UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

THERESA M. PETRELLO, Plaintiff, v. CITY OF MANCHESTER, Defendant	)	Civil Case. No. 1:16-cv-00008-LM

PLAINTIFF'S [CORRECTED] MEMORANDUM OF LAW IN SUPPORT OF HER MOTION FOR SUMMARY JUDGMENT AS TO COUNTS 1 THROUGH IV

The First Amendment protects the ability of a person to peacefully panhandle and seek charity from others. Yet the City of Manchester and its police department have engaged in a concerted effort since 2015 to suppress such protected activity in public places adjacent to the City's roadways in violation of the United States Constitution. Accordingly, judgment should be entered in favor of Plaintiff and against the Defendant City of Manchester as to Counts I through IV. As to the June 3, 2015 summons, a trial should be scheduled on damages.

STATEMENT OF MATERIAL FACTS CONSTRUED IN FAVOR OF THE CITY

I. The MPD's Panhandling Crackdown and Disorderly Conduct Policy

1. In 2014 and 2015, the Manchester Police Department ("MPD") began strengthening its efforts to combat panhandling and the perceived criminal activities related to it. These efforts coincided with James Soucy becoming interim and then full captain of the MPD's Community Policing Division in April 2014 and January 2015, respectively. *See* Soucy Depo. 8:21-9:4, attached to Bissonnette Declaration ("Biss. Decl.") at *Ex. A*.[1]

[1] All exhibits referenced herein are attached to the accompanying Declaration of Gilles Bissonnette, Esq. in Support of Plaintiff's Motion for Summary Judgment as to Counts I through IV. This declaration and exhibits have been filed simultaneously with this Motion and supporting Memorandum.

2. This crackdown was, in part, due to complaints about panhandling from the Manchester business community.[2] As explained in the Community Policing Division Report authored in January 2015 by Capt. Soucy, there had been "[a] growing number of complaints from area businesses and citizens alike" which "generated a push to deal with the ever growing number of Panhandlers in the city." *See* January 2015 Community Policing Report/Reardon Depo. Ex. 1, Biss. Decl. *Ex. B*. In this document, Capt. Soucy discusses additional actions designed to deal with panhandlers that were implemented during the last quarter of 2014:

> As a result, Officers Battistelli and Karoul from the Community Policing Division were tasked with coming up with a solution to this problem. Their initiative included meetings with DMV, District Court personnel, City Solicitor's office and the Legal Division. To date their efforts have resulted in the issuance of 6 Contempt warrants with more to come. Their goal is to identify repeat offenders, hold them accountable, and educate our department on ways to avoid this in the future.

Id.

3. As part of this crackdown, in early 2015, Capt. Soucy asked Lt. Stephen Reardon—who worked in the MPD's legal division—to do some research and look into ways to address panhandling. Panhandling was viewed as a "quality of life" issue. *See* Reardon Depo. 17:5-17, 17:20-18:3, 21:1-19, 25:3-9, Biss. Decl. *Ex. C*. This culminated in the MPD, as early as February 2015, consciously and deliberately implementing a policy in which it detains, harasses, threatens, disperses, and charges panhandlers for allegedly "obstructing vehicular traffic on public streets" under New Hampshire's disorderly conduct statute, *see* RSA 644:2(II)(c), *even when the panhandlers are in a public place and do not step in the roadway*.

4. More specifically, on February 5, 2015, Lt. Reardon sent an email to all sworn

[2] These concerns from the business community go as far back as 2013, where the MPD had communications with the Manchester Chamber of Commerce concerning efforts to combat panhandling. *See* Apr. 8, 2013 Email between MPD and Manchester Chamber/Tessier Depo. Ex. 2, Biss. Decl. *Ex. D* (note that the April 8, 2013 cover email was not marked as an exhibit during the Tessier deposition and has been added to this exhibit); *see also* Tessier Depo. 13:1-5, Biss Decl. *Ex. E* (City has been concerned with panhandling since at least April of 2013).

officers—including Officer Ryan Brandreth—stating the following:

> In an effort to address the numerous issues resulting from those who use the roadways for unlawful purposes—to include ***Panhandling***—please consider utilizing the DOC [disorderly conduct statute] as your first charging option outlined below.
> ***644:2 Disorderly Conduct****.—A person is guilty of disorderly conduct if: … II. He or she: (c)* ***Obstructs vehicular or pedestrian traffic on any public street or sidewalk*** *….*

See Feb. 5, 2015 Policy/Larochelle Depo. Ex. 5, Biss. Decl. *Ex. F* (emphasis in original). This emailed policy (excluding the attachment) was also memorialized in "The Handbook" of Capt. Robert (Bob) Cunha[3] and Lt. Stephen Reardon—a handbook made accessible electronically to all officers in their vehicles and through the MPD's intranet. *See* Handbook of B[ob] S[teve]/Larochelle Depo. Ex. 7, Biss. Decl. *Ex. G*; Reardon Depo. 76:5-8, 76:10-77:3, Biss. Decl. *Ex. C*.

5. This policy was prepared by Lt. Reardon—who had approval from his superiors and was a policy maker in the MPD's legal division. *See* Reardon Depo. 7:23-8:4 (Reardon's role is, in part, to "issue policy directives, guidance to law enforcement officers"), 35:14-36:3 (discussing superior approval), Biss. Decl. *Ex. C*; *see also* Soucy Depo. 29:16-23, Biss. Decl. *Ex. A* (Reardon had authority to send this out even without Soucy's approval). This policy was drafted following discussions in January 2015 with the City Solicitor's Office "to discuss new plan of action" upon the request of the MPD police chief. *See* J. Soucy Mar. 9, 2015 Email and Panhandlers attachment/Soucy Depo. Ex. 4, Biss. Decl. *Ex. H*; Reardon Depo. 46:22-47:1-5, Biss. Decl. *Ex. C* ("a lot of other input … was sought" including from the city solicitor at this stage).

6. Lt. Reardon prepared an initial draft of this policy on or around January 27, 2015. *See* MPD Right-to-Know Document Response, at MANC005-06/Larochelle Depo. Ex. 6, Biss. Decl. *Ex. I*. That day, he circulated this draft document to Capt. Soucy asking for his feedback. *Id.*;

[3] Captain Cunha was the head of the MPD's legal division until late 2013. Lt. Reardon assumed his responsibilities in the legal division in late 2013. Reardon Depo. 16:20-17:4, Biss. Decl. *Ex. C*.

see also Reardon Depo. 32:18-33:9, Biss. Decl. *Ex. C* (assuming that his superior, Captain Maureen Tessier, reviewed it as well).

7. On February 3, 2015, Capt. Soucy provided some suggestions, and asked Lt. Reardon: "Can you look at the revised version and let me know what you think? I sincerely hope I'm not offending you by changing some of the language—I'm just trying to get input from the guys who have been working on this." *See* J. Soucy Feb. 3, 2015 Email/Soucy Depo. Ex. 2, Biss. Decl. *Ex. J*; *see also* Soucy Depo. 22:13-24:11, Biss. Decl. *Ex. A* (describing genesis of email and need for officers to have something "dumbed down" and "easy to read").[4]

8. The revisions likely proposed by Capt. Soucy included (i) adding the language indicating that this new interpretation of the disorderly conduct statute was addressed "*specifically [for]* ***Panhandling***" and (ii) stating that the disorderly conduct statute should be considered "as your first charging option." *See* J. Soucy Feb. 3, 2015 Email/Soucy Depo. Ex. 2, Biss. Decl. *Ex. J* (emphasis in original); *see also* Soucy Depo. 35:3-7, Biss. Decl. *Ex. A* (testifying that it "could have been me" making these additions as he likes to "bold things to get my point across"); Reardon Depo. 34:14-25:4, Biss. Decl. *Ex. C* (he "would imagine [Capt. Soucy] suggested or made that alteration" adding the phrase "specifically panhandling").

9. Capt. Soucy believed that the focus on the disorderly conduct statute likely was because "we were trying to reach the point in some cases, if possible, to make an arrest that had some teeth to it." This would include the possible imposition of criminal penalties. *See* Soucy Depo. 30:18:31:1, 46:10-47:23, Biss. Decl. *Ex. A*. He further acknowledged that the focus at this time was on "how to address panhandling where there is a solicitation of a motorist, and a motorist slows down or stops in response to the solicitation" even if the panhandler is not in the roadway.

[4] Before this February 5, 2015 email, a training bulleting concerning panhandling had been sent in 2013 and 2014 to officers, which has been marked as Larochelle Depo. Ex. 3, and is attached at Biss. Decl. *Ex. K*.

See Soucy Depo. 35:17-36:3, 15-21, Biss. Decl. *Ex. A*.

10. The issuance of this policy on February 5, 2015 was consistent with Capt. Soucy's continued efforts to crackdown on panhandling throughout 2015. In his Community Policing Division Report from April 2015, Capt. Soucy reported:

> Officers Tony Battistelli and Brian Karoul from the Community Policing Division continued their panhandling initiative throughout the quarter [from January to March 2015] [which] included meetings with [the] DMV, District Court personnel, City Solicitor's office and the Legal Division. To date, their efforts have resulted in the issuance of 21 Contempt warrants and 11 arrests—all specific to panhandling or related crimes/violations. Their goal is to identify the repeated offenders, hold them accountable, and educate our department and the public on ways to avoid this in the future.

April 2015 Community Policing Report/Soucy Depo. Ex. 1, Biss. Decl. *Ex. L*. This initiative continued throughout 2015. *See* July 2015 Community Policing Report/Soucy Depo. Ex. 3, Biss. Decl. *Ex. M*.[5]

11. On July 2, 2015—consistent with this February 5, 2015 policy—Capt. Soucy sent another email to all officers explaining that RSA 644:2(II)(c) can be enforced against panhandlers if the "[p]anhandler *causes traffic to slow* or become impeded when accepting donations—*even if they're not standing or step into a public way*." *See* MPD Right-to-Know Document Response, at MANC036-38/Larochelle Depo. Ex. 6, Biss. Decl. *Ex. I* (emphasis added); *see also* Reardon Depo. 62:17-18, Biss. Decl. *Ex. C* (this is "essentially the same type of language" used in the February 5, 2015 email). This document contained an attachment which further referenced the disorderly conduct statute. This document explains that panhandlers who are warned and/or cited for engaging in this activity that is viewed as disorderly can be told to cease engaging in solicitation. *See* MPD Right-to-Know Document Response, at MANC037/Larochelle Depo. Ex. 6, Biss. Decl. *Ex. I* (July

[5] A March 9, 2015 email and attachment from Capt. Soucy to then Assistant Police Chief Enoch Willard also summarized these anti-panhandling efforts to date. *See* J. Soucy Mar. 9, 2015 Email and Panhandlers attachment/Soucy Depo. Ex. 4, Biss. Decl. *Ex. H*; Soucy Depo. 72:10-17, Biss. Decl. *Ex. A* (describing email as a response to Assistant Chief Willard on "what's been going on with regard to the panhandlers").

