UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

KENNETH MCLAUGHLIN and JOSHUA WOOD,

Plaintiffs,

v.

City of LOWELL,

Defendant.

Civil Action No. 1:14-cv-10270-DPW

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Lowell Code of Ordinances § 222.15 ("the Ordinance") regulates one specific category of speech—"the solicitation of any item of value, monetary or otherwise, made by a person, requesting an immediate donation of money or exchange of [services]"—which the law defines as "panhandling." The Ordinance includes two distinct regulations. First, it criminalizes all vocal panhandling in the Downtown Lowell Historic District, an area that covers most of downtown Lowell (the "Downtown Panhandling Ban"). Second, it criminalizes both vocal and non-vocal panhandling conducted in an "aggressive" manner, which the law defines broadly to include any panhandling, no matter how peaceful or passive (including mere signholding), *e.g.*, within a 20-foot buffer zone surrounding numerous public spaces (the "Aggressive Panhandling Ban"). On the face of the Ordinance, the Downtown Panhandling Ban does not criminalize any speech besides "panhandling" in downtown Lowell, nor does the Aggressive Panhandling Ban criminalize any purportedly aggressive conduct unless it is accompanied by speech "requesting an immediate donation of money or exchange of [services]."

Under Supreme Court precedent, including most notably the Court's recent decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), the Ordinance is subject to, and fails, the strict scrutiny applied to content-based laws under the First Amendment. That the Ordinance is a content-based law is not even a close question. To the extent there previously had been any doubt, *Reed* confirms that a law which "on its face" regulates speech "by particular subject matter"—which the Ordinance plainly does—is "obvious[ly]" content-based and subject to strict scrutiny. *Id.* at 2227. Following *Reed*, the Supreme Court granted a petition for certiorari in *Thayer v. City of Worcester* and vacated the First Circuit's prior decision holding that Worcester's "aggressive panhandling" ban was content-neutral. 135 S. Ct. 2887 (2015). Going

a step further, a panel of the Seventh Circuit just granted rehearing on its own pre-*Reed* decision holding that an anti-panhandling law was content-neutral, concluding post-*Reed* that the law was content-based and striking it down on its face. *See Norton v. City of Springfield*, ___ F. App'x ____, 2015 WL 4714073, at *2 (7th Cir. Aug. 7, 2015). Lowell previously relied on the abrogated decisions in *Thayer* and *Norton* to argue that its Ordinance is content-neutral; now, in light of *Reed* and the most recent *Norton* decision, there can be no doubt that the Ordinance is content-based and subject to strict scrutiny.

A holding that the Ordinance is content-based effectively compels entry of a judgment in Plaintiffs' favor. Strict scrutiny requires that a law be the "least restrictive means of achieving a compelling [government] interest," *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014), a description that Lowell never has argued the Ordinance matches. Nor could it. The City's asserted interests justifying the Downtown Panhandling Ban—boosting tourism and supporting business—are not among the few interests deemed compelling for First Amendment purposes. Indeed, allowing a municipal government to ban even peaceful and polite speech on public sidewalks downtown, simply because it might turn off tourists or shoppers, is obviously anathema under the First Amendment. Nor is the Downtown Panhandling Ban the least speech-restrictive means of advancing tourism and business interests. Hundreds if not thousands of cities and towns across America have an interest in their downtown business and historic districts, but hardly any have sought to advance that interest by banning peaceful charitable solicitation (and those few, as in *Norton*, are facing First Amendment challenges).

As for the Aggressive Panhandling Ban, even accepting that public safety is a compelling interest, the Aggressive Panhandling Ban criminalizes speech that poses no public safety risk and ignores conduct that does. The Ordinance is both suspiciously underinclusive—it bans

"aggressive" conduct only if accompanied by certain solicitations, but not any other speech—and grossly overinclusive. Indeed, the City's Mayor, who voted for the Ban as a City Councilor, seemed surprised by the breadth of the Aggressive Panhandling Ban, first insisting that it did not prohibit passive signholding within the 20-foot buffer zones, and then—when confronted with the law's text—insisting that the City Council never actually intended to ban mere signholding. Whatever it means for a law to be the narrowest means available of advancing a compelling government interest, it does not include a law whose breadth is unknown to, and disavowed by, the very politicians who enacted it. Moreover, there are many less speech-restrictive means of addressing truly aggressive panhandling, such as increased enforcement of generic criminal laws against assault and trespassing, to which the City can turn to address truly "aggressive" behavior.

