No. 13-2355

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROBERT THAYER, ET AL.,

Plaintiffs-Appellants,

v.

CITY OF WORCESTER,

Defendant-Appellee.

On Appeal from the Order Denying Preliminary Injunction by
the United States District Court for the District of Massachusetts

BRIEF FOR PLAINTIFFS-APPELLANTS ROBERT THAYER, SHARON BROWNSON, AND TRACY NOVICK

Matthew R. Segal (No. 1151872)
Sarah R. Wunsch (No. 28628)
American Civil Liberties Union
Foundation of Massachusetts
211 Congress Street
Boston, MA 02110
(617) 482-3170
msegal@aclum.org
swunsch@aclum.org

Kevin P. Martin (No. 89611)
Yvonne W. Chan (No. 1161264)
Todd J. Marabella (No. 1161177)
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109
(617) 570-1000
kmartin@goodwinprocter.com
ychan@goodwinprocter.com
tmarabella@goodwinprocter.com

Dated: November 15, 2013

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to Fed. R. App. P. 34(a) and Local Rule 34(a), Plaintiffs-Appellants Robert Thayer, Sharon Brownson, and Tracy Novick ("Plaintiffs") respectfully request oral argument in this appeal, which involves important questions concerning the scope of protection available under the First and Fourteenth Amendments of the United States Constitution. Oral argument will assist the Court in addressing the issues raised in this appeal.

STATEMENT OF JURISDICTION

The United States District Court for the District of Massachusetts had subject matter jurisdiction in *Thayer et al. v. City of Worcester*, Civil Action No. 13-40057 (TSH), pursuant to 28 U.S.C. §§ 1331, 1343, and 1988, as this action arises under the Constitution and laws of the United States. Further, the District Court had supplemental jurisdiction pursuant to 28 U.S.C. § 1367, for the state law claims arising under Massachusetts Civil Rights Act, G.L. c. 12, § 11I.

On October 24, 2013, the District Court entered an order denying Plaintiffs' request for a preliminary injunction enjoining the City of Worcester from enforcing two ordinances on the grounds that they violate the First and Fourteenth Amendments of the United States Constitution. Plaintiffs filed a timely Notice of Appeal on October 28, 2013. This Court has subject matter jurisdiction to review this interlocutory order pursuant to 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court committed an error of law or abused its discretion in holding that c. 9, § 16 of the Worcester Revised Ordinances likely does not violate the First Amendment or the Due Process or Equal Protection Clauses of the Fourteenth Amendment, and in denying Plaintiffs' Motion for Preliminary Injunction.

2. Whether the District Court committed an error of law or abused its discretion in holding that c. 13, § 77(a) of the Worcester Revised Ordinances likely does not violate the First Amendment or the Due Process or Equal Protection Clauses of the Fourteenth Amendment, and in denying Plaintiff's Motion for Preliminary Injunction.

STATEMENT OF THE CASE

Plaintiffs are individuals who regularly panhandle, or engage in political and other speech from traffic islands, in Worcester, Massachusetts. In January 2013, the City of Worcester (the "City") enacted two ordinances as part of a campaign to reduce panhandling. One ordinance (R.O. c. 9, § 16) purportedly outlaws "aggressive" solicitation anywhere in the City, while the other ordinance (R.O. c. 13, § 77(a)) bans standing or walking on traffic islands and roadways except for limited purposes.

On May 13, 2013, Plaintiffs filed their Complaint and Motion for Preliminary Injunction, seeking an injunction against the enforcement of the ordinances on the grounds that they violate the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. JA007-119.[1] The District Court held a motion hearing on June 10, 2013. JA373-417.

On October 24, 2013, the District Court denied Plaintiffs' Motion. *See* Memorandum of Decision and Order on Plaintiffs' Motion for Preliminary Injunction (Add.001-27).[2] The court concluded that the laws are content neutral and that their time, place and manner restrictions likely will survive constitutional

[1] "JA" refers to the Joint Appendix, which is being submitted to the Court in connection with the filing of Appellants' Brief.

[2] "Add." refers to the Addendum to Appellants' Brief.

review. Add.012-19. In finding that Section 16 is likely constitutional, the court deferred to legislative findings by the Worcester City Council that persons "approached by" solicitors exhibiting "aggressive behavior" are vulnerable to coercion, and that "vocal requests for money create a threatening environment, or at least a nuisance for some citizens." Add.013-14, 018. Rejecting any need for "empirical evidence" of the dangers of speech in roadways or on traffic islands, the court also upheld Section 77(a). Add.018.

Plaintiffs filed a timely notice of appeal on October 28, 2013. JA005, 450-51. Plaintiffs also moved this Court for an injunction pending appeal and/or for expedited appeal, pursuant to Fed. R. App. P. 8(a), on November 8, 2013. That motion remains pending as of the date of this brief.

STATEMENT OF RELEVANT FACTS

I. THE CITY ENACTS THE CHALLENGED ORDINANCES FOR THE EXPLICIT PURPOSE OF "REDUCING" PANHANDLING

In January 2013, the Worcester City Council enacted two ordinances aimed at reducing panhandling. This was not the first time that the City tried to reduce panhandling. In 2005, the City Council adopted an "action plan" to reduce panhandling by deterring the public from giving to poor or homeless people who solicit donations. JA120, 124-29. As part of this campaign, the City erected anti-panhandling signs throughout the city and organized a citywide distribution of a brochure declaring that "Panhandling is not the Solution!" JA129. The 2005 anti-

panhandling campaign was criticized by many in the community and the anti-panhandling signs were taken down in 2006. JA120, 131.

In the summer of 2012, "[i]n response to [the] City Council's request," the Worcester City Manager, Michael V. O'Brien, submitted to the City Council "an implementation strategy to reduce the incidence of panhandling throughout the City." JA120, 133-37. Mr. O'Brien noted that "[t]here are a number of strategies and responses that have been employed in municipalities across the county to address the issue of panhandling." JA133. He discussed a "targeted outreach program" to be implemented by the City, which included a "central call line for the public to report incidences of panhandling" to order to allow the City to "track[]" panhandling. JA134. Mr. O'Brien further recommended a public education campaign—akin to the one abandoned in 2005—to "discourage donations" from the Worcester community. JA136. In October 2012, Mr. O'Brien also presented to the City Council two proposed ordinances "aimed at reducing the incidence of panhandling in our community." JA120, 139-46. One ordinance (R.O. c. 9, § 16) purportedly targeted "aggressive" solicitation, while the other (R.O. c. 13, § 77(a)) banned standing or walking on "traffic islands" or being in the street except for limited purposes. *Id*.

The proposed ordinances were subject to much public debate, a repeated focus of which was whether they might reach beyond their intended targets—

panhandlers—and also affect so-called "Tag Days": permits issued by the City to non-profit groups and organizations such as schools, churches, and sports teams, allowing them to solicit donations on sidewalks and traffic islands, and to enter the "traveled portion of any public way" in order to "receive a contribution offered by a motorist." JA161-65, 232-33.[3] The City Council requested a legal opinion from the City Solicitor, David Moore, about the constitutionality of allowing an exemption under Section 77(a) for "Tag Days" while still prohibiting the homeless from panhandling on roadways. In response, Mr. Moore advised that the Constitution did not permit the City to "create a distinction based on the content or the nature of the speaker." JA167. When later asked during a public hearing, however, about political candidates who campaign on the traffic island in Newton Square (a rotary in downtown Worcester), Mr. Moore responded that Section 77(a) afforded an "element of discretion" and that police would not issue any warnings unless there was a "public safety issue"—thus implying that while the City could not *expressly* distinguish between types of speech, it would do so *tacitly* through selective enforcement. *See* JA212 ("So I think there is an element of discretion

[3] When the City adopted its anti-panhandling campaign in 2005, the report submitted by the City Manager made it a point to note that "tag days" would not be affected. *See* JA127. Both the Worcester Police Chief and a Fire Department lieutenant acknowledged, prior to the adoption of the ordinances in January 2013, that there have been no injuries or accidents resulting from "Tag Day" activities. JA226-27.

introduced into the ordinance for the police officers to identify a problem with public safety or not . . . .").

In January 2013, despite objections from several City Councilors and community members, the City Council passed the two ordinances.

II. THE CHALLENGED ORDINANCES BAN A SUBSTANTIAL QUANTITY OF PROTECTED SPEECH

Given the City's intent in enacting the Ordinances to "reduce" panhandling, it is hardly surprising that the Ordinances in fact preclude a substantial portion of all panhandling in Worcester. Section 16, which is styled as a ban on "aggressive" soliciting, makes it "unlawful for any person to beg, panhandle or solicit any other person in an aggressive manner." c. 9, §16(d). The law defines "beg[ging], panhand[ing], and solicit[ing]" to mean:

> asking for money or objects of value, with the intention that the money or object be transferred at that time, and at that place. "Solicit" or "Soliciting" shall include using the spoken, written, or printed word, bodily gestures, signs, or other means of communication with the purpose of obtaining an immediate donation of money or other thing of value the same as begging or panhandling and also include the offer to immediately exchange and/or sell any goods or services.

c. 9, § 16(c). The law thus broadly covers solicitation by any means, including merely holding a sign or standing with hands outstretched. At the same time, it is tailored to limit soliciting an *immediate* donation or transaction, and therefore does not cover soliciting a future payment or a signature on a petition.

The law contains an expansive and enumerated definition of "aggressive manner." While it reaches some forms of truly aggressive conduct that already are criminal under other laws (*e.g.*, "using violent or threatening language and/or gestures . . . which are likely to provoke an immediate violent reaction," § 16(c)), it also includes the following:

> (2) continuing to solicit from a person after the person has given a negative response to such soliciting;
>
> * * *
>
> (7) soliciting money from anyone who is waiting in line for tickets, for entry to a building or for any other purpose;
>
> * * *
>
> (10) soliciting any person within 20 feet of the entrance to, or parking area of, any bank, automated teller machine, automated teller machine facility, check cashing business, mass transportation facility, mass transportation stop, public restroom, pay telephone or theatre or place of public assembly, or of any outdoor seating area of any cafe, restaurant or other business;
>
> (11) soliciting any person in public after dark, which shall mean the time from one-half hour before sunset to one-half hour after sunrise.

c. 9, § 16(c).

Particularly when they are combined, the law's definitions of "solicit" and "aggressive behavior" prohibit a broad swathe of speech. By way of example only, it is now illegal in Worcester to:

- sit or stand still, on any public property anywhere in the city, and use any means (whether a sign or a polite oral request) to ask anyone for immediate help, from one half hour before sunset until one half hour after sunrise. Thus, on the date of the District Court's decision (October 24), it was unlawful for anyone to solicit in any manner anywhere in public from 5:21 p.m.—early in the evening rush hour—until 7:41 a.m., the middle of the morning rush hour.[4] Beginning at 3:50 p.m. on Christmas Eve, it will be unlawful for the Salvation Army to raise money or for a homeless family to ask others to immediately provide them any "thing of value"—such as a place to stay for the night;

- sit or stand still, holding a sign asking for help, within 20 feet of a bus stop;

- stand at any distance from people waiting in any kind of line and solicit donations or immediate cash transactions, no matter how politely and even by merely displaying a sign visible to those in line; or

- no matter the circumstances, no matter where in the city (not limited to public property), and no matter how politely, to ask someone to reconsider an initial decision not to donate or not to engage in an immediate transaction.

The sole justification given by the City for Section 16's restrictions consists of a set of legislative findings appearing in the ordinance's preamble. The findings state that "[p]ersons approached by individuals asking for money . . . are particularly vulnerable to real, apparent or perceived coercion when such request is accompanied by or immediately followed or preceded with aggressive behavior"; that "[a]ggressive soliciting . . . of persons within 20 feet of" various locations

[4] *See* http://www.timeanddate.com/worldclock/astronomy.html?n=911&month=10&year=2013&obj=sun&afl=-11&day=1.

"subjects people being solicited to improper and undue influence and/or fear and should not be allowed"; and that "[p]ersons approaching other individuals in an aggressive manner . . . after dark in public places inspire alarm and fear." c. 9, § 16(a). Thus, two of the findings specifically concern a solicitor "approaching" another person, and all are premised on a display of "aggressive behavior."

The second Worcester ordinance amended Section 77(a), "Crossing Ways or Roadways." Unlike Section 16, the amendments to Section 77(a) are not accompanied by a preamble setting forth the City's justification for the ordinance. Under the amended ordinance:

> No person shall, after having been given due notice warning by a police officer, persist in walking or standing on any traffic island or upon the roadway of any street or highway, except for the purpose of crossing the roadway at an intersection or designated crosswalk or for the purpose of exiting a vehicle at the curb or some other lawful purpose. Any police officer observing any person violating this provision may request or order such person the [sic] remove themselves from such roadway or traffic island and may arrest such person if they fail to comply with such request or order.

c. 13, § 77(a). The definition of "traffic island" in Worcester is "any area or space within a roadway which is set aside by the use of materials or paint for the purpose of separating or controlling the flow of traffic and which is not constructed or intended for use by vehicular traffic or by pedestrians." c. 13, § 1.

Under Section 77(a), it is now potentially against the law to stand or walk on all roadways and traffic islands in Worcester—places that, as in other cities and towns across America, traditionally have been used for political and other speech in Worcester. This prohibition applies to all traffic islands throughout Worcester, including wide, expansive traffic islands that are paved and easily accessible by crosswalks. It also covers all roadways, including any and all side streets, dead end streets, and back roads. On its face Section 77(a) applies to all expressive activity in roadways and traffic islands, including not only soliciting donations from motorists, but also holding political signs on traffic islands or medians; offering leaflets to drivers stopped in traffic; or two neighbors chatting in a cul de sac. The only limit found in Section 77(a) is the requirement that a police officer first give "due notice warning" to individuals to "remove themselves from such roadway or traffic island"; the law, however, provides no guidelines as to when officers should, or should not, issue such warnings.