2, 2015 attachment inviting officers to order panhandlers to "move or remain away from a public place").

12. This July 2, 2015 document was drafted by Capt. Soucy. He drafted this document because he "thought a (brief) bullet point outline from the City Solicitor's to our troops could be used as a guideline—something that would highlight what they can and cannot do on the street." *Id.* at MANC010. This July 2, 2015 document was sent after multiple revisions designed to simplify it, including following review and comment by Lt. Reardon and the City Solicitor's Office. *See id.* at MAN010-24 (June 1, 2015 version), MAN025-29 (June 3, 2015 version by Lt. Reardon, with statement that he wanted to "create a simpler and more user friendly protocol"), MAN033-35 (June 14, 2015 revised version). As Capt. Soucy testified, this email was designed "to provide the officers with a simple reading or simple interpretation of what they could and couldn't do based on what the city solicitors had advised us." *See* Soucy Depo. 53:7-13, Biss. Decl. *Ex. A*.

13. Notwithstanding these efforts, MPD employees have acknowledged at deposition that they can identify, at most, a single accident having anything to do with panhandling in Manchester.[6]

II. Enforcement of this Policy Against the Plaintiff on June 3, 2015

A. Ms. Petrello

14. Plaintiff Theresa Petrello is a 55-year-old grandmother who resides in the City of Manchester. *See* Petrello Depo. 4:10-13, 9:21-22, Biss. Decl. *Ex. O*. She is a military veteran. She served in the Navy for four years. While in the Navy, she was a journalist. *See id.* at 5:13-14, 6:5-9. Ms. Petrello also served in the Army for two years. *See id.* at 6:13-18. She grew up in a military

[6] *See* Tessier Depo. 28:8-18, Biss. Decl. *Ex. E* (speaking on behalf of the MPD, stating that she does not know whether there have been any accidents concerning panhandlers); Soucy Depo. 14:18-22, 38:18-39:2, Biss. Decl. *Ex. A* (not recalling any accidents concerning panhandlers); Brandreth Depo. 57:5-13, Biss Decl. *Ex. N* (acknowledging that he has not responded to an accident that concerned a panhandler); Reardon Depo. 27:7-22, Biss. Decl. *Ex. C* (not recalling a panhandler ever being struck, but believing that a car may have hit another car relating to panhandling).

family. *See id.* at 5:15-23.

15. Since leaving military service, Ms. Petrello has been steadily employed, but mostly in low-wage jobs, including as a manager for a McDonald's Restaurant, as a customer service representative, and as a laundromat employee. *See id.* at 5:15-23, 8:23-9:7.

16. Ms. Petrello began experiencing health problems that caused her to leave her hourly housekeeper job at the Manchester VA Medical Center ("VA") in November 2014. *Id.* at 20:2-12. Given her disability, she hoped to obtain military disability benefits to help her make ends meet. However, months after she left the VA and having not yet been approved for disability benefits (which she ultimately started obtaining in July 2015), she ran out of money to live and pay rent. When she left her VA job in November 2014 because of medical issues, she:

> sent out resume after resume, resume, discovered everything is done by computer. They don't want to meet you anymore, unless you can get past that computer, and they can look at that resume and say that is the person I want to talk to. Those are few and far in-between. Even Goodwill wouldn't even acknowledge they received my resume. Kept putting out my resume, lived off my savings. That didn't last as long as I thought it would. And then [I] became very desperate.

Id. at 21:4-18.

17. Due to this desperation about not being able to make ends meet, she began to panhandle in Manchester about a week before May 15, 2015. *See id.* at 14:6-11. When panhandling, she would carry a sign that said "Veteran" with smaller text seeking a donation. *See, e.g.*, Brandreth Police Report/Reardon Depo. Ex. 4, at PET005, Biss Decl. *Ex. P*.

18. Ms. Petrello believed that it would be inappropriate for her to step in the roadway to solicit a donation. Thus, when she began panhandling in May 2015, she would only solicit and receive donations from motorists in public places, like sidewalks or grassy areas. *See* Petrello Depo. 14:22-15:5, Biss. Decl. *Ex. O* (focus was on soliciting motorists). She would not, as a matter of policy, step in the roadway to solicit or collect a donation. *See id.* at 25:8-10 ("Q: Had you ever

stepped into the road ever when you were panhandling at any time. A: No, sir.").

B. The June 3, 2015 Summons

19. On June 3, 2015, Ms. Petrello was standing in a public place on the grass between the sidewalk and the roadway on the west side of Maple Street, south of Bridge Street. *See* Brandreth Police Report/Reardon Depo. Ex. 4, at PET005-06, Biss Decl. *Ex. P*; Brandreth Depo. 11:7-10, 25:1-3, Biss Decl. *Ex. N*. She was peacefully soliciting donations. It is undisputed that she never stepped in the road either to solicit or to collect a donation. *See* Brandreth Depo. 18:3-5, Biss Decl. *Ex. N*.

20. A Googlemaps photo of the public place where Ms. Petrello was panhandling is below:

See also Brandreth Depo. Ex. 1, Biss. Decl. *Ex. Q* (indicating with "Y" where Plaintiff was standing in green space between the sidewalk and curb).

21. Despite the fact that Ms. Petrello never stepped in the roadway, Officer Brandreth claimed that Ms. Petrello was obstructing traffic because she was causing vehicles to stop. *See* Brandreth Police Report/Reardon Depo. Ex. 4, at PET003, 05-06, Biss Decl. *Ex. P*. As his police report states:

> During a green light cycle for vehicles traveling north on Maple St a black Cadillac came to a complete stop and handed [Ms. Petrello] something. The vehicle then traveled north through the intersection. The vehicle behind it … had to stop because the Cadillac stopped. The light turned red and the Cherokee was unable to make it through on the green light cycle and would not have had to wait for the next light cycle.

Id. at PET005-6; *see also* Brandreth Depo. 12:3-11, Biss Decl. *Ex. N* (explaining summons).

22. Part of this interaction was recorded by Ms. Petrello, in which Officer Brandreth said the following:

> Based on your behavior, ok, *by being out here with a sign panhandling for money*, having a car stop and then not allowing that second car who was not able to get through the intersection that it should have, ok, because they had a green light. So you are stopping that person's whole day, that second person. They had to wait for a whole other light cycle change, ok. So we don't want people doing that anymore, ok.

Video Recording, at 3:14-3:45, Biss. Decl. *Ex. R* (emphasis added). When Officer Brandreth was leaving, he also said, "don't stop any other cars." Ms. Petrello then explained: "I don't stop them at all. I am on the side of the road here. I don't stop them. But you have a good day." *Id.* at 3:51 to 3:59; *see also* Brandreth Depo. 14:12-15:2, Biss Decl. *Ex. N* (stating that the video was of him).

23. Officer Brandreth issued Ms. Petrello a summons to appear in Manchester District Court on July 9, 2015 for one count of disorderly conduct (violation level) for obstructing vehicular traffic under RSA 644:2(II)(c). *See* Brandreth Police Report/Reardon Depo. Ex. 4, at PET003, 05-06, Biss Decl. *Ex. P*.

24. After retaining *pro bono* counsel, the Manchester police department nolle prossed this charge on August 31, 2015. *See* Case Summary, Biss Decl. *Ex. S*.

25. This June 3, 2015 summons was issued pursuant to the Department policy referenced above which authorized a disorderly conduct summons even if the panhandler never stepped in the roadway and was in a public place. *See* Brandreth Depo. 20:15-21:3, 22:8-13, 23:12-20, 23:21-24:1 Biss Decl. *Ex. N* (acknowledging that he was "acting pursuant to that information" in the February 5, 2015 email when he cited Plaintiff).

III. Manchester's Anti-Panhandling Ordinance

26. As the City for Manchester was engaging in its anti-panhandling initiative described above, it began considering in March of 2015 an anti-panhandling ordinance like the one enacted in 2013 in Concord. Under the Concord ordinance, "[n]o person shall knowingly distribute any item

to, receive any item from, or exchange any item with the occupant of any motor vehicle when the vehicle is located in the roadway." *See* Mar. 13, 2015 C. Pelletier Email/Reardon Depo. Ex. 5, Biss. Decl. *Ex. T*.

27. On or about March 13, 2015, then MPD Chief David Mara asked Lt. Reardon to find the Concord ordinance and speak with the Concord police chief about it. *See id.*; Mar. 13, 2015 S. Reardon Email to Chief D. Mara/Reardon Depo. Ex. 6 and Tessier Depo. Ex. 5, Biss. Decl. *Ex. U*; Reardon Depo. 81:18-83:2, Biss. Decl. *Ex. C*. In his interview with Lt. Reardon, the Concord police chief explained that, at that point, no motorists had been issued summonses under the ordinance, and 12 of the 18 panhandlers who had been cited were homeless. Lt. Reardon relayed this information to then Chief Mara by email, where he described the Concord law as a "Panhandling Ordinance." *See* Mar. 13, 2015 S. Reardon Email to Chief D. Mara/Reardon Depo. Ex. 6 and Tessier Depo. Ex. 5, Biss. Decl. *Ex. U*.

28. Four days later, on March 17, 2015, then Manchester Board of Aldermen member Joyce Craig wrote a memo to her Committee on Administration informing it of Concord's ordinance and recommending that a similar ordinance be adopted in Manchester. The subject of the memo was "Panhandling Ordinance." She explained that it had been reviewed by the City Solicitor's Office and Chief Mara, and that it would be presented at the next Committee meeting. As Alderman Craig explained, "Over the years, the City of Manchester has experienced an increase of panhandlers, sometimes aggressive, in the City. Police officers have been actively enforcing state statutes to decrease panhandling. Adoption of this ordinance will provide officers with another tool to ensure public safety." *See* J. Craig Mar. 17, 2015 Memo/Tessier Depo. Ex. 3, Biss. Decl. *Ex. V*; *see also* Concord Ordinance/Tessier Depo. Ex. 4, Biss. Decl. *Ex. W*. In short, as Alderman Craig's memo made clear, this proposed ordinance was specifically targeted at panhandling. *See also e.g.*, Tessier Depo. 22:16-21, Biss. Decl. *Ex. E* (ordinance was targeted at people standing at heavily

congested intersections who, most commonly, were panhandlers). At or around this four-day period between March 13 and 17, the City Solicitor's office apparently started and completed a review of the proposed ordinance. *See* Tessier Depo. 28:8-18, 41:23, Biss. Decl. *Ex. E*.

