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 OBJECTION TO THE CITY'S MOTION FOR SUMMARY JUDGMENT

Plaintiff hereby files her Objection to Defendant City of Manchester's Motion for Summary Judgment. Plaintiff incorporates by reference her Motion for Summary Judgment and supporting Memorandum of Law filed on March 22, 2017. *See* Docket Nos. 27, 28, and 33. As explained below and in Plaintiff's Motion, the City's Motion for Summary Judgment should be denied, Plaintiff's Motion for Summary Judgment should be granted, and a permanent injunction should be issued in Plaintiff's favor. As to the disorderly conduct policy's application to Plaintiff on June 3, 2015, a trial should be set on damages. [1]

STANDARD

Summary judgment is appropriate when the record reveals "no genuine dispute as to any material fact and [that] the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The evidence submitted in support of the motion must be considered in the light most favorable to the nonmoving party, drawing all reasonable inferences in its favor. *See Navarro v. Pfizer Corp*., 261 F.3d 90, 94 (1st Cir. 2001). A party seeking summary judgment must first identify the absence of any genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S.

[1] In an effort to streamline this case, Plaintiff voluntarily dismisses her equal protection claim concerning the Ordinance (Count V).

317, 323 (1986). A material fact "is one 'that might affect the outcome of the suit under the governing law.'" *United States v. One Parcel of Real Prop. with Bldgs.*, 960 F.2d 200, 204 (1st Cir. 1992) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Here, the question of whether a permanent injunction should be issued as to the City's disorderly conduct policy and anti-panhandling Ordinance is ripe for summary judgment.[2]

THE DISORDERLY CONDUCT POLICY

I. The Establishment of Official Policy

As explained in Plaintiff's Motion, Plaintiff raises three independent *Monell* claims against the City as to its interpretation of the disorderly conduct statute: (i) official policy, (ii) custom, and (iii) failure to train. The City addresses only the failure to train *Monell* claim.

As to Plaintiff's official policy claim, the City all but concedes that (i) the Manchester Police Department ("MPD"), at the time of Plaintiff's summons on June 3, 2015, had a policy 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) MPD Officer Ryan Brandreth acted pursuant to this policy when citing Plaintiff despite the fact that she never stepped in the roadway. *See* Def.'s Memo. at 3 ¶ 3. This ends this Court's inquiry as to whether the City can be held liable under *Monell*. As explained in Plaintiff's Motion, this policy, on its face and in application, is inconsistent with the disorderly conduct statute and violates the First Amendment.

[2] In determining whether to grant a permanent injunction, the Court must find that: "(1) plaintiffs prevail on the merits; (2) plaintiffs would suffer irreparable injury in the absence of injunctive relief; (3) the harm to plaintiffs would outweigh the harm the defendant would suffer from the imposition of an injunction; and (4) the public interest would not be adversely affected by an injunction." *Healey v. Spencer*, 765 F.3d 65, 74 (1st Cir. 2014) (quoting *Asociacion de Educacion Privada de P.R., Inc. v. Garcia-Padilla*, 490 F.3d 1, 8 (1st Cir. 2007)). The first element—success on the merits—predominates in this determination. *See Sindicato Puertorriqueno de Trabajadores v. Fortuno*, 699 F.3d 1, 10 (1st Cir. 2012) ("In the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis.").

The City attempts to avoid *Monell* liability on the City's policy in two ways. First, the City attempts to bootstrap this Court's qualified immunity decision. *See* Def.'s Memo. at 7-8. However, this Court did *not* grant qualified immunity on the basis that Officer Brandreth was acting lawfully; rather, qualified immunity was granted based on this Court's conclusion that (i) Officer Brandreth "*arguably* had probable cause" and (ii) the law was not "clearly established" at the time of the arrest sufficient for Officer Brandreth to know that Ms. Petrello was engaging in First Amendment protective activity. *See* Docket No. 26 at pp. 11-12, 17. Under a *Monell* policy claim the deferential qualified immunity "arguable probable cause" and "clearly established" standards do not apply. The question is simply whether the municipal policy and its application violated the law, even if the policy and its application may have seemed reasonable to an officer who is entitled to qualified immunity.