Based on the face of the Ordinance and the undisputed facts, it is indisputable that the Ordinance is a content-based law that cannot survive strict scrutiny. Plaintiffs therefore respectfully request that the Court grant them summary judgment on their claims under the First Amendment, declare the Ordinance to be an unconstitutional infringement of First Amendment freedoms on its face, and permanently enjoin the Ordinance's enforcement. It is time to eliminate the chilling effect the existence of this law has been casting on Lowell's poorest, including Plaintiffs, as they contemplate asking their fellow citizens for simple charity.[1]

SUMMARY OF MATERIAL UNDISPUTED FACTS

I. The Ordinance

Because this case largely turns on the face of the Ordinance, it is important to set out the Ordinance's text, as amended, simply and in one place.

[1] Although Plaintiffs are moving for summary judgment only on their First Amendment claim, they reserve their right to press their remaining claims at trial or in opposition to the City's expected motion for summary judgment.

Both the Downtown Panhandling Ban and the Aggressive Panhandling Ban reference the same definition of "panhandling." The Ordinance defines panhandling as:

> [t]he solicitation of any item of value, monetary or otherwise, made by a person, requesting an immediate donation or exchange of [services]; or any person attempting to sell an item for an amount far exceeding its value, or an item which is already offered free of charge to the general public, and under circumstances a reasonable person would understand that the purchase is in substance a donation.

Plaintiffs' Statement of Undisputed Material Facts ("SUMF") ¶ 6, Exhibit 4.

The Downtown Panhandling Ban states, simply, that "[p]anhandling is prohibited within the Downtown Lowell Historic District." SUMF ¶ 7, Exhibit 4. The Downtown Lowell Historic District, as defined, includes approximately four hundred acres in central Lowell, covering much of the City's non-residential area downtown. SUMF ¶ 8. Among the areas included are the sidewalks outside City Hall, the District Court House, and Middlesex Community College. SUMF ¶ 8.

As originally enacted, the Downtown Panhandling Ban applied only to those soliciting charitable donations on their own behalf; it carved out charitable solicitation by organized charities on behalf of third parties. SUMF ¶ 11, Exhibit 8. Such solicitation historically has included, for instance, fundraising campaigns by the Salvation Army and firefighter boot drives. SUMF ¶ 11. After this lawsuit was threatened, the City amended the law to remove the charitable organization exemption. SUMF ¶ 11, Exhibit 10.

Another amendment limited the Downtown Panhandling Ban to vocal solicitation by adding a limited exemption for silent signholding or playing music with a sign indicating that donations are sought. SUMF ¶ 7, Exhibit 4, Exhibit 11 ("the act of passively standing or sitting or performing music, singing or other street performance with a sign or other indication that a donation is being sought, without any vocal request other than in response to an inquiry by

another person."). A panhandler must be given a warning before he can be arrested for violating the Downtown Panhandling Ban. SUMF ¶ 7, Exhibit 4.

The Aggressive Panhandling Ban states that "[p]anhandling in an aggressive manner is prohibited." SUMF ¶ 13, Exhibit 4. It defines "[a]ggressive manner" to include *all* "[p]anhandling 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 theater, or of any outdoor seating area of any cafe, restaurant or other business." *Id.* It also prohibits, among other things, "[c]ontinuing to engage in panhandling toward a person after the person has given a negative response to such soliciting," "[f]ollowing a person with the intent of asking that person for money or other things of value," "[p]anhandling in a group of two or more persons in an intimidating fashion," and "[u]sing violent or threatening language and/or gestures toward a person or toward their property, which are likely to provoke an immediate violent reaction from that person." *Id.* The police are authorized to arrest panhandlers violating the Aggressive Panhandling Ban without giving them a warning. *Id.* The Aggressive Panhandling Ban originally applied only to the Downtown Lowell Historic District; a subsequent amendment expanded its coverage citywide. SUMF ¶ 14, Exhibit 4, Exhibit 11.