29. The full Board considered the ordinance at a May 5, 2015 meeting in which several Board members dissented to its terms. In opposing the ordinance, then Alderman Jim Roy made clear that this "is about panhandling on the side of the road." Ordinance Minutes at ORD009, Biss. Decl. *Ex. X*. Alderman Joseph Levasseur also expressed free speech concerns with the ordinance. *Id.* at ORD011. Then Alderman Garth Corriveau added: "[I]f they went into a court they would look at the minutes of this meeting and say everyone is talking about panhandling so of course it is about panhandling." *Id.* at ORD015. Chief Mara was present, and he stated, with no data or studies, that "I think there is a real problem right now with the issue of people stepping and stopping traffic, motorists, as well as the people that are panhandling." *Id.* at ORD012. Mayor Ted Gatsas added that "[w]e have an awful situation with this panhandling. If you said to me what are the most calls we get in our office right now it is about panhandlers." *Id.* at ORD013. Indeed, when responding to one Alderman inquiring as to whether the Ordinance would apply to receiving mail by hand from a postman in his vehicle, the Mayor responded "but you don't look like a panhandler." *Id.* at ORD0014. After discussion, the ordinance was approved by a vote of 7 to 4 (with two abstentions), and then sent to the Committee on Bills on Second Reading. *Id.* at ORD016.

30. On May 14, 2015, the ACLU of New Hampshire submitted its opposition to this ordinance to the Board, Chief Mara, and the City Solicitor's Office. In its statement, the ACLU explained, among other things, that the ordinance was overbroad because it does "not impact the motorist at all who actually may be obstructing traffic, instead only impacting the person outside the vehicle who may be on a sidewalk not obstructing traffic." *See* May 14, 2015 ACLU Email, Biss. Decl. *Ex. Y*.

31. On June 2, 2015, the Committee on Bills on Second Reading met to engage in a technical review of the bill. There, Alderman Levasseur again objected to the bill, stating that it was "loaded with technical issues" and "fraught with problems." *Id.* at ORD018, 021. He explained that it was targeted at panhandling. *Id.* at ORD021. Nevertheless, that Committee, by a vote of 3 to 2, recommended that the Board approve the ordinance and refer it to the Committee on Accounts, Enrollment & Revenue Administration. *Id.* at ORD025. On July 7, 2015, the ordinance then went back to the full Board, which referred it to the Committee on Accounts, Enrollment & Revenue Administration by a vote of 8 to 4. *Id.* at ORD026.

32. The Ordinance was ultimately enacted by the Board on October 6, 2015, with three dissenters and one abstention. *See* Ordinance/Larochelle Depo. Ex. 8, Biss. Decl. *Ex. Z*; Ordinance Minutes at ORD051, Biss. Decl. *Ex. X*. As the Ordinance states: "[n]o person shall knowingly distribute any item to, receive any item from, or exchange any item with the occupant of any motor vehicle when the vehicle is located in the roadway." *Id.*

33. Despite its enactment in October 2015, the MPD lost track of whether the Manchester Board of Aldermen had approved it for five (5) months. *See* Tessier Depo. 43:10-44:1., Biss. Decl. *Ex. E*. When the MPD became aware in March 2016 that the Board had approved the Ordinance, the MPD informed its officers of the Ordinance and that it could be enforced. *See* Tessier Mar. 16, 2016 Email/Tessier Depo. Ex. 6, Biss. Decl. *Ex. AA*.

34. Between when the MPD became aware that the Ordinance was enacted in March 2016 and when Defendant submitted its document production in this case on August 4, 2016, the MPD had issued six (6) summonses under this ordinance to five (5) individuals. *See* Ordinance Summonses, Biss. Decl. *Ex. BB*; Tessier Depo. 37:14-38:2, Biss. Decl. *Ex. E*. In all of these

instances, only the panhandler was cited, and not the motorist.[7] Since Defendant's August 2016 document production, the MPD has cited one additional person under the Ordinance who was also a pedestrian. *See* Tessier Depo. 38:13-16, 40:16-22 Biss. Decl. *Ex. E*.

35. Lt. Stephen Reardon was deposed in this case on December 1, 2016. When confronted with the specific language of the Ordinance targeting the panhandler—and not the motorist—Lt. Reardon acknowledged that: (i) "in my opinion, [the Ordinance is] probably not the best language to [cite the motorist]"; (ii) "I can see how you could successfully argue that [the Ordinance] really is pointing more towards the pedestrian than the driver of a vehicle"; and (iii) "So as I look at it today, [the Ordinance] seems less suited for that purpose [of citing the motorist] ... I can see how you could argue that that language seems to be more geared towards the person outside of the vehicle than the person inside the vehicle." Reardon Depo. 99:10-100:7, Biss. Decl. *Ex. C*.

36. When Captain Maureen Tessier—the City's Rule 30(b)(6) designee—was deposed in this case on February 14, 2017, she testified that, following the December 1, 2016 deposition of Lt. Reardon, the MPD decided to cease enforcing this Ordinance until the conclusion of this litigation. This was because, after further review, Lt. Reardon was concerned that the Ordinance may only be applied to the pedestrian panhandler, not the motorist. *See* Tessier Depo. 39:3-40:15, Biss. Decl. *Ex. E*. This decision was made after consultation with the City Solicitor's office. This non-enforcement decision was ultimately relayed to the MPD's officers in approximately January 2017. *Id.* at 44:13-45:5.

37. Ms. Petrello wishes to peacefully panhandle in public places near roadways in the City of Manchester. However, she fears that she will be ordered to leave, harassed, detained, or cited under this Ordinance if she receives donations in public places near the City's roadways from

[7] *See* Ordinance Summonses, Biss. Decl. *Ex. BB*; Tessier Depo. 38:6-7, Biss. Decl. *Ex. E* (acknowledging that all were pedestrians). Moreover, in at least 3 of these summonses, there is not an allegation that the panhandler was obstructing traffic or stepping in the roadway. *Id.* at RFP#6 4-5 (Warrie Ward summons), 8-9 (Aaron White summons), 12-13 (Maurice Brown summons).

motorists. Because of this Ordinance, Ms. Petrello has panhandled in other towns—including in Hooksett and Derry—to make ends meet. *See* Petrello Depo. 15:12-15, 18:13-23, 39:7-14 (referencing panhandling in Hooksett, including during Christmas 2015), 42:21-23 (referencing Derry), Biss. Decl. *Ex. O*. She did this up until July 2016 at around the time she had a heart attack. *Id.* 11:22-12:12 (military disability benefits "not really" enough to live on), 16:16-17:18. Moreover, Ms. Petrello testified that, were it not for the Ordinance, she would panhandle in Manchester if she were legally allowed to there: "I would, because you know, I hate to say it, $1,500 is not a lot to live on. By the time I am done with my rent, groceries, my electric, my phone, my internet, I am practically broke by the end of the month. So yes, I would. Right now, I have got $20 in my bank account." *Id.* at 40:15-41:6. She added that, "if that ordinance is removed and I am able to legally go out, then yes, I would go out." *Id.* at 41:15-18.

STANDARD OF REVIEW

Summary judgment is appropriate when the movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In ruling on a motion for summary judgment, a court "construe[s] the record evidence in the light most favorable to, and [draws] all reasonable inferences in favor of, the non-moving party." *ATC Realty, LLC v. Town of Kingston*, 303 F.3d 91, 94 (1st Cir. 2002) (citation and internal quotations omitted). The moving party "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions [of the record] which it believes demonstrate the absence of a material fact." *Celotex v. Catrett*, 477 U.S. 317, 323 (1986) (citation and internal quotations omitted). Once that burden is met, the non-moving party must "produce evidence on which a reasonable finder of fact … could base a verdict for it," or else the motion will be granted. *Ayala-Gerena v. Bristol Myers-Squibb Co.*, 95 F.3d 86, 94 (1st Cir. 1996) (citation omitted).

THE DISORDERLY CONDUCT POLICY AND ITS APPLICATION

I. Municipal Liability as to the Disorderly Conduct Policy

Plaintiff raises three independent *Monell* claims against the City of Manchester: official policy, custom, and failure to train. First, Plaintiff raises an official policy claim. As the First Circuit has explained, "[a] plaintiff can establish the existence of an official policy by showing that the alleged constitutional injury was caused … by a person with final policymaking authority." *Welch v. Ciampa*, 542 F.3d 927, 941 (1st Cir. 2008) (internal citations omitted); *see also Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978). When a policy is facially unconstitutional, the only evidence the plaintiff need show in order to prevail is the presence of the policy and its application to the plaintiff. *See Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 404 (1997) ("Where a plaintiff claims that a particular municipal action itself violates federal law, or directs an employee to do so, resolving [the] issues of fault and causation is straightforward."); *Rossi v. Town of Pelham*, 35 F. Supp. 2d 58, 74 (D.N.H. Sept. 28, 1997) (same); *Szabla v. City of Brooklyn Park, MN*, 486 F.3d 385, 389-90 (8th Cir. 2007) (same).[8] Here, the City has effectively acknowledged that (i) the MPD, at the time of Plaintiff's summons on June 3, 2015, had what is tantamount to a policy in place that permitted a peaceful panhandler to be detained and cited for allegedly "obstructing vehicular traffic on public streets" under New Hampshire's disorderly conduct statute, *see* RSA 644:2(II)(c), even when the panhandlers are in a public place and do not step in the roadway, and (ii) Officer Brandreth acted pursuant to this policy when citing Plaintiff despite the fact that she never stepped in the roadway. As explained below, this policy is, on its face and in

[8] Municipal liability under this theory—in which the policymaker directs unlawful conduct in a written policy—is distinct from municipal liability based on the municipality's failure to prevent constitutional violations by its employees. Only the latter requires a showing that the municipality was "deliberately indifferent" to the violations. *See Brown*, 520 U.S. at 404-05 ("the conclusion that the action taken or directed by the municipality or its authorized decisionmaker itself violates federal law will also determine that the municipal action was the moving force behind the injury of which the plaintiff complains"); *Haley v. City of Boston*, 657 F.3d 39, 52 (1st Cir. 2011) (describing these two ways of establishing *Monell* liability); *see also Williams v. Kaufman Cnty.*, 352 F.3d 994, 1014 n.66 (5th Cir. 2003); *Rossi v. Town of Pelham*, 35 F. Supp. 2d 58, 78 n.1 (D.N.H. Dec. 18, 1997) ("Thus, for a municipal policy that is either facially unlawful or directs unlawful conduct, plaintiffs need not further establish 'deliberate indifference.'").

application, inconsistent with the disorderly conduct statute and violates the First Amendment.