Put another way, as case after case has concluded, the qualified immunity analysis is not a proxy for examining a *Monell* liability policy claim. *See, e.g., Owen v. City of Independence*, 445 U.S. 622, 657 (1980) ("municipalities have no immunity from damages liability flowing from their constitutional violations").[3] As the Second Circuit succinctly explained in *Askins v. Doe No. 1*, 727 F.3d 248 (2d Cir. 2013):

> It suffices to plead and prove against the municipality that municipal actors committed the tort against the plaintiff and that the tort resulted from a policy or custom of the municipality. In fact, the plaintiff need not sue the individual tortfeasors at all, but may proceed solely against the municipality …. [T]he entitlement of the individual municipal actors to qualified immunity because at the time of their actions there was no clear law or precedent warning them that their conduct would violate federal law is also irrelevant to

[3] *See also Mendiola-Martinez v. Arpaio*, 836 F.3d 1239, 1249-50 (9th Cir. 2016) ("But as a threshold matter, Maricopa County is not eligible for qualified immunity because counties do not enjoy immunity from suit—either absolute or qualified—under § 1983.") (internal citations omitted); *Beedle v. Wilson*, 422 F.3d 1059, 1068 (10th Cir. 2005) ("The Hospital … contends it is not liable because at the time it filed its state suit and opposed Mr. Beedle's various motions to dismiss, the Hospital had a good-faith basis for believing it was not a governmental entity for § 1983 purposes and thus was not precluded from bringing a libel action. This contention approximates a qualified immunity defense in that the Hospital claims a reasonable official would not have known its actions violated a clearly established federal right. Such an argument is misplaced because a governmental entity may not assert qualified immunity from a suit for damages. A qualified immunity defense is only available to parties sued in their individual capacity.") (internal citations omitted); *Tenenbaum v. Williams*, 193 F.3d 581, 597 (2d Cir. 1999) ("While the individual defendants are entitled to qualified immunity, the City is not.").

> the liability of the municipality …. The doctrine that confers qualified immunity on individual state or municipal actors is designed to ensure that the persons carrying out governmental responsibilities will perform their duties boldly and energetically without having to worry that their actions, which they reasonably believed to be lawful at the time, will later subject them to liability on the basis of subsequently developed legal doctrine. That policy, however, has no bearing on the liability of municipalities. Municipalities are held liable if they adopt customs or policies that violate federal law and result in tortious violation of a plaintiff's rights, regardless of whether it was clear at the time of the adoption of the policy or at the time of the tortious conduct that such conduct would violate the plaintiff's rights. To rule, as the district court did, that the City of New York escapes liability for the tortious conduct of its police officers because the individual officers are entitled to qualified immunity would effectively extend the defense of qualified immunity to municipalities, contravening the Supreme Court's holding in *Owen*.

Id. at 253-55 (internal citations omitted).

Second, the City argues that a "deliberate indifference" standard applies and, in so doing, cites an inapplicable failure to train First Circuit case. *See Joyce v. Town of Tewksbury*, 112 F.3d 19, 22-23 (1st Cir. 1997). While this "deliberate indifference" standard applies as to a *Monell* failure to train claim, it does not apply to Plaintiff's *Monell* policy claim. *See, e.g., Bd. of Cnty. Comm'rs of Bryan Cnty., Okl. v. Brown*, 520 U.S. 397, 404-05 (1997) ("[T]he 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 …. 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."); *Williams v. Kaufman Cnty.*, 352 F.3d 994, 1014 n.66 (5th Cir. 2003) (same); *Haley v. City of Boston*, 657 F.3d 39, 52 (1st Cir. 2011) (describing these two ways of establishing *Monell* liability); *Rossi v. Town of Pelham*, 35 F. Supp. 2d 58, 78 n.1 (D.N.H. Dec. 18, 1997) ("[F]or a municipal policy that is either facially unlawful or directs unlawful conduct, plaintiffs need not further establish 'deliberate indifference.'").

Finally, Plaintiff's alternative and independent custom and failure to train *Monell* claims

are supported by the fact that, from January 1, 2015 to early March 2016, the MPD 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. James 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.[4] It can hardly be disputed that the MPD was aware of this practice, as these summonses were issued consistent with the MPD's 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*.

In short, this is not a case of a single incident. It is a case of a pattern of incidents which were known to the City, done pursuant to training that was legally wrong, and were deliberately indifferent to these individuals' constitutional and statutory rights. Given this failure to train on what the law protects—and, in fact, by providing the opposite guidance in its training—it was highly predictable that an officer, like MPD Officer Brandreth, would violate the civil rights of a person like Plaintiff panhandling in a public place adjacent to a roadway. *See Young v. City of Providence*, 404 F.3d 4, 28 (1st Cir. 2005) ("A finding of deliberate indifference requires … that the City have disregarded a known or obvious risk of serious harm from its failure to develop a

[4] In two of these 19 instances, the MPD—correctly—cited cars stopping and donating money when such behavior caused an obstruction. *Id.* at RFP#1 180-81 (citing a driver for "stopping/standing/parking"), 185-86 (citing a driver for "stopping/standing/parking"); *see also* RSA 265:69, I (preventing stopping, standing, and parking in a roadway).

training program …. We think the jury could reasonably make such a finding here. Such knowledge can be imputed to a municipality through a pattern of prior constitutional violations."). And, unlike *Joyce*, there was a repeated history of violations in this case that was the result of specific training provided to officers by the MPD.

