UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

CASE NO. 21-CV-60168-RKA

MARK MESSINA and
BERNARD MCDONALD,

Plaintiffs,

vs.

CITY OF FORT LAUDERDALE,
FLORIDA, a Florida municipal corporation,

Defendant.
_____/

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO LIABILITY

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and S.D. Fla. Local Rule 56.1, Plaintiffs Mark Messina and Bernard McDonald, by and through undersigned counsel, file their Motion for Summary Judgment as to Liability.

In granting Plaintiffs' Motion for Preliminary Injunction, this Court has already ruled that Plaintiffs are likely to succeed on the merits of their claims, holding that the ordinances at issue were likely unconstitutional. ECF 56. Despite the injunction being in place for five months, the City of Fort Lauderdale has yet to repeal the ordinances, and the parties have been unable to reach a settlement. No new evidence has arisen in discovery that would disturb this Court's initial conclusion. Thus, this Court should grant Plaintiffs' Motion for Summary Judgment as to Liability, declare the ordinances unconstitutional, issue a permanent injunction, and this case should proceed to a trial on damages.

I. PROCEDURAL HISTORY

Plaintiffs, periodically homeless men who rely on panhandling in the City to meet basic needs, filed their Verified Complaint on January 25, 2021, alleging that both on their face and as applied to Plaintiffs, Defendant City of Fort Lauderdale's (City) Panhandling Ordinance, Section 16-82 (Count 1), and the City's Right-of-Way Ordinance, Section 25-267 (Count 2), violate the First Amendment because they specifically singled out the solicitation of donations for differential treatment and were therefore content-based restrictions that could not survive strict scrutiny. ECF 1. In response, the City filed a Motion to Dismiss the Complaint for Lack of Subject Matter Jurisdiction, ECF 12, which the Court denied on April 13, 2021. ECF 31.

Shortly after filing the Complaint, Plaintiffs moved for a preliminary injunction, arguing that they have been irreparably harmed by having their speech chilled. ECF 5. The Court held a hearing on April 13, 2021, at which neither party called witnesses but instead relied on documents and exhibits. ECF 56 at 5-6. During argument on the motion, the City raised three new issues. First, the City argued that § 25-267(d) prohibited holding a sign only on private property. Second, the City implied that Plaintiffs lacked standing as to the aggressive panhandling provision in § 16-82 because they hadn't alleged that they had engaged in such conduct. And third, the City contended that the hand-to-hand transmission clause in § 25-267 was a distinct, content neutral prohibition. *Id*. at 7. The Court adjourned the hearing to allow the parties to submit supplemental memoranda of law, which they did. *See* ECF 32, 40, 47.

In respect to § 25-267(d), at the hearing the City represented that in consultation with Plaintiffs, it would draft a memorandum, telling its officers to desist from any future arrest under that provision, and promised to file a notice by April 30, 2021, indicating that it had issued such a memorandum. ECF 56 at 33-34. As of the date of this filing, the City has filed no such notice.

On June 23, 2021, the Court granted Plaintiffs' Motion for a Preliminary Injunction, in full, and preliminarily enjoined the City from enforcing §§ 16-82 and 25-267 of the City Code. ECF 56.

The parties conducted a mediation conference on October 7, 2021, and the parties agreed that Defendant would present to the City Commission a framework for a tentative settlement addressing damages, attorneys' fees, and repeal of or amendment to the ordinances. An executive session of the City Commission was held on October 21, 2021, during which this case was discussed. Since that time, however, the parties have not been able to reach a settlement and the ordinances have not been repealed or amended.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 258 (1986); *Welch v. Celotex Corp.*, 951 F.2d 1235, 1237 (11th Cir. 1992). The burden of showing the absence of any such genuine issue rests with the moving party. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Electric Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *Id*. at 587.

ARGUMENT

As a preliminary matter, the "solicitation of charitable contributions is protected speech" under the First Amendment. *Riley v. National Federation of the Blind*, 487 U.S. 781, 789

(1988). *See also Smith v. City of Fort Lauderdale*, 177 F.3d 954, 956 (11th Cir. 1999) ("Like other charitable solicitations, begging is speech entitled to First Amendment protection."). Moreover, streets, sidewalks, and public places are considered the "archetype of a traditional public forum." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). "Traditional public fora are public areas such as streets and parks that, since 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Bloedorn v. Grube*, 631 F.3d 1218, 1231 (11th Cir. 2011) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983)). The government's ability to restrict speech in these areas is "very limited." *McCullen v. Coakley*, 573 U.S. 464, 477 (2014). In the instant case, both the Panhandling and the Right-of-Way Ordinance exclusively target speech in traditional public fora.

