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 REPLY TO DEFENDANT'S OBJECTION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO COUNTS I THROUGH IV

I. It is Undisputed That Ms. Petrello Did Not Step in the Roadway on June 3, 2015

It is undisputed that Plaintiff did not step in the roadway before being cited by MPD Officer Ryan Brandreth for disorderly conduct on June 3, 2015. As Officer Brandreth explained unequivocally at deposition:

> Q. And you didn't see Ms. Petrello step in the roadway; correct?
> A. *I did not see her step in the roadway.*

See Brandreth Depo. 18:3-5, attached to Third Bissonnette Decl. ("Third Biss. Decl.") at *Ex. KK* (emphasis added). The City's Answer further confirms that Plaintiff "was not seen stepping into the roadway." *See* Def.'s Answer to the Second Amended Compl. ⁋ 19 (Docket No. 12).[1]

In mistakenly arguing that there is a fact dispute concerning whether Plaintiff stepped in the road on June 3, 2015, *see* Def.'s Obj. at p. 1-2, the City cites the unrelated deposition testimony of MPD Officer Matthew Larochelle concerning an entirely separate incident under a different statute occurring on May 15, 2015.[2] In this May 15, 2015 incident, Plaintiff was

[1] Officer Brandreth's June 3, 2015 summons says nothing about Plaintiff stepping in the roadway. *See* Brandreth Police Report/Reardon Depo. Ex. 4, at PET005-06, Biss Decl. *Ex. P*.
[2] Officer Larochelle's deposition transcript is attached to the First Bissonnette Declaration at *Exhibit DD*. *See* Docket No. 28-29.

panhandling peacefully, but Officer Larochelle issued her a summons under RSA 265:39 based on his belief that she stepped in the roadway to receive a donation. Plaintiff denies ever stepping in the roadway. *See* Petrello Depo. 24:18-25:7 (denying stepping in the roadway on May 15, 2015), Biss. Decl. *Ex. O*; *see also* Larochelle May 15, 2015 Report/Larochelle Depo. Ex. 1, Third Biss. Decl. *Ex. LL*. This May 15, 2015 charge under RSA 265:39 was nolle prossed at the same time as Ms. Petrello's June 3, 2015 disorderly conduct charge. *See* May 5, 2015 Larochelle Case Summary, Biss Decl. *Ex. MM*.[3] As to the June 3, 2015 disorderly conduct summons that is this case's focus, however, there is no dispute that Plaintiff remained in a public place.[4]

II. Plaintiff Has Established an Official Policy under *Monell*

It cannot be seriously disputed that a policy exists here concerning enforcement of the disorderly conduct statute under *Monell*. The City has 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. This policy must be enjoined. *See Hydrick v. Hunter*, 669 F.3d 937, 939-40 (9th Cir. 2012) (qualified immunity inapplicable to injunctive relief claim).

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[3] Plaintiff inadvertently included in her *Exhibit N* (Docket No. 28-18) only the first 8 pages of the deposition transcript of Officer Brandreth, and instead mistakenly included the complete deposition transcript of MPD Officer Matthew Larochelle. *Exhibit N* should only have included the complete deposition transcript of Officer Ryan Brandreth. To remedy this error, Plaintiff has attached the complete deposition transcript of Officer Ryan Brandreth as *Exhibit KK* to the Third Declaration of Attorney Bissonnette.

[4] The City also misreads Plaintiff's *Exhibit U*, which is an email exchange from Lt. Stephen Reardon to then Chief David Mara, which recounted Lt. Reardon's conversation with Concord Police Chief Bradley C. Osgood. *See* Mar. 13, 2015 S. Reardon Email to Chief D. Mara/Reardon Depo. Ex. 6 and Tessier Depo. Ex. 5, Biss. Decl. *Ex. U*. The City contends that this email stands for the proposition that, of the 18 panhandlers cited under the Concord ordinance, only 6 were homeless. This is wrong. As the email states: "6 of the 18 individuals issued [a summons] … actually have residences and *are not* actually considered homeless." (emphasis added). Thus, the remaining 12 people cited were actually homeless.

The City seeks an end around from its admissions by arguing that this policy—memorialized in writing and sent to officers on February 5, 2015 (from Lt. Reardon) and on July 2, 2015 (from Capt. Soucy)—was not "formal written policy." However, a formal writing is not a requirement to establish a municipal policy. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480-81 (1986) (an official policy is "often but not always committed to writing"). In any event, such writings exist here.

