

November 4, 2008

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Dear Mr. Piccolo,

The following comments on proposed amendments to the City's Municipal Code are tendered on behalf of the Center for Justice. We appreciate the opportunity to review these amendments prior to their adoption and hope our comments will engender more discussion. In these ordinances, the City is largely attempting to curtail one type of speech – begging. The jurisprudence in this country has made it clear that begging is constitutionally protected speech and, although cities may regulate begging on public sidewalks or parks, these regulations must be consistent with First Amendment protections. For the reasons stated below, we believe the regulations as drafted may be subject to constitutional challenge and hope the City will consider some changes prior to taking these public.

#### General Legal Principles

The City has asked for comments regarding amendments to several municipal ordinances regulating activities in public fora such as sidewalks, parks, and roadways. In

general, ordinances which do not implicate constitutionally protected groups or interests may be valid where these are rationally related to a legitimate government interest. *Roulette v. Seattle*, 850 F. Supp. 1442 (W.D. Wash. 1994). These may nevertheless be deemed facially invalid and a violation of due process where they are either too vague or overbroad. The doctrine of void for vagueness has two prongs – first, the “crime” or harm must be defined with sufficient particularity that it puts citizens on notice concerning conduct they must avoid. *State v. Smith*, 111 Wn. 2d 1, 7 (1988) (statute unconstitutionally vague if “persons of common intelligence must necessarily guess at its meaning and differ as to its application”). Second, the offense must not be susceptible of arbitrary and discriminatory enforcement. *Id.* Essentially, this means adequate notice to citizens and adequate standards to prevent arbitrary enforcement. A statute is overbroad if it sweeps within its proscriptions conduct that is protected and does not need to be restricted to achieve its purpose. *O'Day v. King County*, 109 Wn.2d 796, 803 (1988).

Ordinances may also be void as unreasonable. “An ordinance which makes no distinction between conduct calculated to harm and conduct which is essentially innocent is an unreasonable exercise of the government’s police power.” *City of Seattle v. Webster*, 115 Wn. 2d 635, 635 (1990) (*citing Seattle v. Pullman*, 82 Wn. 2d 794 (1973)). To be void for unreasonableness, however, an ordinance must be clearly and plainly unreasonable.

Ordinances which implicate constitutionally protected expressive activity under the First Amendment are also subject to these doctrines. However, where the expressive activity occurs in traditional public fora, such as sidewalks, streets or public parks, “the government's ability to permissibly restrict expressive conduct is very limited.” *Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010, 1021 (9th Cir. 2008) (*quoting United States v. Grace*, 461 U.S. 171, 177 (1983)). *See also Hague v. CIO*, 307 U.S. 496, 515 (1939) (these

fora have been immemorially held in trust for the public for “assembly, communicating thoughts between citizens, and discussing public questions”). Because government restrictions on the use of these public spaces “risk placing speech on topics of public importance within the purview of only the wealthy or those who enjoy the support of local authorities,” (*Long Beach*, 522 F.3d at 1021 citing *Grossman v. City of Portland*, 33 F.3d 1200, 1205 n. 8 (9th Cir.1994); *City of Richmond*, 743 F.2d at 1356, “First Amendment protections are strongest and regulation is most suspect” within those areas. *Id.* (quoting *Grossman v. City of Portland*, 33 F.3d 1200, 1204 (9th Cir. 1994). See also *A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784, 791 (9th Cir. 2006) (warning of trend toward privatization of public property and transforming public fora into “heavily-regulated domains”).

Although regulation of speech in traditional public fora is disfavored, it may nevertheless be regulated according to prescribed principles. To pass constitutional muster, such regulations must satisfy four criteria. They must be 1) justified without reference to the content of the regulated speech; 2) narrowly tailored to serve a significant government interest; 3) leave open ample channels for communication of the information, and 4) provide adequate standards to guide government discretion, particularly in licensing decisions. *Forsythe County v. Nationalist Movement*, 505 U.S. 123, 130 (1992); *Clark v. Cmty for Creative Non-Violence*, 468 U.S. 288, 293 (1984).<sup>1</sup> A law is content-based rather than content-neutral if “the main purpose in enacting it was to suppress or exalt speech of certain content, or if it differentiates based on the content of speech on its face.” *ACLU of Nevada v.*

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<sup>1</sup> It is likely that the interest test will be stricter in Washington in some contexts. In *Collier v. Tacoma*, 121 Wn. 2d 737 (1993), the court stated that restrictions on speech can be imposed consistent with Washington *Const. art. 1, § 5* only upon a showing of a compelling state interest *Id.* at 747,48. Although application of the higher standard may not apply in all contexts, it is highly likely that courts would apply it to prior restraints on speech imposed through licensing requirements. See *Ino Ino, Inc. v. City of Bellevue*, 132 Wn. 2d 103, 937 P.2d 154 (1997) (*Wash. Const. art. 1, § 5* provides more protection than its federal counterpart in the context of adult entertainment licensing requirements).

*City of Las Vegas (ACLU II)*, 466 F. Supp. 784, 793 (9th Cir. 2006). Even if a law is content-based, it may yet pass constitutional muster if it is necessary to serve a compelling state interest and is narrowly tailored to achieve that end. *Perry Educ. Ass’n v. Perry Local Educ. Ass’n*, 460 U.S. 37, 45 (1983); *Loper v. New York Police Dept.*, 999 F.2d 699, 703 (2<sup>nd</sup> Cir. 1993). Under federal jurisprudence, a regulation is narrowly tailored if it “promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (citations omitted). Further, it may not burden substantially more speech than necessary to achieve the scheme’s important goals. *United States v. Baugh*, 187 F.3d 1037, 1043 (9th Cir. 1999).

Finally, when the government allows some speech but not others, it must show the distinctions are “finely tailored to serve substantial state interests.” *Carey v. Brown*, 447 U.S. 455 (1980).

#### Application of Legal Principles

##### **SMC 10.10.025 Pedestrian Interference**

Subsection C (1) makes it a misdemeanor where one, in a public place, knowingly obstructs pedestrian or vehicular traffic. Because the ordinance exempts constitutionally protected conduct, it appears to regulate pure activity and not speech. However, as drafted, the ordinance is subject to challenge as overbroad and unreasonable where it sweeps into its ambit trivial and inconsequential obstruction.