II. Liability

A. The Fourth Amendment (Count I)

As explained in Plaintiffs' Motion for Summary Judgment, this policy runs contrary to the disorderly conduct statute's terms. *See* RSA 644:2, II(c). 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 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 conveying a peaceful message adjacent to the roadway. Indeed, the City's interpretation deems a panhandler an obstructer simply based on whether and when the motorist decides to respond to the solicitation, despite the fact that the panhandler may have had no intent to (i) personally obstruct the roadway or (ii) motivate the motorist to stop and obstruct the roadway while he or she has the right of way. For example, under the City's view, if the motorist elects to make a donation while stopped at a red light, the panhandler has not committed a crime. But if the motorist elects to make a donation while there is a green light, the

panhandler has committed a crime. Of course, the MPD cannot distort the disorderly conduct statute by applying it to non-obstructing panhandlers in public places simply because the MPD believes that this is a more efficient police tactic than citing motorists. *See* Def.'s Memo. at 10.

Plaintiff's Fourth Amendment claim is simple. MPD Officer Ryan Brandreth, acting pursuant to municipal policy, seized Ms. Petrello without reasonable suspicion and issued a disorderly conduct summons without probable cause. The City, however, incorrectly assumes that Plaintiff can only obtain damages following the issuance of the summons by asserting a malicious prosecution claim. *See* Def.'s Memo. at 9. The City is wrong because the summons issued against her—unlike a grand jury indictment or judicial probable cause finding after an adversarial hearing—was not secured by a neutral legal process where there was an independent finding of probable cause. *See Hernandez-Cuevas v. Taylor*, 723 F.3d 91, 100 (1st Cir. 2013) ("*neutral magistrate's determination that probable cause exists*" is an "intervening act" that severs causation and therefore severs a damage claim following that judicial determination unless "a plaintiff can overcome this causation problem [with a malicious prosecution claim] and demonstrate that law enforcement officers were responsible for his continued, unreasonable pretrial detention") (emphasis added); *see also Kean v. City of Manchester*, No. 14-cv-428-SM, 2015 U.S. Dist. LEXIS 40339, at *5-8 (D.N.H. Mar. 30, 2015) (an *indictment* severed a claim for damages, thereby triggering the need for a malicious prosecution claim to obtain damages after indictment secured; malicious prosecution claim was barred by the indictment because the plaintiff did not "allege that any of the defendants acted improperly in securing the indictment").

But even if Plaintiff is required to bring a malicious prosecution claim to obtain damages after the issuance of the summons, all the elements of such a claim would be easily satisfied here. The proceedings obviously terminated in her favor. The disorderly conduct charge was

voluntarily dismissed (or nolle prossed) by the City. *See* Case Summary, Biss Decl. *Ex. S*. This dismissal was fully consistent with Plaintiff's view from the outset that she never violated the law on June 3, 2015. *See, e.g.*, *Jones v. Gwynne*, 323 S.E.2d 9, 14 (N.C. 1984) ("[A] plaintiff has proven a termination in his favor in a malicious prosecution action when he shows that the prosecutor has voluntarily dismissed the charges against him thereby having to resort to the institution of new proceedings in order to further prosecute the case."); *Nelson v. Miller*, 126, 660 P.2d 1361, 1364 (Kan. 1983) ("a voluntary dismissal of the prior action without prejudice under Kansas law may be a termination in favor of the defendant in that action, if the action is not commenced again"). There was never, despite the City's contention to the contrary, a "plea agreement." *See* Def.'s Memo. at 9. A "plea agreement" is an agreement in which a defendant pleads guilty to a crime in return for agreed-upon conditions. Not only was this disorderly conduct charge dismissed in its entirety, but there was no contract by which the City would have been able to take any action against Plaintiff if she panhandled following this dismissal. Of course, such panhandling would also be constitutionally protected.

B. The First Amendment (Count II)

Even if the MPD's policy is consistent with the disorderly conduct statute's terms (which it is not), its application of the disorderly conduct statute violates the First Amendment as explained on Pages 21 to 27 in Plaintiff's Memorandum of Law in support of her Motion for Summary Judgment. This is because the policy fails narrow tailoring under any form of scrutiny. As *McCullen*, *Cutting*, and *Rideout* demonstrate—cases in which content-neutral laws were struck down due to 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 ….). Courts have repeatedly recognized these more tailored conduct-based approaches that do not sacrifice the First Amendment for the sake of efficiency. *See, e.g.*, *McCullen v. Coakley*, 134 S. Ct. 2518, 2538 (2014) (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 v. City of Portland*, 802 F.3d 79, 91-92 (1st Cir. 2015) (addressing more narrowly tailored approaches to address safety); *Rideout v. Gardner*, 838 F.3d 65, 74 (1st Cir. 2016) ("the State has not demonstrated that other state and federal laws prohibiting vote corruption are not already adequate to the justifications it has identified"). The City's use of existing law, *see* RSA 265:69, I, against two motorists confirms the viability of this more tailored, conduct-based approach. *See* Def.'s Memo. at 10.