III. THE CITY'S ENFORCEMENT OF THE CHALLENGED ORDINANCES

After the ordinances were adopted in late January, the City and its Police Department stated their intent to "immediately enforce against aggressive panhandling." JA221-22. For the first few weeks after the ordinances took effect, the Worcester Police Department issued warnings and handed out cards to the homeless stating that "panhandling" was prohibited "at or in" roadways, rotaries,

and traffic medians and islands. JA311, 316, 318, 321. The Department of Public Works also distributed flyers informing the public that offering donations to a solicitor standing in a roadway or on a median was now prohibited. JA224.

Since then, the Police Department has arrested multiple individuals for panhandling in violation of the ordinances. JA235-36, 294-308; Appellants' 11/8/13 Mot. for Inj. Ex. E, ¶ 7 & Ex. 3. On the other hand, the Department declined to issue a warning during a protest that took place shortly after the ordinances were adopted, in which several protesters stood on a traffic median in Worcester's Lincoln Square in violation of Section 77(a). JA235, 290-92.

In the weeks and months leading up to the November 2013 elections, numerous supporters of local politicians, as well as the politicians themselves, campaigned on traffic islands and rotaries in Worcester in violation of Section 77(a). *See* Appellants' 11/8/13 Mot. for Inj. Ex. D, ¶¶ 3-5 & Exs. 1-3; *id.* Ex. E ¶¶ 4-6 & Exs. 1-2. No arrests of such individuals have been reported.

IV. THE PLAINTIFFS

Plaintiffs are individuals who regularly solicit donations or engage in political and other protected speech in Worcester. Robert Thayer and Sharon Brownson are residents of Worcester who have been homeless for approximately three years and who rely on the donations they receive from passersby in order to purchase basic necessities such as food. JA309-10, 317-18. Mr. Thayer and Ms.

Brownson typically stand on the sidewalk with a sign asking for help or money; they do not step into the street or approach a vehicle unless an occupant of a stopped vehicle has indicated that he or she wishes to make a donation. JA310, 314, 318. Since the ordinances were adopted, Mr. Thayer and Ms. Brownson have been told by Worcester police officers that they are not permitted to solicit for donations next to the road. JA311, 318. Tracy Novick is an elected member of the Worcester School Committee who has campaigned (along with other local politicians, including members of the City Council) on traffic islands and rotaries during previous elections. JA322-24.

V. THE DECISION BELOW

On May 13, 2013, Plaintiffs filed their Complaint and Motion for Preliminary Injunction, asserting that the ordinances violate the First Amendment, the Due Process Clause, and the Equal Protection Clause. In its decision below, the District Court found that the ordinances were likely constitutional and therefore denied Plaintiffs' Motion.

The District Court began its analysis by reviewing the history of the ordinances, including the City's prior attempts to reduce panhandling in Worcester. In doing so, the court agreed that "some City Councilors voiced opinions suggesting that the purpose of these ordinances was primarily to eradicate panhandling in the City." Add.004. As the court recounted, "the minutes of

meetings involving City Council members present somewhat of a mixed bag," as "some City Councilors were clearly concerned with the safety and welfare of both those individuals engaged in solicitation as well as members of the public being solicited; at the same time, the primary concern of other councilors appeared to be that panhandling was a blight on the City which should be eliminated at all costs." Add.016. Nonetheless, the court accepted, on the basis of the statement of purpose in the preamble to Section 16, that the ordinances were adopted to address public safety issues relating to "aggressive" panhandling and persons standing in the roadway and on traffic islands. Add.016-19.

The District Court found that both ordinances are content neutral because they "apply with equal force without regard to message" and "Ordinance 9-16 prevents all individuals from *aggressively* soliciting funds." Add.013. The District Court also found that both ordinances were narrowly tailored to serve a significant government interest, while leaving open ample alternative means of communication. Add.018.

With respect to Section 16, the District Court concluded that the ordinance is narrowly tailored because it "bans only aggressive forms of solicitation—those which are most likely to result in possible violent confrontation, that are most likely to intimidate those being solicited and that are most likely to endanger the solicitor and or members of the general public." Add.017. The court concluded

that Section 16 leaves open ample alternative channels for communication because "Worcester has determined that vocal requests for money create a threatening environment, or at least a nuisance for some citizens" and "[t]he City has chosen to restrict soliciting only in those circumstances where it is considered especially unwanted or bothersome; at night, around banks, in lines for theatre, etc." Add.018. In reaching this conclusion, the District Court did not address the fact that Section 16 also applies to non-vocal solicitations, did not address each prong of the ordinance's definition of "aggressive manner," and did not identify the source of its "at least a nuisance" or "especially unwanted or bothersome" tests for restricting speech.

With respect to Section 77(a), the District Court found that the ordinance was narrowly tailored and left open ample alternative channels for communication because it "essentially bans people from congregating and/or loitering on traffic islands, medians and other like public ways under circumstances where such conduct could prove distracting to drivers and pedestrians." Add.018. The court credited the City's assertion that the prohibited conduct was unsafe and declined to require any "empirical evidence" to support that assertion, citing instead to the definition in www.urbandictionary.com of Kelley Square, a Worcester traffic island and intersection, as "[a] large deathtrap." Add.018 & n.13.

The District Court rejected Plaintiffs' argument that the ordinances are unconstitutionally vague, finding that "a protracted discussion of this issue is simply not warranted." Add.019-20. The District Court found that Section 16 "goes into exacting detail about what type of conduct is prohibited and both ordinances adequately define as well the types of public areas as to which they apply." Add.019. The court further found that Section 16's preamble "provides additional guidance for determining [what] activity is and is not permitted." *Id.* The court rejected Plaintiffs' argument that the ordinances permit the police unfettered discretion in finding a violation of Section 77(a), finding that "[t]his argument bootstraps on Plaintiffs' argument that the ordinances do not sufficiently define what conduct is prohibited." Add.020.

With respect to Plaintiffs' Equal Protection claim, the District Court found that although "[t]he preamble to [Section 16] and the minutes of the City Council meeting suggest that the ordinances were enacted . . . in part, to eliminate the incidents of panhandling within the City," and although "enforcement of the ordinances *may* end up having a disproportionate effect on the poor and homeless," Plaintiffs were not likely to succeed on the merits. Add.020-21.

SUMMARY OF THE ARGUMENT

The District Court committed legal error in finding that Plaintiffs are unlikely to succeed in their challenges to the Worcester ordinances. Both

ordinances infringe upon constitutionally-protected speech within traditional public forums, and neither ordinance can survive as a time, place, and manner restriction.

First, the District Court erred in finding that Section 16 is content neutral. The law, which was specifically introduced to reduce panhandling, does not apply to all solicitation but only the type in which the poor are most likely to engage: solicitations for *immediate* donation or payment. Other solicitations—those for future payment or for a signature on a political petition—are allowed, no matter how "aggressively" made. Earlier this year, the Fourth Circuit found such a distinction between solicitations for immediate and future payment to be potentially content based. Because the law's application depends on the content of the speech and not merely the nature of the accompanying conduct, the law is content based and must be subjected to strict scrutiny.

Second, whether reviewed under strict scrutiny as a content-based law or intermediate scrutiny as a content-neutral law, Section 16 is likely unconstitutional. The law is not narrowly tailored to the public safety rationale invoked by the City. The legislative findings concerning "aggressive" panhandling say nothing about such inherently non-aggressive conduct as passively sitting or standing still, or simply holding a sign, yet the law's operative provisions ban all such conduct as "aggressive," a characterization that in any event defies common sense. Section 16 is, unsurprisingly, inconsistent with laws enacted by other cities which typically

permit passive sign-holding. Similarly overbroad restrictions on solicitation have been rejected by other courts and Plaintiffs in this case also are likely to prevail.

Third, Plaintiffs are likely to prevail on their claim that Section 77(a) is unconstitutional. The law, which is unsupported by legislative findings, applies to all traffic islands and roadways throughout the city regardless of location, traffic patterns, and ease of pedestrian accessibility. Numerous courts have struck down similarly overbroad bans on all communicative activity in roads, traffic islands, and medians.

Fourth, Plaintiffs are likely to prevail on their claim that the laws violate the Due Process and Equal Protection Clauses. The District Court improperly blessed the limitless discretion that Section 77(a), in particular, accords police officers to order individuals out of the roadway and traffic islands, and curtly rejected Plaintiffs' due process vagueness concerns without actually resolving the ambiguity that Plaintiffs identified.

Fifth, the court's finding that Plaintiffs are unlikely to succeed on their equal protection claim cannot be squared with the fact that the ordinances were specifically proposed to reduce panhandling by the poor and homeless. The City Solicitor told city council members in advance of Section 77(a)'s passage that "discretion" existed not to enforce the law against politicians or others besides panhandlers, and that is how police in fact are (and are not) enforcing the law.

ARGUMENT

I. STANDARD OF REVIEW AND BURDEN OF PROOF

A denial of a preliminary injunction should be reversed upon a showing that the district court abused its discretion. *Corp. Technologies, Inc. v. Harnett*, 731 F.3d 6, 10 (1st Cir. 2013). An error of law is always an abuse of discretion. *Voice of the Arab World, Inc. v. MDTV Med. News Now, Inc.*, 645 F.3d 26, 31 (1st Cir. 2011); *Francisco Sanchez v. Esso Standard Oil Co.*, 572 F.3d 1, 14 (1st Cir. 2009). In addition, an abuse of discretion occurs "when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when . . . the court makes a serious mistake in weighing [the relevant factors]." *Id*. (quoting *Charlesbank Equity Fund II v. Blinds To Go, Inc*., 370 F.3d 151, 158 (1st Cir. 2004)).

It is the government's burden to show that a law restricting speech is consistent with the First Amendment. *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 647 (1985); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000). This burden is "heavy," *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971), and cannot be satisfied by "mere speculation or conjecture"; the government must offer evidence establishing that the problem it identifies is real and that the proposed restriction will alleviate it materially. *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); *see also Playboy*

Entm't Grp., 529 U.S. at 816-17. Moreover, while restrictions on speech can be justified based on "history, consensus, and simple common sense," the government's failure to offer any actual evidence, especially in the face of contrary evidence, clearly shows its burden has not been met. *El Dia, Inc. v. P.R. Dep't of Consumer Affairs*, 413 F.3d 110, 116 (1st Cir. 2005).

II. THE DISTRICT COURT COMMITTED LEGAL ERROR IN ANALYZING SECTION 16 AS A CONTENT-NEUTRAL LAW

The District Court found that Section 16 is content neutral because "[t]he restrictions imposed on speech by the ordinances apply with equal force without regard to message" and "Ordinance 9-16 prevents all individuals from *aggressively* soliciting funds." Add.013 (emphasis in original). In paraphrasing Section 16, however, the court overlooked that the law does not, in fact, apply to all solicitation equally. In particular, the court glossed over the key requirement that, to be banned, the solicitation must be for an *immediate* donation or transaction. *Supra* at 5-8.

Thus, Section 16 does not apply to solicitors asking for something different than an immediate donation or payment, such as a future payment or the signature of a political petition, no matter whether their conduct otherwise would constitute "aggressive" behavior. Someone asking for a future payment can follow up an initial rejection with a request for reconsideration, or solicit people standing in a line or waiting at a bus stop, or solicit "after dark," but someone (indeed, the same

person) asking for an immediate donation cannot do any of those things. Even conduct that can be truly threatening or offensive, such as "intentionally touching or causing physical contact with another person or their property without that person's consent in the course of soliciting," § 16(c)(3), is prohibited under Section 16 only if it is done while soliciting immediate donations, but not if it is done in the course of soliciting a signature on a petition or a pledge of future donations.

As a result of its disparate treatment of solicitations for immediate donations or transactions and other types of solicitations, Section 16 is a classic example of a content-based speech regulation. As the Fourth Circuit stated earlier this year in rejecting a district court's conclusion that an ordinance similarly defining "solicit" as "request[ing] an *immediate* donation of money or other thing of value from another person" (emphasis added) necessarily was content neutral:

> We cannot agree. The Ordinance plainly distinguishes between types of solicitations on its face. Whether the Ordinance is violated turns solely on the nature of content of the solicitor's speech: it prohibits solicitations that request immediate donations of things of value, while allowing other types of solicitations, such as those that request future donations, or those that request things which may have no "value"—a signature or a kind word, perhaps.

Clatterbuck v. City of Charlottesville, 708 F.3d 549, 552, 556 (4th Cir. 2013); *see also Berger v. City of Seattle*, 569 F.3d 1029, 1050 (9th Cir. 2009) (rule distinguishing between active solicitations for money and other speech, such as

solicitations for political support, is content based); *Kelly v. City of Parkersburg*, No. 6:13-cv-23260, 2013 WL 5716350 (S.D. W.Va. Oct. 16, 2013) (granting preliminary injunction and finding that ordinance that applied only to solicitations for money or contributions was content based).

Not only does Section 16 on its face expressly distinguish speech based on content, but clearly the distinction cannot be justified "without reference to the content of regulated speech." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992). Common sense suggests that solicitations for future transactions or for the signature of a political petition using "violent or threatening language . . . likely to provoke an immediate violent reaction," § 16(c)(5), or such solicitations made in a manner "likely to cause a reasonable person to fear immediate bodily harm," § 16(c)(1), pose the same risks to public safety as similar conduct in soliciting for immediate donations or transactions, yet only the latter are banned by Section 16. Clearly, the City must be relying on the specific content of a request for an immediate donation or transaction to justify this differential treatment. *See Kelly*, 2013 WL 5716350, at *2-3 (finding ordinance content based because concerns about traffic safety did not justify regulating only one type of solicitation).