The Aggressive Panhandling Ban, unlike the Downtown Panhandling Ban, does not contain an exception for signholding; accordingly, any solicitation, even passive signholding, within the 20-foot buffer zones is a crime. At his Rule 30(b)(6) deposition on behalf of the City, Lowell's Mayor at first insisted that the signholding exemption applies to the Aggressive Panhandling Ban's buffer zones. SUMF ¶ 17, Exhibit 3. When shown that, on the face of the Ordinance, the signholding exemption applies only to the Downtown Panhandling Ban, the

Mayor testified that this was not the City Council's intent. *Id.* He continued to insist that the City Council did not intend to criminalize signholding in the buffer zones, and had no interest in doing so, even when redirected on this point by the City's own lawyer. *Id.*

II. The City's Justifications for the Ordinance

On July 9, 2013, the Lowell City Council voted to ask the City Manager to review possible ordinances or laws in the City regarding panhandling "and develop a plan to prohibit and enforce same." SUMF ¶ 5, Exhibit 5, Exhibit 6. On October 10, 2013, the City's Law Department responded to this request with a letter to the City Council. SUMF ¶ 5, Exhibit 7. The letter recognized the "First Amendment implications" of panhandling, but suggested that a ban limited to the downtown area could be justified based on the City's interest in "tourism." *Id.* At the October 15, 2013, City Council meeting the Councilors voted to have the Law Department proceed with drafting an ordinance to ban panhandling in downtown Lowell. The Law Department drafted such an ordinance, which following a public hearing was adopted on November 12, 2013. SUMF ¶ 5, Exhibit 8, Exhibit 9.

The Ordinance's preamble explained the Downtown Panhandling Ban by stating that "[t]ourism is one of Lowell's most important economic industries," and that Lowell "has a compelling interest in providing a safe, pleasant environment" for tourists, and in eliminating what it described as "nuisance activity" within Downtown Lowell. SUMF ¶ 9, Exhibit 8.

Several weeks after the Ordinance was adopted and following plaintiffs' threats of litigation, the City amended the Ordinance to eliminate the charitable organization exemption. SUMF ¶ 11, Exhibit 10. The amendment did not add to the Ordinance's preamble to explain why the City newly thought it necessary to ban organized charities from soliciting charity downtown. At their depositions, the City's witnesses conceded that charitable solicitation by organized charities does not deter tourism or business. SUMF ¶ 12, Exhibit 3. The mayor

conceded that the city has no interest in banning solicitation by charities in downtown Lowell. *Id.* He also stated that the city's Law Department drafted and proposed the amendment without being asked to do so. *Id.*

The amendment adding the Aggressive Panhandling Ban to the Ordinance explained that it was needed because people from whom money is requested are "vulnerable" to "coercion" when the request is "accompanied by or immediately followed or preceded by aggressive behavior." SUMF ¶ 15, Exhibit 10. The preamble also stated that "[a]ggressive soliciting, begging or panhandling of persons nearby 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 subjects the people being solicited to improper and undue influence and/or fear[.]" *Id.* Finally, the preamble noted that "[i]ncidents of panhandling within the City have given rise to numerous citizen complaints. During the first eleven months of 2013, the Lowell Police Department received 237 calls related to panhandling. Some of these calls related to incidents involving aggressive behavior[.]" *Id.*

ARGUMENT

Summary judgment is appropriate when "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Once the moving party discharges its "initial burden of informing the trial court of the basis for [its] motion and identifying the portions of [the record] that demonstrate the absence of any genuine issue of material fact," the burden "shifts to the nonmoving party, who must, with respect to each issue on which [it] would bear the burden of proof at trial, demonstrate that a trier of fact could reasonably resolve that issue in [its] favor." *Borges ex rel. S.M.B.W. v. Serrano-Isern,* 605 F.3d

1, 5 (1st Cir. 2010). When "the summary judgment target bears the ultimate burden of proof" as the City does here, it "cannot rely on an absence of competent evidence, but must affirmatively point to specific facts that demonstrate the existence of an authentic dispute." *McCarthy v. Nw. Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995).

I. Standard of Review

Solicitation for charitable donations is expressive activity protected by the First Amendment. *See, e.g., Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980); *Loper v. N.Y.C. Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993). Courts apply "exacting scrutiny to laws restricting the solicitation of contributions to charity," as such "noncommercial solicitation is characteristically intertwined with informative and perhaps persuasive speech." *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1664-65 (2015) (citation omitted) (internal quotation marks omitted).

The Ordinance bans panhandling on streets and sidewalks throughout Lowell, which are "the archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). In public fora, the "most exacting" form of First Amendment scrutiny applies to laws that are "content-based." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994).