It is important to note that the City's policy permits a "heckler's veto." As explained in Plaintiff's Motion for Summary Judgment, cases have routinely held that a person's speech—including the speech of panhandlers—cannot be criminalized because of someone's reaction to it, even if that reaction is a motorist deciding to slow down in a roadway. Here, once again, the policy violates this principle by deeming a panhandler an obstructer simply based on whether and when the motorist decides to respond to the solicitation, despite the fact that the panhandler may have had no intent to (i) personally obstruct the roadway or (ii) motivate the motorist to stop

and obstruct the roadway while he or she has the right of way.

C. Equal Protection (Count III)

This policy also violates the Fourteenth Amendment's guarantee of equal protection. Here, on its face and in application, the MPD's policy discriminates against panhandlers, who are disproportionately poor and homeless. For example, it was only when Plaintiff asked for a donation *as a panhandler* in a public place did Officer Brandreth, pursuant to MPD 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 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*. This targeting of speakers who are not obstructing a roadway bears no rational relationship to the stated goal of addressing roadway obstructions. As explained on Pages 26-28 of Plaintiff's Memorandum of Law in support of her Motion for Summary Judgment, the MPD's implementation and enforcement of this policy has also 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 Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985).

THE ORDINANCE

I. Plaintiff Has Standing to Challenge the Ordinance

To establish Article III standing, a plaintiff must show (1) an "injury in fact," (2) a

sufficient "causal connection between the injury and the conduct complained of," and (3) a "likel[ihood]" that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

The U.S. District Court for the District of Massachusetts recently summarized the two ways in which standing can be established with respect to a pre-enforcement First Amendment challenge:

> Under certain circumstances, a plaintiff can suffer sufficient injury to challenge a law without having been subject to "an actual arrest, prosecution, or other enforcement action" under that law. [*Susan B. Anthony List*, 134 S. Ct. at 2342.] The First Circuit has recognized two such types of circumstances. *Blum v. Holder*, 744 F.3d 790, 796 (1st Cir. 2014) (citing *Mangual v. Rotger-Sabat*, 317 F.3d 45, 56-57 (1st Cir. 2003)). The first is where a plaintiff alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by the statute, and there exists a credible threat of prosecution." *Id.* at 796 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)); *see also Susan B. Anthony List*, 134 S. Ct. at 2342. The second is where the plaintiff "is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences." *Blum*, 744 F.3d at 796 (quoting *Mangual*, 317 F.3d at 57).

Martin v. Evans, No. 16-11362-PBS, 2017 U.S. Dist. LEXIS 37156, at *7 (D. Mass. Mar. 13, 2017). Under both of these two approaches, a plaintiff's standing "hinge[s] on the existence of a credible threat that the challenged law will be enforced." *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996). "If such a threat exists, then it poses a classic dilemma for an affected party: either to engage in the expressive activity, thus courting prosecution, or to succumb to the threat, thus forgoing free expression. Either injury is justiciable." *Id.* Thus, a plaintiff's standing to bring a pre-enforcement challenge turns on whether there is a credible threat that the challenged law will be enforced against them.

The Plaintiff easily satisfies each of these two independent standing doctrines. As to the first standing doctrine, Plaintiff testified at deposition that she prospectively intends to engage in

a course of conduct proscribed by the Ordinance. She explained 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." *See* Petrello Depo. 40:15-41:6, Biss. Decl. *Ex. O*. 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.

As to the second independent standing doctrine, Plaintiff has demonstrated injury in the form of chilling under the Ordinance. Following the Ordinance's implementation in March 2016, Ms. Petrello has panhandled in other towns—including in Hooksett and Derry—to make ends meet so as to not violate its terms. *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. In short, this is not a case of subjective chill; rather, Ms. Petrello has actually been deterred from exercising her constitutional rights as a result of the Ordinance.

It also can hardly be disputed that there has been a credible threat of enforcement under the challenged Ordinance. 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 to six (6) individuals—two of whom described themselves as homeless. *See* Six Ordinance Summonses to Five Individuals, Biss. Decl. *Ex. BB*; Seventh Ordinance Summons, Second Bissonnette Declaration ("Second Biss. Decl."), *Ex. GG*; Tessier Depo. 37:14-38:2, Biss.

Decl. *Ex. E*. In all of these instances, only the panhandler/pedestrian was cited, not the motorist.

