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

CASE NO. 23-CV-60806-CMA

DEAN LUTRARIO,

Plaintiff,

vs.

CITY OF HOLLYWOOD,
FLORIDA, a Florida municipal corporation,

Defendant.
_____/

MOTION FOR PRELIMINARY INJUNCTION
AND SUPPORTING MEMORANDUM OF LAW

Plaintiff, Dean Lutrario, by and through undersigned counsel, hereby moves for a preliminary injunction enjoining the Defendant, the City of Hollywood, from enforcing three Solicitation Ordinances, Sections 122.27, 122.31, and 122.54 of the Hollywood City Code. In support of this motion, Plaintiff states the following.

INTRODUCTION

The Hollywood City Code regulates the solicitation of donations in several ways. Under § 122.27, a person cannot solicit for donations and contributions without first obtaining a permit from the City's Department of Licensing. Under § 122.31, a person requesting a donation must also comply with a list of specific restrictions, including avoiding panhandling wherever the City has posted a sign banning it. Finally, section 122.51 prohibits offering anything for sale, asking for a donation, or engaging in a hand-to-hand exchange with an occupant of a motor vehicle while standing along one of six listed major roadways.

Because they single out the solicitation of donations for differential treatment, these ordinances are content-based and therefore subject to strict scrutiny. Because they are not narrowly tailored to any compelling government interest, nor are they the least restrictive means of advancing any interest, they are unconstitutional restrictions of free speech in violation of the First Amendment. Further, § 122.51's ban on hand-to-hand exchanges, while content neutral, also violates the First Amendment because it is not narrowly tailored and burdens more speech than is necessary to achieve the city's interest in traffic safety.

Plaintiff, who is disabled and homeless, panhandles in the City and has been harassed by City police officers for doing so. He has been formally charged twice for violating § 122.31 and twice for violating §122.54. Plaintiff wishes to continue to solicit donations and needs to do so to contribute to his survival, but fears arrest for doing so. Plaintiff therefore seeks preliminary injunctive relief enjoining enforcement of these ordinances so that he can engage in constitutionally protected speech, and damages for the violation of his First Amendment rights. Plaintiff also seeks a declaration that the ordinances are facially unconstitutional, on behalf of himself and others not before the Court who undoubtedly avoid exercising their free speech rights because they fear arrest and prosecution.

STATEMENT OF FACTS

A. Solicitation Ordinances Passed on October 21, 1981

On October 21, 1981, the Hollywood City Commission enacted Ordinance No. O-81-72, which was later codified as §§ 122.25—122.31 of the City Code, captioned "Charitable Solicitations." Section 122.26 defines "Solicitation" as: "The request, either directly or indirectly, of any donation or contribution for charitable purposes, including but not limited to any oral or written request; the sale, offer to sell or attempt to sell any article, service,

publication, advertisement, subscription, membership or other thing for charitable purposes; or, the making of any announcement to or through the press or other media concerning an appeal, drive or campaign to which the public is requested to make a donation. A solicitation shall be deemed to have taken place when the request is made, whether or not the person making the request receives any donation." Exhibit 1, Hollywood City Code § 122.25 - § 122.33.

Under § 122.27(A), "It shall be unlawful for any person to solicit donations for charitable purposes within the city without first having obtained a permit therefor; however, the provisions of this subchapter shall not apply to any solicitation conducted solely among members of charitable organizations by other members thereof." Ex. 1.

Section 122.31, "Solicitation Regulations and Prohibitions," states:

In conducting solicitations, individual solicitors shall be charged with obeying the following restrictions on behavior:

(A) While engaged in soliciting, each solicitor must carry and display an identification card issued by the Director of Licensing, which shall contain the name, address and telephone number of the solicitor as well as the name of the person or organization for whose benefit or on whose behalf the solicitor is acting.

(B) No solicitor shall in any way unlawfully obstruct, delay or interfere with the free movements of any person against that person's will or seek to coerce, or physically disturb any other person.

(C) No solicitor shall in any way unlawfully obstruct, delay or interfere with vehicular traffic within the city.