In *Reed*, the Supreme Court resolved a circuit split by confirming that a law is necessarily content-based if it "'on its face' draws distinctions based on the message a speaker conveys." *Reed*, 135 S. Ct. at 2227. A regulation is "obvious[ly]" content-based if it "defin[es] regulated speech by particular subject matter"; but "more subtle" regulations, "defining regulated speech by its function or purpose," are also content-based and subject to strict scrutiny. *Id.* When a law is content-based on its face, the government's motivation for the law is irrelevant; it must pass strict scrutiny to survive. *See id.* at 2228 ("A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack

of animus toward the ideas contained in the regulated speech." (citation omitted) (internal quotation marks omitted)); *see also City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (ban on distribution of "'commercial handbills,' but not 'newspapers,'" was content-based "[r]egardless of the *mens rea* of the city" or its "'justification' for the regulation").

Laws subject to strict scrutiny are "presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and for good reason: the government must show that the law is "the least restrictive means of achieving a compelling [government] interest." *McCullen*, 134 S. Ct. at 2530 (citing *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000)). Governments defending regulations subject to strict scrutiny "face[] a heavy burden," *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987), as it is the "rare case[] in which a speech restriction withstands strict scrutiny." *Williams-Yulee*, 135 S. Ct. at 1666; *see also Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.").

II. The Ordinance Is Content-Based On Its Face.

There can be no doubt that Lowell's Ordinance is "obviously" content-based under the standards confirmed by *Reed* because, "on its face," the Ordinance "defin[es] regulated speech by particular subject matter." 135 S. Ct. at 2227. The Ordinance applies to one category and one category only of speech: solicitations for immediate charitable donations or transactions that, in substance, are charitable donations. *See supra* at 3-5. In downtown Lowell, and in the numerous buffer zones established by the Aggressive Panhandling Ban, one can approach tourists and shoppers and harangue them about politics, or religion, or commercial transactions, or any other topic under the sun. One also can approach tourists and shoppers and berate them *not* to give to panhandlers. Only one "particular subject matter"—requests for immediate charitable

donations—is singled out for criminal sanction, and so "obviously" the law is content-based on its face.

A holding that the Ordinance is content-based not only is consistent with the Supreme Court's reasoning in *Reed*, it also is consistent with the Supreme Court's resolution of the petition for certiorari in *Thayer* and recent decisions in other federal Courts of Appeals.

Plaintiffs' petition for certiorari in *Thayer* was pending when *Reed* was decided. As the Court will recall, the First Circuit had concluded that Worcester's aggressive panhandling law, although targeted on its face only at certain solicitations (just like Lowell's Ordinance), was nonetheless content-neutral because (the court reasoned) Worcester's city government was not motivated by "animus" against the homeless. *See Thayer v. City of Worcester*, 755 F.3d 60, 67-71 (1st Cir. 2014). The *Thayer* plaintiffs filed their petition for certiorari challenging (*inter alia*) the First Circuit's analysis of content specificity and specifically recommended that the Supreme Court delay consideration of the petition pending the outcome of *Reed*. Agreeing with that approach, the Supreme Court in fact "held" *Thayer* for several months while it was considering *Reed*. When *Reed* finally was decided, the Supreme Court quickly granted the *Thayer* plaintiffs' petition, vacated the First Circuit's decision, and remanded for reconsideration in light of *Reed*. 135 S. Ct. 2887. The Supreme Court's decision to grant, vacate, and remand *Thayer* was no ministerial action, but represented the Supreme Court's conclusion that there was "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and . . . such a redetermination may determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). The Supreme Court, in other words, was giving the First Circuit a chance to fix its mistake. The First Circuit did so, vacating Judge Hillman's order denying plaintiffs' motion for preliminary

injunction and remanding for further proceedings in conjunction with pending motions for summary judgment. *See Thayer v. City of Worcester*, No. 13-2355 (1st Cir. July 14, 2015).

Likewise, in *Norton*, a panel of the Seventh Circuit granted rehearing of its own pre-*Reed* decision finding an ordinance similar to Lowell's to be content-neutral, fixing its own mistake by holding that the law was content-based under *Reed*. *Compare Norton*, 2015 WL 4714073, *with Norton v. City of Springfield*, 768 F.3d 713 (7th Cir. 2014). The court observed that, under *Reed*, "[a]ny law distinguishing one kind of speech from another by reference to its meaning" is subject to strict scrutiny, and holding that Springfield's statute was content-based because it "barr[ed] oral requests for money now but [did] not regulat[e] requests for money later." 2015 WL 4714073, at *1, 2. Because Springfield did not argue that its law satisfied strict scrutiny, the Seventh Circuit entered a preliminary injunction. *See id.* at *2. As a concurring opinion made clear, this result was compelled under *Reed* even though the law does not discriminate among solicitors; its discrimination against solicitors as a group is enough to trigger strict scrutiny. *See id.* at *3 (Manion, J., concurring).

