UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

KENNETH MCLAUGHLIN and JOSHUA WOOD,	**C.A. 14-10270-DPW**
Plaintiffs,	
v.	
CITY OF LOWELL,	
Defendant.	

MEMORANDUM OF LAW IN SUPPORT OF
CITY OF LOWELL'S MOTION FOR SUMMARY JUDGMENT

Defendant City of Lowell (the "City") respectfully submits this memorandum in support of the City's motion for summary judgment.

INTRODUCTION

Panhandling is often seen as a product of economic deprivation – the wan handmaiden, as it were, of homelessness. There is a perception that no one would engage in panhandling if viable alternatives were available. The reality of panhandling is less sentimental and more complex. Panhandling is a culture, a lifestyle, a hobby, and for some, a business. It is a cohesive social world with, among some, a code of conduct. As a culture, it has both festive and sinister aspects. It attracts the occasionally or ambiguously homeless; those in and out of housing, rehab and jail; modern-day court jesters or buffoons; trouble-makers; those with apparent access to housing, employment and conventional social participation but who choose a more raffish *modus operandi*; alcoholics; and the drug-addicted. Panhandling is a way of passing the time between morning and evening meals provided by charities. It is an organized economic enterprise

featuring division of labor and markets. In short, panhandling represents a raucous alternative culture that for reasons of economic dependence – or in a different view, parasitism – must occupy the same geographic space as those mainstream souls who lack the "need" – or perhaps the chutzpah – to importune strangers for money.[1]

The relationship between the two worlds can get out of balance. In 1982, researchers James Q. Wilson and George L. Kelling published an influential article called "Broken Windows."[2] The premise of this article is that the fact and appearance of public disorder in public places contributes, firstly, to a cycle of increasing crime. "If the neighborhood cannot keep a bothersome panhandler from annoying passersby, the thief may reason, it is even less likely to call the police to identify a potential mugger or to interfere if the mugging actually takes place." More broadly, the perception of neighborhood deterioration caused citizens to avoid going out in public at all, thus effectively ceding the neighborhood to disorder. Wilson and Kelling discuss an experiment in one community where police took a proactive approach toward public disorder. Among other things, "[t]alking to, bothering, or begging from people waiting at the bus stop was strictly forbidden." The experiment had a significant effect on the public's perception of and participation in public spaces.[3]

Plaintiffs in this suit will be quick to cite case law saying that the First Amendment does not protect passersby from being "bothered" or "annoyed." But such jurisprudence arose fundamentally from courts' desire to protect the marketplace of ideas. In that realm, the First Amendment protects a true chaos of conflicting assertions – be they religious tirades, sidewalk "counseling" against abortion, or even advocacy of overthrowing the government. The

[1] For a partial and anecdotal corroboration of the assertions in this paragraph, see the City's Statement of Uncontested Material Facts ¶¶ 42-45, and 65 and the City's Statement of Confidential Facts, ¶¶ 5-6.
[2] James Q. Wilson and George L. Kelling, "Broken Windows," *Atlantic Monthly*, March 1982, available at http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/, accessed on August 28, 2015.
[3] In connection with this paragraph, *see generally* Statement of Confidential Facts, ¶¶ 2, 4-5.

Founders concluded, and subsequent courts have agreed, that this chaos of ideas is worth the often significant side effect of harm to public order. But the culture of panhandling, as it has developed recently, is a direct attack on public order. To the extent that various courts have equated panhandling with other types of First Amendment "speech" – based implicitly on a now-antiquated image of a lone needy person on a street corner, hat in hand – such courts have contributed to a pendulum swing that has now gone, or is on the verge of going, too far.

Panhandling contributes very little to the marketplace of ideas. To be sure, panhandling may be connected with advocacy and commentary on social, political, religious or other topics. Some courts have opined that the panhandler's expression of present need is itself a message of sorts. More broadly, there is an apparent perception (not specifically advanced by Plaintiffs herein, but the City will address it here anyway) that the practice of panhandling somehow serves to keep the issues of poverty and/or homelessness in the public eye. The concept is that if the public and/or the government are sufficiently discomfited by experiences with panhandlers, people might finally do something about homelessness. As applied to the old stereotype of more or less involuntary panhandling, the concept may have merit: "Brother, can you spare a dime?" may give rise to the socio-religious question, "Am I my brother's keeper?"

But as applied to modern panhandling, the argument is flawed in its basic premise and also in terms of the protection afforded by the First Amendment. To engage in a war on the public sentiment, as modern panhandling does, is unlikely to attract adherents to the cause of alleviating homelessness. Secondly, the First Amendment is designed *inter alia* to prevent the government from favoring certain speakers instead of others. The core activity that is panhandling – for which the usual legalese is "immediate solicitation" – carries unique costs. As the legal precedents that have upheld restrictions on panhandling have noted, panhandling is rife

with risks for fraud, duress and intimidation. As the City's evidence will show, members of the non-panhandling public are not so much "bothered" or "annoyed" by panhandling as they are *afraid*. To restrict the government from protecting its citizens from "speech" with such intolerable costs is not a removal of the governmental thumb from the scales, rather it is simply placing the thumb on the opposite end of those scales.