Finally, the City makes much of an August 28, 2015 email from Ms. Petrello's *pro bono* criminal defense attorney to Manchester's city prosecutor where her attorney engaged in a "prediction" that Ms. Petrello would no longer panhandle in light of federal benefits that she may be receiving. This was only a "prediction" and, as this email makes obvious, there was never an enforceable "plea agreement" in which Ms. Petrello contractually agreed to not panhandle. Once again, Ms. Petrello—consistent with her claim of innocence—never pled guilty to anything, nor did she waive her First Amendment right to panhandle in the future. As is common in life, circumstances and attitudes change, and Ms. Petrello later elected to assert her First Amendment right to peacefully panhandle in public places given her economically disadvantaged position.

II. The Ordinance Restricts Speech

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.

As explained on Pages 29 to 33 in Plaintiff's Memorandum of Law in support of her Motion for Summary Judgment, the Ordinance is a speech restriction. For example, the Ordinance would ban leafletting to a motorist from a pedestrian on a sidewalk. MPD's Lt. Stephen Reardon conceded this fact at deposition, which establishes that the Ordinance is a speech restriction. *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 …."). Thus, because the Ordinance implicates speech in public fora, the City has the burden of showing that it is constitutional. *See U.S. 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*, 134 S. Ct. at 2540 ("To 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 ….") (emphasis added).

In attempting to rebut the fact that the Ordinance is a speech restriction, the City makes much of the position that the ACLU of New Hampshire ("ACLU-NH") and New Hampshire Legal Assistance ("NHLA") took when the City of Concord proposed and adopted a similar ordinance in 2013. The City is correct that between 2013 and 2015 the ACLU-NH and NHLA did not oppose this Concord-style ordinance on First Amendment grounds and made public statements to this effect. However, in the Spring of 2015, the positions of these two organizations changed in response to recent case developments, which included (i) the pendency of the *Cutting* case before the First Circuit, (ii) the numerous then-pending cases that ultimately struck down anti-panhandling laws and embraced a more speech-protective approach to these provisions, and (iii) the United States Supreme Court's approach that the conveyance of money can constitute First Amendment expressive activity. *See Cutting v. City of Portland*, No. 2:13-

cv-359-GZS, 2014 U.S. Dist. LEXIS 17481 (D. Me. Feb. 12, 2014) (striking down median ban), *aff'd*, 802 F.3d 79 (1st Cir. 2015) (decided Sept. 11, 2015); *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 556 (4th Cir. 2013) (plaintiff's complaint challenging no-solicitation zone survives motion to dismiss); *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) (same); *McCutcheon v. F.E.C.*, 134 S. Ct. 1434 (2014) (overturning limits on aggregate federal campaign contributions on First Amendment grounds). As the law changes, of course, so too must the position of advocacy organizations seeking to protect fundamental civil liberties.

Reflecting this change in position, on May 14, 2015, the ACLU-NH submitted its opposition to this Ordinance to the Manchester Board of Aldermen, then MPD Chief David Mara, and the City Solicitor's Office. In its statement, the ACLU-NH explained how the proposed Ordinance was overbroad. *See* May 14, 2015 ACLU Email, Biss. Decl. *Ex. Y*. The ACLU-NH opposed similar ordinances proposed in Rochester (on November 4, 2015, yet approved), Somersworth (on October 2, 2015, yet approved), Lebanon (on March 18, 2015, and not adopted), and Nashua (on October 13, 2015 and December 21, 2015, and vetoed in both instances). In fact, Nashua's proposed ordinance was vetoed precisely because of these First Amendment concerns raised. *See* Nashua Oct. 20, 2015 and Dec, 29, 2015 Veto Statements and Proposed Ordinances, Second Biss. Decl., *Exs. HH and II*.

III. The City Uses the Incorrect First Amendment Legal Standard

As the Ordinance is a speech restriction, the City uses the incorrect legal standard in examining this restriction under the First Amendment. The standard here is not whether "no set of circumstances exist under which [the Ordinance] would be valid." *See* Def.'s Memo. at 13.

Rather, the question when examining First Amendment 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."). As the United States Supreme Court explained in *United States v. Stevens*, 559 U.S. 460 (2010):

> In the First Amendment context … this Court recognizes a second type of facial challenge, whereby a law may 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.

The City also cannot escape First Amendment scrutiny by alleging that Plaintiff was never cited under the Ordinance. *See* Def.'s Memo. at 13. 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 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).