The Fourth Circuit also revised its standard for determining content neutrality based on *Reed* in *Cahaly v. Larosa*, ___ F.3d ____, 2015 WL 4646922 (4th Cir. Aug. 6, 2015). The court held that whereas under pre-*Reed* Fourth Circuit law, the "government's purpose" was always controlling, under *Reed* a statute that "makes content distinctions on its face" always is subject to strict scrutiny, and the government's purpose is therefore "irrelevant." *Id.* at *4 (citation omitted) (internal quotation marks omitted). The court therefore applied strict scrutiny to an anti-robocall statute that "applies to calls with a consumer or political message but does not reach calls made for any other purpose." *Id.*

Even pre-*Reed*, the Sixth Circuit recently concluded that laws discriminating against charitable solicitation must be subjected to strict scrutiny. *See Planet Aid v. City of St. Johns*, 782 F.3d 318 (6th Cir. 2015). In that case, the city had enacted an ordinance banning all "donation box[es]," which it defined as "an outdoor, unattended receptacle designed with a door, slot, or other opening that is intended to accept *donated* goods or items." *Id.* at 322 (emphasis added) (internal quotation marks and brackets omitted). The court held that this ordinance "clearly regulates protected speech on the basis of its content": it "does not ban or regulate all unattended, outdoor receptacles," but instead "bans only those unattended, outdoor receptacles with an expressive message on a particular topic—charitable solicitation and giving." *Id.* at 328.

Lowell's Ordinance, including both its Downtown Panhandling Ban and Aggressive Panhandling Ban, criminalizes only solicitations for immediate donations while leaving all other speech, including all other solicitations, unregulated. Under *Reed*, and consistent with court of appeals decisions discussed above, the Ordinance is facially content-based and therefore subject to strict scrutiny.

III. Neither The Downtown Panhandling Ban Nor The Aggressive Panhandling Ban Can Survive Strict Scrutiny.

The City never has argued that the Ordinance can survive strict scrutiny; it has argued only that the Ordinance is content-neutral and survives intermediate scrutiny. *See, e.g.*, Defendant City of Lowell's Opposition to Plaintiffs' Motion for Preliminary Injunction, ECF No. 30. That is for good reason: the Downtown Panhandling Ban is not justified by any compelling government interest at all, and neither the Downtown Panhandling Ban nor the Aggressive Panhandling Ban is the "*least* restrictive" means of achieving the City's asserted interests.

A. The City's Asserted Interests Supporting The Downtown Panhandling Ban Are Not Compelling.

On its face, the Ordinance asserts two related interests in support of the Downtown Panhandling Ban: ensuring a pleasant environment for tourists, and responding to complaints from business owners who think that panhandling annoys their customers. *See supra* at 6-7. The City's witnesses identified no different interests supporting the Downtown Panhandling Ban at their depositions. SUMF ¶ 10.

As a matter of law, these interests are not compelling. The City's interests in promoting tourism, boosting local business, and protecting citizens and tourists from uncomfortable speech in public do not rise to the level of compelling government interests—a sparingly used category reserved for government objectives of "the highest order." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (identifying combating terrorism as a compelling interest). The Supreme Court and numerous other courts have recognized that in traditional public fora, such as the roadways and sidewalks in Lowell's downtown, the actual compelling government interest is in ensuring a free flow of ideas, not shielding listeners from unwelcome speech. As the Supreme Court recently explained in *McCullen*:

> With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment's purpose to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, this aspect of traditional public fora is a virtue, not a vice.

134 S. Ct. at 2529 (citation omitted) (internal quotation marks omitted). This principle is crystalized in the general rule that "in such a forum the government may not 'selectively . . . shield the public from some kinds of speech on the ground that they are more offensive than others.'" *Id.* (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975); *see also Boos*

v. Barry, 485 U.S. 312, 322 (1988) ("[C]itizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." (citations omitted) (internal quotation marks omitted)).