(D) No solicitor shall solicit door-to-door at any residence between the hours of 9:00 p.m. and 8:00 a.m.

(E) Solicitors shall solicit only during the conditions permitted.

(F) Solicitors shall not solicit at nor enter upon any premises within the city where a "No Solicitation" sign is posted in accordance with the provisions of this subchapter, unless otherwise invited onto the premises for that purpose. *Id.*

B. Solicitation Ordinances Passed on June 18, 2014

On June 18, 2014, the Hollywood City Commission expanded its regulation of charitable solicitation to include roadway solicitations by enacting Ordinance No. O-2014-12, which was later codified as §§ 122.50—122.54 of the City Code, captioned "Panhandling, Begging or Solicitation."

Section 122.51 defines "Right of Way Solicitor" as:

> Any person who sells or offers for sale any thing or service of any kind, or who seeks any donation of any kind, or who personally hands to or seeks to transmit by hand or receive by hand any thing or service of any kind, whether or not payment in exchange is required or requested, to any person who operates or occupies a motor vehicle of any kind, which vehicle is engaged in travel on or within any portion of any of the streets or roadways in the city, whether or not such vehicle is temporarily stopped in the travel lanes of the road. The term shall not apply to any person who merely holds or displays a sign lawfully permitted to be displayed by a person as long as there is no entry by such person or sign into any portion of the roadway or its median.

Exhibit. 2, Hollywood City Code § 122.50 - § 122.54.

Section 122.54 then states that, "It shall be unlawful for any person to act as a right-of-way panhandler or solicitor on a prohibited roadway or within 200 feet from the lateral curb or boundary line of an intersection located on the prohibited roadways identified in this section."[1]

[1] Section 122.51 contains its own definition of "soliciting": "Any request made in person on a street, sidewalk or public place, asking for an immediate donation of money or other thing of value, including the purchase of an item or service for an amount far exceeding its value, under circumstances where a reasonable person would understand that the transaction or purchase is a donation. Solicitation shall not include passively standing or sitting with a sign or other indication that one is seeking donations without addressing the request to any specific person." Ex. 2. "Begging" or "Panhandling" is defined as "the same as soliciting." *Id.* If prohibited, this would be a content-based restriction that would fail strict scrutiny; however, this ordinance does not appear to rely on this definition.

The "prohibited roadways" in Hollywood are State Road 7/US 441, Federal Highway, A1A/Ocean Drive, Hollywood Boulevard, Johnson Street, and Sheridan Street. Ex. 2.

The penalty for a violation of the solicitation provisions is set forth in Section 122.99 of the City Code, which provides for a fine not to exceed five hundred dollars ($500.00), a term of imprisonment not to exceed sixty (60) days, or both a fine and imprisonment. Exhibit 3, Hollywood City Code § 122.99.

C. Enforcement of the Ordinances

Sections 122.27, 122.31, and 122.54 of the Hollywood City Code have been enforced predominantly against poor and homeless people who were soliciting donations in public places. On August 30, 2018, numerous civil rights organizations notified the City of Hollywood in a letter that §§ 122.50—122.54 were unconstitutional restrictions on speech and requested that the City cease enforcement, repeal the ordinances, and develop constructive approaches to the issues of homelessness and poverty. Ex. 4, Letter. On information and belief, the City did not respond to the letter.

Instead, the City has persisted in enforcing the ordinances and continues to cite and arrest people for asking for donations. Since mid-2018 to the present date, over 150 people—virtually all of whom were soliciting for donations—were either cited with a notice to appear in court or arrested and taken to jail or for a violation of §§ 122.27, 122.31, and 122.54 of the Hollywood City Code. Exhibit 5, Citations, 2018 – January 2023.[2] One hundred and forty-two people (142)

[2] As a result of the format in which these documents were received by the City via a public records request, included within this exhibit are citations for violations of other solicitation provisions that are not challenged here.

were cited for a violation of § 122.54, eight (8) for a violation of § 122.27, and six (6) for a violation of § 122.31. *Id*.

