrutiny and the test of narrow tailoring. Last year, a federal district court ruled that a plaintiff was likely to succeed in his challenge to an ordinance that prohibited solicitation "while in any public transportation vehicle." *See Guy*, 2014 U.S. Dist. Lexis 132226, at *6.

Subsection (b)(10): soliciting in a parking garage or parking lot

Subsection (b)(10) forbids soliciting in a parking garage or parking lot, regardless of how courteous, polite and non-threatening the solicitation. Last year, federal courts in Hawaii and Idaho ruled that plaintiffs challenging similar provisions were likely to succeed on the merits. *ACLU of Idaho*, 998 F. Supp. 2d at 915, 919; *Guy*, 2014 U.S. Dist. Lexis 132226, at *6.

Subsection (b)(11)

Subsection (b)(11) prohibits directing a solicitation to a person at a sidewalk restaurant, or to someone in a car stopped on a street, or to someone entering or exiting a car. A federal district court preliminarily enjoined a portion of a Boise ordinance that prohibited soliciting a person who was waiting in line, as well as a provision that prohibited solicitation within 20 feet of a sidewalk café or a street vendor. *ACLU of Idaho*, 998 F. Supp. 2d at 915, 919. The enjoined Idaho ordinance was narrower than Fort Collins'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 Fort Collins.

III. Plaintiffs who Solicit Passively are Substantially Likely to Prevail on the Merits of Their Due Process Claim

As noted earlier, an obvious overreach of the City's campaign of anti-solicitation enforcement is its targeting of street musicians and persons who quietly and passively solicit contributions by displaying a sign inviting donations, like Plaintiffs Landow, Alan, and Wymer. The definition of "panhandle" in the challenged Ordinance applies only to persons who "approach, accost, or stop" the person solicited. Passive panhandlers do not initiate interaction, and they neither approach, accost, nor stop the passersby whose donations they invite. The application and enforcement of the Ordinance against Plaintiffs who solicit donations passively violates not only their First Amendment rights, but also their right to due process of law, as the

text of the Ordinance does not provide them with notice that their communications are prohibited. Plaintiffs who solicit passively by displaying a sign are likely to succeed on the merits of their claim that the challenged Ordinance does not prohibit their communicative activity.

IV. 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)); s*ee 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. *Cmty. Commc'ns Co. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981).

V. The Balance of Equities Tips Sharply in Plaintiffs' Favor

Here, Fort Collins's challenged campaign of enforcement heavily burdens First Amendment rights – a burden that constitutes irreparable injury as a matter of law – and Fort Collins is likely violating the Constitution. 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"); *American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999) ("[T]he 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").

VI. The Injunction is in the Public Interest

The temporary injunction Plaintiffs seek, which preserves First Amendment and Due Process 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* El*am Constr. v. Reg. Transp. Dist.*, 129 F.3d 1343, 1347 (10th Cir. 1997) ("The public interest . . . favors plaintiffs' assertion of their First Amendment rights").

VII. 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).

In this case, Plaintiffs have a strong likelihood of success on the merits, and Fort Collins will suffer no harm from an interim injunction. Accordingly, no security should be required.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for a Temporary Restraining Order and a Preliminary Injunction should be granted. The Court should enjoin Fort Collins from relying on the challenged provisions of its Panhandling Ordinance as a basis for arrest, tickets, or advising persons to move on, until this Court issues a final judgment on the merits of Plaintiffs' claims.

Dated: February 10, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on _____, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following email addresses:

[INSERT FROM USDC WEBSITE]

and I hereby certify that I have mailed or served the document or paper to the following non CM/ECF participants:

INSERT FROM USDC WEBSITE (IF ANY) / ADD IN ANY ADDITIONAL NAMES HERE]