I. The Panhandling Ordinance, § 16-82

A. The Panhandling Ordinance is Content Based

A law is "content-based" if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). The Panhandling Ordinance singles out the solicitation of contributions by banning it at certain times and places and imposing certain restrictions on how it is conducted, while permitting other speech to occur without those bans and restrictions, and is therefore content-based and subject to strict scrutiny. The Panhandling Ordinance bans "requesting an immediate donation of money or other thing of value for oneself or another person or entity" at certain times and locations and bans at all locations a second request for a donation after a request is initially declined. However, the ban and restrictions apply *only* to those soliciting for money or other items of

value. As this Court held, the Ordinance "doesn't touch other topics of discussion."[1] ECF 56 at 16. No other type of speech, such as speech seeking support for a political, religious, or social cause, is subject to the regulations. Thus, whether the regulations and criminal penalties apply depends entirely on the content of the message (i.e., a solicitation for "money or other thing of value").

A "heavy weight of authority" supports Plaintiffs' position that the Panhandling Ordinance is content based and does not survive strict scrutiny. *Id*. In *Browne v. City of Grand Junction*, 136 F.Supp.3d 1276, 1280-1282, 1287-1288 (D. Colo. 2015), the court applied the *Reed* framework to an ordinance very similar to Section 16-82, in that the Grand Junction ordinance prohibited panhandling in or near certain locations, including bus stops, ATMs, buses, schools, parking garages and lots, and retail establishments. *Browne* found the ordinance to be content-based, and concluded it did not survive strict scrutiny because the provisions were not narrowly tailored to serve the government's interest in public safety. *Id.* at 1289-1294.

Other courts have joined *Browne* in striking down ordinances like Section 16-82 as content-based ordinances that were subject to strict scrutiny. *See Homeless Helping Homeless, Inc. v. City of Tampa*, 2016 WL 4162882 (M.D. Fla. 2016) (ordinance precluding solicitation in broad downtown zone, as well at ATMs, sidewalk cafes, and other locations, was content-based restriction precluding speech in a traditional public forum, and did not survive strict scrutiny); *Norton v. City of Springfield, Illinois*, 806 F.3d 411 (7th Cir. 2015) (ordinance prohibiting panhandling in city's downtown historic district was content-based under *Reed*); *Thayer v. City*

[1] The Court's Order granting Plaintiffs' Motion for a Preliminary Injunction is published at *Messina, et. al. v. City of Ft. Lauderdale*, –F.Supp.3d--, No. 21-cv-60168, 2021 WL 2567709 (S.D. Fla, June 23, 2021). Citations to the Order in this Motion shall refer to the electronic case file number ("ECF") and page number of the Order.

of Worcester, 144 F.Supp.3d 218 (D. Mass. 2015) (ordinance that defined aggressive panhandling to include soliciting within 20 feet of banks, mass transportation facilities, outdoor café seating, places of public assembly, etc. was content-based and did not survive strict scrutiny); *McLaughlin v. City of Lowell*, 140 F.Supp.3d 177 (D. Mass. 2015) (ordinance barring most downtown panhandling and location-based aggressive panhandling - e.g. banks, mass transportation facilities, outdoor seating areas, etc. - was content-based and did not survive strict scrutiny); *see also Leatherman v. Watson*, No. 17-cv-05610-HSG, 2019 WL 827633 at ** 1, 3 (N.D. Cal. 2019) (where ordinance prohibited seeking donations on median strips, near intersections, at gas stations, within 15 feet of banks and ATMs, and within 35 feet of driveways to shopping centers and business establishments, plaintiffs sufficiently alleged that ordinance was content-based).

This Court has already held that the Panhandling Ordinance is content-based. Nothing should disturb that legal conclusion.

B. The Panhandling Ordinance Cannot Withstand Strict Scrutiny Because it is Not Narrowly Tailored to, and the Least Restrictive Means of Achieving, a Compelling Government Interest.