IV. The Ordinance Violates the First Amendment on its Face (Count IV)

A. The Ordinance is Content Based and Discriminatory

Whatever the City's intent, the text of the Ordinance clearly discriminates against panhandlers and is therefore content based. The intent behind a law is irrelevant when it is discriminatory on its face. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015) ("A law

that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech."). Here, on its face, the Ordinance's plain meaning only targets the pedestrian—e.g., the panhandler—not the motorist. There is no ambiguity. *See Herman v. Hector I. Nieves Transp., Inc.*, 244 F.3d 32, 34 (1st Cir. 2001) ("In the absence of ambiguity, we generally do not look beyond the plain meaning of the statutory language."). As the Ordinance states: "No *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* (emphasis added). A panhandler—who is the "person" under the Ordinance—can be cited, but a motorist cannot. Consistent with the Ordinance's text, every one of the seven summonses under the Ordinance were issued to the panhandler/pedestrian, not the motorist. *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*. The Supreme Court has also made it clear that the First Amendment generally prohibits laws that "impose restrictions on certain disfavored speakers." *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 888, 899 (2010); *see also Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2663 (2011) (applying strict scrutiny to law that "disfavors specific speakers"). Such laws are akin to those that discriminate by content, and are therefore subject to strict scrutiny. *Citizens United*, 130 S. Ct. at 898-99.

The City does not meaningfully dispute the Ordinance's discriminatory impact on its face. This is apparently why the City has ceased enforcement of this Ordinance during the pendency of this litigation. When Lt. Reardon was deposed in this case, he 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*. 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 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*.[5] In an attempt to avoid the Ordinance's plain terms, the City claims that it never intended the Ordinance to apply to only pedestrians, but rather to both pedestrians and motorists. *See* Def.'s Memo. at 15. But when the text of a law clearly discriminates—as it does here—intent is irrelevant. *See Reed*, 135 S. Ct. at 2228.

In any event, regardless of the Ordinance's text, it is also content based for the independent reason that it was enacted with discriminatory intent. *See id.* ("a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary"). This is for two reasons. First, the record makes clear that, while the Ordinance was being considered by the City of Manchester, the City was placed directly on notice that the Ordinance targeted only the pedestrian panhandler, not the motorist. As the ACLU-NH explained in its May 14, 2015 correspondence, the Ordinance was defective, in part, because it does "not impact the motorist at all who actually may be obstructing traffic, instead

[5] It is worth noting that a March 13, 2015 e-mail sent from Lt. Reardon to then-Chief David Mara relayed statistical data from Chief Bradley C. Osgood of the Concord Police Department concerning the Concord 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*. This data showed that every one of the 30 summonses issued to 18 individuals for a violation of the Concord ordinance—which was to be adopted verbatim by Manchester—was issued to a pedestrian. However, no Manchester official took any action to ensure that this was not repeated in the City.

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*. The fact that the City was informed of this textual defect yet did nothing to correct it further highlights the City's deliberate intent to target only panhandling speech, and not the actions of motorists. *See Rideout*, 838 F.3d at 74-75 (rejection of proposal by legislative body—there, the House Criminal Justice Committee—suggested legislative intent).

Second, as explained on Page 35 of Plaintiff's Memorandum of Law in Support of her Motion for Summary Judgment, the legislative history of the Ordinance demonstrates the City's discriminatory intent. 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. 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. 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 ORD014. 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 pretext. 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.

B. Under Any Form of Scrutiny, the Ordinance is not Tailored

Even if this Court concludes that the Ordinance is content neutral, the Ordinance would fail intermediate scrutiny for the same reasons that it would fail strict scrutiny—lack of tailoring. *See Rideout*, 838 F.3d at 71-72 (content-neutral law must be "narrowly tailored to serve a significant governmental interest"). This is for at least three reasons.

First, the Ordinance applies to all exchanges even if the solicitor does not step in the roadway and is not actually causing an obstruction. This would include a leafletter engaging a motorist from a sidewalk on a quiet intersection. This overbreadth is significant, as the pedestrian is in a public place and would not even be causing a traffic hazard when engaging in an exchange. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949 (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 because, in part, it would prohibit "*signbearers on sidewalks seeking patronage or offering handbills even though their conduct does not pose a traffic hazard*") (emphasis added). A far more narrowly tailored approach would be to regulate the pedestrian only when he or she actually steps in the roadway, as did the City of Arlington in Texas. *See Watkins v. City of Arlington*, 123 F. Supp. 3d 856, 861, 868 (N.D. Tex. 2015) (rendering constitutional an ordinance preventing the distribution of literature in heavily trafficked intersections where the person "*is within a public*

roadway," and making clear that a person "may solicit or sell or distribute material to the occupant of a motor vehicle on a public roadway so long as he or she remains on the surrounding sidewalks and unpaved shoulders, and not in or on the roadway itself ….") (emphasis added).