Some courts, relying on the Supreme Court's plurality opinion in *United States v. Kokinda*, 497 U.S. 720 (1990), have held that laws restricting solicitation are content neutral. But the laws at issue in those cases (unlike the ordinance in the

Fourth Circuit's *Clatterbuck* case, discussed *supra*) are distinguishable from Section 16 because their applicability is not limited to solicitations for "immediate" donations or transactions. *Kokinda*, for its part, involved a regulation of a particular Postal Service sidewalk that was applicable to *all* financial solicitations and also to various non-financial solicitations. *See* 497 U.S. at 724, 736. Likewise, the other cases typically involve broader prohibitions against solicitation. *See Bays v. City of Fairborn*, 668 F.3d 814, 818 (6th Cir. 2012) (festival's solicitation policy included all sales and the solicitation of causes); *Int'l Soc'y for Krishna Consciousness of New Orleans v. City of Baton Rouge*, 876 F.2d 494, 497 (5th Cir. 1989) (ordinance covered solicitations of "employment, business, or charitable contributions of any kind from the occupant of any vehicle"). In addition, these courts often rely on the factor that the law in question does not distinguish between speech activities that are likely to produce the same undesirable consequences. *See Fraternal Order of Police, N.D. State Lodge v. Stenehjem*, 431 F.3d 591, 596-97 (8th Cir. 2005). In contrast, Section 16 permits solicitations to remain unregulated, no matter how "aggressive[ly]" the solicitor acts, so long as the solicitation is not for an immediate donation or transaction. *See supra*, at 5-8, 18-20.

If there were any doubt that Section 16 is not content neutral, the history of the ordinance would dispel it. The ordinance was proposed specifically in

response to a request by the City Council for measures to reduce panhandling, and was identified as part of "a number of strategies aimed at reducing the incidence of panhandling in our community." JA139. This evidence of the intent behind the ordinance cannot be ignored in considering whether the law is content neutral. *See Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 819-20 (9th Cir. 2013) (district court correctly concluded that restrictions on day labor solicitation were content based where, despite the state's argument that they were "content-neutral traffic regulations," "they appear expressly intended to deter day labor activity by undocumented immigrants").

Laws like Section 16, which are not content neutral, are highly suspect. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428-31 (1993); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Viewed under strict scrutiny, Section 16 fails for the reasons below.

III. SECTION 16 IS INVALID UNDER THE FIRST AMENDMENT

Even if intermediate scrutiny is applied to Plaintiffs' challenge to Section 16, the District Court committed legal error in finding that the law is likely valid.

A. The District Court Misconstrued The Intermediate Scrutiny Standard

As an initial matter, the District Court misapplied the intermediate scrutiny standard, finding the law narrowly tailored because "[t]he City has chosen to restrict soliciting only in those circumstances where it is considered especially

unwanted or bothersome." Add.018. The First Amendment, however, does not allow speech to be restricted merely because it is unwanted or bothersome. "[C]itizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Boos v. Barry*, 485 U.S. 312, 322 (1988) (internal quotation marks omitted); *see also Berger*, 569 F.3d at 1054 ("[W]e cannot countenance the view that individuals who choose to enter [public parks], for whatever reason, are to be protected from speech and ideas those individuals find disagreeable, uncomfortable, or annoying."). In case after case, "[t]he Supreme Court has made clear that an individual's speech is protected even if it does 'not meet standards of acceptability' from the potential audience's view." *Bays*, 668 F.3d at 824.

While governments have some narrow ability to balance free speech rights against the prerogative of those who do not wish to listen—for example, by prohibiting an unconsented approach closer than 8 feet of a person nearby a health care facility, *see Hill v. Colorado*, 530 U.S. 703 (2000)—that is only where "the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975). In nearly all other cases, the First Amendment requires audience members to "avert[] their eyes" from unwanted speech, *see Cohen v. California*, 403 U.S. 15, 21 (1971).

B. Section 16 Is Not Narrowly Tailored

With that legal background in mind, it is clear that the District Court committed legal error in ruling that Section 16 is "narrowly tailored to a significant government interest." As discussed above, the suppression of "unwanted" speech is not a significant government interest unless, at a minimum, the audience is truly captive and cannot avoid exposure. Thus, the Massachusetts Supreme Judicial Court struck down a prohibition on begging in Cambridge, noting that "people are free to ignore or walk away from the beggar's request for money or attention." *Benefit v. City of Cambridge*, 679 N.E.2d 184, 190 (Mass. 1997).

Section 16 is not remotely limited to situations involving unavoidable captivity and ignores the obligation of audience members to "ignore or walk away from the beggar's request for money or attention," *Benefit*, 679 N.E.2d at 190, including by "averting their eyes," *Cohen*, 403 U.S. at 21. A solicitor holding a sign near a bus stop, or within view of a queue, or anywhere from 30 minutes before sunset to 30 minutes after sunrise, is not so imposing on others that his speech may be banned entirely. Rather, those who do not wish to see his message must utilize their ability simply to look away. Even a verbal request for donations can be ignored, particularly when the solicitor is just sitting or standing, but also whenever the request does not rise to the level of "in your face" harassment. *Loper v. New York City Police Dep't*, 999 F.2d 699, 706 (2d Cir. 1993) ("A verbal

request for money for sustenance or a gesture conveying that request carries no harms of the type enumerated by the City Police, if done in a peaceful manner.").

Although the District Court devoted many pages of its opinion to the legislative findings in Section 16's preamble, Add.016-21, it failed to consider that those findings do not begin to support the scope of conduct Section 16 actually outlaws. The findings mainly focus on the purported threat inherent in being "approached" by a solicitor displaying "aggressive behavior." *Supra* at 7-8. The findings say nothing specific about soliciting while merely sitting or standing still, rather than "approaching" someone "aggressively." Likewise, there is no specific legislative finding concerning passively displaying a sign or passing out written material. Indeed, to the extent the court stated that "Worcester has determined that *vocal* requests for money create a threatening environment, or at least a nuisance for some citizens," Add.018 (emphasis added), it perhaps inadvertently confirmed that the City's findings never assert that non-vocal requests pose any risk to public safety and also that, intuitively, such requests are not threatening.

Even with respect to conduct arguably addressed by the findings, the District Court erred in deferring to the City's legislative findings that broad categories of solicitations inherently constitute "aggressive conduct." The City's findings do not reference any evidence in support of such sweeping conclusions. The court cited a reference to "181 incidents of aggressive behavior by individuals who may have

been panhandling" appearing in a memorandum from the City Manager, Add.003, but that document never states whether the conduct was *in fact* panhandling or whether it was aggressive in a manner addressed by Section 16's specific prohibitions. Indeed, the document suggests that a majority of incidents involved conduct *not* addressed by Section 16: trespassing on private property. JA135-36. And the City did not provide any evidence of its purported safety concerns at the preliminary injunction hearing. Before First Amendment rights may be so broadly limited, some evidence is necessary. *Supra* at 17-18. The City provided none.

On their face, certain of Section 16's provisions plainly are broader than necessary to avoid public safety concerns. By way of example only, the law outlaws all forms of solicitation, including sign-holding, during a period that sometimes includes both the middle of the afternoon and the morning and evening rush hours, when many people are about and many areas of the city are well lit. *Supra* at 6-7 & n.4. Such a broad restriction is not "narrowly tailored" even to the City's asserted interest in protecting the public from "aggressive" behavior after dark. It "would prohibit 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," and "does not distinguish between solicitations that occur in dark alleyways and solicitations that take place in lighted buildings or well-lit street corners." *State v. Boehler*, 262 P.3d 637, 643-

44 (Ariz. Ct. App. 2011); *cf. City of Watseka v. Illinois Pub. Action Council*, 796 F.2d 1547 (7th Cir. 1986), *aff'd*, 479 U.S. 1048 (1987) (city presented no evidence that fraud was necessarily more prevalent after 5 p.m.). The other examples of outlawed conduct described *supra* at 6-7 likewise do not pose any public safety risk.

Finally, the fact that the ordinance bans only solicitations for immediate donations or transactions but does not ban other types of solicitation, even if the latter are conducted in an identically "aggressive manner," demonstrates that the ordinance is not narrowly tailored. "The Supreme Court has repeatedly recognized that an underinclusive regulatory scheme is not narrowly tailored." *Joelner v. Village of Washington Park*, 508 F.3d 427, 433 (7th Cir. 2007). Thus, an ordinance was held to be unconstitutional where the plaintiff was prohibited from soliciting on the sidewalk and the city asserted that the ban was necessary to prevent disruption of traffic, but the city did not ban other similar activities on sidewalks. *People v. Griswold*, 821 N.Y.S.2d 394, 402-03 (N.Y. City Ct. 2006); *see also City of Cincinnati*, 507 U.S. at 425 (where "the city has asserted an interest in esthetics, but respondent publishers' newsracks are no greater an eyesore than the newsracks permitted to remain on [the city's] sidewalks," ordinance was unconstitutional); *Saieg v. City of Dearborn*, 641 F.3d 727 (6th Cir. 2011) (striking down prohibition on leaflet distribution where sidewalk vendors

were not restricted); *News & Sun-Sentinel Co. v. Cox*, 702 F. Supp. 891, 902 (S.D. Fla. 1988) (statute was unconstitutional where it only prohibited "commercial" activity on roads, such that newspaper sales would be barred but not newspaper giveaways).

C. Section 16 Does Not Leave Open Ample Alternative Channels of Communication

Plaintiffs also are likely to show that the City has not met its burden of proving that Section 16 leaves open ample alternative channels for communication.

As an initial matter, it is important to bear in mind that in the specific paragraph of the District Court's decision addressing the "ample alternative channels" requirement, the court incorrectly stated that "Worcester has determined that *vocal* requests for money create a threatening environment." Add.018 (emphasis added). But of course the law also applies to non-vocal requests for money. *Supra* at 5-9. The court never analyzed whether banning *both* vocal *and* non-vocal solicitation leaves open sufficient alternative channels of communication for panhandlers and other solicitors for immediate transactions. To the extent that the court's conclusion that there were "ample alternative channels" rested on the mistaken assumption that non-vocal solicitation is still permitted under Section 16, that conclusion necessarily was erroneous.

If the District Court had properly analyzed Section 16's application to both vocal and non-vocal solicitations, it would have seen that other cities banning

solicitation typically exempt non-vocal solicitation, and courts have relied on that exemption in upholding the laws. *Gresham v. Peterson*, 225 F.3d 899 (7th Cir. 2000), offers such an example. Although the ordinance in that case prohibited *vocal* solicitation at night, citizens could still "hold up signs requesting money or engage in street performances, such as playing music, with an implicit appeal for support" after dark. *Id*. at 906-907. The Seventh Circuit stressed these exceptions in upholding the law, explaining that the city could not entirely foreclose a speaker's ability to reach her desired audience. *Id*. at 906; *see also Henry v. City of Cincinnati*, 2005 WL 1198814, *1 (S.D. Ohio Apr. 28, 2005) (noting that ordinance "does not include 'passively standing or sitting with a sign that a donation . . . is being sought without any vocal request other than a response to an inquiry by another person'"); *State v. Dean*, 866 N.E.2d 1134, 1140-41 (Ohio Ct. App. 2007) (finding that ordinance restricting solicitation was narrowly tailored because "[s]olicitors are not prohibited from displaying signs or from employing other nonvocal methods of solicitation," and left open alternative channels of communication because "nonvocal solicitation is not prohibited"). That other jurisdictions have determined that banning non-vocal solicitation is not necessary to promote interests of public safety is yet another indication that the Worcester ordinance is not narrowly tailored to its asserted interests. *See Edwards v. City of Coeur d'Alene*, 262 F.3d 856, 866 (9th Cir. 2001).

Even putting aside Section 16's foreclosure even of passively soliciting donations using a sign, the law does not leave open ample alternative channels for communication. The broad geographic and temporal scope of Section 16 precludes solicitation in the vast majority of spaces (*e.g.*, near the entrance to any "place of public assembly," near public transit, near people in a queue, and near numerous parking lots) and times (during the morning and evening rush hours, and early evening when people are in Worcester for its restaurants, bars, and entertainment venues) in which panhandlers' intended audience is likely even to be accessible. A restriction on speech that fails to leave speakers with "realistic[]" opportunities for effective speech does not provide adequate alternatives. *Linmark Assocs. v. Town of Willingboro*, 431 U.S. 85, 93 (1977). As the Supreme Court previously instructed the City of Worcester:

> It is suggested that the Los Angeles and Worcester ordinances are valid because their operation is limited to streets and alleys and leaves persons free to distribute printed matter in other public places. But, as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

Schneider v. State (Town of Irvington), 308 U.S. 147, 163 (1939); *see also Martin v. City of Struthers*, 319 U.S. 141 (1943) (striking down restriction on door-to-door leafleting while noting that such a manner of expression "is essential to the poorly

financed causes of little people"); *Weinberg v. City of Chicago*, 310 F.3d 1029, 1041 (7th Cir. 2002) ("Whether an alternative is ample should be considered from the speaker's point of view," and "an alternative is not adequate if it 'foreclose[s] a speaker's ability to reach one audience even if it allows the speaker to reach other groups.'") (quoting *Gresham*, 225 F.3d at 907); *Bery v. City of New York*, 97 F.3d 689, 698 (2d Cir. 1996) (holding that a total ban on sidewalk art does not leave open alternative means of communication because alternative display in galleries or museums would not reach the same audience).

For instance, the law bans any solicitation, by any means, anywhere in public, during a time period that frequently includes both rush hours and even mid-afternoon. *Supra* at 7. During this period the law leaves *not a single channel* open to solicit the large number of people in Worcester who, *e.g.*, are only outside their place of employ before and after work. The City has not shown that public safety justifies entirely foreclosing *all* channels for solicitation *everywhere* in the City during such an extensive period. *See City of Watseka*, 796 F.2d at 1558 (rejecting ordinance banning solicitation after 5:00 p.m. as it did not offer ample alternative channels for communication). Indeed, the City cannot possibly identify a valid public safety rationale for outlawing the Salvation Army from soliciting donations beginning mid-afternoon during the holiday season, or preventing the homeless from asking for a place to stay on Christmas Eve.