According to the Washington State Supreme Court, “mere sauntering or loitering on a public way is lawful and the right of any man, woman or child.” *Seattle v. Webster*, 115 Wn. 2d 635, 642 (1990) (citations omitted). Yet one could be criminally cited under this statute if one’s “saunter” causes others to take evasive action. Besides simply strolling along, there are innumerable reasons why one might slow or stop along a sidewalk – to tie one’s shoe,

calm a crying child, window shop, discuss restaurant choices, converse with friends, or look around, to name only a few. It is implausible to claim that one doesn't "know" that such slowing or stopping may cause obstruction or require others to take "evasive" action – but is this really "criminal" behavior?

In ruling on the constitutionality of a similar ordinance, the trial court in *Seattle v.*

*Webster* expressed similar concerns:

“A person could be charged with this, under this ordinance, and be doing something that no one in the world would think was an unlawful conduct, including on a very nice hot sunny day being age sixteen and sitting on a sidewalk watching cars go by, which of course I think that all of us have done; being a Santa Claus at Christmas time and standing ringing a bell at the front of a department store; walking from the side of the store out to the street to see if your bus has come and making people walk around you.”

*Webster*, 115 Wn.2d at 638.

Further, as the trial court noted, this type of ordinance is susceptible to discriminatory enforcement because it was likely that persons deemed “acceptable” to the authorities would not be arrested while “scrubby looking individual[s]” would. *Id.*

What saved the ordinance in *Webster* was the element of intent. Under the Seattle ordinance, a person could not be charged unless that person acted with intent to block another's passage or with intent to cause a person to take evasive action. “The element of intent in the ordinance sufficiently narrows its scope to save [it] against a claim of unconstitutional overbreadth.” *Id.* at 642.

Spokane's municipal code has adopted the definitions of culpability under chapter 9A RCW. (SMC 10.02.015.) Under these, “a person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(a). Knowing is a lesser degree of culpability and not co-equal with intent.

Although this ordinance includes a definition of intent that essentially mirrors RCW

9A.08.010(a), it requires only a “knowing” obstruction. To avoid challenge as unreasonable and overbroad, the ordinance should require an intentional obstruction.

Finally, it should be noted that begging or panhandling, i.e. solicitation for the purpose of immediately receiving contributions, is a constitutionally protected activity under the First Amendment. *Roulette v. City of Seattle*, 850 F. Supp. 1442, 1451 (1994) (*citing* *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980)); *U.S. v. Kokinda*, 497 U.S. 720 (1990); *Spokane v. Marr*, 129 Wn. App. 890, 894 (Div. 3 2005) (citations omitted). Thus, nonaggressive begging which does nothing to intimidate and where the solicitee is free to walk around the speaker should not violate subsection C(1) of this ordinance. *See Marr*, 129 Wn. App. at 894 (“[I]f begging is a constitutional right, it would not be unlawful to incidentally obstruct pedestrian traffic in order to exercise that right); *Webster*, 115 Wn. 2d at 653 (J. Utter, concurring and dissenting) (“While a municipality may regulate First Amendment activity to prevent obstruction of passage, *see Shuttlesworth v. Birmingham*, 382 U.S. 87, 91 (1965), it may not restrict First Amendment rights just to prevent annoyance to the citizenry”). Similarly, protected expressive activity in which a stool or table is necessary to the message – such as playing the harp or displaying leaflets – should not constitute a crime under this ordinance. *See ACLU II*, 466 F. Supp. at 784 (putting up of tables for distribution of leaflets was protected First Amendment activity where it facilitates the message rather than simply provides comfort or convenience to the solicitors).

#### *Aggressive Solicitation/Solicitation by Coercion*

Subsection C (2) prohibits aggressive solicitation in all public places within the city limits. As proposed SMC 10.10.027 (C) prohibits coercive solicitation which is very similar to aggressive solicitation, it is analyzed herein as well.

Although solicitation is a protected activity, soliciting with the “intent to intimidate” is not. *Roulette*, 850 F. Supp. at 1442. In *Roulette*, defendants challenged a similar aggressive begging ordinance as overbroad and vague. As in Spokane, the ordinance at issue there originally made it unlawful to “beg with the intent to intimidate another person into giving money or goods.” *Id.* at 1452. There, however, the ordinance defined intimidate as follows: “Intimidate means to engage in conduct which would make a reasonable person fearful or feel compelled.” *Id.* Later amendments added descriptions of circumstances which could be considered in determining whether an actor “intended” to intimidate another into giving. These included touching, following, directing profane or abusive language, or persistence after refusal.

The *Roulette* plaintiffs argued that the language was unconstitutionally overbroad as not all profane or abusive language was unlawful. The court agreed but cured by construing the word “intimidate” to be limited to “conduct which threatens the person solicited,” equated the word “compel” with “threat,” and ruled that the ordinance prohibits only those threats which would make a reasonable person fearful of harm to his or her person or property. *Id.* at 1442. “Limiting the sweep of the ordinance to prohibit only those threats which would make a reasonable person fearful of harm to his or her person or property is an appropriate narrowing construction of the ordinance. Simply put, threats to cause bodily injury or physical damage to the property of another which would make a reasonable person fearful of such harm are not protected speech.” *Id.*

The court also agreed that the circumstances section, which attempted to describe various circumstances in which solicitation becomes unlawful, created difficulties of both overbreadth and vagueness and struck that language. “The court understands that the intention of the circumstances section was to be of assistance to concerned persons ...

However, given that some of the circumstances, in and of themselves, describe speech which is clearly protected by the First Amendment, and the lack of specificity in the definitions of the particular circumstances, the court finds that the ordinance will remain within constitutional limits only by striking the circumstances section.” *Id.*

SMC 10.10.27(C) may suffer a similar fate by the inclusion of a non-exhaustive list of conduct that would violate the ordinance. For example, persisting in a solicitation after the person solicited has given a negative response could easily sweep into its ambit protected speech. Take the following scenario, for example: A panhandler asks for some help, the person keeps walking and as he passes, or even if he says “no,” the panhandler replies, “Please?” Is this criminal persistence under the ordinance? What type of attempted delivery or demand falls afoul of subsection (g)? Proffering a rose and saying “that’ll be a dollar?” It is likely a court would feel it necessary to limit all these to acts which would cause a reasonable person to believe that the person is being threatened with injury to body or property.