Second, even if there is an obstruction, it would be caused by the motorist, not the pedestrian standing in a public place. Yet this Ordinance's plain terms specifically exclude the motorist actually in the roadway causing the obstruction. Once again, the City does not appear to dispute this interpretation. The obvious more targeted and speech-protective approach is to address the obstructing non-speaker motorist who is in a roadway on which motorists are traveling. As explained on Page 40 of Plaintiff's Memorandum of Law in Support of her Motion for Summary Judgment, an abundance of existing laws already do this. And even if the City believes that it is easier to cite the panhandler as opposed to the motorist, *see* Def.'s Memo. at 10, the First Amendment cannot be "sacrifice[ed] … for efficiency." *Cutting*, 802 F.3d at 92.

Third, the Ordinance applies to *all* "roadways" in the City except for the areas designated for parking, regardless of whether they present any documented public safety problem. The City suggests that the Ordinance allows sufficient opportunities for panhandlers to engage motorists because it permits the passage of items to or from a motorist who pulls over into a permitted on-street parking area. *See* Def.'s Memo. at 12. Even if true, this does nothing to cure the geographically overinclusive nature of the Ordinance. For example, the Ordinance's prohibitions encompass *every intersection* in the City regardless of whether it presents a safety hazard, is busy, or has a traffic light. This is because parking is banned in the City at *every* intersection.[6] *See, e.g., Cutting*, 802 F.3d at 92 (city's blanket median ban was facially

[6] Parking is significantly limited throughout the City, including at all intersections. Under City ordinance 70-36(A), "…. no vehicle shall be allowed to stop, stand, or park: … (5) within 20 feet from the intersection of the curbing or edge of the pavement or, … (6) Within 30 feet upon the approach to any traffic control device located at the side of the roadway." *See* Manchester City Ordinance 70.36, Second Biss. Decl., *Ex. JJ*.

unconstitutional because the city did not show "that it contemplated and rejected as ineffective an ordinance limited to the few medians in Portland where the City had identified safety hazards in the past [or] an ordinance limited to the smallest or most dangerous medians"); *Redondo Beach*, 657 F.3d at 949 (anti-solicitation ordinance is not tailored because it is "geographically overinclusive"); *Wilkinson v. Utah*, 860 F. Supp. 2d 1284, 1290 (D. Utah 2012) (state statute banning a person from sitting, standing, or loitering on or near a roadway for the purpose of soliciting a motorist was unconstitutional on its face because it applies to "all roads" without regard to public safety).

The City has presented no evidence that *all* roadways which lack on-street parking—including *all* intersections in the City—present a public safety problem or are "busy." MPD Captain Maureen Tessier, who was the City's Rule 30(b)(6) designee, admitted at deposition that the City did not conduct any studies about the solicitation of motorists or public safety in the City's roadways before considering the Ordinance. *See* Tessier Depo. 27:19-28:18, Biss. Decl. *Ex. E*. Further demonstrating the unnecessary nature of the Ordinance, the MPD lost track of the Ordinance for five months after its passage in October 2015. *See id.* at 43:10-44:1; Tessier Mar. 16, 2016 Email/Tessier Depo. Ex. 6, Biss. Decl. *Ex. AA*. The City has the burden of showing that the Ordinance is narrowly tailored using objective evidence, and it has failed to meet this burden in this case. *See Redondo Beach*, 657 F.3d at 948 ("To satisfy the narrow tailoring requirement, 'the Government . . . bears the burden of showing that the remedy it has adopted does not burden substantially more speech than is necessary to further the government's legitimate interests.'") (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994)); *Watkins*, 123 F. Supp. 3d at 868 (the municipality has "the burden of producing … objective evidence showing that the restriction serves its interest in public safety").

Attempting to overcome this lack of evidence necessary to meet its burden, the City suggests that the Court can simply assume, as a matter of judicial notice, that all roadways that lack permitted parking are dangerous and "busy," apparently at all hours of the day. *See* Def.'s Memo. at 12. This argument, however, was unsuccessful in *Cutting*. There, the First Circuit rejected the City of Portland's argument that its blanket median ban was tailored because "it is obvious that all medians are unsafe." *See, e.g.*, *Cutting*, 802 F.3d at 92. Just as *Cutting* made clear that a median cannot be a proxy for dangerousness, a roadway that does not permit parking or an intersection similarly cannot be viewed as a proxy for dangerousness.