Finally, the District Court's conclusion that Section 16 leaves open "ample alternative channels" overlooks that the City's explicitly stated goal was to "reduc[e] the incidence" of panhandling—not to concentrate it during particular times and not to steer it to particular locations, but to *reduce* it. Worcester's mechanism for reducing panhandling was to craft an ordinance that specifically targets the areas and times of day in which panhandling stands a reasonable chance of success. If Worcester had left open "ample alternative channels for communication" for panhandlers then it would fail in its stated objective of reducing panhandling. The City's intent thus confirms what is plain on the face of the law: that Section 16 does not leave open ample alternative channels for panhandlers to communicate their requests for charity to their fellow citizens.

IV. SECTION 77(A) IS INVALID UNDER THE FIRST AMENDMENT

The District Court's conclusion that Plaintiffs are unlikely to prevail on their First Amendment claim against Section 77(a) also constitutes legal error.

The City has made no showing that Section 77(a)—which precludes a wide range of speech from holding political signs on traffic islands, to offering written material to vehicle occupants from a median, to taking one step from the sidewalk into a roadway while traffic is stopped to accept a driver's proffered donation—is narrowly tailored to serve a significant government interest. Unlike Section 16, Section 77(a) is unsupported by legislative findings and the City offered no

evidence at the preliminary injunction stage. Nor did the City rebut evidence submitted by Plaintiffs that, in the decades of "Tag Day" activities, there had been no accidents or injuries. JA226-27. Where the government fails to offer any evidence that its restriction on speech is needed to actually serve its asserted interest, this Court has not hesitated to strike those restrictions down. *See Casey v. City of Newport*, 308 F.3d 106, 117 (1st Cir. 2002) (striking down ordinance after noting that the record was "silent" as to whether less restrictive alternatives would address the city's asserted interests); *see also Weinberg*, 310 F.3d at 1039 (striking down a peddling ban where the city "provided no objective evidence" that traffic flow was disrupted by book selling).[5]

In this case, rather than holding the City to its burden to come forward with some evidence at the preliminary injunction stage in support of the ordinance, the District Court instead admonished that it is unnecessary to have "empirical evidence" that political campaigning on traffic islands or soliciting donations from

[5] The District Court *sua sponte* cited to an irreverent website, www.urbandictionary.com, defining one Worcester traffic island as a "large deathtrap," as evidence supporting the City's purported safety concerns. Add.018 n.3. This was legal error, *see* Fed. R. Evid. 201(b)(2), *cf. United States* v. *Lawson*, 677 F.3d 629, 650 (4th Cir. 2012) (stressing the unreliability of user-edited "reference" websites), particularly when combined with the court's failure to address photos of safe traffic islands that Plaintiffs put into the record (*see, e.g.*, JA238, 240). In any event, the court's citation of the website's definition of a single intersection in Worcester, even if proper (and it is not), is hardly enough to support a finding that *all* traffic islands and roadways in Worcester are unsafe.

stopped motorists is dangerous. Add.018. That reasoning, however, ignores the fact that Section 77(a) applies to all traffic islands and all roadways within Worcester's city limits. *Supra* at 9. This includes not only Interstate 290 but also quiet side streets, dead end roads, and busier streets in which the flow of traffic nonetheless is regularly interrupted by stop signs and streetlights. Worcester imposed the same regulation in all of these places, no matter that common sense dictates the degree of danger from traffic in such varying geographies will be quite different—to the extent there is any danger at all. Before reaching *that* decision, the City should have compiled some evidence justifying the breadth of its rule. But it did not.

Numerous courts have struck down similarly broad restrictions applicable to all roadways and traffic islands unsupported by "objective evidence." As the Ninth Circuit explained in a case in which the city came forward with evidence of traffic problems only with respect to certain streets and medians:

> Because the burden rests on the City to submit evidence in support of its position, we cannot simply assume that the City's other streets, alleys, and sidewalks allegedly suffer from similar solicitation-related traffic problems. By applying the Ordinance citywide to all streets, alleys, and sidewalks, the City has burdened substantially more solicitation speech than is reasonably necessary to achieve its purpose.

Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 948-51 (9th Cir. 2011); *Traditionalist Am. Knights of Ku Klux Klan v. City of*

Desloge, 914 F. Supp. 2d 1041, 1051 (E.D. Mo. 2012) (striking down ban on solicitation and other activities on streets where "Defendant offers no evidence demonstrating that a complete ban on the use of its streets for expressive activity is justified, suggesting only that in the past, solicitation at certain intersections caused traffic congestion"). In this case, the City has not provided evidence of safety issues with respect to *any* of Worcester's traffic islands or roadways, never mind evidence supporting a citywide ban on speech on *all* traffic islands or roadways.

In addition to the Ninth Circuit in *Comite de Jornaleros,* several other courts have struck down laws banning being present in all city roadways and/or traffic islands for purposes of speech. *See, e.g.*, *Wilkinson v. Utah*, 860 F. Supp. 2d 1284, 1290 (D. Utah 2012) (striking down similar blanket ban); *Cox*, 702 F. Supp. at 901-02 (S.D. Fla. 1988) (striking down law that "fails to take into account the fact that actual traffic hazards may vary with the level of traffic flow which exists at each of the state roads"); *ACORN v. City of New Orleans*, 606 F. Supp. 16, 21-22 (E.D. La. 1984) (striking down ban on all solicitation from "neutral ground" anywhere in New Orleans); *cf. United States Labor Party v. Oremus*, 619 F.2d 683, 688 (7th Cir. 1980) (upholding ban applicable "only on highways"). And in other cases, courts have observed that the laws in question did not apply to traffic islands, suggesting that for many municipalities it is not self-evident that standing in such areas is too dangerous to allow. *See ACORN v. St. Louis Cnty.*, 930 F.2d

591, 594 (8th Cir. 1991) (parties stipulated that ban on soliciting "in a roadway" did not apply to medians); *Sun-Sentinel Co. v. City of Hollywood*, 274 F. Supp. 2d 1323, 1332 (S.D. Fla. 2003) (finding that ban on soliciting in roadways left open ample alternative channels because it still allowed solicitation from medians).[6]

Moreover, there already are laws that outlaw the behavior that most concerned the District Court, *i.e.*, a law that makes it illegal to "signal[] a moving vehicle on any public way or cause[] the stopping of a vehicle thereon" for purposes of soliciting. Mass. Gen. Laws ch. 85, § 17A. In striking down a prohibition on solicitation from sidewalks and roadways, the Ninth Circuit noted that "[t]he City has various other laws at its disposal that would allow it to achieve its stated interests while burdening little or no speech," and that "[e]ven under the intermediate scrutiny 'time, place, and manner' analysis, we cannot ignore the existence of these readily available alternatives." *Comite de Jornaleros*, 657 F.3d at 949-50; *see also Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, at 637 (1980) (ordinance not narrowly tailored because "[t]he Village's

[6] While some other courts have upheld bans on being in a roadway or median to solicit from vehicles, those cases either turned on evidence of risks particular to solicitation from vehicles and distinguished other forms of speech, *Int'l Soc'y for Krishna Consciousness, Inc.*, 876 F.2d 494, 498 (5th Cir. 1989), or considered the alternative opportunities for organizations, not individuals, to solicit through other channels, *Denver Publ'g Co. v. City of Aurora*, 896 P.2d 306, 316-17 (Colo. 1995). Plaintiffs are unaware of any decision—other than the decision below—upholding a ban applicable to *all* speech by an individual in a roadway or median.

legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation"). Similar reasoning is no less applicable here.

Finally, it bears mention that the City's failure to identify any examples of accidents caused by persons soliciting from or waving political campaign signs on traffic islands in Worcester is itself some evidence that such conduct is not so inherently dangerous that it all should be banned throughout the City. That conclusion is buttressed by the City's willingness to allow such conduct for decades—until a desire arose to reduce panhandling.

V. PLAINTIFFS ARE LIKELY TO PREVAIL ON THEIR DUE PROCESS CLAIM

The District Court also erred in cursorily rejecting Plaintiffs' vagueness challenge under the Due Process Clause as "strained" and "at best, disingenuous." Add.019.

As an initial matter, the court explicitly declined to resolve or even consider the specific ambiguities in the ordinances presented by Plaintiffs. For example, with respect to Section 77(a), "traffic island" is defined as "any area or space within a roadway which is set aside by the use of materials or paint for the purpose of separating or controlling the flow of traffic and which is not *constructed or intended* for use by vehicular traffic or by pedestrians." c. 13, § 1 (emphasis added). But nowhere does the ordinance explain how a pedestrian should

determine whether a traffic island that is, for example, raised, paved, and bisected by crosswalks—but is not itself comprised entirely of crosswalks—was subjectively "intended for use . . . by pedestrians" by the City. Plaintiffs submitted a photograph of such a traffic island as an example of the vagueness inherent in the ordinance, JA238, but the District Court did not even attempt to explain whether the non-crosswalk portions of that traffic island are covered by Section 77(a).

Further, Section 77(a) permits walking or standing on a traffic island or roadway only for the purpose of crossing the roadway, entering or exiting a vehicle, "or for some other lawful purpose." c. 13, § 77(a). Use of such an ambiguous catch-all as "for some other lawful purpose" has been found to exacerbate vagueness concerns in other contexts. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 157 n.1, 164 (1972) (striking down as vague a vagrancy law that criminalized, *inter alia*, "wandering or strolling around from place to place *without any lawful purpose* or object") (emphasis added). One reasonable interpretation of that language here is that political speech and solicitation—both of which are protected by the First Amendment—constitute "lawful purpose[s]" for being on a roadway or traffic island, and that Section 77(a) only precludes using roadways and traffic islands for conduct that is already illegal. That, of course, is not how the City interprets the ordinance, which only serves to demonstrate its inherent vagueness. Thus, while some courts have saved

broad uses of the phrase "lawful purpose" from vagueness challenges by interpreting the phrase to refer to conduct that does not violate the criminal code, *see, e.g.*, *State v. Brake*, 796 So. 2d 522, 528-29 (Fla. 2001); *People v. Williams*, 551 N.E.2d 631, 633 (Ill. 1990), the City has effectively ruled out that option here, leaving plaintiffs to guess what else the phrase possibly could mean.[7]

The District Court also erred in finding that Section 16 provided sufficient guidance as to the conduct it prohibits. Section 16 defines "solicit" broadly to include even the use of signs, and goes on to prohibit "continuing to solicit from a person after that person has been given a negative response to such soliciting." *Supra* at 5. Nowhere is it explained whether an individual must stop displaying a sign once someone who looks at it has "given a negative response." Nor does the ordinance provide a speaker with any guidance as to whether she must put away her sign if just one person in a large crowd around her expresses an unwillingness to give money.

---

[7] The District Court relied on *URI Student Senate v. Town of Narragansett* to support its reliance on Section 16's preamble as "provid[ing] additional guidance for determining [what] activity is and is not prohibited" (Add.019), but that case involved an ordinance which this Court found to provide adequate guidance for police because it allowed for police intervention only after another law had been violated. 631 F.3d 1, 14 (1st Cir. 2011). After finding the "violation of law" prerequisite to be a sufficiently limiting condition precedent, this Court then looked to the preamble of the ordinance to confirm its conclusion about the scope of the ordinance. *Id.* In contrast, in this case, Section 77(a) does not contain any prerequisites to clarify the ambiguities in the ordinance.

In addition to this vagueness in terminology, the District Court held that application of Section 77(a) hinges on police officers' discretion. Add.008 ("If a person or people are congregated on a traffic island or median and do not pose a threat to public safety, then the officer would have the discretion to allow the person(s) to remain."). This fact alone renders the law unconstitutionally vague:

> 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. Far from providing the "breathing space" that "First Amendment freedoms need . . . to survive," the ordinance is susceptible of regular application to protected expression. We conclude that the ordinance is substantially overbroad, and that the Court of Appeals did not err in holding it facially invalid.

City of Houston v. Hill, 482 U.S. 451, 467 (1987) (quoting *NAACP v. Button*, 371 U.S. 415 (1963); *see also Papachristou*, 405 U.S. at 168. Section 16, which states that police "may" issue cease-and-desist orders and "may" make arrests, suffers from the same constitutional infirmity.

The District Court neither addressed the problem of police discretion, nor did it seek to resolve even the specifically identified ambiguities in the ordinances. The court's decision thus was erroneous and constituted an abuse of discretion.

VI. PLAINTIFFS ARE LIKELY TO PREVAIL ON THEIR EQUAL PROTECTION CLAIM.

The District Court also erred in ruling that the laws do not discriminate against the poor. The court noted that the laws were enacted "in part, to eliminate

the incidents of panhandling within the City," and that "the primary concern of [some City Councilors] appeared to be that panhandling was a blight on the City which should be eliminated at all costs." Add.016. In fact, the district court noted that the application of Section 77(a) to individuals other than panhandlers was "a lesson on the law of unintended consequences." Add.004. Thus, the court itself seemed to acknowledge that the ordinance's *intended consequence* was to reduce the speech of the poor and the homeless. That intention alone raises equal protection concerns. *Parr v. Mun. Court*, 479 P.2d 353, 360 (Cal. 1971) ("[W]e cannot be oblivious to the transparent, indeed the avowed, purpose and the inevitable effect of the ordinance in question: to discriminate against an ill-defined social caste whose members are deemed pariahs by the city fathers."); *see also Mosley*, 408 U.S. at 99-100 (striking down a law because the city intended to preclude labor picketing while leaving other types of picketing unaffected).

But there is more. First, Section 16 was purposefully limited to those transactions most likely to be initiated by the poor—solicitation for an immediate donation or sale—while excluding other solicitations, no matter how aggressive. *Supra* at 5-8. The discriminatory intent behind the law was thus made manifest in the law's operative provisions.