Finally, the definition of aggressive solicitation requires an “intent” to intimidate, but a violation requires a lesser degree of culpability, “knowingly.” This is confusing. Acting intentionally encompasses knowledge of what one is doing, but requires more – an intent to do it. As in *Roulette*, the safer route would be to require an intentional violation of both aggressive solicitation and pedestrian interference.

### **SMC 10.10.26, Sitting, Lying on Sidewalk in Retail Zone**

Although this ordinance appears facially constitutional, it may yet be subject to “as applied” challenges. As drafted, it provides no exceptions for constitutionally protected First Amendment activities. There may be situations in which a prohibition against sitting or lying impermissibly restricts expressive conduct. *Roulette*, 850 F. Supp at 1449 n.8 (ordinance

prohibiting sitting/lying on sidewalks unconstitutional as applied to street musician whose message was difficult if not impossible to communicate without keyboard). In fact, the court in *City of Seattle v. McConahy* raised this same concern. *McConahy*, 86 Wn. App. 557, 561 (1997)(court holds sitting/lying ordinance valid but notes that result might have been different had appellants been involved in protected speech or activity). Rather than face “as applied” challenges, the City may save money by proactively exempting First Amendment activity as in SMC 10.10.25 (3)(A)(b).

We agree with ULA that forewarning cures to some degree arbitrary enforcement as in the ordinance at issue in *McConahy*, 86 Wn. App. at 573 Appendix A. We also suggest revisiting the criminality of these acts. The sitting/lying ordinance at issue in *McConahy/Roulette* made a violation thereof a civil infraction subject to a fine or public service.

**SMC 10.10.27 (B)(1)(b) Requiring a special events permit for any person or organization prior to engaging in solicitation within any public right-of-way.**

Analysis of this ordinance is found after the section on SMC 10.40.010, Peddler’s Designation below.

**SMC 10.40.010 Peddler’s Designation – section D**

We disagree with ULA’s analysis of this section, particularly its reliance on the recent Ninth Circuit decision, *Berger v. City of Seattle*, 512 F.3d 882 (2008). See *Berger v. City of Seattle*, --- F.3d ---, 2008 WL 2779307 (9th Cir. 2008) (court will hear the case en banc and three-judge panel decision may not be cited to in this jurisdiction) and believe the requirement for a business license will be found to be an unlawful prior restraint on speech and not narrowly tailored to a compelling state interest.

Background

Under the Spokane Municipal Code, business licenses are required by all persons who engage in business in areas within the jurisdiction of the City (with a few exceptions). SMC 8.01.070. The authority to require a business license is an exercise of the City’s power to “license for revenue.” SMC 8.01.010; RCW 35.22.280 (33) (first class cities have the power to grant licenses for any lawful purpose and to fix by ordinance the amount to be paid therefore); *Diamond Parking, Inc. v. The City of Seattle*, 78 Wn. 2d 778, 784 (1971) (city has right to exact license fees for the purpose of securing revenue).

The definition of a business under the SMC is extremely broad and “includes all activities, occupations, trades, pursuits, professions and matters located or engaged in within the City or anywhere else within the City’s jurisdiction with the object of gain, benefit or advantage to the taxpayer or to another person or class, directly or indirectly.” SMC 8.01.030. A business is further defined as including “all kinds of activities and matters, together with the devices, machines, vehicles and appurtenances used therein, which are conducted in this city or anywhere else within the City’s jurisdiction.” 4.04.010(A).

SMC 8.01.070 provides:

No person may engage in business in the City or with the City without first having obtained and being the holder of a valid business license or temporary business license as provided in this chapter. In addition, persons whose activities fall within the definition of SMC 10.40.010 must obtain a “peddler” designation on their regular or temporary business license.

Currently, a peddler’s designation is required as follows:

A regular or temporary business license issued under chapter 8.01 SMC must have a special designation as “peddler” under any of the following circumstances:

- A. Where the person is eligible for a temporary business license, and is engaged in the business of selling or delivering goods or services within the City from a fixed or temporary location as an itinerant vendor.
  1. Examples are people selling food or wares from mobile carts on the sidewalk or roving vehicles in the streets. (Cross Reference: SMC

8.01.220)

B. Where the person travels from door to door as the principle means of conducting business offering, exposing for sale, or selling within the City any goods, merchandise, service or product.

C. Where the person engages in any business in the City with no permanent location. (Cross Reference: SMC 8.01.070)

SMC 10.40.010.

The City now proposes to bring street musicians who actively seek donations within this designation by adding the following subsection to SMC 10.40.010:

D. Where the person engages in the activity of a street performer in the public right-of-way. For the purposes of this section, a street performer shall mean an individual, including street musicians, who performs any form of artistic expression with the intent to attract an audience for the purpose of actively seeking donations. Individuals who engage in constitutionally protected expressive activities in the public right-of-way and do not attempt to attract an audience for the purpose of actively seeking donations shall not be required to obtain a business license under this section. Such individuals must still comply with all other regulations regarding conduct in the public right-of-way.

Applicants for a peddler's designation by street performers remain subject to all the other requirements for Class I Business Licenses. These include the duty to truthfully disclose the following:

A. Persons within the definition of SMC 10.40.010 must further truthfully disclose on their business license application the following information:

1. Applicant's permanent address.
2. Address of his principal(s) and supplier(s).
3. Address of the fixed location within the City of Spokane, if any, from which the activity is to be conducted.
4. Nature and type of goods or services to be sold and that the applicant has all necessary licenses or permits from owners of copyright, trademark or other such lawful interests in the goods or materials to be sold; and

5. Applicant has not violated the City license code or the copyright or trademark laws of the United States or had his application for a City license denied within the past twelve months.

B. The license officer may require proper documentation of the application as he deems necessary prior to issuing the license or as a condition of not revoking or suspending the license after issuance.

C. All applications shall be filed at least three business days before issuance.

SMC 10.40.030.