Second, and alternatively, the MPD has developed a custom of interpreting the disorderly conduct statute in this fashion. "A municipality may be liable for an unconstitutional municipal custom if it is 'so well-settled and widespread that the policymaking officials of the municipality can be said to have either actual or constructive knowledge of it yet [do] nothing to end the practice.'" *See Britton v. Maloney*, 901 F. Supp. 444, 449-50 (D. Mass. 1995) (quoting *Bordanaro v. McLeod*, 871 F.2d 1151, 1156 (1st Cir. 1989)), *aff'd in part and rev'd in part on other grounds*, 196 F.3d 24 (1st Cir. 1999). "Unlike a 'policy,' which comes into existence because of the top-down affirmative decision of a policymaker, a custom develops from the bottom-up. Thus, the liability of the municipality for customary constitutional violations derives not from its creation of the custom, but from its tolerance of or acquiescence in it." *Id.*; *see also Baron v. Suffolk Cty. Sheriff's Dep't*, 402 F.3d 225, 237 (1st Cir. 2005) (articulating custom standard). Here, based on documents produced by the MPD, from January 1, 2015 to early March 2016, the MPD has issued at least thirty-six (36) summonses to panhandlers in various circumstances under RSA 644:2, II(c). *See* Tessier Depo. 19:10-20, Biss. Decl. *Ex. E* (estimating 39 summonses). Of these approximately 36 incidents, approximately 19 involved panhandling individuals soliciting motorists who never stepped in the roadway, including Ms. Petrello. *See* Eighteen Disorderly Conduct Summonses, Biss. Decl. *Ex. CC*. Nine (9) of these 19 summonses were issued during the holiday season of 2015, from November 18, 2015 to December 23, 2015. *Id.* In addition, 12 of these 19 summonses were issued by Community Policing Division Officers Battistelli and Karoul, who were in charge of Capt. Soucy's anti-panhandling initiative. *Id.* Many of these summonses contain language that appears to have become boilerplate. *Id.* And in all but two of these 19 instances, no action was taken against

the motorist.[9] It can hardly be disputed that the MPD was aware of this practice, as these summonses were issued consistent with the MPD's February 5, 2015/July 2, 2015 directive sent to officers. This custom was also memorialized in a press release. *See* Dec. 7, 2015 Press Release/Reardon Depo. Ex. 3, Biss, Decl. *Ex. FF*.

Finally, the MPD failed to train its officers on the correct interpretation of the disorderly conduct statute. This too is apparent based on the fact that the written training provided to MPD officers on February 5, 2015/July 2, 2015—falsely—deemed a panhandler as violating the disorderly conduct statute simply if, for example, a motorist slowed down in response and even if the panhandler was not in the roadway. Given this failure to train on what is legally permissible—and, in fact, by providing a training directive that is unlawful—it was highly predictable that an officer, like Officer Brandreth, would violate the civil rights of a person like the Plaintiff. *See Brown*, 520 U.S. at 399 (even where a pattern does not exist, municipal liability exists for a failure to train where "a violation of federal rights [was] a highly predictable consequence of a failure to equip law enforcement officers with specific tools to handle recurring situations"); *see also Young v. City of Providence*, 404 F.3d 4, 28 (1st Cir. 2005) (same).

A. The Policy and its Causal Impact

The MPD has consciously and deliberately implemented a policy in which it detains, harasses, threatens, disperses, and charges panhandlers for allegedly "obstructing vehicular traffic on public streets" under New Hampshire's disorderly conduct statute, *see* RSA 644:2(II)(c), even when the panhandlers are in a public place and do not step in the roadway. More specifically, on February 5, 2015, Lt. Reardon sent an email to all sworn officers—including Officer Ryan Brandreth—stating the following:

[9] In two of these 19 instances, the MPD also—correctly—cited cars stopping and donating money when such behavior caused an obstruction. *Id.* at RFP#1 181-82 (citing a driver for "stopping/standing/parking"), 182-86 (citing a driver for "stopping/standing/parking"); *see also* RSA 265:69. I (preventing stopping, standing, and parking in a roadway).

> In an effort to address the numerous issues resulting from those who use the roadways for unlawful purposes—to include ***Panhandling***—please consider utilizing the DOC [disorderly conduct statute] as your first charging option outlined below.
> ***644:2 Disorderly Conduct***.—*A person is guilty of disorderly conduct if: … II. He or she: (c)* ***Obstructs vehicular or pedestrian traffic on any public street or sidewalk*** ….

See Feb. 5, 2015 Policy/Larochelle Depo. Ex. 5, Biss. Decl. *Ex. F* (emphasis in original). This emailed policy (excluding the attachment) was also memorialized in "The Handbook" of Capt. Robert Cunha and Lt. Stephen Reardon—a handbook made accessible electronically to all officers in their vehicles and through the MPD's intranet. *See* Handbook of B[ob] S[teve]/Larochelle Depo. Ex. 7, Biss. Decl. *Ex. G*; Reardon Depo. 76:5-8, 76:10-77:3, Biss. Decl. *Ex. C* (discussing how it is electronically accessible). This policy was prepared by Lt. Reardon—who was a policy maker in the MPD's legal division—with the approval of his superiors. *See* Reardon Depo. 7:23-8:4, 35:14-36:3, Biss. Decl. *Ex. C*. This policy was internally and externally vetted. It was drafted following discussions in January 2015 with the City Solicitor's Office "to discuss new plan of action" upon the request of the MPD police chief. *See* J. Soucy Mar. 9, 2015 Email and Panhandlers attachment/Soucy Depo. Ex. 4, Biss. Decl. *Ex. H*; Reardon Depo. 46:22-47:1-5, Biss. Decl. *Ex. C* ("a lot of other input … was sought" including from the city solicitor at this stage). As Lt. Reardon testified at deposition:

> Q. So is it fair to say, I mean, this reflected, you know—this reflected department policy as to how to use the disorderly conduct statute against a panhandler who is engaging in disorderly conduct.
> A. Right.
> Q. Okay. I take it when you send these out these types of documents the expectation is that officers will comply with guidance that's provided, correct?
> A. Yes, ideally, yes.

Reardon Depo. 36:8-16, Biss. Decl. *Ex. C*. And, on July 2, 2015, consistent with this February 5, 2015 policy, community policing Capt. James Soucy sent another email to all officers explaining that RSA 644:2(II)(c) can be enforced against panhandlers if the "[p]anhandler *causes traffic to slow* or become impeded when accepting donations—*even if they're not standing or step into a public*

way." *See* MPD Right-to-Know Document Response, at MANC036-38/Larochelle Depo. Ex. 6, Biss. Decl. *Ex. I* (emphasis added).

Defendant has also acknowledged that Officer Brandreth acted pursuant to this policy when he cited Plaintiff on June 3, 2015. *See* Brandreth Depo. 20:15-21:3, 22:8-13, 23:12-20, 23:21-24:1 Biss Decl. *Ex. N* (acknowledging that he was "acting pursuant to that information" in the February 5, 2015 email when he cited Plaintiff); Reardon Depo. 36:8-17, 72:8-18, Biss. Decl. *Ex. C* (email reflects department policy; acknowledging that Brandreth "was following the recommended policy to deal with the behavior described); *see also* Larochelle Depo. 47:15-48:8 (noting that the February 5, 2015/July 2, 2015 documents were "directive[s] on how to legally handle those situations" concerning panhandling), Biss. Decl. *Ex. DD*; Def.'s Mot. for Judg. on the Pleadings, at 7 (Docket No. 14-1), Biss, Decl. *Ex. EE* (acknowledging that Brandreth had been instructed about this interpretation).

B. The Policy and its Application Violated the Fourth Amendment (Count I)

The February 5/July 2, 2015 policy, and its enforcement against Plaintiff, violated the Fourth Amendment. The Fourth Amendment prevents unreasonable seizures of persons. Where an "officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen … a 'seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968); *see also United States v. Mendenhall*, 446 U.S. 544, 553 (1980). In effect,

> a person has been "seized" within the meaning of the Fourth Amendment only if, *in view of all of the circumstances surrounding the incident*, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure . . . would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Mendenhall, 446 U.S. at 554 (emphasis added). A seizure may violate the Fourth Amendment even if it does not constitute an arrest or its equivalent. Such seizures do not violate the Fourth

Amendment where the officer, based "on a reasonable and articulable suspicion," makes the stop to "investigate suspected past or present criminal activity." *United States v. Acosta-Colon*, 157 F.3d 9, 14 (1st Cir. 1998) (quoting *United States v. McCarthy*, 77 F.3d 522, 529 (1st Cir. 1996)); *see also Acosta v. Ames Dep't Stores, Inc.*, 386 F.3d 5, 9 (1st Cir. 2004) ("When there is probable cause for an arrest, the Fourth Amendment's prohibition against unreasonable searches and seizures is not offended."). Put another way, a seizure under *Terry* violates the Fourth Amendment where there is no "reasonable and articulable suspicion" that the person has or is engaging in criminal activity. Here, not only was Plaintiff seized, but the June 3, 2015 summons itself lacked probable cause.

Under the disorderly conduct statute, "[a] person is guilty of disorderly conduct if: … He or she: … (c) *Obstructs vehicular* or pedestrian *traffic on any public street* or sidewalk or the entrance to any public building." *See* RSA 644:2(II)(c) (emphasis added). However, the February 5/July 2, 2015 policy expressly allows a panhandler who is engaging in speech in a public place to be detained and arrested based solely on how a motorist reacts to this speech. The MPD's employees repeatedly acknowledged this at deposition. *See, e.g.*, Reardon Depo. 42:21-43:3, 44:8-14, Biss. Decl. *Ex. C* (arguing that speech "actively" soliciting motorists would be barred under this interpretation where the motorist actually impedes traffic flow in response to the speech, as opposed to passively holding out a sign); Brandreth Depo. 39:8-11, Biss. Decl. *Ex. N* (a panhandler obstructs "based on the response that the motorist has to the panhandler"); Larochelle Depo. 28:18-29:5, 30:2-8, Biss. Decl. *Ex. DD* (it would be unlawful if the Plaintiff "was soliciting motorists from the sidewalk without stepping into the roadway and a motorist slowed down in response to that [causing an obstruction]").