The City also claims that there is no *Monell* liability because the final policymaker is the Chief, not Lt. Reardon or Capt. Soucy. *See* Def.'s Obj. at p. 3. This argument is baseless, as there is no dispute that Lt. Reardon and Capt. Soucy had the authority to issue this policy. As the Supreme Court has explained, final policymakers cannot insulate the municipality "from liability simply by delegating their policymaking authority to others[.]" *See City of St. Louis v. Praprotnik*, 485 U.S. 112, 126-127 (1988) (plurality); *see also Pembaur*, 475 U.S. at 483 ("particular officers may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances") (plurality); *Haus v. City of N.Y.*, 2011 U.S. Dist. LEXIS 155735, at *39 (S.D.N.Y. Aug. 31, 2011) (delegation of policy-making authority by decision-maker subjects City to liability; "if the Commissioner simply deferred to his chiefs, he—and thus the City—could still be fairly taxed with responsibility …."). Indeed, state law allows chiefs of police who otherwise possess final decision-making power to delegate their policymaking authority to subordinates. *See* RSA 105:2-a ("each chief of police … shall have authority to direct and control all employees of his or her department in their normal course of duty"). This is precisely what occurred here. MPD Chief David Mara and the City Solicitor's Office authorized Lt. Reardon and Capt. Soucy to make Departmental policymaking decisions concerning how to enforce the disorderly conduct

statute against panhandlers and to send these communications to MPD Officers. In short, Capt. Soucy and Lt. Reardon spoke for the Department on these training issues concerning panhandling. *See Hyland v. Wonder*, 117 F.3d 405 (9th Cir.), *as amended*, 127 F.3d 1135 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1166 (1998) (delegation of final policymaking authority had occurred where the San Francisco superior court judges possessed final policymaking authority over the Juvenile Probation Department, yet the superior court judges, "left the internal management of the Juvenile Probation Department to [the chief juvenile probation officer] and attempted not to interfere").

As Lt. Reardon testified, he had the approval of his superiors before sending the February 3, 2015 directive. *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 Capt. Soucy's approval); MPD Right-to-Know Document Response, at MANC005-07/Larochelle Depo. Ex. 6, Biss. Decl. ***Ex. I*** (discussion between Lt. Reardon and Capt. Soucy on Jan. 27, 2015 re: draft). This February 5, 2015 email 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).

Similarly, as to the July 2, 2015 email reaffirming this policy issued by Capt. Soucy, this document was approved by the Solicitor's Office. Capt. Soucy explained that 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." *See* MPD Right-to-

Know Document Response, at MANC010/Larochelle Depo. Ex. 6, Biss. Decl. *Ex. I*. This July 2, 2015 document was sent after multiple revisions designed to simplify it. *See id.* at MAN010-24 (June 1, 2015 version, with discussion including City Solicitor's Office and Capts. Soucy and Tessier), MAN025-29 (June 3, 2015 version by Lt. Reardon, with statement to Capts. Soucy and Tessier 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*.

As to Plaintiff's independent *Monell* custom claim, it also cannot be seriously disputed that the City had an established and widespread pattern and practice—consistent with this policy—of enforcing the disorderly conduct statue against peaceful panhandlers in public places who were not stepping in the roadway. It is worth repeating that, from January 1, 2015 to early March 2016, the MPD issued at least 19 disorderly conduct summonses to panhandlers soliciting motorists who never stepped in the roadway, including Ms. Petrello. *See* Eighteen Disorderly Conduct Summonses, Biss. Decl. *Ex. CC*. The City, in fact, concedes that these incidents were directly the result of the training authorized by the Department—a fact which demonstrates that the City knew this was occurring and ratified it. *See* Def.'s Obj. at 4 ("the enforcement under the disorderly conduct statute was the result of training"); *see also Baron v. Suffolk Cty. Sheriff's Dep't*, 402 F.3d 225, 242 (1st Cir. 2005) (under a custom theory, "municipal liability can also be based on a policymaker's constructive knowledge—that is, if the custom is so widespread that municipal policymakers should have known of it"); *Bordanaro v. McLeod*, 871 F.2d 1151, 1156-57 (1st Cir. 1989) (same).

III. The City Continues to Misapprehend the Standard and Burden of Proof

The City continues to insist that Plaintiff must establish that "no set of circumstances exist under which the [Ordinance] would be valid, i.e. that the law is unconstitutional in all of its applications." Def.'s Obj. at p. 6 (citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008)). This argument is contradicted by the ruling of the United States Supreme Court in *United States* v *Stevens*, 559 U.S. 460 (2010), which recognized a different standard in First Amendment cases raising facial challenges:

> In the First Amendment context.…this court recognizes a second type of facial challenge, whereby a law can be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.

Id. at 473.