Street performers seeking a license will also be subject to the following restrictions:

“Subject to specification by the license officer in the license, every person within the definition of SMC 10.40.010 is required to:

- A. refrain from using excessively noisy devices or methods to attract public attention to his wares or services and from shouting or calling his wares or services in a loud or boisterous manner;
- B. keep all conveyances and containers for foodstuffs and edibles clean and sanitary and to keep all consumables well covered and protected from all dirt, insects or other contamination;
- C. refrain from standing, by person or vehicle, upon any public way more than ten minutes in any one place;
- D. move from a location adjacent to another’s place of business or residence when requested by someone in charge of such business or residence;
- E. move from a location included within the boundaries of a special event when requested by the chief of police or someone in charge of such special event;
- F. refrain from any illegal, fraudulent or deceptive practice;
- G. have upon his person for display upon inquiry by any person a copy of the City license and, in addition, documents showing he is authorized by the copyright or trademark owner to sell the goods concerned.

SMC 10.40.060.

As a Class I business license, street performers under a Peddler’s Designation must pay \$60 a year for their license plus additional fees based on the number of personnel

employed. SMC 8.02.026. A reduced business license fee of \$10 per year is available to persons whose gross business revenues for the calendar year do not exceed \$12,000. *Id.* To be eligible for the reduced fee, however, an applicant must present sufficient proof (unspecified) of gross revenues to the license officer. SMC 8.01.190. And SMC 8.01.240 requires all persons liable for a business license to maintain suitable records for five years for the determination of the fee, including the reduction. However, for those who do not keep necessary records “within the City, it shall be sufficient if the taxpayer produces within the City such records as required by the license officer, or if the taxpayer bears the cost of examination at the place where the records are kept.” SMC 8.01.240. Additionally, persons whose income falls below the federal poverty guidelines may apply for a waiver from the mayor. SMC 8.02.011.

### Legal Analysis

It is unquestionable that street performances fall within the protections of the First Amendment. *Ward*, 391 U.S. at 799. For purposes of First Amendment coverage, “the Constitution looks beyond written or spoken words as mediums of expression,” *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995), and extends its protection to include music, pictures, films, paintings, drawings, and engravings. *Miller v. California*, 413 U.S. 15, 22-3 (1973) (*rehearing denied* 414 U.S. 881 (1973)); *Kaplan v. California*, 413 U.S. 115, 119-20 (1973). This protection “is not diminished merely because the ... speech is sold rather than given away.” *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 756 n. 5 (1988); *see also Ayres v. City of Chicago*, 125 F.3d 1010, 1014 (7th Cir.1997). Nor does it rely on ideological or political content. *Mastrovincenzo v. City of New York*, 435 F.3d 78 (2nd Cir. 2006) (*quoting Hurley*, 515 U.S. at 569, 115 S.Ct. 2338 (internal citation omitted) (“if the First Amendment protected only

expressive conduct ‘conveying a ‘particularized message,’ [it] would never reach the unquestionably shielded painting of Jackson Pollack, music of Arnold Schönberg, or Jabberwocky verse of Lewis Carroll’’)).

As noted above, one does not lose constitutional protections merely because money changes hands. Thus, active as well as passive solicitation by street performers deserves constitutional protection. Hence, to survive challenge, the ordinances regulating this activity must be content-neutral, narrowly tailored to serve a substantial government interest<sup>2</sup>, and leave open ample alternatives.

Because the ordinance applies only to “active solicitation” and not “passive,” it may not be content-neutral. “Although courts have held that bans on the *act of solicitation* are content-neutral, we have not found any case holding that a regulation that separates out *words of solicitation* for differential treatment.” *ACLU II*, 466 F.3d 784 (citations omitted). Thus, the manner of solicitation may be content neutral, but the message is not. Because “active” solicitation includes written or printed matter as well as verbal or non-verbal communication, it appears to regulate based on the particular message conveyed. If so, the ordinance would be subject to strict scrutiny and will be valid only if it is the least restrictive means to achieve a compelling state interest. *S.O.C. Inc. v. County of Clark*, 152 F.3d, 1136 (9th Cir. 1998). However, should a court find the ordinance content-neutral, we believe it will still be subject to strict scrutiny under state jurisprudence as it requires government permission prior to engaging in speech. *See Ino Ino, Inc. v. City of Bellevue*, 132 Wn. 2d 103, 937 P.2d 154 (1997) (text and history of Washington *Const.*, *art. I*, § 5 dictate enhanced protection under the state constitution in the context of adult entertainment regulations that impose prior restraints through licensing requirements).

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<sup>2</sup> Or under Washington law, compelling. See *infra* at n. 1.

## Tailoring to Government Interest

In determining whether an ordinance is narrowly tailored, one must first identify an applicable government interest. Although the City fails to state the purpose for this amendment, the requirement to obtain a Class I Business License was no doubt enacted under the City's authority to raise revenue and its police powers to ensure the health and safety of its citizens. The Supreme Court has recognized raising of revenue through its taxing power as an important, indeed "fundamental" state interest. *Bates v. City of Little Rock*, 361 U.S. 516, 524-25 (1960) (citations omitted); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231-32 (1987); *Minneapolis Star & Tribune Co., v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585-86 (1983). Although courts in this circuit have found a significant state interest in protecting the local merchant economy, it is doubtful "this interest could ever be compelling." *ACLU II*, 466 F.3d at 797 n. 14; *Id.* (quoting *Bock v. Westminster Mall Co.*, 819 P.2d 55, 61 (Colo. 1991) ("Economic necessity, however, cannot provide the cover for government-supported infringements of speech").

Our courts do recognize "substantial governmental interests in regulating competing uses of public fora," in providing notice to municipalities of the need for additional public safety and other services related to these uses and charging nominal fees to defray policing of these activities. *Forsyth County*, 505 U.S. at 130; *Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010, 1023 (9th Cir. 2008); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1032 (9th Cir. 2006). Nevertheless, the "public fora cannot be put off limits to First Amendment activity solely to spare public expense." *N.A.A.C.P., Western Region v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984) (citing *Schneider v. State*, 308 U.S. 147 (1939)).