Thus, courts repeatedly have recognized, including in striking down anti-panhandling laws, that protecting those in public fora from the discomfort of interacting with solicitors or other speakers is not a legitimate government purpose. As one federal district court bluntly put it, "[b]usiness owners and residents simply not liking panhandlers in acknowledged public areas does not rise to a significant governmental interest." *ACLU of Idaho, Inc. v. City of Boise*, 998 F. Supp. 2d 908, 917 (D. Idaho 2014). Other decisions are to similar effect. *See, e.g.*, *Benefit v. City of Cambridge*, 679 N.E.2d 184, 190 (Mass. 1997) (in a challenge to an anti-panhandling law, explaining that "[a] listener's annoyance or offense at a particular type of communicative activity does not provide a basis for a law burdening that activity."); *State v. Boehler*, 262 P.3d 637, 644 (Ariz. App. 2011) (in a challenge to an anti-panhandling law, observing that "[o]ur constitution does not permit government to restrict speech in a public forum merely because the speech may make listeners uncomfortable."); *see also, e.g., Bays v. City of Fairborn*, 668 F.3d 814, 824 (6th Cir. 2012) (organizers of a city's "sweet corn festival" could not tell religious preachers to stop approaching festival attendees to proselytize; "The 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." (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971))); *Berger v. City of Seattle*, 569 F.3d 1029, 1054-55 (9th Cir. 2009) (stating "we 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," and describing the implications of the city's argument to the contrary as "startling").

This Court therefore should hold that the Downtown Panhandling Ban fails strict scrutiny because it does not advance a compelling government interest.

B. The Downtown Panhandling Ban Is Not The Least Restrictive Means To Achieve The City's Asserted Interests.

Even if promoting tourism and business in downtown Lowell by shielding them from annoying speech were compelling government interests, the Downtown Panhandling Ban is not the means *least* restrictive of free speech available to achieve those interests, nor is it even "narrowly tailored" to those interests. The Downtown Panhandling Ban prohibits speech the City admits it has no interest in regulating, speech that has no demonstrated impact on tourists and shoppers, and speech that some tourists and shoppers actually might be interested in hearing.

As an initial matter, it scarcely can be said that a city or town that wishes to advance interests in tourism and downtown business has no choice but to enact a ban on all vocal solicitation for charity. Lowell is not the only city with areas it considers historically significant or that wants to promote downtown economic development. Yet cities like Atlanta, Boston, Chicago, Philadelphia, San Francisco, and Washington, D.C. do not have blanket bans on vocal solicitation for charity.[2] Lowell is one of only a handful of cities to ban peaceful solicitation in an entire downtown area in the name of tourism and business. Another is Springfield, Illinois, whose downtown ban was just struck down in *Norton*; another is Tampa, Florida, where a challenge is pending. None of these cities (including, to date, Lowell) ever have offered an argument that their law is the narrowest means possible of advancing an interest in business and

[2] New York City passed a "total prohibition on begging in the city streets," but it was struck down by the Second Circuit years ago. *See Loper*, 999 F.2d at 705-06.

tourism; all have relied on an argument, now foreclosed by *Reed*, that strict scrutiny simply does not apply.

Moreover, the City admits that the Downtown Panhandling Ban prohibits speech the City has no interest in regulating. As but one example, the Downtown Panhandling Ban prohibits solicitation by charitable organizations, yet the Ordinance's preamble never explains why that prohibition was added as an amendment to the Ordinance and the City's mayor, testifying as a Rule 30(b)(6) witness, admitted that the City has no interest in prohibiting charitable organizations from soliciting donations. SUMF ¶ 12, Exhibit 3 ("Q. Do you think that the City has an interest in prohibiting charitable organizations from soliciting? A. No.").

The Downtown Panhandling Ban criminalizes vocal solicitation even if the solicitation is welcomed by its intended audience. This further evidences its unconstitutionality. *See Berger*, 569 F.3d at 1055 (even if city had interest in preventing unwelcome speech, law would still be overinclusive "because it prohibits *all* 'speech activities,' not just those that continue after the recipient of the speech has signaled a preference to be left alone"). Some people affirmatively desire to help those less fortunate, and have no objection to being approached politely and asked vocally for money. Mayor Elliott testified that he has donated money to panhandlers, explaining that "[y]ou want to help them out." SUMF ¶ 3, Exhibit 3.