To withstand strict scrutiny, the City of Fort Lauderdale must prove that the Panhandling Ordinance "furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S. Ct. at 2231. The City must also show that the laws are the "least restrictive means" of accomplishing that vital interest. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."). Moreover, "'content-based regulations are presumptively invalid,' and the Government bears the burden to rebut that presumption." *Id.* at 817 (quotation omitted).

The City cannot meet its burden because the Panhandling Ordinance does not serve a compelling government interest. The interests Fort Lauderdale asserted for the enactment of the Panhandling Ordinance include the comfort of the individuals being solicited for donations and the impact on nearby businesses of panhandling.[2] These interests do not rise to the level of compelling government interests. *See Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 509 (1969) (speech cannot be restricted based on "mere desire to avoid ... discomfort and unpleasantness"); *McCullen*, 573 U.S. at 476 (fact that individual using the public streets and sidewalks may encounter an "uncomfortable message" is a "virtue, not a vice" of such traditional public fora); *McLaughlin*, 140 F.Supp.3d at 188-189 (promotion of business is at most a significant and substantial governmental interest, but not a compelling governmental interest). In fact, this Court has already found that the City's asserted interests in protecting its economic interests and to make people more comfortable were not compelling.[3] ECF 56 at 21. Without a compelling government interest, the Panhandling Ordinance cannot survive strict scrutiny.

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[2] The second "WHEREAS" clause in the preamble of the Panhandling Ordinance states, "the City Commission finds that an increase in aggressive begging, panhandling and Right-of-Way throughout the city has become extremely *disturbing* and *disruptive* to residents and businesses and has contributed to the *loss of* access to and *enjoyment of public places* and also *loss of customers for businesses and closure of businesses in the city*." Ordinance No. C-12-10, ECF 5-1(emphasis added).

The fourth "WHEREAS" clause in the preamble states, "the City Commission finds that the presence of individuals who solicit money from other individuals at or near outdoor cafes, automated teller machines, entrances/exits to and from buildings and parking garages is especially troublesome because these solicited individuals cannot readily escape from *unwanted* Right-of-Way." *Id*. (emphasis added). The City's concerns about Right-of-Way being "unwanted," "disturbing and disruptive," and purportedly causing "loss of ... enjoyment of public places" amount to no more than concerns about the comfort of those being solicited.

[3] Although the Court found that public safety could be a compelling interest, it held that the ordinances nonetheless failed strict scrutiny because they were not narrowly tailored to that goal,

Even if the City had asserted compelling government interests, the Panhandling Ordinance is not narrowly tailored to serve them. As this Court has held, the Panhandling Ordinance is "both over- *and* under-inclusive." ECF 56 at 25 (emphasis original). Laws may fail the narrow tailoring requirement where they "burden substantially more speech than is necessary to further the government's legitimate interests[,]" and are therefore fatally *over*inclusive. *McCullen*, 573 U.S. at 486 (under the lesser standard of intermediate scrutiny, striking down law imposing speech buffer zones around abortion clinics in part because the law applied statewide instead of targeting the one problematic clinic). *See also Cutting v. City of Portland, Maine*, 802 F.3d 79, 82, 90 (1st Cir. 2015) (ordinance prohibiting standing on a median, which city enforced against panhandlers, was not narrowly tailored because it was "geographically overinclusive"); *Reynolds v. Middleton*, 779 F.3d 222, 231-232 (4th Cir. 2015) (under intermediate scrutiny, holding that ordinance prohibiting roadway solicitation was not narrowly tailored when it applied to all roads regardless of location and traffic volume).

The Panhandling Ordinance is overinclusive by restricting panhandling at locations that represent a broad swath of Ft. Lauderdale – bus stops, public transportation facilities, and public transportation vehicles; city parking lots, parking garages, and parking pay stations; city parks; sidewalk cafés, automatic teller machines, entrances or exits of commercial or governmental buildings; and all private property (without the owner's permission). Sections 16-82(a) – (c). *See McLaughlin*, 140 F.Supp.3d at 194, 195 (restrictions on panhandling near bus stops and ATMs were not narrowly tailored). Whatever the City's goal in passing the ordinance, banning requests for funds in large swaths of the City is certainly not the least restrictive means of advancing it.