Nor can the City resort to conclusory and contested statements masked as "judicial notice" after failing to produce any evidence that would support such statements. *See also* Fed. R. Evid. 201 (The court may judicially notice a fact that is not subject to reasonable dispute only if it (i) is generally known within the trial court's territorial jurisdiction; or (ii) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned); *see also Valore v. Islamic Republic of Iran*, 700 F. Supp. 2d 52, 59 (D.D.C. 2010) (judicial notice is "inappropriate absent some particular indicia of indisputability"); *see also Korematsu v. United States*, 584 F. Supp. 1406, 1415 (N.D. Cal. 1984) ("Care must be taken that Rule 201 not be used as a substitute for more rigorous evidentiary requirements and careful factfinding."). This is especially the case where the evidence actually rebuts any contention that a roadway's lack of parking can be viewed as a proxy for dangerousness. 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. *See* Def.'s *Ex. L*. No accident has been identified anywhere else in the City, reflecting that not all roadways and intersections present the same

level of danger. Such a blanket city-wide speech restriction based on a one incident in one location can hardly be considered tailored. *See, e.g., Redondo Beach*, 657 F.3d at 949 (noting that "the City has introduced evidence of traffic problems only with respect to a *small number of major streets and medians*," and ruling that "we cannot simply assume that the City's other streets, alleys, and sidewalks allegedly suffer from similar solicitation-related traffic problems") (emphasis added); *see also Watkins*, 123 F. Supp. 3d at 868 (rendering narrowly tailored an ordinance preventing the distribution of literature in heavily trafficked intersections where the person "is within a public roadway" based on specific factual evidence presented by the city showing "*a substantial number of deaths and injuries* to pedestrians") (emphasis added).

Moreover, the City made no effort before enacting this overbroad Ordinance to limit its prohibitions only to this Bridge Street/Beech Street intersection or other roadways where the City can show concrete evidence of actual safety hazards posed by panhandlers. This failure to seriously undertake less intrusive measures is fatal. *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 91-92 (same). And even the one accident cited by the City would have been prevented had the motorist complied with existing motor vehicle laws (yet the motorist was apparently not cited, while the panhandler was arrested and placed in handcuffs). *See* RSA 265:69, I (preventing a motorist and others from stopping in a roadway).[7]

[7] The City suggests that the Ordinance allows sufficient opportunities for panhandlers to solicit motorists by arguing that "all that need[s] to be done [for a panhandling exchange to occur] [is] for the vehicle to pull over into an area where parking [is] permitted." *See* Def.'s Memo. at 12. In support, the City once again engages in speculation by asking this Court to accept as a matter of "judicial notice" that "most roads, or at least a large number of roads, allow parking along their lengths unless prohibited by sign." *Id.* This is an argument that focuses not on narrow tailoring, but rather on whether alternative channels of communication exist. To the extent the Court views the Ordinance as content neutral and applies intermediate scrutiny, the Court need not reach this alternative channels inquiry because the Ordinance lacks narrow tailoring. *See Cutting*, 802 F.3d at 92 n.15 ("Because the ordinance restricts substantially more speech than is necessary, and because there were less restrictive means of serving the City's significant interest in protecting the public, we do not need to address whether the ordinance leaves open ample alternative channels for communication."). In any event, the City presented no evidence as to the nature and extent of

V. The Ordinance Violates the First Amendment as Applied

As explained in Pages 41-42 of Plaintiff's Memorandum of Law in Support of her Motion for Summary Judgment, even if this Court concludes that the Ordinance is facially constitutional (which it is 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 the Ordinance "has been enforced selectively in a viewpoint discriminatory way." *McGuire v. Reilly*, 386 F.3d 45 (1st Cir. 2004). Every one of the seven summonses issued under the Ordinance has been issued to a panhandler/pedestrian, despite the City's repeated assertions that it (at least until January 2017) believed that the Ordinance applied to the motorist as well. *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*. 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.[8]

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opportunities for expressive activities afforded by areas adjacent to roadways where parking is permitted. Again, contrary to the City's judicial notice request, the Ordinance bans panhandling exchanges with motorists in all areas of the City where parking is not permitted, which includes *every* intersection in Manchester regardless of whether it presents a safety hazard, is busy, or has a traffic light. And, of course, parking spaces are readily occupied. As in *Cutting*, the City does not get to dictate where individuals can engage in protected panhandling activity absent a compelling or significant municipal justification and a tailored response to it. *See id*. at 89 ("appellee Alison Prior, who uses medians to panhandle, finds sidewalks so useless for her purposes that she now takes a bus to a different town in order to panhandle from medians."). Indeed, the City's position that panhandlers can simply relocate to other permitted areas of the City "is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books …. '[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.'" *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)).

[8] This unequal enforcement is also no surprise given the fact that the Ordinance's purpose has been, from the beginning, to deter panhandling. Again, the Ordinance, on its face, specifically targets only the panhandler in a public place, not the motorist. The City does not meaningfully dispute this interpretation of the Ordinance's text. Consistent with its text, 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*. And throughout the entire discussion of the Ordinance at several meetings of the Board it was referred to as "the panhandling ordinance."

Respectfully submitted,

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Dated: April 21, 2017

CERTIFICATE OF SERVICE

I hereby certify that an original of the foregoing were forwarded, via the Court's ECF system, on this 21st day of April, 2017 to Robert Meagher, Esq.

/s/ Gilles R. Bissonnette
Gilles R. Bissonnette