D. Plaintiff Dean Lutrario

Plaintiff Dean Lutrario is sixty-two years old. Mr. Lutrario suffers from a medical disability and is currently without permanent housing. ECF 1, Complaint, ¶ 30.. Because he receives limited financial assistance, Mr. Lutrario must peacefully request donations from others to contribute to his survival. *Id*. at ¶ 32.. To help support himself, Plaintiff engages in peaceful panhandling in the City of Hollywood and requests donations from occupants of cars. He stands on either the sidewalk adjacent to the street, or on a median, or on the edge/shoulder of a city street and verbally requests a donation while holding a sign that requests assistance. If a motorist or an occupant of a stopped car signals to Mr. Lutrario that they want to give him a donation, he walks to the car and accepts it, and then quickly returns to the shoulder, sidewalk, or median and resumes holding his sign. Mr. Lutrario does not obstruct or interfere with vehicular traffic. *Id*. at ¶ 32.

Mr. Lutario is indigent and does not have a permit to panhandle nor does he carry an identification card issued by the Hollywood Director of Licensing. *Id*. at ¶ 33. He has been repeatedly harassed by the Hollywood police while panhandling. The police typically drive up to where he is panhandling and warn him that if he doesn't stop and leave the area, he will be arrested and taken to jail. *Id*. at ¶ 34. Over the past thirty months, Mr. Lutrario has been formally charged with violations of Hollywood solicitation ordinances on four occasions, twice for a violation of § 122.54 and twice for a violation of § 122.31. The most recent citations were issued by the Hollywood police to Mr. Lutrario in January 2023. *Id*. at ¶¶ 35 - 39; Exhibit 6, Lutrario Citations.

Mr. Lutrario wants to panhandle more in the City of Hollywood but does not because he is afraid of being cited and arrested. Because he has been deterred from panhandling more, he has not been able to obtain the amount of donations that he otherwise would receive and is constantly struggling to survive. He has also suffered mental and emotional distress from the constant threat and fear of arrest. *Id*. at ¶ 40. The ongoing threat of citation and arrest has had a chilling effect on Mr. Lutrario's exercise of his First Amendment rights in the City of Hollywood. Consequently, Plaintiff has suffered and continues to suffer harm for the violation of his constitutional rights under the First Amendment, which will continue absent injunctive relief.

ARGUMENT

Plaintiff is entitled to a preliminary injunction enjoining the enforcement of §§ 122.27, 122.31, and 122.54 of the Hollywood City Code. A district court may issue preliminary injunctive relief when the plaintiff demonstrates that: (1) there is "a substantial likelihood that [the plaintiff] will succeed later on the merits"; (2) the plaintiff "will suffer an irreparable injury absent preliminary relief"; (3) the plaintiff's injury likely "outweighs any harm that its opponent will suffer as a result of an injunction"; and (4) preliminary relief would not "disserve the public interest." *Scott v. Roberts*, 612 F.2d 1279, 1290 (11th Cir. 2010).

I. Plaintiff Is Likely to Succeed on the Merits of His First Amendment Claims

Plaintiff is likely to succeed in showing that §§ 122.27, 122.31, and 122.54 of the Hollywood City Code impose unconstitutional speech restrictions, both on their face and as applied to Plaintiff. As a preliminary matter, Plaintiff notes that 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 solicitation, 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, §§ 122.27, 122.31, and 122.54 target speech in traditional public fora.

A. Sections 122.27 and 122.31 Are Content-Based Restrictions of Protected Speech Under the Supreme Court's Decision in *Reed v. Town of Gilbert.*

Because Sections 122.27 and 122.31 single out the solicitation of contributions—by requiring a permit and imposing certain restrictions on how it is conducted—while permitting other speech to occur without such requirements and restrictions, the provisions are content-based and therefore subject to strict scrutiny. The Supreme Court recently clarified this area of the law by holding that a law is "content-based" if it "applies to particular speech because of the topic discussed or the idea or message expresses." *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). The *Reed* framework is based on the fundamental premise that under the First Amendment, "government, including a municipal government, has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id*. at 163.