Not only is the law *geographically* overinclusive, but the ordinance is also overinclusive

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as explained below.

because it prohibits expressive speech—panhandling—which poses no threat to public safety. The ordinance sweeps up the speech activities of panhandlers who never act violently toward others. ECF 56 at 25 (citing *Brown*e, 136 F.Supp.3d at 1292-94, noting that panhandling law was overinclusive because it "prohibited speech that posed no threat to public safety"). The Panhandling Ordinance bars repetitive requests for donations throughout the City, conduct which may be annoying, but certainly does not pose a threat to public safety. *See McLaughlin*, 140 F.Supp.3d at 194, 195 (giving panhandlers only one opportunity to convey their message, without a chance to follow up, was more restrictive than necessary).

Courts have also found laws not to be narrowly tailored where they are underinclusive. *See Reed*, 135 S. Ct. at 2232 ("In light of this underinclusiveness, the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest.").[4] The Panhandling Ordinance bars a request for a donation *only*, and does not apply to someone engaging in other forms of speech, such as a person holding a sign to recruit people to join a church, or a person holding a sign decrying the bank that operates an ATM, or a politician holding a sign at a bus stop stating "vote for me." As this Court has held, "it isn't hard to conjure up a hundred other examples of its under-inclusivity." ECF 56 at 25.

Finally, the Panhandling Ordinance is not narrowly tailored because of already existing criminal laws which address similar conduct. In *McLaughlin*, the court held that "the City has not demonstrated that public safety requires harsher punishments for panhandlers than others

[4] Under inclusiveness also raises doubts as to whether the City's proffered justification is compelling. *See Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 546-47 (1993) ("Where government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling.").

who commit assault or battery or other crimes." 140 F.Supp.3d at 193. "The City may not deem criminal activity worse because it is conducted in combination with protected speech, and it certainly may not do so in order to send a message of public disapproval of that speech on content based grounds." *Id.* *See also Thayer,* 144 F.Supp.3d at 235-237 (following *McLaughlin* in declining to uphold panhandling restrictions that duplicated existing criminal laws). In this case, the City's Panhandling Ordinance defines aggressive panhandling to include blocking a person's passage, touching a person without permission, or engaging in conduct threatening another with "imminent bodily injury" or "commission of a criminal act" or intended to force compliance with demands. Section 16-82(a). As this Court recognized, these activities are already punishable through existing criminal laws. ECF 56 at 24-25.

For all these reasons, the Panhandling Ordinances is a content-based restriction on protected speech that cannot withstand strict scrutiny because it is not narrowly tailored to a compelling state interest, nor is it the least restrictive means of furthering that interest. Nothing has arisen through discovery that would disturb the Court's initial ruling. Plaintiffs are therefore entitled to summary judgment as to Count I.

II. The Right-of-Way Ordinance, § 25-267

A. The Prohibitions on Selling/Advertising and Requesting Donations in § 25-267(a) are Content Based Restrictions on Speech Which are Not Narrowly Tailored to, or the Least Restrictive Means of Achieving, a Compelling Government Interest.

The first two clauses of the Right-of-Way Ordinance, Section 25-267(a), apply to one who "[1] sells or offers for sale anything or service of any kind, or advertises for sale anything or service of any kind, or [2] who seeks any donation of any kind" while on an arterial public right of way. These are content-based and subject to strict scrutiny because they treat those who

request donations and advertise or sell differently than those who seek to communicate religious, political, or other ideological messages. These clauses fall squarely into the content-based camp as defined by *Reed* because they "single[] out specific subject matter for differential treatment." *Reed*, 135 S. Ct. at 2230. As such, "the first two clauses are content-based and subject to strict scrutiny." ECF 56 at 29. *See also See Fernandez v. St. Louis County, Missouri*, 461 F.Supp.3d 894, 898 (E.D. Mo. 2020) (ordinance that barred persons from standing in the roadway to solicit charitable contributions or business was not content-neutral); *Rodgers v. Bryant*, 942 F.3d 451, 456 (8th Cir. 2019) (state loitering law which singled out panhandling was content-based because the law "applies only to those asking for charity or gifts, not those who are, for example, soliciting votes, [or] seeking signatures for a petition.").