A closer reading of *Washington State Grange* confirms the separate First Amendment standard articulated in *Stevens*. *See Washington State Grange*, 552 U.S. at 449 n. 6 ("Our cases recognize a second type of facial challenge in the First Amendment context under which a law may be overturned as impermissibly overbroad because a 'substantial number' of its applications are unconstitutional") (internal citations omitted); *see also Reynolds v. Middleton*, 779 F. 3d 222, 226 (4th Cir. 2015) ("Where a plaintiff claims suppression of speech under the First Amendment, the plaintiff bears the initial burden of proving that speech was restricted by the governmental action in question …. After the plaintiff makes his initial showing, the burden then falls on the government to prove the constitutionality of the speech restriction") (citations omitted).[5]

As set forth on Pages 29 to 33 and 37 to 40 of Plaintiff's Memorandum of Law in Support

[5] Notwithstanding the City's citation to *Reynolds v. Middleton*, 779 F.3d 222, 229 (4th Cir. 2015) in support of its argument that "common sense" can suffice as a justification with respect to roadway solicitors, the Court in *Reynolds* specifically held that the government is required to "present *actual evidence* supporting its assertion that a speech restriction does not burden substantially more speech than necessary." *Id.* at 229 (emphasis added). Again, over a three-year period from January 2013 to July 2016, the City has not been able to identify any significant public safety incidents other than a single accident occurring at a single intersection (at Bridge Street and Beech Street) having anything to do with panhandling or pedestrian/motorist exchanges. *See* Def.'s *Ex. L*.

of her Motion for Summary Judgment, the Ordinance prohibits a wide array of expressive activities by people in public places involving occupants of motor vehicles at every street corner in the City. This includes: (i) people distributing political leaflets; (ii) people passing commercial advertising flyers; (iii) ordinary citizens passing out information about yard sales; (iv) poor people obtaining assistance to pay for food or other basic necessities of life; and (v) people obtaining donations for charities. In short, "a substantial number of its applications are unconstitutional." *See Stevens*, 559 U.S. at 473.[6]

Finally, it is important to note that Plaintiff's overbreadth claim using the "substantial number of applications" approach under *Stevens* is separate and distinct from Plaintiff's independent facial challenge using the forum-based analysis applied in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014) and *Cutting v. City of Portland*, 802 F.3d 79 (1st Cir. 2015). As explained in prior briefing, the Ordinance lacks tailoring under either strict scrutiny or intermediate scrutiny using this forum-based approach. Indeed, the Courts in *McCullen*, *Cutting*, and *Rideout* acknowledged how the overbreadth approach and the forum-based approach were distinct theories. *See McCullen*, 134 S. Ct. at 2540 n.9 ("Because we find that the Act is not narrowly tailored, we need not …. consider petitioners' overbreadth challenge."); *Cutting*, 802 F.3d at 87 n.9 (same); *Rideout v. Gardner*, 838 F.3d 65, 72 n.5 (1st Cir. 2016) (same).

IV. The Ordinance is Unconstitutional as Applied Under the First Amendment

To avoid the evidence that the City's allegedly even-handed Ordinance was applied solely against panhandlers/pedestrians, the City creates a classification that is irrelevant to Plaintiff's First Amendment as applied claim. Specifically, the City argues that Plaintiff needs to "offer evidence that there were different classes of people who are engaged in the same behavior, interacting with traffic, and who were being willfully ignored." Def's Obj. at p. 15. This fails

[6] *See also* Pl.'s Obj. to the City's Motion for Summary Judgment at pp. 20-24 addressing the Ordinance's scope.

for two reasons.

First, Plaintiff's as-applied claim is based on the undisputed fact that—despite the City's unwavering claim that it intended the Ordinance to apply to both the motorist and the pedestrian—the City never applied it against motorists. Between when the MPD became aware that the Ordinance was enacted in March 2016 and when the City decided to cease enforcing the Ordinance for the duration of this case in January 2017, the MPD had issued seven (7) summonses under this Ordinance *only* to six (6) panhandlers/pedestrians. *See* Six Ordinance Summonses to Five Individuals, Biss. Decl. *Ex. BB*; Seventh Ordinance Summons, Second Biss. Decl., *Ex. GG*; Tessier Depo. 37:14-38:2, Biss. Decl. *Ex. E*. Consistent with its disorderly conduct policy targeting panhandlers, the MPD exclusively used the Ordinance to target panhandlers, not motorists.[7]

Second, the fact that the Ordinance has only been applied against panhandlers—as opposed to other pedestrian exchangers—is equally problematic. It is difficult to imagine that no Manchester police department officer since March 2016 has ever seen a non-panhandler pedestrian exchange an item with a motorist in a roadway, whether it be a pedestrian receiving take-out food, mail, etc. This targeting of panhandlers strongly suggests that the City has turned a blind eye to ordinance violations committed by non-panhandler pedestrians. Perhaps this is because, as Mayor Gatsas explained, these people "don't look like … panhandler[s]." *See* Ordinance Minutes at ORD014, Biss. Decl. *Ex. X*.