A law is "content-based" under *Reed* if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Id*. In making this determination, a court must "consider whether a regulation of speech 'on its face' draws distinctions based on the

message of the speaker." *Id.* This is so even if the law does not favor one viewpoint over another. Although viewpoint discrimination is more "egregious," the Court made clear that "a speech regulation targeted at specific subject matter is content-based even if it does not discriminate among viewpoints within that subject matter." *Id.* at 169. In other words, treating different categories of speech differently renders a law content-based, even if the law permits all viewpoints within that category.

Sections 122.27 and 122.31 fall squarely into the category of content-based regulations. Section 122.27(A) criminalizes only those who "solicit donations for charitable purposes within the city without first having obtained a permit therefor." Section 122.31 imposes a list of six restrictions only on those who request a "donation or contribution for charitable purposes." Those restrictions include a prohibition on soliciting or entering "upon any premises within the city where a 'No Solicitation' sign is post[ed]," § 122.31(F), and the requirement to carry and display an identification card issued by the Department of Licensing. § 122.31(A). No other type of speech is subject to the regulations.

Indeed, the provisions impose no regulation on the church member asking for support for a religious cause, a candidate for public office asking for votes in an upcoming election, the political activist seeking support for a different climate change policy, or the tourist asking for directions. But, if a person asks for a "donation or contribution," that person is prohibited from doing so without first obtaining a permit under § 122.27 and must comply with the other six regulations under § 122.31. Failure to comply is punishable by arrest, fines, and imprisonment. Therefore, sections 122.27 and 122.31 easily qualify as content-based under *Reed*: They "single out specific subject matter for differential treatment." *Id.* at 169. As such, the provisions are content-based and must survive strict scrutiny.

In recent years, "substantially all" federal courts in the country considering this issue have agreed, striking down panhandling regulations as unconstitutional content-based restrictions on speech. *See Thayer v. City of Worcester*, 144 F.Supp.3d 218, 233 (D. Mass. 2015) (recognizing that "a protracted discussion of the issue is not warranted as substantially all of the Courts which have addressed similar laws since *Reed* have found them to be content-based and therefore, subject to strict scrutiny"). *See also, e.g., Messina v. City of Ft. Lauderdale*, 546 F. Supp. 3d 1227, 1242 (S.D. Fla. 2021) (following "the very heavy weight of authority" in concluding that a panhandling ordinance was content based); *Indiana Civil Liberties Union Found., Inc. v. Superintendent, Indiana State Police*, 470 F. Supp. 3d 888, 903 (S.D. Ind. 2020) ("The statute's plain text establishes its content-based nature, because it defines the prohibited conduct by referring to the content of the speech—a request for an immediate donation of money or something else of value."); *Rodgers v. Bryant*, 942 F.3d 451, 456 (8th Cir. 2019) (Arkansas ban on begging that is harassing, causes alarm, or impedes traffic was content based because it applied "only to those asking for charity or gifts, not those who are, for example, soliciting votes, seeking signatures for a petition, or selling something."); *Homeless Helping Homeless v. City of Tampa*, No. 8:15-CV-1219-T-23AAS, 2016 WL 4162882 (M.D. Fla. Aug. 5, 2016) (finding ordinance banning panhandling in downtown Tampa was content-based restriction of speech); *McLaughlin v. City of Lowell*, 140 F.Supp.3d 177, 185–86 (D. Mass. 2015) (finding a city ordinance banning aggressive panhandling was a content-based restriction on speech); *Browne v. City of Grand Junction*, 136 F.Supp.3d 1276, 1290–91 (D. Colo. 2015) (finding a city's provision that prevented solicitation at specified times was content-based and failed to survive strict scrutiny); *Clatterbuck v. City of Charlottesville*, 92 F.Supp.3d 478 (W.D. Va. 2015)

(solicitation ordinance unconstitutional because its application turned entirely on content of speech).

Sections 122.27 and 122.31 are content-based restrictions on speech and must survive strict scrutiny.