The City also has not shown that laws targeting specific, problematic behavior would be insufficient to promote its tourism and business interests. Even under intermediate scrutiny, a government's inability to demonstrate that it cannot achieve its interests by enforcing generic criminal laws, or more narrowly tailored laws employed by other jurisdictions, is fatal to a law banning speech. *Cf. McCullen*, 134 S. Ct. at 2539 (to satisfy narrow tailoring under intermediate

scrutiny, government must show that it "seriously undertook to address the problem with less intrusive tools readily available to it"). That certainly also is true under strict scrutiny.

Finally, the City simply has no evidence concerning the extent to which even peaceful, vocal panhandling downtown has been depressing tourism and business, or the extent to which a ban on such panhandling would cause tourism and business to expand. The City is asking the Court to accept its pure speculation that panhandling is driving away tourism and business. SUMF ¶ 10. Such speculation is wholly insufficient to establish the narrow tailoring necessary for a law banning speech to survive strict scrutiny. *See, e.g.*, *Turner*, 512 U.S. at 664 (rather than "simply posit[ing] the existence of the disease sought to be cured," the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way" (citations omitted) (internal quotation marks omitted)).

C. The Aggressive Panhandling Ban Is Not The Least Restrictive Means To Achieve The City's Interest In Preventing Coercion.

With respect to the Aggressive Panhandling Ban, plaintiffs do not deny that a City has a compelling interest in, *e.g.*, prohibiting unwanted and offensive touching, whether by charitable solicitors or others. But the Ordinance is not limited to such truly "aggressive" conduct. Instead it criminalizes even peaceful solicitation for charity—including mere signholding within countless 20-foot buffer zones. And it approaches its subject is a discriminatory, content-based manner. The Aggressive Panhandling Ban, no less than the Downtown Panhandling Ban, cannot survive strict scrutiny.

The City asserts that the entire Aggressive Panhandling Ban is necessary to prevent "coercion" of the audience into donating. Even crediting that interest, the Aggressive Panhandling Ban is not the "least restrictive" means of advancing it. Other cities confront the

same purported threat of coercion from panhandling, but few prohibit so much speech as Lowell chose to criminalize. For instance, while Lowell's Aggressive Panhandling Ban applies to mere sign-holding, most jurisdictions with "aggressive panhandling" laws exempt sign-holding.[3] Likewise, even cities that have taken the drastic measure of adopting "no-panhandling" buffer zones have done so on a much narrower basis than Lowell. Many of these laws apply to fewer locations than the Aggressive Panhandling Ban does, and the buffer zones they do create are much more limited in size (*e.g.*, Boston's ordinance creates a 10-foot buffer zone only around banks and ATMs).[4] Some cities prohibit only truly "aggressive" solicitation within the buffer zones, and do not prohibit (as does Lowell) even peaceful solicitation in the zones.[5] Lowell's

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[3] *See, e.g.*, Anchorage, Alaska, Code § 14.70.160 (2014); San Bruno, Cal., Mun. Code § 6.13.020 (2014); Santa Paula, Cal., Code tit. XIII, ch. 133 § 133.03 (2013); Visalia, Cal., Code tit. 9, ch. 9.34 (2014); Colorado Springs, Colo., Code § 9.2.111 (2014); Lakewood, Colo., Mun. Code § 9.50.130 (2012); Wilmington, Del., Code pt. II, ch. 36, art. VII, § 36-221 (2014); Fort Lauderdale, Fla., Code ch. 16, art. IV, § 16.82 (2014); Hollywood, Fla., Code tit. XI, ch. 122 § 122.51 (2014); Orlando, Fla., Code ch. 43, § 43.86 (2014); Sarasota, Fla., Code ch. 23, art. III, § 23-6 (2014); Tampa, Fla., Code ch. 14, art. II, div. 2, § 14-46 (2015); Honolulu, Haw., Code ch. 29, art. 17 (2014); Chi., Ill., Mun. Code § 8-4-025 (2013); Evanston, Ill., Code § 9-5-25 (2014); Indianapolis-Marion County, Ind., Code tit. II, art. I, § 407-102 (2012); Lawrence, Kan., Code ch. XIV, § 14-418 (2014); New Orleans, La., Code ch. 54, art. VI, div. 4, § 54-412 (2014); Minneapolis, Minn., Code tit. 15, ch. 385, § 385.60 (2014); St. Louis, Mo., Code tit. 15, div. IV, ch. 15.44.010 (2014); Billings, Mont., Code § 18-1001 (2014); Lincoln, Neb., Mun. Code tit. 9, ch. 9.20, § 9.20.080 (2014); Reno, Nev., Admin. Code § 8.30.010 (2014); Albuquerque, N.M., Code § 12-2-28 (2013); Cincinnati, Ohio, Code tit. IX, ch. 910, § 910-12 (2015); Allentown, Pa., Code pt. 7, § 730.09 (2014); Nashville, Tenn., Code § 11.12.090 (2014); *see also Gresham v. Peterson*, 225 F.3d 899, 907 (7th Cir. 2000) (relying in part on sign-holding exemption in an Indianapolis ordinance to reject a First Amendment challenge).