The City cannot meet its burden as to the first two clauses because they do not serve a compelling government interest. During the enactment process, the City asserted that its interest in traffic safety justified the law.[5] But traffic safety is not a compelling government interest. *See Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267 (11th Cir. 2005) (for purpose of challenge to content-based restriction on speech, traffic safety was not a compelling interest); *Beaulieu v. City of Alabaster*, 454 F.3d 1219, 1233-1234 (11th Cir. 2006) (in challenge to content-based restriction on speech, traffic safety was substantial but not compelling interest).

Even if it had asserted a compelling government interest, the first two clauses of the Right-of-Way Ordinance fail the narrow tailoring test, as this Court has already held. Assuming *arguendo* that traffic safety is a compelling government interest, the Right-of-Way Ordinance is fatally underinclusive: it penalizes only certain types of activities that generate the alleged safety

hazard, while leaving others unregulated. People holding political signs are just as likely to distract drivers—if not more so—as people holding signs requesting donations, yet the Right-of-Way Ordinance bars requesting donations while leaving people free to hold political signs. ECF 56 at 29. If the Right-of-Way Ordinance legitimately sought to promote traffic safety, it would apply in a broader array of circumstances that could potentially create the targeted public danger the law seeks to prevent. The Right-of-Way Ordinance is thus fatally underinclusive and not narrowly tailored.

Courts have soundly rejected similar restrictions based on public safety when finding that panhandling is singled out for different treatment, as with the first two clauses of the instant Right-of-Way Ordinance, which treats requests for donations differently than persons holding a sign to support a cause. *See Rodgers*, 942 F.3d at 457 (since state provided "no justification for its decision to single out charitable Right-of-Way from other types of Right-of-Way, the anti-loitering law is underinclusive and, consequently, not narrowly tailored"); *Clatterbuck v. City of Charlottesville,* 92 F. Supp. 3d 478, 487 (W.D. Va. 2015) ("The same public safety issue is presented whether the person stopping (or attempting to stop) the vehicle is seeking an immediate donation of something of value; or a signature on a petition; or a pledge of future donations; or directional information …"); *Kelly v. City of Parkersburg,* 978 F. Supp. 2d 624, 630 (S.D. W. Va. 2013) (in pre-*Reed* case, holding anti-panhandling law unconstitutional in part because "[a] solicitor of votes presumably presents the same traffic safety concerns as a solicitor of money or contributions. Yet only solicitors requesting money or contributions are regulated by the Ordinance.").

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[5] The fifth "WHEREAS" clause in the preamble of the Right-of-Way Ordinance states, "distraction of motorists occasioned by solicitations ... impedes the safe and orderly flow of

As with the above claims, no information has arisen through discovery that would disturb this Court's ruling that the first two clauses are unconstitutional. Plaintiffs are therefore entitled to summary judgment as to the first two clauses of the Right-of-Way Ordinance because they are not "narrowly tailored to the City's goal of promoting traffic safety." ECF 56 29.

B. The Hand-to-Hand Transmission Clause in § 25-267(a) Fails Intermediate Scrutiny Because It Is Not Narrowly Tailored to Achieve a Significant Government Interest and Does Not Leave Open Ample Alternative Channels of Communication.

The third clause in §25-267(a)—the hand-to-hand transmission clause—is content neutral. But even though it is content-neutral, it still fails intermediate scrutiny and should be declared unconstitutional. Under intermediate scrutiny, the City must still show that the law is narrowly tailored to achieve a significant government interest and that it leaves open ample alternatives of communication. *Bloedorn*, 631 F.3d at 1231. And the City must demonstrate that it "seriously undertook to address the problem with less intrusive tools readily available to it" and "considered different methods that other jurisdictions have found effective." *McCullen*, 573 U.S. at 494. The City fails to meet that burden here.

The hand-to-hand transmission ban fails intermediate scrutiny because it is not narrowly tailored to any government interest and burdens substantially more speech than necessary to further the city's interests in traffic and pedestrian safety. *McCullen* 573 at 486. The ban defines a "right-of-way canvasser or solicitor" as any "person who personally hands to or seeks to transmit by hand or receive by hand anything or service of any kind" to or from any person in a motor vehicle, and bans those transmissions on any public right-of-way—including a sidewalk—

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traffic." Ordinance No. C-14-38, ECF 5-3.

with a functional classification of "arterial."[6] Sec. 25-267(a) & (b). The provision therefore prohibits transmitting *anything* between pedestrians and vehicle occupants—including political or religious leaflets, donations, water bottles, and newspapers—on all sidewalks abutting an arterial road in Fort Lauderdale. And the ban applies regardless of whether the interactions either cause safety issues or obstruct traffic.