B. Sections 122.27 and 122.31 Cannot Withstand Strict Scrutiny Because the City Cannot Prove that They are Narrowly Tailored to, and the Least Restrictive Means of Achieving, a Compelling Government Interest.

To withstand strict scrutiny, the City of Hollywood must prove that each ordinance "furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 576 U.S. at 171. 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.

1. The City Has Not Advanced Compelling Government Interests In Support of Sections 122.27 and 122.31.

The City cannot meet its burden because §§ 122.27 and 122.31 do not serve a compelling government interest. Presumably, the City will assert an interest in traffic safety. 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).

These provisions fail strict scrutiny for this reason alone.

2. Even Assuming That the City Has Advanced Compelling Government Interests, Sections 122.27 and 122.31 Are Not Narrowly Tailored to Serve These Interests.

Even if the City has asserted compelling government interests, both Ordinances do not survive strict scrutiny. To meet its burden, the City must show that the laws are narrowly tailored and are the "least restrictive means" of accomplishing that vital interest. *See Playboy Entm't Grp.*, 529 U.S. at 813. The City cannot do so.

Sections 122.27 and 122.31 are not narrowly tailored chiefly because they are fatally underinclusive: They impose regulations and punish only certain types of activities that generate the alleged safety hazard, while leaving others unregulated. *See Reed*, 576 U.S. at 172 ("In light of this under inclusiveness, the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest."); *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011) (law restricting the sale of violent video games to minors was "wildly underinclusive" because the state "declined to restrict" other forms of media that could be equally dangerous to children). Candidates for elective office holding signs and asking people for their vote are just as likely to distract drivers—if not more so—as people holding signs requesting donations, yet Sections 122.27 and 122.31 regulate only the latter forms of speech. If the provisions legitimately sought to promote traffic safety, they would apply to all solicitations that could potentially create the targeted public danger the law seeks to prevent. Sections 122.27 and 122.31 are thus fatally underinclusive and not narrowly tailored.

In fact, courts have soundly rejected street solicitation restrictions based on public safety that single out panhandling out for different treatment. *See Rodgers*, 942 F.3d at 457 (since state provided "no justification for its decision to single out charitable solicitation from other types of solicitation, the anti-loitering law is underinclusive and, consequently, not narrowly tailored");

Clatterbuck, 92 F.Supp.3d at 487 ("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*, 978 F.Supp.2d at 630 (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 donations or contributions are regulated by the Ordinance.").

Permitting and licensing schemes singling out panhandling have met the same fate. *See Vigue v. Shoar*, 494 F. Supp. 3d 1204, 1224 (N.D. Fla. 2020) (two Florida statutes which prohibited individuals from soliciting charity on roadways without obtaining a permit, but which exempted 501(c)(3) organizations, "impermissibly favor[ed] organizational, campaign and other group speech over other types of speech, like individual charitable contributions," and were unlawful content-based restrictions on speech); *Dumiak v. Village of Downers Grove*, 475 F. Supp. 3d 851, 855-56 (N.D. Ill. 2020) (ordinance which required only panhandlers soliciting money from motorists to have certificate of registration was content-based); *Blitch v. City of Slidell*, 260 F.Supp.3d 656, 673 (E.D. La. 2017) (finding ordinance that prohibited panhandling without a permit was content-based and unconstitutional under strict scrutiny).

Sections 122.31(B) and (C) are also not narrowly tailored because they regulate behavior that already violates existing criminal laws. For instance, under § 122.31(B), solicitors may not "unlawfully obstruct, delay or interfere with the free movements of any person against that person's will or seek to coerce, or physically disturb any other person." And § 122.31(C) states that no "solicitor shall in any way unlawfully obstruct, delay or interfere with vehicular traffic within the city." These activities—assault, battery, and obstruction of traffic—are already

punishable through existing criminal laws. In *Messina v. City of Ft. Lauderdale*, 546 F. Supp. 3d at 1245, the court held the city's panhandling ordinance was not narrowly tailored where the "State has already criminalized assault and battery, *see* FLA. STAT. §§ 784.011 *et seq*., and the City doesn't explain why a batterer should receive *enhanced* penalties solely because, before the assault, he asked the victim for change." (emphasis in original). Similarly, in *McLaughlin*, the court held that "the City has not demonstrated that public safety requires harsher punishments for panhandlers than others who commit assault or battery or other crimes." 140 F.Supp.3d at 193. *See also Thayer*, 144 F.Supp.3d at 235-237 (following *McLaughlin* in declining to uphold panhandling restrictions that duplicated existing criminal laws).