Second, in response to concerns about the impact of the ordinance on political campaigning from traffic islands, the City Solicitor reassured the City

Council and members of the Worcester community that Section 77(a) affords police an "element of discretion" in enforcement and that police would not issue any warnings unless there was a "public safety issue." JA234-35. The clear implication, in context, was that while the City could not *expressly* distinguish between politicians and the homeless, it could do so *tacitly* through selective enforcement. In the proceedings below, Plaintiffs presented evidence that several panhandlers had been arrested while the police declined to issue a warning to protesters occupying a traffic island. JA235-36, 290-308. In fact, the evidence from the recent election season now demonstrates that political campaigners, including supporters of the City Council members who voted for Section 77(a), have been campaigning in violation of that law without repercussion, *see* Appellants' 11/8/13 Mot. for Inj. Ex. D, ¶¶ 3-5 & Exs. 1-3; *id.* Ex. E, ¶¶ 4-6 & Exs. 1-2, even though the District Court took for granted that political campaigners are "distracting" to drivers. Add.018.

In light of this evidence that the ordinances were targeted at eliminating panhandling by the poor and the homeless, as well as the evidence of enforcement only against the poor and the homeless, the District Court abused its discretion in finding that Plaintiffs had not demonstrated a likelihood of success on their equal protection claim.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court reverse the District Court's denial of Plaintiffs' Motion for a Preliminary Injunction.

Respectfully submitted,

ROBERT THAYER, SHARON BROWNSON, TRACY NOVICK

By their attorneys,

/s/ Kevin P. Martin
Kevin P. Martin (First Circuit No. 89611)
Yvonne W. Chan (First Circuit No. 1161264)
Todd J. Marabella (First Circuit No. 1161177)
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109
(617) 570-1000

Matthew R. Segal (First Circuit No. 1151872)
Sarah R. Wunsch (First Circuit No. 28628)
American Civil Liberties Union Foundation of Massachusetts
211 Congress Street
Boston, MA 02110
(617) 451-3170

Dated: November 15, 2013

No. 13-2355

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROBERT THAYER, ET AL.,

Plaintiffs-Appellants,

v.

CITY OF WORCESTER.,

Defendant-Appellee.

CERTIFICATE OF COMPLIANCE

The undersigned, Kevin P. Martin, counsel for Plaintiffs-Appellants, hereby certifies pursuant to Fed. R. App. P. 32(a)(7)(C) that the Brief for Plaintiffs-Appellants complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). According to the word count of Microsoft Word, the word-processing system used to prepare the brief, the brief contains 10,622 words.

/s/ Kevin P. Martin
Kevin P. Martin
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109
(617) 570-1000

Dated: November 15, 2013

No. 13-2355

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROBERT THAYER, ET AL.,

Plaintiffs-Appellants,

v.

CITY OF WORCESTER.,

Defendant-Appellee.

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(b)-(c), 30(a)(3), and 31(b), I hereby certify that on November 15, 2013, a true and correct copy of the foregoing was served on the following counsel of record in this appeal via CM/ECF:

David M. Moore
Wendy L. Quinn
City Hall, Room 301
455 Main Street
Worcester, MA 01608
(508) 799-1161
moored@worcesterma.gov
quinnwl@worcesterma.gov

/s/ Kevin P. Martin
Kevin P. Martin, Esq.

No. 13-2355

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ROBERT THAYER, ET AL.,

Plaintiffs-Appellants,

v.

CITY OF WORCESTER.,

Defendant-Appellee.

ADDENDUM TO PLAINTIFFS-APPELLANTS' BRIEF

Pursuant to Local Rule 28 and Federal Rule of Appellate Procedure 28(f), the following materials are attached to the Brief of Plaintiffs-Appellants.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROBERT THAYER, SHARON BROWNSON, and TRACY NOVICK, Plaintiffs, v. CITY OF WORCESTER, Defendant.	)	**CIVIL ACTION** **No. 13-40057-TSH**

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION (Docket No. 2).
October24 , 2013

Hillman, D.J.

Nature of The Case

In January of 2013, the City of Worcester ("City") adopted two ordinances aimed at controlling aggressive panhandling. Specifically, the City of Worcester Revised Ordinances of 2008, as amended through February 5, 2013 ("R.O.") ch. 9, § 16 ("Ordinance 9-16") makes it " ... unlawful for any person to beg, panhandle or solicit in an aggressive manner." R.O. ch. 13, § 77(a)("Ordinance 13-77") prohibits standing or walking on a traffic island or roadway except for the purpose of crossing at an intersection or crosswalk, or entering or exiting a vehicle or "for

some other lawful purpose."[1] On May 31, 2013, the Plaintiffs brought suit against the City seeking declaratory and injunctive relief and monetary damages. On June 10, 2013, I held a hearing on the Plaintiffs' request for a preliminary injunction. For the reasons set forth below, I deny that motion.

Background Facts

In 2005, the City implemented an action plan to reduce the incidents of panhandling in the City. That plan contemplated public education, increased involvement by social service agencies and treatment providers, and enforcement strategies. It also featured billboards which read "Panhandling is not the solution" in an effort to discourage the citizenry from giving money directly to panhandlers instead of an appropriate social service agency. *See Complaint*, at *Ex. 1.* For reasons that are unclear, that plan languished until 2012 when the City sought guidance from City Manager Michael O'Brien ("City Manager O'Brien") on how to implement a new strategy to reduce panhandling throughout the City. In a July 12, 2012, communication to the City Council, City Manager O'Brien reported that: "[t]here is no current mechanism for tracking or compiling statistics on panhandling or its impact on the community by the City or any of our community partners or local social service agencies." *Id.*, at *Ex. 2* ("*July Memorandum*"). He suggested that the solution should involve a "multi-faceted, community-wide response that incorporates direct service providers, non-profit agencies, area businesses, policymakers, and public services." *Id.* He also related a Department of Justice caution that "'law enforcement alone is seldom effective in reducing or solving the problem.'" *Id.*

As part of his analysis of the problem, City Manager O'Brien acknowledged that peaceful panhandling is constitutionally protected speech under the First Amendment to the Constitution. However, City Manager O'Brien pointed out that incidents of aggressive panhandling may be

[1] The text of the ordinances can be found in the *Appendix* attached hereto,

proscribed by state law. He noted that between January 2011 and January 2012, City Police were dispatched to 181 incidents of aggressive behavior by individuals who may have been panhandling resulting in five arrests. *Id.*

On October 30, 2012, City Manager O'Brien followed up his *July Memorandum* by announcing the results of a City led "data collection effort ... to understand and assess the scope of panhandling" in the City. *See Complaint*, at *Ex. 3*. That data collection effort compiled the results of outreach by an experienced social worker who, along with 16 case workers, engaged 38 panhandlers. In furtherance of the goal to understand and assess the scope of panhandling, these individuals worked with panhandlers for purposes of educating them about resources and services available to them. *Id.* For example, the outreach worker referred some of the panhandlers to housing and financial assistance programs and others to mental health and substance abuse treatment services. City Manager O'Brien stressed the importance of the outreach efforts because "it takes time to work with routine panhandlers in order to effectively change their behavior pattern and develop service plans in conjunction with their existing providers." *Id.* On the record before me, it is unclear whether the City is continuing these outreach efforts.

In addition to touting the value of engagement, education, and connection with services, City Manager O'Brien also opined that the practice of soliciting for donations by walking in and out of traffic is inherently dangerous and needed regulation. *Id.* The two ordinances which are the subject of this lawsuit were passed to address these concerns. Specifically, Ordinance 9-16 regulates the time, place, and manner of panhandling by outlawing "aggressive panhandling and solicitation." Ordinance 13-77 prohibits standing or walking on a traffic island or roadway

except for the purposes of crossing at an intersection or crosswalk, for the purpose of entering or exiting a vehicle or "for some lawful purpose."

In a lesson on the law of unintended consequences, Ordinance 13-77, while preventing panhandling on public streets and intersections, also serves to prohibit tag day fundraisers and political speech much to the dismay of local charities, civic organizations youth sports teams, and politicians running for office. Concerns about these unintended consequences were raised during the City Council debate on the passing of the then proposed ordinances. Also raised was the concern that these ordinances were unnecessary because existing laws already serve to regulate the aggressive behavior which the proposed ordinances targeted. *See Decl. of Todd Marabella* (Docket No. 4)("*Marabella Decl.*"), at *Ex. 9* (audio file of November 13, 2013 Worcester City Council Meeting) and *Ex. 10* (unofficial transcript of November 13, 2013 Worcester City Council Meeting)(together, "*City Council Meeting Tr.*"). Although some City Councilors voiced opinions suggesting that the purpose of these ordinances was primarily to eradicate panhandling in the City, Mayor Petty emphasized that in his mind, the purpose of the proposed ordinances was to address a "purely a public safety issue." *Id.*

On March 20, 2013, the Worcester Telegram & Gazette reported that four people had been arrested in March for violating Ordinance 9-16; one of them was arrested twice. *Id.*, at *Ex. 12.* According to the article, the individuals were given multiple warnings about the new ordinance prohibiting aggressive panhandling before being arrested. *Id.* No incidents of arrest for violation of Ordinance 13-77 have been brought to the Court's attention.

Discussion

In determining whether to issue a preliminary injunction, the Court must weigh four factors:

> '(1) the likelihood of success on the merits; (2) the potential for irreparable harm if the injunction is denied; (3) the balance of relevant impositions, *i.e.*, the hardship to the nonmovant if enjoined as contrasted with the hardship to the movant if no injunction issues; and (4) the effect (if any) of the court's ruling on the public interest.'

Charlesbank Equity Fund II v. Blinds to Go, Inc., 370 F.3d 151, 162 (1st Cir. 2004)(citation to quoted case omitted). "The sine qua non of this four-part inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity." *New Comm. Wireless Services, Inc., v. SprintCom, Inc.*, 287 F.3d 1, 9 (1st Cir. 2002)..

Standing

As a preliminary matter, the Defendants argue that Plaintiffs have no likelihood of success on the merits because they lack standing to maintain the suit. The Plaintiffs, Robert Thayer and Sharon Brownson, are individuals who regularly solicit donations. The Plaintiff, Tracy Novick, is a Worcester School Committee member who has regularly stood on median strips and traffic circles within the city holding campaign and political signs. Each of these Plaintiffs has filed an affidavit in support of their application for injunctive relief. The City argues that since the Plaintiffs have not been arrested, their challenge is a facial challenge of the ordinance rather than an "as applied" challenge. They posit that the Plaintiffs have not shown an objectively reasonable possibility that the ordinance would be applied to their activities.

"The necessity to establish constitutional standing is rooted in the case or controversy requirement of the Constitution. '[T]he standing question is whether the plaintiff has "alleged

such a personal stake in the outcome of the controversy" as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.'" *See Mangual v. Rotger-Sabat*, 317 F.3d 45, 56 (1st Cir. 2003) (quoting *Warth v. Seldin*, 422 U.S. 490, 498–99, 95 S.Ct. 2197 (1975)); *see also* U.S. Const. art. III, § 2. "For standing to challenge the constitutionality of a particular municipal ordinance ... plaintiffs [must] show an objectively reasonable possibility that the ordinance would be applied to their own activities." *Sullivan v. City of Augusta*, 511 F.3d 16, 25 (1st Cir. 2007)(*citing Osediacz v. City of Cranston*, 414 F.3d 136, 143 (1st Cir.2005)).

That the Plaintiffs have not been arrested for violating either ordinance does not preclude a finding that they have the requisite standing to mount their claims. *See Mangual,* 317 F.3d at 56 ("[a] party need not violate the statute and suffer the penalty in order to generate a conflict worthy of standing in federal court"); *see also Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393, 108 S.Ct. 636 (1988)(plaintiff who challenges statute must demonstrate realistic danger of sustaining direct injury as result of its operation or enforcement, but does not have to await consummation of threatened injury to obtain preventive relief-- if injury is certainly impending, that is enough)). Where a litigant seeks to challenge governmental action as violative of the First Amendment, two types of injuries may confer Article III standing without necessitating that the challenger have been subjected to criminal prosecution. The first is when "the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 230 (1979). Such Plaintiffs may have standing even if they have never been prosecuted or threatened with prosecution. *Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct. 739 (1973); *see also Steffel v.*

Thompson, 415 U.S. 452, 462, 94 S.Ct. 1209 (1974)(plaintiffs need not place themselves "between the Scylla of intentionally flouting state law and the Charybdis of forgoing ... constitutionally protected activity"). The second type of injury is when "the plaintiff is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences. In such situations the vice of the statute is its pull toward self-censorship" *N.H. Right to Life PAC v. Gardner,* 99 F.3d 8, 13-14 (1st Cir. 1996)(internal citation omitted).

Both types of cases "hinge on the existence of a credible threat that the challenged law will be enforced. If such a threat exists, then it poses a classic dilemma for an affected party: either to engage in the expressive activity, thus courting prosecution, or to succumb to the threat, thus forgoing free expression. Either injury is justiciable. Conversely, if no credible threat of prosecution looms, the chill is insufficient to sustain the burden that Article III imposes. A party's subjective fear that she may be prosecuted for engaging in expressive activity will not be held to constitute an injury for standing purposes unless that fear is objectively reasonable." *Id.* at 14.

All three Plaintiffs have acknowledged engaging in conduct that would be proscribed under the ordinances. Both Mr. Thayer and Ms. Brownson step into the street occasionally to receive contributions from passing motorists and both have been warned by the police to stop soliciting on City sidewalks or face arrest. Ms. Novick represents that she and her campaign workers regularly hold signs on medians and traffic islands and that she now fears that she will be arrested for this conduct. There can be no doubt that should Mr. Thayer and Ms. Browning continue to engage in the conduct they describe, they would be subject to arrest. Indeed, City police officers have arrested individuals who have engaged in similar conduct after receiving

prior warnings. Therefore, as to them, the threat is objectively real and I find that they have standing to challenge Ordinance 9-16.