As this Court noted, the ordinance is not narrowly tailored. It is over-inclusive because it prohibits conduct that is not dangerous, and under-inclusive because it penalizes only the panhandler and not the motorist whose conduct is arguably just as dangerous. ECF 56 at 33. *See also Petrello v. City of Manchester*, No. 16–cv–008–LM, 2017 WL 3972477 at *20 (D. N.H., Sept. 7, 2017) (striking down similar ordinance because it "prohibits a panhandler on the sidewalk from accepting money from a motorist at a red light, even though the interaction does not obstruct traffic or endanger the public"). As a result, §25-267 unconstitutionally bans protected speech and is substantially overbroad. *See also Reynolds*, 779 F.3d at 231 (ordinance prohibiting roadside leafletting and solicitation, even where those activities would not be dangerous, failed narrow tailoring); *Rodgers v. Stachey*, No. 6:17-cv-06054, 2019 WL 1447497 *7-8 (W.D. Ark. April 4, 2017) (analyzed under intermediate scrutiny, ordinance banning physical interaction between pedestrians and motorists was not narrowly tailored).

In fact, this Court concluded that the hand-to-hand transmission ban failed intermediate scrutiny in part because the City had completely failed to put forth any evidence to justify the

[6]Section 25-267 adopts the definition of a "right-of-way" in §25-97 of the Code of Ordinances." Section 25-97 defines "rights-of-way" as: "Rights-of-way means the surface and space above and below any real property in which the city has an interest in law or equity, whether held in fee, or other estate or interest, or as a trustee for the public, including, but not limited to any public street, boulevard, road, highway, freeway, lane, alley, court, **sidewalk**, or bridge." (emphasis added).

law. ECF 56 at 32. While the Court noted that further evidentiary development might affect that conclusion, discovery has shown that no such evidence exists. The undisputed factual record supports Plaintiffs' contention.

The City cannot cite a *single* incidence in the two year period prior to the passage of §25-267 of a pedestrian injury involving a person who was engaged in roadway solicitation. *See* City Amended Answer to Plaintiff's Request for Admission No. 6. ECF 67-2 Moreover, nor can the City cite a *single* instance in the two-year period prior to the passage of ordinance where a person who was engaged in roadway solicitation caused or contributed to a motor vehicle accident. *See* City Amended Answer to Plaintiff's Request for Admission No. 8. *Id*. Thus, the "scenarios" that this Court posited would result in striking down the law—involving little to no evidence of harm caused by hand-to-hand exchanges—have proved to reflect reality. ECF 56 at 31. And as this Court found, under those "scenarios, the City would have had less intrusive ways of promoting traffic safety. "And, as should be obvious, under any of these three hypotheticals, our law would be both over- and under-inclusive: over-inclusive because it penalizes panhandlers whose conduct is not dangerous; under-inclusive because it punishes only the panhandler and not the driver." *Id*. at 31-32.

Finally, the City has at its disposal other less speech restrictive means to further its interests in pedestrian and motorist safety. The City can enforce existing criminal offenses under both city and state law that prohibit the obstruction of traffic and other conduct that endangers public safety on the city's roadways. Because the City has failed to do so, it has not "seriously [undertaken] to address" the problem of traffic safety "with less intrusive tools readily available to it." *McCullen*, 573 U.S. at 494. Instead, it "sacrific[ed] speech for efficiency," and, in doing

so, failed to observe the "close fit between ends and means" that narrow tailoring demands. *Id.* at 486 (internal quotation marks omitted).

Based on the above argument and authorities, Plaintiffs are entitled to summary judgment as to the hand-to-hand transmission clause of the Right-of-Way Ordinance because it is not narrowly tailored to any government interest and burdens substantially more speech than necessary to further the city's interests in traffic and pedestrian safety.