[7] That the City will continue to focus overwhelmingly on pedestrians if the Ordinance remains in effect seems clear from the City's brief, as well as from the testimony of Officer Brandreth who noted, "there are inherent problems in chasing down a driver and still being able to get back and deal with the pedestrian …" Def's Obj. at p. 10. While targeting the panhandler may seem to be more efficient, courts have been clear that the First amendment cannot be sacrificed for the sake of efficiency. *See, e.g., McCullen*, 134 S. Ct. at 2534-35, 2540 ("But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency.'; "the prime objective of the First Amendment is not efficiency") (citations omitted).

V. MPD's Captain Tessier's New Affidavit Cannot Be Considered

In an attempt to justify the Ordinance in opposing Plaintiff's Motion, the City attaches a new affidavit from Captain Maureen Tessier. *See* Docket No. 39-2. This affidavit attaches a previously unproduced report purporting to list 247 pedestrian accidents over the past three years and their locations. This report must be rejected for two reasons.

First, this report was never produced in litigation despite the fact that the City was explicitly asked to produce all documents and information that the City claims supports its justification for the Ordinance. The City produced its initial disclosures on July 19, 2016. The City did not produce this report at that time. *See* City's July 19, 2016 Initial Disclosures, Biss Decl. *Ex. NN*. Plaintiff also sent a specific document request seeking "[a]ll documents … concerning the purported need for the ordinance's provisions … and your claim that the Ordinance is constitutional." The City did not produce this report in response. *See* City's Aug. 4, 2016 Document Responses, Biss Decl. *Ex. OO*.

Given this late disclosure, the City is barred from using this undisclosed report. Rule 37(c)(1) prohibits the "use as evidence … at a hearing" of any exhibit not previously disclosed under Rule 26(a), absent "substantial justification." This rule—which also applies to summary judgment—"gives teeth" to Rule 26 "by forbidding the use at trial of any information required to be disclosed by Rule 26(a) that is not properly disclosed," regardless of lack of bad faith or willfulness. *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001). "The baseline rule is that the required sanction in the ordinary case is mandatory preclusion." *Harriman v. Hancock Cnty.*, 627 F.3d 22, 29 (1st Cir. 2010) (citations omitted). Preclusion depends on several factors, including "the sanctioned party's justification for the late disclosure; the opponent-party's ability to overcome its adverse effects (i.e., harmlessness); the

history of the litigation; the late disclosure's impact on the district court's docket; and the sanctioned party's need for the precluded evidence." *Id.*

These factors support preclusion of the report. The City has offered no justification for its late disclosure. Moreover, this late disclosure has deprived Plaintiff of the ability to vet this report in discovery. Capt. Tessier was deposed in this case on February 14, 2017 as the City's Rule 30(b)(6) designee, and the discovery deadline was February 17, 2017. Yet this report was produced three months later on April 21, 2015. *See* Docket No. 11. Plaintiff has had no ability to depose Captain Tessier on the report's contents—including on the facts that (i) these accidents had nothing to do with panhandling and/or the exchange of an item from a motorist to a pedestrian and (ii) Captain Tessier lacks personal knowledge of each accident (which is a problem because the City has not produced the reports describing the details of each accident).

Even if the report was not excluded due to the City's failure to make a timely disclosure, it is irrelevant. The report shows no connection between these accidents and panhandling or individuals/pedestrians engaging in other types of exchanges with motorists. Once again, over a three-year period from January 2013 to July 2016, the City has not been able to identify any injury to any person or property having anything to do with panhandling or pedestrian/motorist exchanges other than a single accident occurring at a single intersection. *See* Def.'s *Ex. L*.[8] In short, Capt. Tessier's April 21, 2017 belated affidavit and report (Docket No. 39-2) should be stricken and is irrelevant.

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[8] The City contends that Plaintiff did not request production of accident reports related to panhandling. *See* Def.'s Obj. at 10. This is incorrect. Plaintiff's first two document requests sought, from January 1, 2013 to the date of production, "all complaints or reports or incidents … made to the Manchester police department concerning": (i) individuals panhandling or soliciting money in public or (ii) individuals passing items to or from a motorist in a roadway. *See* City's Aug. 4, 2016 Document Responses No. 1 and 2, Biss Decl. Ex. *OO*. These requests including all panhandling "reports or incidents" obviously include accidents related to panhandling. The 18 incidents produced in response in which a panhandler was cited for disorderly conduct without stepping in the roadway are located at *Exhibit CC*. In this production, the City has been able to only come up with one accident.

Respectfully submitted,

THERESA M. PETRELLO,

/s/ Gilles R. Bissonnette

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Dated: May 2, 2017

CERTIFICATE OF SERVICE

I hereby certify that an original of the foregoing were forwarded, via the Court's ECF system, on this 2nd day of May, 2017 to Robert Meagher, Esq.

/s/ Gilles R. Bissonnette
Gilles R. Bissonnette