Finally, in defense of §§ 122.27 and 1222.31, Hollywood cannot argue that the provisions are just regulations and not outright bans or complete prohibitions. First, § 122.31(F) *does* ban solicitation for donations or contributions at every location where a "No Solicitation" is posted. Second, "[i]t is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree. The Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Playboy Entertainment Group*, 529 U.S. at 812. Thus, any attempt to distinguish post-*Reed* decisions applying strict scrutiny to anti-panhandling ordinances by noting that Hollywood is merely regulating panhandling entirely fails.

For all these reasons, §§ 122.27 and 122.31 are content-based restrictions on protected speech that cannot withstand strict scrutiny because they are not narrowly tailored to a compelling state interest, nor are they the least restrictive means of furthering that interest. Plaintiff is likely to succeed on the merits of his First Amendment claims as to Counts I and II.

C. Section 122.54 Violates the First Amendment Because the Selling and Requesting Donations Clauses in the Definition of a "Right-of-Way Solicitor" in § 122.51 are Content Based Restrictions on Speech Which are Not Narrowly Tailored to, or the Least Restrictive Means of Achieving, a Compelling Government Interest.

Section 122.54 prohibits a person from acting as "a right-of-way panhandler or solicitor" on one of the six prohibited roadways in § 122.51. The first two clauses of the definition of a "right-of-way solicitor" in § 122.51 apply to 1) one "who sells or offers for sale any thing or service of any kind," or 2) one "who seeks any donation of any kind" while "on a prohibited roadway or within 200 feet from the lateral curb or boundary line of an intersection located on the prohibited roadways."

The selling and requesting donations clauses—just like §§ 122.27 and 122.31—are content-based and subject to strict scrutiny because they treat those who sell and request donations 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*, 576 U.S. at 169. Like §§ 122.27 and 122.31, because the City's asserted governmental interest in § 122.54 is traffic safety—which is not a "compelling" state interest—the City cannot survive strict scrutiny as to the first two clauses. And as with §§ 122.27 and 122.31, the City cannot prove that the clauses are narrowly tailored to a compelling interest.[3]

In *Messina*, the court addressed the nearly identical language in Fort Lauderdale's "Right-of-Way Ordinance" and held that the selling and asking for donations clauses were

[3] Plaintiff hereby adopts and incorporates the argument and authorities cited in Sections I.A., B.1, and B.2, *supra*.

content-based and unable to withstand strict scrutiny. 546 F. Supp. 3d at 1248. In issuing a preliminary injunction, the court stated:

> When read properly, then, the statute clearly prohibits two speech activities—our first two "subsections" above—based on their communicative content. A person may not stand on any portion of one of the designated rights-of-way and (1) sell (or advertise for sale) a service or item, or (2) ask for a donation. Nothing on the face of the Right-of-Way Ordinance, though, prevents a person from standing in precisely the same spot and communicating *other* messages, such as "Vote for Jones," "Join the Nazis," or "Read John Locke." In that way, those first two clauses are content based and subject to strict scrutiny.
>
> And for many of the same reasons we've already given, those clauses are unlikely to survive strict scrutiny." The clauses prohibit someone from standing on "any portion" of a designated right-of-way, such as a median or crosswalk, and "requesting a donation." But why would it be more dangerous to stand on that crosswalk and ask for a donation than, say, to stand in that same place and talk to pedestrians about politics, religion, books, ideas, sports, or *anything else*? (emphasis in original).

Id.

Plaintiff is likely to succeed on the merits of his First Amendment claim regarding the first two clauses of § 122.54.