With respect to Ms. Novick, it is a closer call. Persons violate Ordinance 13-77 only if they refuse to move along after being advised to do so by a police officer. At a meeting of the Worcester Joint Public Health & Human Services and Municipal Operations Committee, the City Solicitor indicated that Ordinance 13-77 was worded in such a way as to give police officers discretion regarding its enforcement. If a person or people are congregated on a traffic island or median and do not pose a threat to public safety, then the officer would have the discretion to allow the person(s) to remain. *See Marabella Decl.,* at *Ex. 11* (audio file) and *Ex. 12* (unofficial transcript). Ms. Novick is currently seeking re-election to the Worcester School Committee and, as she has in past elections, would like to be able to stand on a traffic island or median strip with supporters holding signs to be viewed by passing motorists. Such activity is squarely within the conduct that the Ordinance 13-77 is intended to prohibit. The question becomes whether there is a credible threat of injury to Ms. Novick, *i.e.* whether the ordinance is likely to be enforced against her. Under the circumstances, I find it objectively reasonable to fear that the police would deem such activity as distracting to drivers and therefore, to constitute a public safety issue warranting enforcement of the ordinance. Therefore, I find that Ms. Novick has standing to challenge Ordinance 13-77. *Accord Mangual*, 317 F.3d at 57 (while a plaintiff's subjective fear of prosecution is insufficient to confer standing, the evidentiary bar which must be met is very low and courts will assume a credible threat of prosecution absent compelling evidence to contrary); *see also Sugarman v. Village of Chester*, 192 F.Supp.2d 282, 289 (S.D.N.Y. 2002)(plaintiff had standing to assert facial challenge to sign ordinance where she voluntarily

complied with ordinance rather than risk enforcement and negative publicity; this is type of self-censorship that led courts to relax traditional standing requirements).

The Likelihood of Success on the Merits

What level of scrutiny to employ?

Soliciting contributions is expressive activity that is protected by the First Amendment. In *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 100 S.Ct. 826 (1980), the United States Supreme Court struck down an ordinance prohibiting solicitations by charitable organizations that did not use at least seventy-five per cent of their revenues for charitable purposes. The Court reaffirmed that "charitable 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-that are within the protection of the First Amendment.... [S]olicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political or social issues, and ... without solicitation the flow of such information and advocacy would likely cease." *Id*. at 632, 100 S.Ct. 826; *see also United States v. Kokinda*, 497 U.S. 720, 725, 110 S.Ct. 3115 (1990)(solicitation is recognized form of speech protected by First Amendment); *Benefit v. City of Cambridge*, 424 Mass. 918, 922-23, 679 N.E.2d 184, 187-88 (1997)(same). Furthermore, it is black letter law that political speech of the type in which Ms. Novick seeks to engage, *i.e.,* she and her supporters holding up political signs and waving to passing motorists and pedestrians, is speech which is afforded the strongest protection under the First Amendment. *See Long Beach area Peace Newtwork v. City of Long Beach*, 574 F.3d 1011, 1021 (9th Cir. 2009)(political speech is core First Amendment speech critical to function of our democratic system).

Because the activities in which the Plaintiffs seek to engage are protected speech, the Court's first task is to determine what level of judicial scrutiny to apply in this case. "The Supreme Court has established different levels of scrutiny for analyzing alleged First Amendment violations, depending on where the speech takes place. In traditional public fora, 'the government's ability to permissibly restrict expressive conduct is very limited.' In such locations, First Amendment protections are strongest and regulation is most suspect." *Id.* (internal citations and citation to quoted case omitted). Since in this case, Plaintiffs "seek to engage in protected speech in … [areas recognized as traditional public forums, namely city sidewalks, street, traffic islands and medians,] the government's power to regulate that speech is limited, though not foreclosed." *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 555 (4th Cir. 2013)[2]; *see also Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 45, 103 S.Ct. 948 (1983)(in places which by long tradition or government fiat have been devoted to assembly and debate, rights of government to limit expressive activity are sharply circumscribed; at one end of spectrum are streets and parks which are quintessentially public forums.) "In a traditional or designated public forum, content-neutral restrictions on the time, place, and manner of expression must be narrowly tailored to serve some substantial governmental interest, and

[2] There may be some question as to whether a median strip or traffic island is a traditional public forum. Many of the median strips and traffic islands in question are parts of the public thoroughfare and have long been utilized by politicians and others to express their views—whether with the express or tacit approval of the City-- and therefore, if not traditional public forums arguably fall into the category of designated public forums, *i.e.*, public property which has been opened for use by the public as a place to express activity. *Accord Warren v. Fairfaz County,* 196 F.3d 186 (4th Cir. 1999)(en banc)(dicta). The government may rescind the open character of such property, but while open to the public, designated public forums are afforded the same scrutiny as traditional public forums. On the other hand, many of the medians and islands specifically cited by the Plaintiffs are in the middle of public roadways, with limited access and sidewalks and no benches or similar amenities which would suggest that they are intended to be used by the public. Lesser scrutiny is applied to restrictions imposed on government property which constitutes a non-public forum. Because I find that the Ordinance 13-77 withstands Plaintiffs' challenge even under the heightened standard afforded public forums, it is not necessary for me to resolve this issue. For a detailed discussion of the issue of whether medians and the like should constitute traditional public forums, *see Satawa v, Macomb County Road Com'n*, 689 F.3d 506 (6th Cir. 2012)(finding highway median was traditional public forum: median had no parking spaces or public restrooms, but public had been allowed to use it for variety of expressive purposes, there are benches on the median, a pedestrian sidewalk provides access, and memorial plaques are displayed thereon).

must leave open adequate alternative channels of communication." *New England Re'l Council of Carpenters v. Kinton*, 284 F.3d 9, 20 (1st Cir. 2002). Moreover, "viewpoint-based restrictions are prohibited, and any content-based restriction must satisfy strict scrutiny, but reasonable time, place, and manner limitations are permissible." *Watchtower Bible and Tract Soc. of New York, Inc. v. Sagardia De Jesus*, 634 F.3d 3, 11 (1st Cir. 2011).

Content-Based Versus Content-Neutral Speech

"The First Amendment generally prevents government from proscribing speech … because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid. " *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382, 112 S. Ct. 2538, 2542 (1992). However, "even so precious a freedom must, in particular iterations, be balanced against the government's legitimate interests in protecting public health and safety". *McCullen v. Coakley*, 571 F.3d 167, 175 (1st Cir. 2009)(citing *Schenck v. United States*, 249 U.S. 47, 52, 39 S.Ct. 247 (1919) ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre.")).

> In striking this delicate balance, a court must calibrate the scales differently depending on the nature of the governmental action. That calibration takes place along a continuum. At one end of the continuum are laws in which the government attempts to differentiate between divergent views on a singular subject; that is, laws in which the government attempts to 'pick and choose among similarly situated speakers in order to advance or suppress a particular ideology or outlook.' Such viewpoint-based discrimination is highly offensive to the core values of the First Amendment, and courts are wary of such encroachments. … Further along the continuum are laws that do not regulate speech per se but, rather, regulate the time, place, and manner in which speech may occur such as the ordinances in question. Because such time-place-manner restrictions are by definition content-neutral, they tend to burden speech only incidentally; that is, they burden speech for reasons unrelated to either the speaker's viewpoint or the speech's content. Regulations of this type will be upheld as long as 'they are justified without reference to the content of the regulated speech, ... are narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication of the information.' This more relaxed standard, familiarly known as 'intermediate scrutiny,' is justified because the fact that a regulation is both content-neutral and viewpoint-neutral helps to ensure that

> government is not using the regulation as a sub rosa means of interfering in areas to which First Amendment protections pertain.

Id. (internal citations and citation to quoted cases omitted); *see also Frisby v. Schultz*, 487 U.S. 474, 481, 108 S.Ct. 2495 (1988)("[T]he appropriate level of scrutiny is initially tied to whether the statute distinguishes between prohibited and permitted speech on the basis of content"); *Clatterbuck*, 708 F.3d at 555.

The Plaintiffs allege that the ordinances are content-based and that I must apply strict scrutiny. Not surprisingly, the Defendants say that they content-neutral and thus entitled to intermediate scrutiny. If the ordinance is content-based, the ordinance will survive only if it is the least restrictive means available of furthering a compelling government interest. If I find that the ordinance is content neutral, then the Court's inquiry is limited to whether the ordinances: (1) possess adequate standards to guide the exercise of official discretion, and (2) are narrowly tailored to a significant government interest while leaving open satisfactory alternative means of communication. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746 (1989).

Do the ordinances satisfy the test for content-neutrality?

The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295, 104 S.Ct. 3065 (1984). The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. *See Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48, 106 S.Ct. 925 (1986). *Ward*, 491 U.S. at 791, 109 S.Ct. 2746. For the reasons set forth below, I find that the ordinances in question are content-neutral.

The restrictions imposed on speech by the ordinances apply with equal force without regard to message. Thus, Ordinance 9-16 prevents all individuals from *aggressively* soliciting funds on streets, highways, sidewalks, walkways, plazas and other public venues within the City whether they be panhandlers or belong to political groups, religious organizations, charities, civic organizations, youth sports teams, *etc*. More specifically, all individuals are banned from: asking for money as well as objects or other things of any value; and from using the spoken or written word, bodily gestures, signs or other means of communication in order to obtain donations of money or other things of value and to offer to exchange and/or sell any goods or services. Similarly, Ordinance 13-77 applies to anyone, regardless of message, who stands on a traffic island or roadway except for the purposes of crossing at an intersection or crosswalk, for the purpose of entering or exiting a vehicle or "for some lawful purpose." While it appears that to date only panhandlers have been arrested for violating either of the ordinances (specifically, Ordinance 9-16), there is no evidence that the ordinances have not been applied evenhandedly—that is, there is no evidence that anyone other than panhandlers have violated either ordinance and not been arrested. Because I find that the ordinances do not distinguish between types of speech, I find that they are content-neutral.

Are the Ordinances Narrowly Tailored to a Significant Government Interest while Leaving Open Satisfactory Alternative Means of Communication

In determining whether Ordinance 9-16 is narrowly tailored to serve the governmental interest at stake, the preamble attempts to justify the legislative balancing of the right to exercise First Amendment freedoms, against the rights of the City to impose reasonable time, place, and manner restrictions on panhandling. That preamble states that: "[p]ersons approached by individuals asking for money, objects or other things of any value are particularly vulnerable to real, apparent or perceived coercion when such request is accompanied by, or immediately

followed or preceded with, aggressive behavior." *Ordinance 9-16*, at ¶ (a)(3). While this statement of purposes is somewhat self-serving it does establish the ostensible reason for enacting the ordinance. It also is responsive to City Manager O'Brien's report that, during calendar year 2011, Worcester Police were dispatched to 181 incidents of aggressive behavior by individuals who may have been panhandling.

In the case of *Clatterbuck*, the Fourth Circuit reversed the lower court's grant of a Rule 12(b)(6) motion to dismiss a challenge to an ordinance forbidding soliciting in a particular part of the City of Charlottesville. The court pointed out that:

> The Ordinance does not contain a statement of purpose, and no evidence is properly before us to indicate the City's reason or reasons for enacting the Ordinance. To be sure, the City has advanced some plausible arguments that it enacted the Ordinance without any censorial purpose and with a compelling, content-neutral justification. These rationales additionally find support in First Amendment jurisprudence.
>
> Without any facts before us pertaining to the government's reasons for enacting the Ordinance, however, forming conclusions about these asserted purposes becomes mere conjecture.

Clatterbuck, 708 F.3d at 559 (internal citations omitted); *see, also Kokinda*, 497 U.S. at 733–36, 110 S.Ct. 3115.

The Supreme Court has held that a municipality's "own implementation and interpretation" of an ordinance may be considered when evaluating a facial challenge. *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123, 131, 112 S.Ct. 2395 (1992). Although the Supreme Court has not specifically delineated what facts a court should consider to discern the municipality's intentions, in at least one case the Court examined a preamble for clarification about the purposes of an ordinance. *See City of Newport, Kentucky v. Iacobucci*, 479 U.S. 92, 96-97, 107 S.Ct. 383 (1986)(summary disposition); *see also URI Student Senate v. Town of Narragansett*, 631 F.3d 1, 14 (1st Cir. 2011) ("The Supreme Court has looked to an ordinance's preamble to ascertain what activity it was intended to prohibit.").

The Courts of Appeal have followed suit in determining that preamble language can assist their understanding of a statute or ordinance. *See, e.g., Ass'n of Am. Railroads v. Surface Transp. Bd.*, 237 F.3d 676, 681 (D.C.Cir. 2001) (citing *Wyoming Outdoor Council v. United States Forest Serv.*, 165 F.3d 43, 53 (D.C.Cir. 1999) ("[A]lthough the language in the preamble of the statute is 'not an operative part of the statute,' it may aid in achieving a 'general understanding' of the statute.")); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 723 n. 28 (7th Cir. 2003) (noting that when federal courts evaluate the "predominant concerns" motivating the enactment of a statute or ordinance, they may look at materials including "any preamble or express legislative findings associated with it"). The First Circuit has utilized these principles as well; in *URI Student Senate* the court analyzed the preamble of an ordinance that allowed police to mark noisy houses with an "x," in order to determine whether the ordinance was unconstitutionally vague. *See* at *URI Student Senate, 631 F.3d* at 14.