However, as a matter of common sense and the disorderly conduct statute's plain terms, a peaceful panhandler soliciting donations from motorists in a public place is *not* obstructing traffic, regardless of how the motorist responds. According to Black's Law Dictionary, to "obstruct" means "[t]o block up; to interpose obstacles; to render impassable; to fill with barriers or impediments; as

to obstruct a road or way." *See* "Obstruct," Black's Law Dictionary, *available at* http://thelawdictionary.org/obstruct/. A peaceful panhandler in a public place engaging in speech directed at motorists is not "blocking," "interposing obstacles," "rendering impassable" or "filling with barriers or impediments" in a roadway. To the extent anyone is obstructing a roadway, *it would be the motorist* who makes the independent, intervening decision to slow down or stop his car and donate—not the panhandler who is simply conveying a peaceful message adjacent to the roadway.

Under Defendant's theory, a teenager on a public place adjacent to a roadway would be criminally liable for disorderly conduct when a motorist slows down or impedes traffic solely in response to the teenager's speech simply asking (whether it be verbally or through a sign) motorists to pull over or make a turn to buy lemonade or have their car washed. Like Plaintiff's speech, this speech is not obstructive where a speaker is not impeding someone's right of way and not causing the motorist to take evasive action. *See Human v. Colarusso*, No. 13-cv-296-SM, 2015 U.S. Dist. LEXIS 4866, at *4, 12, 2015 DNH 012 (D.N.H. Jan. 15, 2015) (noting that plaintiff "obstructed pedestrian traffic at that intersection" when he "forc[ed] people to walk around his display to access the crosswalk"). Moreover, under Defendant's extreme "but/for" causation theory, the owner of a sign on a median or a billboard telling a motorist to turn left on a single-lane road to enter a business could create an obstruction on a roadway when the driver slows down or even stops to make the turn in response to the speech. Under this example, the speaker—here, the sign or billboard owner—would have violated the law simply because of how the motorist responded to his or her protected speech. As a matter of common sense and the statute's plain meaning, this is incorrect because (i) the speaker is not in the road doing the obstructing and (ii) there is an intervening act that severs any semblance of causation—namely, the free will of the motorist deciding to slow down or stop.

C. The Policy and its Application Violated the First Amendment (Count II)

The February 5, 2015/July 2, 2015 policy and its application—even if consistent with the

disorderly conduct statute—violated the First Amendment.

Solicitation, panhandling, and begging are constitutionally-protected forms of speech. In *Village of Schaumburg v. Citizens for a Better Environment*, the United States Supreme Court struck down an ordinance that prohibited solicitation by certain organizations, holding that "charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment." 444 U.S. 620, 632 (1980). As the Court explained, "solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues," and "without solicitation the flow of such information and advocacy would likely cease." *Id.* at 620-21.

In the decades since *Village of Schaumburg*, courts have repeatedly reached the same result in the panhandling context. The Second Circuit Court of Appeals has observed:

> Begging frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation. Even without particularized speech, however, the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance.

Loper v. New York City Police Dep't, 999 F.2d 699, 704 (2d Cir. 1993) (restriction on "begging" was impermissibly content-based). Other courts, including those within the First Circuit, have agreed. *See, e.g., Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 556 (4th Cir. 2013) (plaintiff's complaint challenging no-solicitation zone survives motion to dismiss); *Ayres v. City of Chicago*, 125 F.3d 1010, 1015-16 (7th Cir. 1997) (granting injunction against ordinance forbidding the peddling of any merchandise, except newspapers, on either public property or certain private property in districts designated by the city council); *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 232 (D. Mass. 2015) ("Soliciting contributions is expressive activity that is protected by the

First Amendment."); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 184 (D. Mass. 2015) ("Solicitations of money by organized charities are within the protection of the First Amendment.") (internal quotations omitted).[10]

Panhandling speech directed at motorists from public places—like the speech engaged in by Plaintiff in public places—is constitutionally protected regardless of how motorists react to the speech. This includes speech soliciting donations, as well as speech asking motorists to pull over, slow down, or honk. To hold otherwise would permit a "heckler's veto." Indeed, it is axiomatic that a person's speech—including the speech of panhandlers—cannot be criminalized simply because of someone's reaction to it, even if that reaction is a motorist deciding to slow down in a roadway. *See, e.g., Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011) (anti-solicitation ordinance that bars individuals from "stand[ing] on a street or highway and solicit[ing], or attempt[ing] to solicit, employment, business, or contributions from an occupant of any motor vehicle" is unconstitutional on its face); *Valle Del Sol Inc. v. Whiting*, 709 F.3d 808, 814 (9th Cir. 2013) (striking down law that made it unlawful for a motor vehicle occupant to hire or attempt to hire a person for work at another location from a stopped car that impeded traffic, or for a person to be hired in such a manner; while acknowledging "that Arizona has a real and substantial interest in traffic safety," holding that "Arizona, however, has failed to justify a need

[10] *See also, e.g., Pindak v. Dart*, 125 F. Supp. 3d 720, 766 (N.D. Ill. 2015) (rejecting qualified immunity, and explaining that "[t]he relevant case law clearly establishes Plaintiffs' First Amendment right to engage in … panhandling"); *Speet v. Schuette*, 889 F. Supp. 2d 969, 978 (W.D. Mich. 2012) (holding unconstitutional Michigan statute prohibiting begging), *aff'd*, 726 F.3d 867 (6th Cir. 2013); *Wilkinson v. State*, 860 F. Supp. 2d 1284, 1288-90 (D. Utah 2012) (striking down statute stating that, in multiple circumstances, a person "may not sit, stand, or loiter on or near a roadway for the purpose of soliciting from the occupant of a vehicle"); *Benefit v. City of Cambridge*, 679 N.E.2d 184, 188 (Mass. 1997) (concluding that "there is no distinction of constitutional dimension between soliciting funds for oneself and for charities and therefore that peaceful begging constitutes communicative activity protected by the First Amendment"). In *Benefit*, for example, the Massachusetts Supreme Judicial Court struck down a Massachusetts statute which made it a crime to beg without a license, finding that there was no compelling state interest justifying such a broad restriction on the right to freedom of speech:

> *The statute intrudes not only on the right of free communication, but it also implicates and suppresses an even broader right—the right to engage fellow human beings with the hope of receiving aid and compassion* …. If such a basic transaction as peacefully requesting or giving casual help to the needy may be forbidden in all such places, then we may belong to the government that regulates us and not the other way around.

Benefit, 679 N.E.2d at 190 (emphasis added).

to serve that interest through targeting and penalizing day labor solicitation that blocks traffic, *rather than directly targeting those who create traffic hazards without reference to their speech*, as currently proscribed under the State's preexisting traffic laws") (emphasis added); *Goedert v. City of Ferndale*, 596 F. Supp. 2d 1027, 1028 (E.D. Mich. 2008) (striking down city's ordinances that, in part, prohibited the display of signs asking motorists to "honk" their horns to express their support for the demonstrators). Courts have repeatedly held that the government should not suppress the speech of a speaker because of the response to the speech, but rather should address the reaction to the speech (here, the actions of the motorist). *See, e.g., Van Arnam v. GSA*, 332 F. Supp. 2d 376, 402 (D. Mass. 2004) ("Courts have held that when the cost to the speaker of using the forum location is made to depend not only on expenses for which she may be directly responsible, but also for the expenses potentially created by counterdemonstrators and others over whom she has no control, an unconstitutional 'heckler's veto' can be created.") (citing *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992)).

The protected nature of panhandling speech was echoed in the recent First Circuit decision *Cutting v. City of Portland*, 802 F.3d 79 (1st Cir. 2015). There, the First Circuit struck down a content-neutral ordinance that indiscriminately banned virtually all expressive activity in all of Portland's median strips. This ordinance was motivated by a desire to restrict panhandling directed at motorists. In rejecting the ordinance, the First Circuit explained how a median ban could impact panhandling speech, noting that one of the plaintiffs was a panhandler "who uses medians to panhandle" but who "finds sidewalks so useless for her purposes that she now takes a bus to a different town in order to panhandle from medians." *Id.* at 89.

Because the MPD's policy implicates speech, it is the City's burden to establish that it survives First Amendment scrutiny. *See United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 816-17 (2000) ("When the Government restricts speech, the Government bears the burden of

proving the constitutionality of its actions.") (collecting cases); *McCullen v. Coakley*, 134 S. Ct. 2518, 537-40 (2014) ("To meet the requirement of narrow tailoring, the government must demonstrate [that the speech restriction meets the relevant requirements]"); *Cutting*, 802 F.3d at 91 (same). Manchester cannot meet its burden here. At the outset, the policy's content-based nature and lack of tailoring make this a much easier case than *Cutting*.

The policy, itself, focusses exclusively on panhandlers, therefore rendering it presumptively unconstitutional under strict scrutiny. *See, e.g.*, *Thayer*, 144 F. Supp. 3d at 233-34 (ordinance targeting panhandling speech—namely, speech seeking an immediate donation of money or another thing of value—was content based and triggered strict scrutiny); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227, 2231 (2015) (even if content-neutral, a speech restriction will be subject to strict scrutiny if enacted "because of disagreement with the message [the speech] conveys"; when applying strict scrutiny, the government must show that the restriction "furthers a compelling governmental interest and is narrowly tailored to that end"); *see also* Soucy Depo. 36:15-21, Biss. Decl. *Ex. A* (focus was on panhandling "where there is a solicitation of a motorist, and a motorist slows down or stops in response to the solicitation"). Indeed, it was only when Plaintiff asked for a donation *as a panhandler* in a public place did Officer Brandreth, pursuant to Department policy, elect to criminalize her speech because of how a motorist reacted to it. Video Recording, at 3:14-3:45, Biss. Decl. *Ex. R* (citation triggered by fact that Plaintiff was "being out here with a sign panhandling for money"). If there is any further doubt as to the targeting nature of this policy, the Court need look no further than the fact that, from January 1, 2015 to early March 2016, the MPD has issued at least 19 summonses under RSA 644:2, II(c) to panhandlers who had not stepped in roadways. In all but two of these 19 instances, no action was taken against the motorist. *See* Eighteen Disorderly Conduct Summonses, Biss. Decl. *Ex. CC*.