Under the standard applied by federal courts to protected speech in public fora, the requirement to give advance notice of speech through permit requirements, as a prior restraint on speech, has in almost all cases been legitimate only where these were required for coordination purposes such as crowd management and control, to prevent congestion or to keep public ways clear to allow unimpeded passage of the public, all substantial government interests. It has rarely, if ever, been applied to single individuals.<sup>3</sup>

“As the cautionary language in our earlier opinions indicates, the significant governmental interest justifying the unusual step of requiring citizens to inform the government in advance of expressive activity has always been understood to arise only when large groups of people travel together on streets and sidewalks. See *Rosen v. Port of Portland*, 641 F.2d 1243, 1247 (9th Cir. 1981); see also *Grossman v. City of Portland*, 33 F.3d 1200, 1206 (9th Cir. 1981); *N.A.A.C.P., Western Regions v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984). Small groups, however, can also “march” and “assemble” for expressive purposes, and can do so without interfering with the free flow of traffic (except in the trivial respect that anyone walking on a public sidewalk or roadway takes up space and therefore prevents someone else from traveling precisely the same route). Without a provision limiting the permitting requirements to larger groups, or some other provision tailoring the regulation to events that realistically present *serious* traffic, safety, and competing use concerns, significantly beyond those presented on a daily basis by ordinary use of the streets and sidewalks, a permitting ordinance is insufficiently narrowly tailored to withstand time, place, and manner scrutiny.”

*Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1032 (9th Cir. 2006).

The City’s requirement for Special Events permits is a prime example. For more examples see:

- *Cox v. Louisiana*, 379 U.S. 536, 558 (1965); *Edwards v. South Carolina*, 372 U.S. 229, 236, 83 S.Ct. 680, 683, 9 L.Ed.2d 697 (1962); *Cox v. New Hampshire*, 312 U.S. 569 (1941) – Cited for the proposition that even advance notice requirements under parade exceptions must be narrowly tailored.

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<sup>3</sup> Any law imposing a “prior restraint” on the exercise of First Amendment rights carries a “heavy presumption against its constitutional validity.” *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 317, 100 S.Ct. 1156, 1161, 63 L.Ed.2d 413 (1980), quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963); *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 558, 96 S.Ct. 2791, 2802, 49 L.Ed.2d 683 (1975); *New York Times Co. v. United States*, 403 U.S. 713, 714, 91 S.Ct. 2140, 2141, 29 L.Ed.2d 822 (1970); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 1577, 29 L.Ed.2d 1 (1970).

- *Thomas v. Chicago Park Dist*, 534 U.S. 316, 325 (2002) - Significant state interest in managing competing uses when large groups of people intend to use public property.
- *Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010 (9th Cir. 2008) – Court held that a group of 75 people using a public open space in Long Beach is large enough to warrant an advance notice and permitting requirement. “Advance notice and permitting requirements applicable to smaller groups would likely be unconstitutional, unless such uses implicated other significant government interests, or where the public space in question is so small that even a relatively small number of people could pose a problem of regulating competing uses.” *Id.* at 1033.
- *White v. City of Sparks*, 500 F.3d 953 (9th Cir. 2007) – Ninth Circuit invalidates an ordinance requiring an artist to obtain either a vendor’s license prior to exhibiting his work or pre-approval under a “First Amendment exception.”
- *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022 (9th Cir. 2006) – Court upheld constitutionality of ordinance requiring permits for groups which would “not comply with the normal or usual traffic regulations,” but struck down another which was unrelated to group size and actual impediment. Additionally, court upheld two day advance period where event required government coordination in heavily burdened and limited public space. Court held that “a narrowly tailored permit requirement must maintain a close relationship between the size of the event and its likelihood of implicating government interests.” *Id.* at 1040.
- *Grossman v. City of Portland*, 33 F.3d 1200 (9th Cir. 1981) – Court struck down a permit requirement for demonstrating or gathering in parks that required seven day advance registration but was unrelated to size. “Some type of permit requirement *may* be justified in the case of large groups, where the burden placed on park facilities and the possibility of interference with other park users is more substantial.” *Id.* at 1206.
- *Rosen v. Port of Portland*, 641 F.2d 1243 (9th Cir. 1981) – Court invalidates ordinance requiring one business day's notice of an intent to distribute literature, picket, demonstrate, or “otherwise communicate with the general public” in airport terminal and advance disclosure of the names, addresses, and telephone numbers of the sponsoring person and “responsible” person unconstitutional. The court noted “that advance notice provisions may be included in parade permit ordinances,” (citing *Cox v. Louisiana*, 379 U.S. 536, 558 (1965) under the rationale that the “governmental interest in regulating parades, when large groups use public streets and disrupt traffic by causing major arteries to be closed and transportation rerouted, is apparent.” *Rosen, supra* at 1247. Where the ordinance merely regulated individuals or small groups, the parade exception did not apply.
- *American-Arab Anti-Discrimination Committee v. City of Dearborn*, 418 F.3d 600 (6th Cir. 2005) – Court invalidated permit requirement for “special events,” regardless of size. “Permit schemes and advance notice requirements that potentially apply to small groups are nearly always overly broad and lack narrow tailoring.” *Id.* at 608. “In most circumstances, the activity of a few people peaceably using a public right of way for a

common purpose or goal does not trigger the city of Dearborn's interest in safety and traffic control." *Id.*

- *Cox v. City of Charleston, S.C.*, 416 F.3d 281 (4th Cir. 2005) – Invalidating requirement of prior written permit for parades, meetings, exhibitions, assemblies or processions of persons and/or vehicles on the streets or sidewalks of the city as unlawful prior restraint and not narrowly tailored to government interest. “Rather than enforcing a prior restraint on protected expression, cities can enforce ordinances prohibiting and punishing conduct that disturbs the peace, blocks sidewalks, or impeded the flow of traffic.”
- *Bery v. City of New York*, 97 F.3d 689 (2d Cir. 1996) – Here, the Second Circuit invalidated a regulation which required visual artists to obtain a general vendor license prior to exhibiting or selling their art in public places. The code set a numerical number of licenses on all but veterans and completely exempted vendors of newspapers, books and other written matters. Moreover, vending was barred within parks without written permission of the city's parks department. The code also restricted vending in some places within the city. The Court found the licensing requirement a *de facto* bar and inconsonant with the First Amendment. “The City may enforce narrowly designed restrictions as to where appellants may exhibit their works in order to keep sidewalks free of congestions and to ensure free and safe public passage on the streets, but it cannot bar an entire category of expression to accomplish this accepted objective when more narrowly drawn regulations will suffice.” *Id.* at 697.