One Eleventh Circuit case, *Wise Enterprises, Inc. v. Unified Government of Athens-Clarke County, Georgia*, 217 F.3d 1360 (11th Cir. 2000), is instructive with respect to the weight and use a court may allot to preamble language. In that case, the appellant ran an adult entertainment establishment that was negatively affected by an Athens-Clarke County's ban on nude barroom dancing in establishments serving alcoholic beverages. *See id.* at 1362. After determining that the ordinance should be considered content-neutral, the Eleventh Circuit then applied the intermediate scrutiny test set forth in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673 (1968) to assess the ordinance's validity. The second prong of that test required the court to analyze whether "the ordinance furthers [a substantial interest]." *Id.* at 1364. The court recognized that for the "[Athens-Clarke] County to meet its burden under this element, it must have '*some* factual basis for the claim that [adult] entertainment in establishments serving

alcoholic beverages results in increased criminal activity.'" *Id.* (citation to quoted case omitted; emphasis in original). Consequently, the court turned to statements in the preamble to the ordinance, which established that the County had made findings that such behavior often led to increased criminal behavior, depression of property values, increased use of law enforcement personnel, and acceleration of community blight. *Id*. at 1363-64 (quoting Athens-Clarke County Code § 6-11 (1997)). The preamble language, together with minutes of a county commission meeting that had been provided to the court, established that "the County's enactment of the ordinance was based upon the experiences of other urban counties and municipalities, copies of studies from other jurisdictions examining the problems associated with public nudity in conjunction with the sale of alcohol, and a review of information received by the Athens-Clarke County Police Department detailing visits to adult entertainment establishments in the County." *Id.* at 1364. Accordingly, the Eleventh Circuit concluded that "the County had a reasonable basis for believing the ordinance would sufficiently further its interests." *Id.*

While I appreciate and understand that legislative preambles are necessarily self-serving, I nevertheless give them credibility in determining that the restrictions on speech in the ordinances are narrowly tailored to serve the governmental interest. This is particularly true in this case where the minutes of meetings involving City Council members present somewhat of a mixed bag. In discussing Ordinance 9-16, some City councilors were clearly concerned with the safety and welfare of both those individuals engaged in solicitation as well as members of the public being solicited; at the same time, the primary concern of other councilors appeared to be that panhandling was a blight on the City which should be eliminated at all costs. As to Ordinance 13-77, the primary concern of the City Council appeared to be the safety and welfare of the public. *See generally City Council Meeting Tr.*

The City has a legitimate interest in promoting the safety and convenience of its citizens on public sidewalks and streets. *See Madsen v. Women's Health Center*, 512 U.S. 753, 768, 114 S.Ct. 2516, (1994) ("State also has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks ..."); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650, 101 S.Ct. 2559 (1981) (recognizing state interest in safety and convenience of citizens using public fora); *Cox v. New Hampshire*, 312 U.S. 569, 574, 61 S.Ct. 762 (1941) (recognizing state interest in safety and convenience on public roads); *Ayres v. City of Chicago*, 125 F.3d 1010, 1015 (7th Cir.1997) ("There are unquestionable benefits from regulating peddling, First Amendment or otherwise, [including] … the control of congestion."). Additionally, a government regulation can be considered narrowly tailored " 'so long as the ... regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward*, 491 U.S. at 799, 109 S.Ct. 2746 (citation to quoted case omitted). This means the regulation need not be a perfect fit for the government's needs, but cannot burden substantially more speech than necessary. *Id.* at 800, 109 S.Ct. 2746. Furthermore, a time, place or manner restriction need not be the least restrictive means of achieving the government purpose, so long as it can be considered narrowly tailored to that purpose. *Id.* at 798, 109 S.Ct. 2746. *Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir. 2000).

I find that both ordinances are narrowly tailored to achieve their intended purposes: Ordinance 9-16 bans only aggressive forms of solicitation—those which are most likely to result in possible violent confrontation, that are most likely to intimidate those being solicited and that are most likely to endanger the solicitor and/or members of the general public. Ordinance 13-77 essentially bans people from congregating and/or loitering on traffic islands, medians and other

like public ways under circumstances where such conduct could prove distracting to drivers and pedestrians.

Finally, the ordinances also leave open ample alternative channels for communication. Worcester has determined that vocal requests for money create a threatening environment, or at least a nuisance for some citizens. The City has chosen to restrict soliciting only in those circumstances where it is considered especially unwanted or bothersome; at night, around banks, in lines for theatre, etc. Further, they have determined that the solicitation of funds by stepping into the street is inherently dangerous and that any standing or walking on a traffic island or roadway except for the purposes of crossing is likewise dangerous. Hopefully, we are all in agreement that the act of stepping into traffic to solicit or receive a donation is dangerous does not require empirical evidence or a "body count."

That Ordinance 13-77 prohibits not just solicitation, but political and other protected types of speech in a rotary, traffic island or crosswalk was the cause of much discussion in the City Council. One of the most vibrant displays of democracy in action takes place during rush hour and on Saturday mornings at election time. The cacophonous political sign holders that populate the rotaries, traffic islands, and intersections of our communities represent the electoral process in full bloom. They are colorful, persistent, and, at times distracting. Rotaries and traffic islands are especially attractive venues for both political sign holders and those seeking to solicit for funds because of their clear sight lines and heavy traffic. They are also dangerous exercises in survival driving skills.[3] At the same time, politicians and others with messages to

[3] The Urban Dictionary definition of Kelley Square: "A large deathtrap in Worcester, MA consisting of two rotaries and several roads intersecting them. Only the bravest of the brave and/or the craziest of the crazy should even attempt to drive through it."

spread are not banned from utilizing other public forums, such as sidewalks (so long as they don't wander into traffic), and parks (presuming they are properly permitted, if required).

Whether the Ordinances Are Unconstitutionally Vague

Plaintiffs assert that the ordinances fail to meet the requirements of the Due Process Clause of the Fourteenth Amendment in that they are so vague and standardless that they leave the public uncertain as to the conduct prohibited. More particularly, Plaintiffs argue that the ordinances fail to adequately define the conduct which is prohibited. I disagree.

> 'It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.' ... 'For such a facial challenge to succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications.'
>
> To comport with the strictures of due process, a law must define an offense ' "[1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." The void-for-vagueness doctrine embraces these requirements.' Nevertheless, words are rough-hewn tools, not surgically precise instruments. Consequently, some degree of inexactitude is acceptable in statutory language. Consistent with this reality, ' "the fact that a statute requires some interpretation does not perforce render it unconstitutionally vague." It follows that 'reasonable breadth' in the terms employed by an ordinance does not require that it be invalidated on vagueness grounds.

URI Student Senate, 631 F.3d at 13-14.

The Plaintiffs strained arguments in support of their attempt to challenge the ordinances on vagueness grounds are at best, disingenuous; therefore, a protracted discussion of this issue is simply not warranted. Ordinance 9-16 in particular goes into exacting detail about what type of conduct is prohibited and both ordinances adequately define as well as the types of public areas as to which they apply, *i.e.*, sidewalks, traffic islands, medians, etc. Furthermore, the preamble to Ordinance 9-16 provides additional guidance for determining was activity is and is not permitted. *See URI Student Senate*, 631 F.3d at 14; *see also Ass'n of Am. Railroads,* 237 F.3d at 681; *Wyoming Outdoor Council,* 165 F.3d at 53 (preamble of statute may aid in determining its

general). I am also unpersuaded by Plaintiffs' argument that the ordinances' language and enforcement provisions are vague because they allow the police seemingly unfettered discretion as to what constitutes a violation of the ordinance, and whether to make an arrest for violating its terms. This argument bootstraps on Plaintiffs' argument that the ordinances do not sufficiently define what conduct is prohibited. In other words, Plaintiffs argue that the police have unfettered discretion in enforcing the ordinances because the ordinances are unclear as to what conduct is prohibited. I have found that the ordinances provide concrete guidance as to the type of conduct prohibited, which informs both their enforcement by police and any subsequent prosecution: "[t]he bottom line is that, viewed in context, it is clear what conduct the [ordinances] as a whole forbid[]. Taken together, [the ordinances definition of what constitutes an offense thereunder], the list of examples of [conduct] that might serve as such a predicate to police intervention included in the [ordinances]," and the City's reasons for enacting the ordinances, "provide sufficient enforcement guidance to the police and adequately types of behavior prohibited." *URI Student Senate*, 631 F.3d at 15.

Whether the Ordinances Discriminate Against the Poor

Plaintiffs assert that the ordinances violate the Equal Protection Clause of the Fourteenth Amendment because they discriminate against the poor and homeless. In support, the Plaintiffs argue that although they purport to apply to anyone who engages in prohibited activities, the evidence is they target the poor and homeless.

"The Equal Protection Clause protects against invidious discrimination among similarly situated individuals or implicating fundamental rights. The threshold element of an equal protection claim is disparate treatment; once disparate treatment is shown, the equal protection analysis to be applied is determined by the classification used by government decision-makers.

Strict scrutiny is appropriate only if a classification infringes on a class of people's fundamental rights or targets a member of a suspect class. When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized. Under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Speet v. Schuette*, 889 F. Supp. 2d 969, 978-79 (W.D. Mich. 2012) *aff'd,* 726 F.3d 867 (6th Cir. 2013)(internal quotations and citations omitted).

The preamble to Ordinance 9-16 and the minutes of the City Council meeting suggest that the ordinances were enacted for health and safety reasons and, in part, to eliminate the incidents of panhandling within the City. At the same time, those sources also make clear that the City Council recognized that the ordinances would be applied evenhandedly to all individuals engaging in such conduct, including, without limitation, politicians, members of religious organizations, and members of charitable organizations. While it is true that enforcement of the ordinances *may* end up having a disproportionate affect on the poor and homeless, I do not find that Plaintiffs have evidenced a likelihood of establishing that the City's actions have been taken "with an evinced intent to discriminate against an identifiable group." *Joyce v. City and County of San Franciso*, 846 F.supp. 843, 858 (N.D. Cal. 1994).

For the reasons set forth above, I find that the Plaintiffs have failed to establish a likelihood that they will succeed on the merits of their claims.

Irreparable Harm

In the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis. As the Supreme Court has explained, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673 (1976); *see also Asociación de Educación Privada de Puerto Rico, Inc. v. García–Padilla*, 490 F.3d 1, 21 (1st Cir.2007) (applying *Elrod* to irreparable harm component of permanent injunction analysis); *Maceira v. Pagan*, 649 F.2d 8, 18 (1st Cir.1981) ("It is well established that the loss of first amendment freedoms constitutes irreparable injury."). Accordingly, irreparable injury is presumed upon a determination that the movants are likely to prevail on their First Amendment claim. *Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 10-11 (1st Cir. 2012). I have found that there is little likelihood of success on the merits and therefore, will not presume irreparable harm. I additionally find that the Plaintiffs will not suffer irreparable harm. Those that would solicit for funds will not suffer lost opportunity as Plaintiffs suggest. Their opportunities are simply proscribed as to time, place, and manner. Plaintiff, Novick, will still be able to campaign, just not from the medians, traffic islands or the like.

The Balancing of the Harms and The Public Interest

In my analysis, I have found that the City has a legitimate reason for enacting the ordinances in question, that these interests are substantial and necessarily outweigh the Plaintiffs' interest in the unfettered right to solicit in public areas. I further find that it is in the public's interest to be safe and secure in their person, and for safety of all to be maintained on City streets, sidewalks, traffic islands and similar public areas.

Conclusion

IT IS HEREBY ORDERED that:

Plaintiffs' Motion For Preliminary Injunction (Docket No. 2) is **denied**.

/s/ Timothy S. Hillman
TIMOTHY S. HILLMAN
DISTRICT JUDGE

Chapter Nine - Public Safety

§ 16. Aggressive Begging, Soliciting and Panhandling – Ordained January 29, 2013 - 9839

(a) *Declaration of Findings and Policy.*

The city of Worcester, acting by and through its City Council, hereby makes the following findings:

(1) The City of Worcester has a duty to protect the rights of all people to exercise their First Amendment rights safely. The City of Worcester has a compelling governmental interest in imposing certain reasonable time, place and manner regulations whenever potential First Amendment activities such as begging, solicitation and panhandling occur on streets, highways, sidewalks, walkways, plazas, and other public venues within the City;

(2) This ordinance is not intended to limit any persons from exercising their constitutional right to solicit funds, picket, protest or engage in constitutionally protected activities. The provisions of this division are expressly established to most narrowly tailor any such restrictions to protect the First Amendment rights of all people within the City as well as the rights of non-participating people and their property, and to ensure the rights and safety of all people and/or property to the extent possible;

(3) Persons approached by individuals asking for money, objects or other things of any value are particularly vulnerable to real, apparent or perceived coercion when such request is accompanied by or immediately followed or preceded with aggressive behavior such as:

(A) continuing to beg or solicit from a person after the person has given a negative response to such solicitation;

(B) touching another person or their property in the course of begging or soliciting without that person's consent;

(C) blocking or interfering with the safe or free passage of a pedestrian or vehicle by any means;

(D) using violent or threatening gestures which are likely to provoke an immediate violent reaction from the person who is the subject of the solicitation or request for money;

(E) closely following behind, ahead or alongside a person who has been solicited or asked for money after that person has given a negative response to such solicitation;

(F) using profane, threatening, or abusive language, either during the solicitation or begging or following a refusal;

(G) begging or soliciting money from anyone who is waiting in line for tickets, entering a public building or riding on public transportation;

(H) begging or soliciting in a manner with conduct, words or gestures intended or likely to cause a reasonable person to fear imminent bodily harm, danger or damage to or loss of property or otherwise to be intimidated into giving money or any other thing of value; or

(I) begging or soliciting in a group of two or more persons in an intimidating fashion.

(4) The City desires to respect a person's potential right to solicit, beg or panhandle while simultaneously protecting another's right to not be unduly coerced.

(5) The City further finds that aggressive soliciting, begging or panhandling of persons within 20 feet of any outdoor seating area of any cafe, restaurant or other business, bank, automated teller machine, automated teller machine facility, check cashing business, mass transportation facility, mass transportation stop, or pay telephone also subjects people being solicited to improper and undue influence and/or fear and should not be allowed.