Even if this Court views the policy as content neutral and applies intermediate scrutiny, it

would still be unconstitutional. *See Rideout v. Gardner*, 838 F.3d 65, 71-72 (1st Cir. 2016) (content-neutral law must still be "narrowly tailored to serve a significant governmental interest"); *see also Texas v. Johnson*, 491 U.S. 397, 406-07 (1989) ("A law directed at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires."). This is for two reasons. First, while Manchester may have an "abstract" interest in preventing roadway obstructions, it has not demonstrated—after being asked to collect over three-years-worth of documents concerning panhandling incidents—that this is an actual problem in need of solving. As the First Circuit has explained, "intermediate scrutiny is not satisfied by the assertion of abstract interests." *Rideout*, 838 F.3d at 72. Here, neither Capt. Soucy—whose inquiries to Lt. Reardon led to the drafting of the February 5, 2015 policy—nor Capt. Tessier could reference a single accident related to panhandlers in Manchester. *See* Soucy Depo. 14:18-22, 38:18-39:2, Biss. Decl. *Ex. A*; Tessier Depo. 28:8-18, Biss. Decl. *Ex. E*. At most, one accident has been cited. *See* Stmt. of Facts ¶13. In fact, the directive was motivated by business and "quality of life" concerns that have little to do with roadway safety. *See* January 2015 Community Policing Report/Reardon Depo. Ex. 1, Biss. Decl. *Ex. B*. Of course, protecting the sensibilities of the business community or complaining citizens is not a legitimate municipal interest. *See Boos v. Berry*, 485 U.S. 312, 322 (1988) ("As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment.") (internal quotations omitted).

Second, even if Manchester has a significant municipal interest in addressing traffic obstructions, the directives are not sufficiently tailored to this interest. As *McCullen*, *Cutting*, and *Rideout* demonstrate—cases in which content-neutral laws were struck down for lack of tailoring—a far more tailored approach to addressing roadway obstructions, without encumbering speech, would be to (i) penalize the motorist's obstructing conduct under the disorderly conduct statute and

other laws, not the speech of a speaker in a public place, and (ii) cite a panhandler if he or she steps in the roadway in violation of the disorderly conduct statute (if there is an obstruction) and other existing law. *See, e.g.*, RSA 265:39, I ("Where sidewalks are provided it shall be unlawful for any pedestrian to walk along and upon an adjacent roadway"); RSA 265:69, I (preventing stopping, standing, and parking in a roadway); RSA 265:40, I ("No person shall stand on the travelled portion of a roadway for the purpose of soliciting a ride, employment, business or contributions from the occupant of any vehicle."). Courts have repeatedly recognized these more tailored, conduct-based, approaches. *See, e.g.*, *McCullen*, 134 S. Ct. at 2538 (noting that Massachusetts had ample alternatives that would more directly address its public safety interests without substantially burdening speech, including greater enforcement of existing "criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like"); *Cutting*, 802 F.3d at 91-92 (addressing more narrowly tailored approaches to address safety); *Rideout*, 838 F.3d at 74 ("the State has not demonstrated that other state and federal laws prohibiting vote corruption are not already adequate to the justifications it has identified").

D. The Policy and its Application Violates the Fourteenth Amendment's Right to Equal Protection (Count III)

The February 5/July 2, 2015 policy, and its enforcement against Plaintiff, also violated the Fourteenth Amendment's right to equal protection.

Under the Fourteenth Amendment, classifications by race, alienage, or national origin, *or regulations which "impinge on personal rights protected by the Constitution,"* are "subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985) (emphasis added). Even regulations that do not infringe upon fundamental rights are subject to "rational basis" review and must be "rationally related to a legitimate governmental purpose." *Id.* at 446. A government

actor "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." *Id.* Moreover, "some objectives—such as 'a bare … desire to harm a politically unpopular group'—are not legitimate state interests." *Id.* at 446-47 (internal citation omitted).

Here, on its face, the MPD's policy discriminates against panhandlers, who are disproportionately poor and homeless. This targeting of speakers who are not obstructing a roadway bears no rational relationship to the stated goal of addressing roadway obstructions. Rather, the MPD's implementation and enforcement of this policy has been motivated by an intent to prevent the poor and the homeless from soliciting donations, as well as a desire to cater to the wishes of local businesses and residents who do not want individuals soliciting donations in the community. Those are not legitimate interests. *See id.* at 448. As the Supreme Court of California stated in striking down an ordinance which prohibited, among other things, sitting on a public lawn, and which was intended to eliminate the perceived "influx" of "hippies":

> [W]e cannot be oblivious to the transparent, indeed the avowed, purpose and the inevitable effect of the ordinance in question: to discriminate against an ill-defined social caste whose members are deemed pariahs by the city fathers. This court has been consistently vigilant to protect racial groups from the effects of official prejudice, and we can be no less concerned because the human beings currently in disfavor are identifiable by dress and attitudes rather than by color.

Parr v. Mun. Court for Monterey-Carmel Judicial Dist, 479 P.2d 353 (Cal. 1971). The same result is required here.

THE ANTI-PANHANDLING ORDINANCE

I. The Anti-Panhandling Ordinance Violates the First Amendment On Its Face (Count IV)

The Ordinance states that "[n]o person shall knowingly distribute any item to, receive any item from, or exchange any item with the occupant of any vehicle when the vehicle is located in the roadway." *See* Ordinance/Larochelle Depo. Ex. 8, Biss. Decl. *Ex. Z*. On its face, the Ordinance

applies if the pedestrian is in a public place—like a sidewalk or green space—and not stepping in the roadway. It also only applies to the pedestrian, not the motorist who is actually in the roadway.

A. The Ordinance is a Speech Restriction

As the United States Supreme Court has explained:

> The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea, we have acknowledged that conduct may be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.

Johnson, 491 U.S. at 404 (internal quotations and citations omitted). Thus, the threshold inquiry is whether the particular behavior prohibited under the Ordinance possesses sufficient communicative elements to bring the First Amendment into play. This is not a difficult threshold to meet. *See American Legion Post 7 of Durham, N.C. v. City of Durham*, 239 F.3d 601, 607 (4th Cir. 2001) (because free speech rights are fragile, "the amount of burden on speech needed to trigger First Amendment scrutiny as a threshold matter is minimal"). Here, especially after recent federal court precedent, this minimal threshold is easily satisfied.

On its face, the Ordinance regulates speech. For example—as MPD employees conceded at deposition—the Ordinance would ban leafletting to a motorist from a pedestrian on a sidewalk. *See, e.g.*, Reardon Depo. 94:18-20, Biss. Decl. *Ex. C* (acknowledging leafletting ban). Leafletting is core political speech that can be traced to this country's founding days. *See, e.g.*, *Schneider v State of New Jersey, Town of Irvington*, 308 U.S. 147, 164 (1939) (law prohibiting the handing of literature was a speech restriction); *Reynolds v. Middleton*, 779 F.3d 222, 231 (4th Cir. 2014) (striking down an ordinance that prohibited, in part, leafleting on all county roadways and medians; noting that leafletting "is one of the most important forms of political speech"); *see also McCullen*, 134 S. Ct. at 2536 ("[H]anding out leaflets in the advocacy of a politically controversial viewpoint is the

essence of First Amendment expression ….").

Leafletting aside, federal courts have found "communicative elements" embedded in laws that ostensibly regulate only conduct associated with panhandling, and then struck these laws down due to their chilling effect on such communications. Most recently, in *Cutting v. City of Portland*, 802 F.3d 79 (1st Cir 2015), the First Circuit Court of Appeals ruled that a municipal ordinance which made no reference to speech—but prohibited standing, sitting, or staying (and almost all other activities) on medians—was an unconstitutional encroachment on plaintiffs' speech rights because it "sacrifice[ed] speech for efficiency." *Id.* at 92. The Court rejected the median ban, which was similarly motivated by a desire to restrict panhandling, because it (i) prohibited plaintiffs from speaking from the location they "believe they can accomplish [their] objective best" and (ii) forced the panhandler plaintiff to "[take] a bus to a different town in order to panhandle from medians" due to the fact that, according to that plaintiff, sidewalks were less effective for her purposes. *Id.* at 88-89. Not only did the First Circuit easily find this conduct-based ordinance to be a speech restriction, but the implication of this decision's analysis is that panhandling speech—including both the speech and the exchange resulting from the speech—is protected and can only be infringed upon subject to First Amendment rules.[11]

Just as soliciting charity is speech, the act of receiving charity is speech. This is because the act of receiving charity is intertwined with the protected soliciting behavior—so much so that the Ordinance's inevitable effect here (by banning an exchange resulting from a solicitation) is to

[11] Other panhandling cases have assumed this reality as well. *See, e.g., Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (panhandling is a form of expression entitled to the same constitutional protection as traditional speech); *Loper v. City of New York City Police Department*, 999 F.2d 699, 704 (2d Cir. 1993) ("Begging frequently is accompanied by speech indicating the need for food shelter, clothing, medical care, or transportation."); *Gresham v. Peterson*, 225 F.3d. 899, 904 (7th Cir., 2000) (["the panhandler's] messages cannot always be separated from their need for money"); *Speet v. Schulette*, 726 F. 3d 867, 875 (6th Cir. 2013). As noted by the Second Circuit, "Panhandling is an expressive act regardless of what words, if any, a panhandler speaks …. Even the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance." *Loper*, 999 F.3d. at 704; *see also McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 184 (D. Mass. 2015).

effectively ban the solicitation itself. *See O'Brien v. United States*, 391 U.S. 367, 384 (1968) (holding that "the inevitable effect of a statute on its face may render it unconstitutional"). Courts have repeatedly held that the government cannot skirt the protections of the First Amendment by regulating some conduct integral to speech as opposed to the speech itself. The cases do not draw "a distinction between the process of creating a form of *pure* speech (such as writing or painting) and the product of these processes (the essay or the artwork) in terms of the First Amendment protection afforded." *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060-1062 (9th Cir. 2010) (emphasis in original). For example, a government could not, as a practical matter, ban videography and photography without also banning the pure speech of videos and photographs, themselves. *Anderson* is a case study of this principle. There, the Ninth Circuit considered and rejected arguments that the business of tattooing, unlike the resulting tattoo, is not expressive and therefore not entitled to full First Amendment protection. *Id.* at 1061-1062. The Court held that the tattoo and its production could not be meaningfully separated. *Id.* at 1062.