From these cases, one could reasonably argue that the permit requirement, as applied to street performers, is not narrowly tailored to a substantial state interest in the absence of any indication that such performance would attract large crowds. Indeed, it is just as likely that a performer who solicits passively would attract a larger crowd through a superior performance. And if aggressive solicitation is the harm, pre-registration is no cure.

Certainly the City's interests could be achieved by its ordinances regulating the use of sidewalks or parks or aggressive solicitation without requiring advance notification. Moreover, the permit requirement does not provide the City with advance notice of performances likely to increase the need for government services where the permits are for one year and performers are not required to give notice as to when or where they will perform. The permit requirement has little to do with space or resource allocation. Thus, the scheme cannot be said to be achieved less effectively without prior registration.

Further, the permit requirement has no exception for spontaneous expression. “The strong interest in protecting the opportunity for spontaneous expression in public fora with respect to individuals or small groups has been emphasized by prior cases.” *Food not Bombs*, 450 F.3d at 1046 (citing, e.g., *Watchtower Bible & Tract Soc’y, of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 165-66, 122 S.Ct. 2080, 153 L.Ed.2d 205 (2002) (“it is offensive-not only to the values protected by the First Amendment, but to the very notion of a free society-that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so”)); *Grossman*, 33 F.3d at 1206-07 (noting the importance of preserving the ability of small groups to engage in spontaneous expression).

#### Ample alternatives

Next we consider whether the permitting provisions preserve ample alternative means for communicating protected expression. “In the ‘ample alternatives’ context, the Supreme Court has made clear that the First Amendment requires only that the government refrain from denying a ‘reasonable opportunity’ for communication.” *Menotti v. City of Seattle*, 409 F.3d 1113, 1141 (2005) (quoting *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986)); see *Edwards v. City of Coeur d’Alene*, 262 F.3d 856, 866 (9th Cir.2001) (“If an ordinance effectively prevents a speaker from reaching his intended audience, it fails to leave open ample alternative means of communication.”). Alternatives must be practically available and are not “alternatives” if they are far from satisfactory. *Metromedia*, 453 U.S. at 516.

One could certainly argue that the ordinance fails on this prong as well. Performers wishing to actively rather than passively solicit may not perform **anywhere** in the City without a permit. Indeed, even with a permit, street performers may not perform in any of the City’s parks without the permission of the parks board. SMC 10.40.050.

### Vagueness challenge

The definition of “active solicitation” includes using a hat or open guitar case. This would indicate that the ordinance includes any performer who takes no steps to actively solicit other than providing something for people to throw money into. It’s hard to imagine a way to “passively solicit” that would not fall within this definition. It would appear then that the ordinance aims at any performer who performs for money without actually saying so.

### Lack of standards to guide official discretion

For those performers unable to pay \$60, obtaining a fee waiver also depends upon the discretion of the finance director’s approval of whatever documents the director requires. Additionally, the finance officer may require unspecified documentation as a condition for approval of the peddler’s license or a reduced fee and may also include further restrictions at her discretion. These requirements and restrictions could make it impossible for a street performer to obtain a license at all or to perform where she is prohibited from remaining in one place in a public way (sidewalks are included in this definition) for longer than ten minutes. Moreover, the requirement to refrain from “excessively” noisy or boisterous hawking or calling out of one’s wares could fail as vague or overbroad where it prohibits music or speech that is otherwise within reasonable noise limits, exempted from the city’s noise ordinance, or where it is enforced with unbridled discretion. SMC 10.08.020. Finally, the requirement to “move from a location adjacent to another’s place of business or residence when requested by someone in charge of such business or residence” essentially grants private persons complete discretion to silence protected speech in a public forum simply because they don’t like it. First Amendment jurisprudence generally does not favor business owners’ perceived economic interests over expressive conduct unless the conduct can be shown to be otherwise unlawful. Doing so would essentially privatize the commons.

**SMC 10.10.27 (B)(1)(b) Requiring a special events permit for any person or organization prior to engaging in solicitation within any public right-of-way.**

This section states: “It is unlawful for any person or organization to engage in solicitation within any public right of way unless the person or organization has first obtained a special events permit pursuant to chapter 10.39 SMC.” Although there is no definition of “public right-of-way,” the term generally encompasses streets, roads, sidewalks, alleys, by-ways, pathways, footpaths, etc. open for public use. By enacting this sweeping ordinance, the City has placed a prior restraint on all protected speech activities in which the message includes a request for immediate contributions. Henceforth, no individual may solicit on public by-ways without first asking the government’s permission to speak at least seven to 30 days beforehand, even when these otherwise have a charitable solicitation or street performer permit. The ordinance is, then, a prior restraint and a *de facto* bar to spontaneous solicitation speech.

For all the reasons articulated in the peddler’s section above, this requirement is an unlawful prior restraint on protected speech. It is not content neutral because it requires a license only for those whose message includes a request for immediate donations. It is not narrowly tailored to a substantial or compelling state interest where it captures individuals as well as small groups with no measureable impact on pedestrian or vehicular traffic. Its sweep is broad and its imposition burdensome on those who are not planning a “special event” as defined in SMC 10.39.010 and arguably don’t fall within the reach of chapter 10.39 SMC which is designed for large events which actually do raise extra policing and traffic concerns. The only exceptions under 10.39 SMC are for funerals, governmental activities and lawful picketing. There are no other exceptions; hence no alternatives.

“It is offensive-not only to the values protected by the First Amendment, but to the very notion of a free society-that in the context of everyday public discourse a citizen must

first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.” *Watchtower Bible & Tract Soc’y, of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 165-66 (2002). This ordinance is constitutionally deficient and will be subject to challenge.

It is possible the City meant to limit this ordinance to roadways. If so, then the ordinance would most likely still be an impermissible prior restraint for small groups or individuals not falling within the Special Events definition.