C. The Sign Ordinance Provision of Fort Lauderdale Code, § 25-267(d), Violates the First Amendment.

Fort Lauderdale Code § 25-267(d) provides that "[i]t is a violation of this section for any right-of-way canvasser or solicitor to hold, carry, possess or use any sign or other device of any kind, within any portion of the public right-of-way contrary to any of the terms and provisions of section 47-22, of the Unified Land Development Regulations." Section 47-22, in turn, contains many pages of various regulations for signage on private property. As this Court held, the sign ordinance does not merely regulate signs on private property; rather, it imports the restrictions on private signs to those carried on *public* property. ECF 56 at 34-35. And, City police officers have been enforcing it in that manner, arresting people for displaying signs on public property. *See* ECF 56 at 35. Notably, the sign ordinance applies to every public right-of-way in the City—including all sidewalks—and is not limited to those classified as arterial. Sec. 25-267(d).

One particular section of the Unified Land Development Regulations, 47-22.6(A), provides that "[a]ny sign or any item, device, seating arrangement, structure or any movable object shall not create a traffic or fire hazard, or be dangerous to the general welfare or interfere with the free use of public streets or sidewalks." The broad wording of this provision gives Fort Lauderdale police officers the discretion to cite or arrest under §25-267(d) any right-of-way

canvasser or solicitor for merely holding or carrying a sign, regardless of the dimensions of the sign or of the materials from which the sign is constructed.

Both Plaintiffs occasionally carry signs when they panhandle (ECF 1, at ¶¶ 37, 43), and carrying signs subjects them to the possibility of arrest or citation under § 25-267(d) for violation of § 47-22.6(A). Moreover, Fort Lauderdale police officers have repeatedly cited and arrested other panhandlers for merely holding a sign while acting as a right-of-way canvasser or solicitor in the public right-of-way in violation of § 25-267(d), without citing a particular provision of Section 47-22 that the panhandler's sign is violating. *See* Supplemental Arrest Reports, ECF 20-1 at 7; Arrest Reports/Citation, ECF 5-6, at 11, 30, 66, 76, 84, 98, 99.[7]

Because the sign ordinance only applies to "right of way canvasser[s] [and] solicitor[s]," it is unconstitutional for the same reasons that the first two clauses of the Right of Way Ordinance are unconstitutional. *See* section II.A, *supra*. It is content based because it only punishes people carrying signs if they are 1) offering/advertising something for sale or 2) seeking a donation, yet it permits unrestricted sign-carrying by people spreading political, religious, or any other type of message. Because it is content based, the city must show that it is narrowly tailored to a compelling government interest and the least restrictive means of achieving it. The City cannot do so for all the reasons described above: Traffic safety is not a compelling government interest, and the ordinance is fatally under-inclusive because signs held by people offering something for sale or seeking a donation are no more dangerous than signs held by

[7] The citation and arrest forms mistakenly refer to Ordinance 14-38(c) (codified at §25-267(c), rather than Ordinance 14-38(d) (codified at §25-267(d), but closely paraphrase or quote the language of Ordinance 14-38(d)/§25-267(d), in the narrative portions of the forms.

people spreading other messages.[8] In addition, it is fatally overinclusive because it applies to every single public right of way in the City regardless of its level of danger to pedestrians.

And as this Court has found regarding the City's response to the Plaintiffs' Motion for a Preliminary Injunction, the City chose not to defend the Ordinance, offered no legitimate governmental interest, and adduced no evidence that the provision is in any way tailored to that interest. ECF 56 at 35. Therefore, this portion of the ordinance is unconstitutional as well and Plaintiffs are entitled to summary judgement as to § 25-267(d).

CONCLUSION

Plaintiffs respectfully request that this Court declare that the City's Panhandling and Right-of-Way Ordinances are unconstitutional, both facially and as applied to Plaintiffs, enter summary judgment for Plaintiffs as to liability on all claims, enter a permanent injunction enjoining enforcement of both ordinances, and proceed to a trial on damages.

Respectfully submitted,

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[8] In theory, the sign ordinance also applies to the third category of solicitor: those who engage in hand-to-hand transmission with motorists. This does not affect the analysis here because each Plaintiff who would seek to engage in a hand-to-hand transmission—to receive a donation—would also be subject to one of the first two clauses because they would be holding signs and seeking donations. Even assuming it would apply Plaintiffs, the provision fails intermediate scrutiny for the reasons argued above.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed today, November 19, 2021, the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all persons registered to receive electronic notifications for this case, including all opposing counsel.

By: *s/Ray Taseff*
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