D. The Hand-to-Hand Transmission Clause in the Definition of a "Right-of-Way Solicitor" in § 122.51 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 of the definition of a "Right-of-Way Solicitor" in § 122.51—the hand-to-hand transmission clause—applies to one who "who personally hands to or seeks to transmit by hand or receive by hand any thing or service of any kind, whether or not payment in exchange is required or requested, to any person who operates or occupies a motor vehicle of any kind."

Unlike the selling and requesting donations clauses, the hand-to-hand transmission clause is content neutral. But even though it is content-neutral, it still fails intermediate scrutiny and is 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 burdens substantially more speech than necessary to further the city's interests in traffic and pedestrian safety. *Id.* at 486. The provision prohibits transmitting *anything* between pedestrians and vehicle occupants—including political or religious leaflets, donations, water bottles, and newspapers—on all sidewalks, shoulders, and medians abutting one of the six prohibited roadways listed in § 122.51. And the ban applies regardless of whether the interactions either cause safety issues or obstruct traffic.

Thus, the hand-to-hand transmission clause is overinclusive because it prohibits expressive conduct that poses no risk of danger to either pedestrians or motorists. *See 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"); *Reynolds v. Middleton*, 779 F.3d 222, 231 (4th Cir. 2015) (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). As a result, the hand-to-hand transmission clause unconstitutionally bans protected speech.

Indeed, Hollywood's hand-to-hand transmission clause is identical to the Ft. Lauderdale ordinance that was enjoined in *Messina v City of Ft. Lauderdale*. There, the court held that the hand-to-hand transmission clause was not narrowly tailored because it was both over- and under-inclusive and issued a preliminary injunction. It was over-inclusive because it prohibited conduct that is not dangerous, and under-inclusive because it penalized only the panhandler and not the motorist whose conduct is arguably just as dangerous. *Messina*, 546 F. Supp. 3d at 1250. In addition, the court in *Messina* also concluded that the hand-to-hand transmission ban failed intermediate scrutiny because the City of Ft. Lauderdale had completely failed to put forth any evidence to justify the law, in that the city had no evidence to show that roadway solicitors had been either the subjects of any accidents on any of the prohibited roadways, or that their conduct caused or contributed to a traffic accident. *Id*. Here, Hollywood's hand-to-hand transmission clause fails for the same reasons.

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).

Plaintiffs are likely to succeed on their First Amendment claim as to the hand-to-hand transmission clause of § 122.51.

II. Plaintiff Have Established the Remaining Criteria for a Preliminary Injunction

A. Irreparable Injury

"[I]t is well settled that the 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitute irreparable injury.'" *KH Outdoor, LLC v. City of Titusville*, 458, F.3d 1261, 1271-72 (11th Cir. 2006) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The penalization of Plaintiff's First Amendment rights cannot be "cured by the award of monetary damages." *KH Outdoor*, 458 F.3d at 1272. *See also Scott*, 612 F.3d at 1295.

B. Balance of Harms and Public Interest

The third and fourth preliminary injunction criteria are also satisfied. With respect to the balance of harms, "even a temporary infringement of First Amendment rights constitutes a serious and substantial injury." *Scott*, 612 F.3d at 1297. On the other side of the ledger, "the public, when the state is a party asserting harm, has no interest in enforcing an unconstitutional law." *Id*. Enforcing unconstitutional laws also wastes valuable public resources. Finally, because the public has no interest in enforcing an unconstitutional speech restriction, an injunction against enforcement cannot "disserve" the public interest. *Id*. at 1290, 1297.

CONCLUSION

Based on the above argument and authorities, Plaintiff respectfully requests that this Court declare that Sections 122.27, 122.31, and 122.54 of the Hollywood City Code are unconstitutional, both facially and as applied to Plaintiff, and immediately enjoin the City and its agents from enforcing them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed today, May 2, 2023, 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. Also, on today's date, I sent a copy of this Motion and its attachments via email to: Douglas R. Gonzales, City Attorney, City of Hollywood, PO Box 229045, Hollywood, Florida, 33020, dgonzales@hollywoodfl.org.

By: *s/Ray Taseff*
Ray Taseff