[4] *See* Boston, Mass., Mun. Code § 16-41.1, -41.2 (2014); *see also* D.C. Code § 22-2302 (2015) (establishing 10-foot buffer zones around any ATM); Chi., Ill., Mun. Code § 8-4-025 (2013) (establishing 10-foot buffer zones around any bus shelters, public transportation vehicles or facilities, "vehicle[s] which [are] parked or stopped on a public street or alley," sidewalk cafés or restaurants, filling stations, ATMs, banks, or currency exchanges); N.Y.C. Admin. Code § 10-136 (2014) (establishing 10-foot buffer zones around "any entrance or exit of any" ATM, bank or check cashing business).

[5] *See, e.g.*, Honolulu, Haw., Code ch. 29, art. 17 (2014); South Bend, Ind., Mun. Code § 13-26 (2014).

Aggressive Panhandling Ban cannot be the least restrictive means of promoting Lowell's interest when so many other cities have adopted less restrictive laws to promote the same interests.

Tellingly, Lowell's Mayor repeatedly conceded at his deposition, as a Rule 30(b)(6) witness on behalf of the City, that the Aggressive Panhandling Ban's designation of buffer zones in which even mere signholding is criminalized is *not* the least restrictive means of preventing coercion. As recounted above, Mayor Elliott did not even realize that signholding is criminalized within the buffer zones, and when shown that it is, he repeatedly testified that the City Council did not actually intend that result. *See supra* at 5-6. If the Aggressive Panhandling Ban criminalizes even more speech than the City Council thought necessary to restrict, it cannot possibly be the least restrictive means of preventing coercion.

Even putting aside the signholding issue and the breadth and number of buffer zones, the aggressive panhandling ban cannot survive strict scrutiny. First, the law remains extraordinarily overinclusive. As with the Downtown Panhandling Ban, the Aggressive Panhandling Ban criminalizes speech by organized charitable groups that the City admittedly has no interest in banning, and speech within the buffer zones that may be welcomed by the audience. *See supra* at 4, 6-7.

Second, Lowell has not demonstrated that enforcement of generic criminal laws that do not directly burden speech would be insufficient to advance its interests. *See McCullen*, 134 S. Ct. at 2538; *Loper*, 999 F.2d at 701-02, 705; *Reynolds v. Middleton*, 779 F.3d 222, 231-32 (4th Cir. 2015). Laws against disorderly conduct, trespassing, assault and battery, and obstruction of sidewalks are all available to address truly aggressive panhandling behavior; Lowell has provided no evidence that more vigorous enforcement of such content-neutral laws cannot

suffice to combat coercion, such that a ban on even peaceful solicitation in buffer zones is necessary.

Finally, the law is suspiciously underinclusive, casting serious doubt on the City's assertion that it is intended to advance an interest in public safety and preventing coercion. *See Williams-Yulee*, 135 S. Ct. at 1668 (noting that "underinclusiveness can raise doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint" (citation omitted) (internal quotation marks omitted)). If the City truly had a public safety concern with individuals engaged in the "aggressive" conduct subject to the Aggressive Panhandling Ban, then then Ordinance would not single out for criminalization only conduct accompanied by certain solicitations; it would ban the conduct in question (*e.g.*, an unwanted touching) even if accompanied by some other solicitation, or some other speech, or no speech at all. It did not, confirming the lack of fit between the Ordinance and the City's asserted interests.

CONCLUSION

For all of these reasons, Plaintiffs respectfully request that the Court grant their motion for summary judgment, declare the Ordinance facially unconstitutional, and enter an order permanently enjoining its enforcement.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Kevin P. Martin, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on August 28, 2015.

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