**SMC 10.10.27 (B)(1)(a) Solicitation near designated locations and facilities.**

This section prohibits solicitation within 15 feet of an automated teller machine, the entrance of a building, an exterior pay phone, a self-service car wash, a self-service fuel pump, a public transportation stop, any parked vehicle where occupants may be entering or exiting, or designated loading, for-hire, or taxi zones. We believe the regulation may be subject to challenge as an over broad restriction on protected speech.

As drafted, the ordinance is arguably content based and hence subject to strict scrutiny. *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002) Under SMC 10.10.027(A)(9), “solicit” is defined as “...to ask, beg, or plead, whether orally, non verbally or in a written or printed manner, *for the purpose of immediately receiving contributions, alms, charity, or gifts of items of value* for oneself or for another person.” Under this definition, the only speech that is prohibited is that which solicits contributions immediately. Speech that does not include a message that requests immediate contribution does not fall within the reach of this ordinance. This could even include messages that require “in-hand” exchange such as leaflets or even asking for signatures for political calls to action. Basically, solicitation under this definition is really aimed at panhandling or begging.

The ordinance does not expressly regulate the “act” of contributing, merely the message and as such it is not content-neutral. *See ACORN v. St. Louis County*, 930 F.2d 591

(8th Cir. 1991) (anti-solicitation law was content-neutral because it limited solicitations for all purposes)<sup>4</sup>; *International Society for Krishna Consciousness of New Orleans, Inc. v. City of Baton Rouge*, 876 F.2d 494 (5th Cir. 1989) with *Benefit v. City of Cambridge*, 424 Mass. 918, 679 N.E.2d 184 (Mass. 1997) (anti-solicitation law was content-based because the content determined guilt or innocence); *Loper v. New York City Police Department*, 999 F.2d 699 (2d Cir. 1993). Content-based restrictions must be narrowly tailored to a compelling state interest. The stated purpose of this ordinance is to “protect citizens from the fear and intimidation accompanying certain kinds of solicitation, to promote tourism and business, and to preserve the quality of urban life while providing ‘safe and appropriate venues for individuals to engage in solicitation.’” The municipal code already prohibits intimidating or aggressive solicitation, hence the City apparently believes these place restrictions are necessary to promote tourism and preserve the quality of urban life by finding “safe and appropriate venues” for solicitation that is otherwise lawful. And that somehow the enumerated places are not “safe” or “appropriate” for panhandling.

While protecting the merchant economy or preserving some vague idea of “urban life” is unlikely to trump protected speech activities, public safety might. *Madsen v. Women’s Health Center*, 512 U.S. 753 (1994) (public safety is a recognized legitimate state interest). The question then is whether these place restrictions are narrowly tailored to protect public safety and do not restrict more speech than necessary. *Ward*, 591 U.S. at 799.

Some of these restrictions appear to target solicitation of persons already stopped – those pumping gas, getting money from ATMs, washing cars, waiting for a ride, getting out of a vehicle, or talking on the phone. As the ordinance doesn’t prohibit all those with an

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<sup>4</sup> ULA cites and discusses a similar case as the bases of its argument that this statute is content neutral, *ACORN v. City of Phoenix*, 798 F.2d 1260 (9th Cir. 1986). *Phoenix* determined that Phoenix’s anti-panhandling statute was content-neutral because it prohibited all kinds of solicitation, including charitable organizations. Here, the SMC specifically targets panhandling speech, a strong differentiation from the ULA’s *Phoenix*-based discussion.

expressive message from approaching these folks, even those which might involve an in-hand exchange of information, the City must believe that a request for money somehow makes the exchange unsafe or inappropriate. However, because the place restrictions are not targeted to intimidating behavior, as defined in this code, it appears unrelated to safety.

It would appear the City may be attempting to regulate panhandling on the basis of the “captive audience” doctrine. Under this doctrine, some courts have allowed restrictions where the audience does not have the freedom to choose whether or not to hear the message. *Cohen v. California*, 403 U.S. 15, 21 (1971) (courthouse visitors were not captive to displays of free speech). Courts have refused, however, to extend this doctrine to restrictions on speech in a public forum. *Kuba v. I-A Agricultural Association*, 387 F.3d 850, 861 (9th Cir. 2004). As far as we can find, no court has ever upheld the type of protection from solicitation that the City wants to extend to public fora, especially where the public can simply “avert their eyes” from an unwelcome solicitation. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975) (pedestrians on public street are not captive audience and can simply avert their eyes from any unwanted speech).

Without a doubt, panhandlers who obstruct traffic or threaten individuals are in violation of existing law. For those who do not, the distinction is not narrowly drawn. Further, the distinction is not narrowly drawn where solicitation near the entrance of a building but on a public sidewalk is left to the unfettered discretion of private persons. We understand that some people will feel uncomfortable when a poorly dressed person asks for money while they are otherwise engaged. Without evidence of improper behavior, a listener’s annoyance or discomfort “does not provide a basis for a law burdening that activity.” *Texas v. Johnson*, 491 U.S. 397, 408-09 (1989).

### **SMC 10.10.028**

This ordinance prohibits solicitation directed at vehicles from any public or private property adjacent to an arterial street. Because it regulates based on the type of message – a request for immediate contribution – it is not content neutral.

In *ACORN*, the court found the ordinance at issue content neutral because it limited solicitations for all purposes. *ACORN*, 798 F.2d at 1267-68. By contrast, here the ordinance restricts only those messages asking for something in return immediately. Because the content of the message must be examined to determine its lawfulness, it is not content neutral. *See Loper*, 999 F.2d at 705 (ordinance prohibiting loitering not content neutral where it prohibits all speech related to begging); *Benefit v. City of Cambridge*, 424 Mass. 918, 924 (1997) (aggressive panhandling law not content-neutral where it criminalized “communicative activity that asks for direct, charitable aid”). *See also City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J. concurring) (if a statute describes speech by content, it is content based).