(6) Persons approaching other individuals in an aggressive manner asking for money, objects or other things of any value after dark in public places inspire alarm and fear, which coupled with the inherent difficulty of establishing identity should not be allowed.

(b) *Purpose and Intent.*

The public purpose of this ordinance is to protect the rights of all peoples to exercise their First Amendment rights as well as the people and/or property of those who chose to be non-participating.

(c) *Definitions.*

As used in this section, the following words and terms shall have the meanings indicated. The meaning of all other terms and words not specifically defined shall be their generally accepted definition:

"Beg," "begging" or *"panhandling"* shall be synonymous and shall mean asking for money or objects of value, with the intention that the money or object be transferred at that time, and at that place. "Solicit" or "Soliciting" shall include using the spoken, written, or printed word, bodily gestures, signs, or other means of communication with the purpose of obtaining an immediate donation of money or other thing of value the same as begging or panhandling and also include the offer to immediately exchange and/or sell any goods or services.

"Aggressive manner" shall mean:

(1) approaching or speaking to a person, or following a person before, during or after soliciting if that conduct is intended or is likely to cause a reasonable person to fear bodily harm to oneself or to another, or damage to or loss of property or otherwise to be intimidated into giving money or other thing of value;

(2) continuing to solicit from a person after the person has given a negative response to such soliciting;

(3) intentionally touching or causing physical contact with another person or their property without that person's consent in the course of soliciting;

(4) intentionally blocking or interfering with the safe or free passage of a pedestrian or vehicle by any means, including unreasonably causing a pedestrian or vehicle operator to take evasive action to avoid physical contact;

(5) using violent or threatening language and/or gestures toward a person being solicited, or toward their property, which are likely to provoke an immediate violent reaction from the person being solicited;

(6) following the person being solicited, with the intent of asking that person for money or other things of value;

(7) soliciting money from anyone who is waiting in line for tickets, for entry to a building or for any other purpose;

(8) soliciting in a manner with conduct, words or gestures intended or likely to cause a reasonable person to fear immediate bodily harm, danger or damage to or loss of property or otherwise be intimidated into giving money or any other thing of value;

(9) begging in a group of two or more persons in an intimidating fashion;

(10) soliciting any person within 20 feet of the entrance to, or parking area of, any bank, automated teller machine, automated teller machine facility, check cashing business, mass transportation facility, mass transportation stop, public restroom, pay telephone or theatre or place of public assembly, or of any outdoor seating area of any cafe, restaurant or other business;

(11) soliciting any person in public after dark, which shall mean the time from one-half hour before sunset to one-half hour after sunrise.

"Automated teller machine" shall mean a device, linked to a financial institution's account records, which is able to carry out transactions, including, but not limited to: account transfers, deposits, cash withdrawals, balance inquiries, and mortgage and loan payments which are made available to banking customers.

"Automated Teller Machine Facility" shall mean the area comprised of one or more automatic teller machines, and any adjacent space which is made available to banking customers during and after regular banking hours.

"Public place" shall mean a place to which the public has access, including, but not limited to: a place which a governmental entity has title, any street open to public use, bridge, sidewalk, walkway, driveway, parking lot, plaza, transportation facility, school, park, or playground, and the doorways and entrances to building and dwellings.

"*Bank"* shall mean the same as defined in M.G.L. c. 167, § 1.

"*Check cashing business*" shall mean the same as that defined by M.G.L. c. 169A, § 1.

(d) *Prohibited Activity.*

It shall be unlawful for any person to beg, panhandle or solicit any other person in an aggressive manner. Any police officer observing any person violating this provision may request or order such person to cease and desist in such behavior and may arrest such person if they fail to comply with such request or order.

(e) *Penalty*

Any person found guilty of violating this subsection (d) of this ordinance shall be punished by a fine not to exceed $50.00 for each such day during which the violation is committed, continued or permitted, or, that the Court may impose such community service as it shall determine in lieu of a monetary fine.

* * *

Chapter Thirteen - Traffic & Parking Of Motor Vehicles

* * *

Pedestrian Control Regulations

§ 77. Crossing Ways or Roadways

(a) Pedestrians shall obey the directions of police officers directing traffic. Whenever there is an officer directing traffic, or whenever there is a traffic control signal within three hundred feet of a pedestrian, no such pedestrian shall cross a way or roadway except at such controlled location. Pedestrian crossings shall be made within the limits of marked crosswalk and as hereinafter provided. **No person shall, after having been given due notice warning by a police officer, persist in walking or standing on any traffic island or upon the roadway of any street or highway, except for the purpose of crossing the roadway at an intersection or designated crosswalk or for the purpose of entering or exiting a vehicle at the curb or for some other lawful purpose. Any police officer observing any person violating this provision may request or order such person the remove themselves from such roadway or traffic island and may arrest such person if they fail to comply with such request or order. ***

(b) It shall be unlawful for any person to actuate a pedestrian control signal or to enter a crosswalk unless a crossing of the roadway is intended.

***Amended January 29, 2013 - 9840**

Amendment 9839

AN ORDINANCE PROHIBITING AGGRESSIVE BEGGING, SOLICITING AND PANHANDLING IN PUBLIC PLACES

Be it ordained by the city council of the city of Worcester, as follows:

Section 1. Chapter Nine of the Revised Ordinances of 2008 is hereby amended by inserting a new section sixteen as follows:

§ 16. Aggressive Begging, Soliciting and Panhandling

(a) *Declaration of Findings and Policy.*

The city of Worcester, acting by and through its City Council, hereby makes the following findings:

(1) The City of Worcester has a duty to protect the rights of all people to exercise their First Amendment rights safely. The City of Worcester has a compelling governmental interest in imposing certain reasonable time, place and manner regulations whenever potential First Amendment activities such as begging, solicitation and panhandling occur on streets, highways, sidewalks, walkways, plazas, and other public venues within the City;

(2) This ordinance is not intended to limit any persons from exercising their constitutional right to solicit funds, picket, protest or engage in constitutionally protected activities. The provisions of this division are expressly established to most narrowly tailor any such restrictions to protect the First Amendment rights of all people within the City as well as the rights of non-participating people and their property, and to ensure the rights and safety of all people and/or property to the extent possible;

(3) Persons approached by individuals asking for money, objects or other things of any value are particularly vulnerable to real, apparent or perceived coercion when such request is accompanied by or immediately followed or preceded with aggressive behavior such as:

(A) continuing to beg or solicit from a person after the person has given a negative response to such solicitation;

(B) touching another person or their property in the course of begging or soliciting without that person's consent;

(C) blocking or interfering with the safe or free passage of a pedestrian or vehicle by any means;

(D) using violent or threatening gestures which are likely to provoke an immediate violent reaction from the person who is the subject of the solicitation or request for money;

(E) closely following behind, ahead or alongside a person who has been solicited or asked for money after that person has given a negative response to such solicitation;

(F) using profane, threatening, or abusive language, either during the solicitation or begging or following a refusal;

(G) begging or soliciting money from anyone who is waiting in line for tickets, entering a public building or riding on public transportation;

(H) begging or soliciting in a manner with conduct, words or gestures intended or likely to cause a reasonable person to fear imminent bodily harm, danger or damage to or loss of property or otherwise to be intimidated into giving money or any other thing of value; or

(I) begging or soliciting in a group of two or more persons in an intimidating fashion.

(4) The City desires to respect a person's potential right to solicit, beg or panhandle while simultaneously protecting another's right to not be unduly coerced.

(5) The City further finds that aggressive soliciting, begging or panhandling of persons within 20 feet of any outdoor seating area of any cafe, restaurant or other business, bank, automated teller machine, automated teller machine facility, check cashing business, mass transportation facility, mass transportation stop, or pay telephone also subjects people being solicited to improper and undue influence and/or fear and should not be allowed.

(6) Persons approaching other individuals in an aggressive manner asking for money, objects or other things of any value after dark in public places inspire alarm and fear, which coupled with the inherent difficulty of establishing identity should not be allowed.

(b) *Purpose and Intent.*

The public purpose of this ordinance is to protect the rights of all peoples to exercise their First Amendment rights as well as the people and/or property of those who chose to be non-participating.

(c) *Definitions.*

As used in this section, the following words and terms shall have the meanings indicated. The meaning of all other terms and words not specifically defined shall be their generally accepted definition:

"Beg," "begging" or *"panhandling"* shall be synonymous and shall mean asking for money or objects of value, with the intention that the money or object be transferred at that time, and at that place. "Solicit" or "Soliciting" shall include using the spoken, written, or printed word, bodily gestures, signs, or other means of communication with the purpose of obtaining an immediate donation of money or other thing of value the same as begging or panhandling and also include the offer to immediately exchange and/or sell any goods or services.

"Aggressive manner" shall mean:

(1) approaching or speaking to a person, or following a person before, during or after soliciting if that conduct is intended or is likely to cause a reasonable person to fear bodily harm to oneself or to another, or damage to or loss of property or otherwise to be intimidated into giving money or other thing of value;

(2) continuing to solicit from a person after the person has given a negative response to such soliciting;

(3) intentionally touching or causing physical contact with another person or their property without that person's consent in the course of soliciting;

(4) intentionally blocking or interfering with the safe or free passage of a pedestrian or vehicle by any means, including unreasonably causing a pedestrian or vehicle operator to take evasive action to avoid physical contact;

(5) using violent or threatening language and/or gestures toward a person being solicited, or toward their property, which are likely to provoke an immediate violent reaction from the person being solicited;

(6) following the person being solicited, with the intent of asking that person for money or other things of value;

(7) soliciting money from anyone who is waiting in line for tickets, for entry to a building or for any other purpose;

(8) soliciting in a manner with conduct, words or gestures intended or likely to cause a reasonable person to fear immediate bodily harm, danger or damage to or loss of property or otherwise be intimidated into giving money or any other thing of value;

(9) begging in a group of two or more persons in an intimidating fashion;

(10) soliciting any person within 20 feet of the entrance to, or parking area of, any bank, automated teller machine, automated teller machine facility, check cashing business, mass transportation facility, mass transportation stop, public restroom, pay telephone or theatre or place of public assembly, or of any outdoor seating area of any cafe, restaurant or other business;

(11) soliciting any person in public after dark, which shall mean the time from one-half hour before sunset to one-half hour after sunrise.

"Automated teller machine" shall mean a device, linked to a financial institution's account records, which is able to carry out transactions, including, but not limited to: account transfers, deposits, cash withdrawals, balance inquiries, and mortgage and loan payments which are made available to banking customers.

"Automated Teller Machine Facility" shall mean the area comprised of one or more automatic teller machines, and any adjacent space which is made available to banking customers during and after regular banking hours.

"Public place" shall mean a place to which the public has access, including, but not limited to: a place which a governmental entity has title, any street open to public use, bridge, sidewalk, walkway, driveway, parking lot, plaza, transportation facility, school, park, or playground, and the doorways and entrances to building and dwellings.

"*Bank"* shall mean the same as defined in M.G.L. c. 167, § 1.

"*Check cashing business*" shall mean the same as that defined by M.G.L. c. 169A, § 1.

(d) *Prohibited Activity.*

It shall be unlawful for any person to beg, panhandle or solicit any other person in an aggressive manner. Any police officer observing any person violating this provision may request or order such person to cease and desist in such behavior and may arrest such person if they fail to comply with such request or order.

(e) *Penalty*

Any person found guilty of violating this subsection (d) of this ordinance shall be punished by a fine not to exceed $50.00 for each such day during which the violation is committed, continued or permitted, or, that the Court may impose such community service as it shall determine in lieu of a monetary fine.

Section 2. Chapter 15, Section 2(b) of the Revised Ordinances of 2008 is hereby amended by inserting a new subsection (32) as follows:

(32) Aggressive Begging, Soliciting and Panhandling Ordinance, R.O. c. 9, § 16(d)

Enforcing Person	Chief of Police
Penalty:	$50.00

In City Council January 29, 2013
Passed to be ordained by a yea and nay vote of Nine Yeas and Two Nays

A Copy. Attest: **David J. Rushford, Clerk**
David J. Rushford
City Clerk

Amendment 9840

AN ORDINANCE RELATIVE TO PEDESTRIAN SAFETY

Be it ordained by the City Council of the City of Worcester, as follows:

Section 1. Chapter Thirteen of the Revised Ordinances of 2008 is hereby amended by inserting a fourth sentence in § 77(a) thereof as follows:

> No person shall, after having been given due notice warning by a police officer, persist in walking or standing on any traffic island or upon the roadway of any street or highway, except for the purpose of crossing the roadway at an intersection or designated crosswalk or for the purpose of entering or exiting a vehicle at the curb or for some other lawful purpose. Any police officer observing any person violating this provision may request or order such person the remove themselves from such roadway or traffic island and may arrest such person if they fail to comply with such request or order.

Section 2. Chapter Thirteen of the Revised Ordinances of 2008 is hereby amended by deleting the definition of "traffic island" in section one thereof and inserting the following as the definition of "traffic island:"

> *traffic island* - any area or space within a roadway which is set aside by the use of materials or paint for the purpose of separating or controlling the flow of traffic and which is not constructed or intended for use by vehicular traffic or by pedestrians, unless such area or space is marked or otherwise designated as a crosswalk.

Section 3. Chapter Eleven of the Revised Ordinances of 2008 is hereby amended by deleting section 13A concerning Tag Day Permits.

Section 4. Chapter 15, Section 2(b), of the Revised Ordinances of 2008 is hereby amended by inserting the following new subsection (31) as follows:

(31) Pedestrian Roadway/Traffic Island Safety Violation, R.O. c. 13, § 77

Enforcing Persons:	Police Chief
Penalty:	$50.00

In City Council January 29, 2013
Passed to be ordained by a yea and nay vote of Nine Yeas and Two Nays

A Copy. Attest: **David J. Rushford, Clerk**
David J. Rushford
City Clerk