As in *Anderson*, the act of soliciting and the resulting charitable donation cannot be meaningfully separated. One flows from the other. When the transaction is banned—as this Ordinance accomplishes—the inevitable effect is that the protected solicitation speech itself is effectively banned. This seems to be by design, as the Ordinance, on its face, targets only the pedestrian solicitor, not the motorist. *See* Ordinance/Larochelle Depo. Ex. 8, Biss. Decl. *Ex. Z* ("person" whose acts are prohibited under the Ordinance is only the person who "knowingly distribute[s] any item to, receive[s] any item from, or exchange[s] any item with [the motorist] … in the roadway"). Technically, of course, the Ordinance allows a pedestrian to engage in solicitation directed at a motorist. But this is so long as the motorist fails to respond to the solicitation by declining to accept a leaflet or flyer, or by declining to donate money. The inevitable effect of an ordinance that allows a panhandler to request charity but forbids the panhandler from actually

accepting it is to chill the constitutionally-protected solicitation to the same extent as a total ban on solicitation. To hold otherwise would be to allow the government to evade the strictures of the First Amendment by simply regulating some physical aspect of protected expressive activity. Courts have repeatedly rejected this approach in the leafletting context and in other areas. *See, e.g.*, *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 582 (1983) (holding that a tax on ink and paper "burdens rights protected by the First Amendment"); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571 (2011) (in striking down Vermont's restrictions on the sale, disclosure, and use of prescriber-identifying information, concluding that "Vermont's statute could be compared with a law prohibiting trade magazines from purchasing or using ink."); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 240 (1936) (state license tax imposed on newspapers violated freedom of the press because, through press could still report, the tax had an effect on the press); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 27–28 (2010) ("The law here may be described as directed at conduct, as the law in *Cohen* was directed at breaches of the peace, but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message.").

The conclusion that the Ordinance regulates speech is consistent with the similar principle that the Constitution protects non-speech actions that are "integral" or "intimately related to expressive conduct protected under the First Amendment." *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-707 & n.3 (1986). One example is donating to a political campaign which is intertwined with political speech. *See Buckley v. Valeo*, 424 U.S. 1, 17 (1976) (the exchange of money itself, without any explicit verbal communication, can constitute constitutionally-protected speech; further holding that the alleged "conduct" of giving or spending money in the political context "arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful"). Here, as in *Buckley*, the City's interest in regulating the conduct of receiving money arises because the City believes that panhandling speech near roadways (which is

integral to the conduct of receiving items from passing motorists) "is itself thought to be harmful." *See id*. But, just as donating and receiving money in political campaigns is protected speech, so too must be the donating and receiving of money for charitable purposes. These principles were recently affirmed by the Supreme Court in *McCutcheon v. F.E.C.*, 134 S. Ct. 1434 (2014) (overturning limits on aggregate federal campaign contributions); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).[12]

For these reasons, the Ordinance is a speech restriction subject to First Amendment principles.

B. Standard

A law is unconstitutionally "'overbroad' in violation of the First Amendment if in its reach it prohibits constitutionally protected conduct." *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). The question when examining overbreadth is whether a substantial number of the challenged law's applications are unconstitutional. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 237 (2002) ("The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process."); *United States v. Stevens*, 559 U.S. 460, 473 (2010) (same). An individual has standing to challenge a law as overbroad even if a more narrowly tailored law could properly be applied to him. *Parker v. Levy*, 417 U.S. 733, 759 (1974). Moreover, the Court's inquiry is not limited to the application of the challenged provisions to the particular litigant before it, as "[l]itigants … are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial

[12] The government also may not make an end run around the First Amendment by enacting a penalty ***after*** speech takes place as opposed to banning the speech outright. "Laws enacted to control or suppress speech may operate at different points in the speech process." *Citizens United*, 558 U.S. at 336–37. The following restrictions—all found to be invalid—are just a few examples of restrictions attempted at different stages of the speech process: (i) restrictions requiring a permit at the outset, *Watchtower Bible & Tract Soc. of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 153 (2002); (ii) imposing a burden by impounding proceeds on receipts or royalties, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 108 (1991); (iii) seeking to exact a cost after the speech occurs, *New York Times Co. v. Sullivan*, 376 U.S. 254, 267 (1964); and (iv) subjecting the speaker to criminal penalties, *Brandenburg v. Ohio*, 395 U.S. 444, 445 (1969) (per curiam).

prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973). As the New Hampshire Supreme Court has also recently explained:

> In the First Amendment context, courts are especially concerned about overbroad and vague laws that may have a chilling effect on speech. Courts are suspicious of broad prophylactic rules in the area of free expression, and therefore precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.

Montenegro v. N.H. DMV, 166 N.H. 215, 220 (2014) (quoting *Act Now to Stop War v. District of Columbia*, 905 F. Supp. 2d 317, 329-30 (D.D.C. 2012)).

Here, the Ordinance impacts speech in public fora. As the MPD acknowledged at deposition, the Ordinance targets a panhandler receiving a donation from a motorist even if that panhandler is in a public place—like a sidewalk or green space—and is not stepping in the roadway. *See* Reardon Depo. 90:7-16, Biss. Decl. *Ex. C*; Tessier Depo. 36:1-3, Biss. Decl. *Ex. E*; Brandreth Depo. 53:23-54:4, Biss. Decl. *Ex. N*. These are places "held in trust for the use of the public … for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Cutting*, 802 F.3d at 83 (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)). Thus, because the Ordinance implicates speech in public fora, Manchester has the burden of showing that the Ordinance can withstand First Amendment scrutiny. *See Playboy Ent. Group, Inc.*, 529 U.S. at 816-17 ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.") (collecting cases); *McCullen*, 134 S. Ct. at 2537-40. As explained below, whether this Court examines the Ordinance using the substantial overbreadth doctrine in *Ashcroft*/*Stevens* or the public forum analysis in *McCullen/Cutting/Rideout*, the Ordinance cannot survive First Amendment scrutiny.

C. The Ordinance is Subject to Strict Scrutiny

Strict scrutiny applies to the Ordinance because it specifically targets panhandling speech.

See Reed, 135 S. Ct. at 2227 (even if content-neutral, a speech restriction will be subject to strict scrutiny if enacted "because of disagreement with the message [the speech] conveys"). On its face, the Ordinance only targets the pedestrian—the panhandler—not the motorist. And when the Ordinance was introduced to the Board of Mayor and Aldermen's Committee on Administration, it was done with a transmittal letter that labeled it as the "Panhandling Ordinance." *See* J. Craig Mar. 17, 2015 Memo/Tessier Depo. Ex. 3, Biss. Decl. *Ex. V*. Throughout the debate on the proposed ordinance, Board members acknowledged that it was designed to address panhandlers. During the May 5, 2015 Board meeting, Alderman Jim Roy explained that this "is about panhandling on the side of the road." *See* Ordinance Minutes at ORD009, Biss. Decl. *Ex. X*. Then Alderman Garth Corriveau added: "[I]f they went into a court they would look at the minutes of this meeting and say everyone is talking about panhandling so of course it is about panhandling." *Id.* at ORD015. The minutes of the June 2, 2015 meeting of the Committee on Bills on Second Reading also make clear that any "content neutral" language in the bill was formulated as a way to make an attack on panhandling that the courts would uphold. As Alderman Levasseur correctly explained:

> It has been pointed out to me that this is not an ordinance for pan handling because if it was a pan handling ordinance then I am told that it would be unconstitutional. The problem is that the memorandum that comes before us [from March 17, 2015] and part of our minutes and part of what this says is that this is an ordinance to stop pan handlers.

Id. at ORD021. Finally, and not surprisingly, since the Ordinance became effective in October 2015, every known person given a summons for violating it has been a panhandler, not a motorist. *See* Six Ordinance Summonses, Biss. Decl. *Ex. BB* (all are panhandlers); Tessier Depo. 38:6-7, Biss. Decl. *Ex. E* (acknowledging that all were pedestrians).[13] Indeed, as Lt. Reardon conceded at deposition, the text of the Ordinance itself appears to target the panhandler, not the motorist. *See*

[13] A seventh summonses under the Ordinance was given to a pedestrian after Defendant's document production, but it is not currently known whether the pedestrian was panhandling. *See* Tessier Depo. 38:13-16, Biss. Decl. *Ex. E*. This summons has not been produced.

Reardon Depo. 99:10-100:7, Biss. Decl. *Ex. C*.

Given that the clear purpose of the Ordinance was to restrict the constitutionally-protected right to panhandle, the City must establish that it is necessary to the achieve a compelling governmental interest. *See Reed*, 135 S. Ct. at 2231. As explained below, this standard cannot be met.

D. The Ordinance Fails Under Either Strict Scrutiny or Intermediate Scrutiny

Even if this Court concludes that strict scrutiny does not apply, the Ordinance would fail intermediate scrutiny for the same reasons that it would fail strict scrutiny—the lack of a sufficient governmental interest and lack of tailoring. *See Rideout*, 838 F.3d at 71-72 (content-neutral law must still be "narrowly tailored to serve a significant governmental interest").

1. Governmental Interest

The City has raised "public safety" and fostering the "free and safe flow of motor vehicle traffic" as interests justifying the Ordinance. *See* J. Craig Mar. 17, 2015 Memo/Tessier Depo. Ex. 3, Biss. Decl. *Ex. V*; Ordinance/Larochelle Depo. Ex. 8, Biss. Decl. *Ex. Z*. Of course, these are significant or compelling governmental interests in the "abstract." But they do not meet the "compelling" or "significant" threshold here where the City has failed to demonstrate—after being asked to collect over three-years-worth of documents concerning panhandling incidents—that this is an actual problem in need of solving. *See Rideout*, 838 F.3d at 72 ("intermediate scrutiny is not satisfied by the assertion of abstract interests"). Once again, neither Capt. Soucy nor Capt. Tessier could reference a single accident related to panhandlers in Manchester. *See* Soucy Depo. 14:18-22, 38:18-39:2 Biss. Decl. *Ex. A*; Tessier Depo. 28:8-18, Biss. Decl. *Ex. E*. At most, one accident has been cited. *See* Stmt. of Facts ¶13.

The Ordinance is also significantly underinclusive in addressing roadway obstructions—a reality which creates reason to suspect that public safety is not the real reason for the Ordinance.

See Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 87 (1st Cir. 2004) ("underinclusiveness raises a suspicion that the stated neutral ground for action is meant to shield an impermissible motive"). Beside the fact that the Ordinance forbids an exchange between a motorist and a pedestrian even when there is no vehicle behind the motorist that has stopped to engage in the exchange, the Ordinance does not address many other behaviors that may actually cause roadway obstructions. The most obvious example of this underinclusivity is the fact that the Ordinance, on its face, only penalizes the pedestrian, not the motorist who may actually be causing an obstruction. Moreover, everyday drivers who are lost and stop on city streets to ask pedestrians for directions are not covered by the Ordinance. A driver who slows down and stops to pick up a hitchhiker is not covered by the Ordinance, even though the motorist could block traffic for at least as long a time as it takes to hand money to a panhandler. Similarly, taxi and Uber/Lyft drivers routinely stop on city streets to pick up customers and may obstruct traffic when doing so. They are immune from the Ordinance's provisions. In short, the City does not have a significant, let alone, compelling governmental interest in enacting an Ordinance that (i) underinclusively punishes panhandlers while ignoring actions that actually obstruct roadways (including motorists) and (ii) as explained below, overinclusively punishes non-obstructive and constitutionally-protected activity.