As a content-based restriction, the ordinance is presumptively invalid unless it is narrowly tailored to a compelling state interest. As discussed above, traffic safety is a substantial state interest and acts which endanger drivers and pedestrians along city streets are clearly subject to state intervention, but this ordinance does not do that. Rather, it merely prohibits one form of speech while at the same time expressly preferring others, charitable solicitations as well as any other that lacks a request for immediate contributions. (The exemption for those with a special events permit makes sense as these are applicable to activities that impact the use of public space in non-trivial ways and thus require proof of preparations to mitigate these concerns, while charitable solicitation permits do not).

There is nothing in this ordinance which prohibits conduct which would impede traffic by forcing interaction with drivers. It prohibits only messages. And, just as with any other signs or messages along roadways, drivers may look away, keep their windows up, turn up their radios, keep driving or otherwise ignore the message.

By its own terms, the ordinance would target someone holding up a sign asking for help. If adverse consequences to traffic safety occur when motorists pull up to the curb in response to people holding signs, then all such sign-holding should be banned, not just some. *See NMI Perry v. Los Angeles Police Dept.*, 121 F.3d 1365, 1369070 (9th Cir. 1997) (ordinance banning sales and solicitations on boardwalks, except for sale of printed materials, sales by non-profit groups, and donation of solicitations by non-profit groups is not narrowly tailored to serve city's legitimate interest in aiding traffic flow); *Coalition for Humane Immigrant Rights of Los Angeles v. Burke*, 2000 Westlaw 1481467, 8-9 (9th Cir. 2000) (ordinance banning solicitations from passing motorists, including people on sidewalks holding signs, is unconstitutional because it burdens speech not shown to cause harm to traffic flow or safety); *ACORN v. City of New Orleans*, 606 f. supp. 16, 23-24 (E.D. La. 1984) (ordinance banning solicitations from road not sufficiently narrowly tailored). As drafted, this ordinance is not narrowly tailored to achieve traffic safety and may be subject to challenge.

#### **SMC 10.10.040 – Public Park**

Although this ordinance is not up for review, it impacts solicitation activities in public fora, including those by street performers, therefore we offer these thoughts. Subsection 1 of this ordinance prohibits all solicitation in city parks except when done in places designated and in the manner prescribed by rule, regulation or special permission of the parks board.

As written, it is unclear whether street performers with a license must also garner park board

permission prior to playing in the park. Regardless, it is a complete ban on solicitation of any kind without park permission – in other words, it’s a prior restraint.

Clearly, parks, like sidewalks, are a traditional public forum where First Amendment protections are strongest and government regulation most suspect. Nevertheless, subsection 1 places a complete ban on park performers, and all others, who solicit donations or collections, either passively or actively, without the permission of the parks board. We were unable to locate any rules, regulations, policies or procedures promulgated by the parks board that would guide official discretion in granting or denying such permission. The Parks Department did provide policies for special events within parks, but these generally, by their terms, apply to large groups or more coordinated commercial events. In fact, a Parks Department employee in charge of special events stated by phone that performances which did not fall within the definition of a “special event” would violate the above ordinance if the person was in any way collecting money for the performance.

Once more, one does not lose First Amendment protection merely because money changes hands. According to the Supreme Court, requests for donations merit constitutional protection. See e.g. *Village of Schaumburg v. Citizens for Better Env’t*, 444 U.S. 620, 633 (1980); *Bates v. State Bar of Arizona*, 433 U.S. 350, 363 (1977) (“...our cases have long protected speech even though it is in the form of ...a solicitation to pay or contribute money.”)

This ordinance on its face bans street performances, but only if they include the soliciting or collection of donations. This could be seen as a content-based restriction because the ordinance arguably prohibits performances that contain some commercial speech (or expressive conduct) while allowing others. In *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136 (9th Cir. 1998), the court invalidated an ordinance which allowed the

distribution of handbills that had no commercial advertising but prohibited those which did. Content based laws trigger strict scrutiny which requires the state to show that the regulation serves a “compelling state interest and is narrowly drawn to achieve that end.” *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991).

To be valid, this regulation must be the least restrictive means of addressing the problem. It is unclear what problems the parks are attempting to address in the absence of evidence that street performances for monetary gain are problematic in city parks. An ordinance regulating aggressive solicitation could just as easily tackle any projected problems without restricting free speech.

The ban is also likely to be restricting more speech than necessary as it appears to be preventing any performers unconnected to special events. As the U.S. Supreme Court stated in *Ward*, “Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.” *Ward*, 491 U.S. at 799. And it allows arbitrary enforcement because there are no standards governing official discretion.

More likely, the park regulations are intended to keep city parks entirely free from street performers and beggars, a purpose that is constitutionally offensive.

## CONCLUSION

Overall, these ordinances appear to be an attempt to do in piecemeal what the City cannot do in whole cloth – ban begging. Taking these ordinances as a whole, the homeless, the poor, those whose messages make “us” uncomfortable are strictly circumscribed in the exercise of their First Amendment right to speech, particularly downtown. If they stop someone in the downtown core, they risk arrest for pedestrian interference, even where their

acts are peaceful and otherwise lawful. If they come near those already stopped, e.g. near phone booths, car washes, gasoline stations, doorways, exits, buildings with ATM machines – they are subject to arrest. They can't solicit near buildings where the owners don't want them, even though they are on public property. And to top it off, they have to get prior permission to speak through cumbersome and costly licensing procedures, procedures out of reach for many.

Clearly, the City's concerns about the impact of begging on economic vitality are legitimate. And, just as clearly, the City may regulate this activity, but not in an unequal and unjust manner. When the "the government prohibits begging, [t]he only 'conduct' which ... [it seeks] to punish is the fact of communication." Hershkoff & Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 Harv. L.Rev. 896, 908 (1991), quoting *Cohen v. California*, 403 U.S. 15, 18, (1971). This communication is a First Amendment right which "[m]ere public intolerance or animosity" cannot abridge. *See Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971) (citations omitted).

We would ask the City to think carefully before enacting criminal laws such as these whose effects will fall especially hard on the poor, are exclusive rather than inclusive, and the very opposite of community. No doubt the City has other plans in place to address the core problems leading to panhandling, not just its visible symptoms.

Sincerely,

/s/ Bonne W. Beavers

Bonne W. Beavers, Attorney  
Chris Longman, Intern  
Center for Justice

cc: George Critchlow, ULA