2. Overbreadth/Lack of Tailoring

Even if a significant or compelling governmental interest exists, the Ordinance must be enjoined because it is both substantially overbroad and not tailored to the purported public safety interests asserted to justify its existence. *See Cutting*, F.3d at 11 ("A content neutral restriction on speech is facially unconstitutional if it does not survive the narrowly tailoring inquiry, even though that ordinance might seem to have a number of legitimate applications."). This is for at least four reasons.

First, the net cast by the Ordinance is so wide that it ensnares vigilantly protected modes of

speech, even where there is no traffic obstruction or actual public safety concern (e.g., when there is no motorist behind the motorist receiving or reciprocating the speech, etc.). *See* Tessier Depo. 35:10-36:2, Biss. Decl. *Ex. E*; Reardon Depo. 90:7-16, Biss. Decl. *Ex. C*. For example, the Ordinance prohibits any person from passing to a motorist a leaflet by which he or she attempts to convey *any* message or information regarding any issue of public importance. Thus, one of the most time honored methods of supporting a political candidate or expressing an opinion regarding a government policy—leafletting—is prohibited on *every* street in Manchester when the person to whom the "speaker" wishes to reach is a motorist. Similarly, solicitation of motorists for donations for a favorite charity are effectively barred. Ordinary individuals are prohibited from passing flyers about a yard sale to passing motorists or taking an envelope from a mail carrier in his or her mail truck. And poor people, such as the Plaintiff, are effectively denied the opportunity to solicit donations to help them pay for food, shelter, medical treatment, and other of life's most basic necessities. All of this is banned even where there is no concern for public safety with respect to the specific exchange occurring (i.e., the vehicle responding to the solicitation does not impede the flow of traffic, etc.).

Second, the Ordinance is both overbroad and not tailored because it applies to every street in the city, including those streets in which there have been no public safety concerns. *See* Reardon Depo. 90:17-23, Biss. Decl. *Ex. C*. This kind of "geographical overbreadth" was a major consideration for the First Circuit when it struck down Portland's ban on standing, sitting, or staying on any median strip in the city. *See Cutting*, 802 F.3d at 89-90. Other courts have similarly used this geographic overbreadth approach. *See Reynolds*, 779 F.3d at 231 (striking down an ordinance that prohibited leafleting on all county roadways and medians where the evidence established "at most, a problem with roadway solicitation at busy intersections in the west end of the county"); *Redondo Beach*, 657 F.3d at 949 (invalidating a regulation prohibiting solicitation on "all streets

and sidewalks in the City" in the absence of evidence supporting the existence of a threat to public safety and traffic flow posed by solicitation on all streets and sidewalks in the city). This geographic overbreadth is what caused a Utah federal court to strike down a similarly problematic statute:

> The language of the statute applies to all roads. The prohibition therefore regulates a wide range of situations that likely have no impact on safety. For example, the statute would prohibit children from selling lemonade in front of their house on a quiet residential street in Parowan, Utah, or a panhandler from requesting donations alongside a gravel road.

Wilkinson v. Utah, 860 F. Supp. 2d 1284, 1290 (D. Utah 2012).

Third, once it became aware of the fact that Concord had adopted a similar ordinance, the City hastily decided to pass a "copycat" ordinance of its own without seriously examining whether it could address its public safety concerns with less intrusive tools already available to it. *See McCullen.* 134 S. Ct. at 2518 ("[T]he Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it"); *Cutting*, 802 F.3d at 91 ("the City did not try—or adequately explain why it did not try—other less speech restrictive means of addressing the safety concerns it identified."). On March 13, 2015, the MPD became aware of the Concord ordinance after Lt. Reardon, upon request of then Chief Mara, conducted "an hour" of research. *See* Reardon Depo. 82:4, Biss. Decl. *Ex. C*. Just four (4) days later, Alderman Craig informed her Committee that she would proposed an identical ordinance and that it had already been reviewed by the Solicitor's Office and Chief Mara. *See* J. Craig Mar. 17, 2015 Memo/Tessier Depo. Ex. 3, Biss. Decl. *Ex. V*. Capt. Tessier—Manchester's Rule 30(b)(6) designee—had no knowledge of whether the City considered any alternatives to the Ordinance after learning about the Concord ordinance—alternatives which could have included limiting the scope of the Ordinance to only specific areas of the City. *See* Tessier Depo. 34:2-35:5, Biss. Decl. *Ex. E*. Capt. Tessier also acknowledged that, before the City considered adopting the Ordinance, the City conducted no studies about (i) traffic accidents caused by the solicitation of motorists or (ii) whether the Ordinance

was even needed in light of current law. *Id.* at 27:19-28:18. This lack of meaningful inquiry into less restrictive alternatives between March 2015 and the Ordinance's passage in October 2015 is fatal under *McCullen* and *Cutting*.

Finally, once again, the more tailored approach to addressing roadway obstructions and roadway safety, without encumbering speech, would be to, for example, (i) penalize only the motorist's obstructing conduct using the disorderly conduct statute and other laws, (ii) restrict the Ordinance's scope to specific intersections at certain times of day where the City can document a genuine public safety problem, and/or (iii) cite a panhandler if he or she steps in the roadway in violation of existing law.[14] The Ordinance also could have been drafted in a more tailored fashion to only address (i) pedestrians who step in the roadway to receive an item from a motorist or (ii) motorists who provide an item to a pedestrian and cause an obstruction. Setting aside the fact that such narrowing alternatives were not even considered, such behavior would already be covered by existing law.

The City may claim that these alternatives are less efficient and would not prevent all accidents that may occur. But this still would not support the Ordinance's intrusion on speech.[15] The First Amendment does not permit the State to "sacrifice speech for efficiency." *See Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 795 (1988). As the United States Supreme Court recently made clear in *McCullen*, "[t]o meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen*, 134 S. Ct. at 2540;

[14] *See, e.g.*, RSA 265:39, I (pedestrians on roadway); 265:69, I (preventing stopping, standing, and parking in a roadway); RSA 265:40, I (pedestrian soliciting rides statute "on the travelled portion of a roadway"); RSA 644:2, II(c) (disorderly conduct where there is an obstruction of a roadway); *see also, e.g.*, *McCullen*, 134 S. Ct. at 2538 (noting that existing laws would address asserted interests without encumbering speech); *Cutting*, 802 F.3d at 91-92 (same); *Rideout*, 838 F.3d at 74 (same).

[15] *See Broadrick*, 413 U.S. at 612 ("[t]he possible harm to society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted ...."); *see also Ashcroft*, 535 U.S. at 255 ("The Government may not suppress lawful speech as the means to suppress unlawful speech. Protected speech does not become unprotected merely because it resembles the latter. The Constitution requires the reverse.").

see also Cutting, 802 F.3d at 92 ("Such a [blanket median] ban is obviously more efficient, but efficiency is not always a sufficient justification for the most restrictive option."). Here, the City has chosen the easier—yet overbroad and unconstitutional—route.

II. The Anti-Panhandling Ordinance Violates the First Amendment As Applied (Count IV)

Even if this Court concludes that the Ordinance satisfies the First Amendment on its face (which it does not), the City has nonetheless applied the Ordinance in a manner that violates the First Amendment. Plaintiff's as applied challenge is based on the idea that, if the law is facially neutral, "it has been enforced selectively in a viewpoint discriminatory way." *McGuire v. Reilly*, 386 F.3d 45 (1st Cir. 2004) (citing *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 325 (2002)). As the First Circuit has explained:

> The essence of a viewpoint discrimination claim is that the government has preferred the message of one speaker over another by enforcing the ordinance disproportionately against only one group of persons to whom it applies. The general principle is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.

Id. at 62 (internal citations and quotations omitted). In *McGuire*, the First Circuit also opined that "We think that some showing of intent on the part of government officials probably is necessary to make out an as-applied First Amendment viewpoint discrimination claim…." *Id.* at 63. Thus, in order to prevail on an as applied claim, there are two essential elements: (1) that the Ordinance is being disproportionately enforced against panhandlers; and (2) the intent of the selective enforcement is to discourage panhandlers. Both elements are met here.

Although enforcement of the Ordinance has been sparse—at least, in part, because enforcement has been suspended due to developments in this action, *see* Tessier Depo. 39:3-40:15, Biss. Decl. *Ex. E*—the factual record could not be more clear. Every one of the six summonses issued under the Ordinance has been issued to a panhandler, despite the City's repeated assertions

that it, at least until this lawsuit, believed that the Ordinance applied to the motorist as well. *See* Ordinance Summonses, Biss. Decl. *Ex. BB*; Tessier Depo. 37:14-38:2, Biss. Decl. *Ex. E*. This targeting of panhandlers also strongly suggests that the City has turned a blind eye to ordinance violations committed by non-panhandler pedestrians who, for example, receive items (e.g., ice cream, mail, takeout food, etc.) from motorists.

This unequal enforcement is also no surprise given the fact that, as discussed in Section I.C., *supra*, the Ordinance's purpose has been, from the beginning, to deter panhandling. The Ordinance was first proposed with a transmittal memo calling it a "Panhandling Ordinance." *See* J. Craig Mar. 17, 2015 Memo/Tessier Depo. Ex. 3, Biss. Decl. *Ex. V*. The transmittal memo went on to explain: "Police officers have actively enforcing state statutes *to decrease panhandling*. Adoption of this ordinance will provide officers with another tool to ensure public safety." *Id.* (emphasis added). Throughout the entire discussion of the ordinance at several meetings of the Board it was referred to as "the panhandling ordinance." One Alderman explicitly noted that the purpose of the content neutral language of the ordinance was to avoid constitutional problems that would arise if it explicitly targeted panhandlers:

> It has been pointed out to me that this is not an ordinance for pan handling because if it was a pan handling ordinance then I am told that it would be unconstitutional. The problem is that the memorandum that comes before us [from March 17, 2015] and part of our minutes and part of what this says is that this is an ordinance to stop pan handlers.

See Ordinance Minutes at ORD021, Biss. Decl. *Ex. X*. As limited as the enforcement record may be, there can be little question that, when combined with the intent behind the Ordinance, the Ordinance has been applied so as to inhibit a panhandler's right to solicit donations from occupants of motor vehicles in violation of the First Amendment.

Respectfully submitted,

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Dated: March 23, 2017

CERTIFICATE OF SERVICE

I hereby certify that an original of the foregoing were forwarded, via the Court's ECF system, on this 23rd day of March, 2017 to Robert Meagher, Esq.

/s/ Gilles R. Bissonnette
Gilles R. Bissonnette