The central utterance of "Give me money!" – whether phrased as such or as a more or less aggressively expressed "request" – illustrates the kinship between modern panhandling and the time-honored stick-up. The atmospherics of a large person panhandling toward a smaller one in the vicinity of an ATM cannot be captured by any putatively "narrower" regulation. The government cannot outlaw a person's size, or her/his tone of voice, or her/his body language. What the government can do is to say, you may not panhandle within a reasonable distance of an ATM.

Other moderate restrictions on panhandling may be warranted by other societal needs such as community revitalization. Like many other communities, the City of Lowell faces difficult challenges in terms of attracting and retaining the industry, business and talent that are the heart of the City's economic and therefore social functioning. Each municipality may have unique resources that it can leverage to keep a foothold in the modern economy. For the City of Lowell, one key bright spot is the City's heritage from its early industrial heyday. Buildings from that era still stand, and create a unique feel to the downtown area. This is not a matter of mere aesthetics. Tens of millions of tourist dollars flow through the City annually. Tourism is an almost classic example of discretionary spending: it may be spent elsewhere or not at all. As the Broken Windows theorists and subsequent commentators have noted, a community may "tip"

from economic decline to vibrancy, or the reverse.[4] Economic decline encompasses increases in poverty and crime and a decrease in the well-being of all persons, panhandlers and non-panhandlers alike.

The First Amendment landscape has been transformed by the Supreme Court's recent issuance of *Reed v. Gilbert*, 135 S. Ct. 2218 (2015), which has been described as easily the most radical decision of the Court's last term.[5] If read broadly, the decision would apply strict scrutiny to any governmental differentiation between *types* of communications over and above the application of such scrutiny to content discrimination within any given type of communication. A broad reading of read would cut a swath through decades and even centuries of well-established regulation in various areas. The City, along with various commentators as well as certain concurring justices, would read *Reed* narrowly so as to benefit from its essential insights while seeking to harmonize the decision with other important precedents.

FACTS AND FIGURES

In the 1850s, "Lowell had the largest industrial complex in the United States.… In 1860, there were more cotton spindles in Lowell than in all eleven states combined that would form the Confederacy."[6]

In 1978, the U.S. Congress passed legislation creating the Lowell National Historical Park. *See* Statement of Undisputed Material Facts ("SOF"), ¶ 1. Over the last 10 years, visitors to the Park have numbered more than 500,000 annually, with a general downward trend in attendance. SOF ¶ 6. For 2013, the Park service estimated that out-of-town visitors generated more than $39 million in economic activity in Lowell. SOF ¶ 7.

[4] *See* Malcolm Gladwell, *The Tipping Point* (Back Bay Books, 2002), p. 140 et seq.
[5] Adam Liptak, "Court's Free-Speech Expansion Has Far-Reaching Consequences," *New York Times*, January 17, 2015, http://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html, retrieved August 24, 2015
[6] https://en.wikipedia.org/wiki/Lowell,_Massachusetts, accessed on August 25, 2015.

In 1983, the Massachusetts Legislature enacted the Lowell Historic District Act, delimiting an area of the City is the Downtown Lowell Historic District and noting the "unique historic values of the city of Lowell, the birthplace of the American industrial revolution." SOF ¶ 2, 4.

Between January 1, 2012 and March 31, 2015, the City of Lowell Police Department received 827 calls from the public that were coded as involving panhandling. SOF ¶ 19. These calls included reports of panhandlers: banging on a car or car windows (18 incidents); ignoring a request to leave the premises (40 incidents); "bothering", "pestering" or "harassing" customers of a business (77 incidents); panhandling in traffic or on highway ramps (101 calls incidents); panhandling in parking lots (96 incidents); being verbally abusive (12 incidents); being intoxicated, on drugs, or drug-seeking (22 incidents); panhandling near a bank or ATM (19 incidents); panhandling in groups (71 incidents); panhandling near the entrance of the restaurant (four incidents); and, variously, panhandling inside a food service establishment, following someone leaving an ATM, seeking to intimidate women in particular, following people to their cars, looking into cars, and shoving a paper cup into someone's face (one incident each).[7] *See* SOF ¶¶ 22-25, 31-38.

Beginning in late 2013, the City Council of the City of Lowell enacted an ordinance with respect to panhandling, and then amended that ordinance twice over the next 16 months. On November 12, 2013, the City banned panhandling in the Downtown Lowell Historic District. The ban included and exemption for 501(c)(3) organizations. SOF ¶ 111. On February 4, 2014 the Council further banned, with regard to the historic district, a set of behaviors labeled as "aggressive panhandling." SOF ¶ 112. The Council also repealed the 501(c)(3) exemption. *Id*. On March 3, 2015, the Council modified the historic district ban so as to allow

[7] Some of the referenced incidents overlap with each other.

for panhandling via holding a sign "or other indication that a donation is being sought." SOF ¶ 113. The March 3, 2015 amendment also extended the aggressive panhandling ban throughout the City. *Id.*[8]

The City has never enforced the Ordinance. SOF ¶ 124.

ARGUMENT

The City's ordinance respecting panhandling (the "Ordinance") is narrowly tailored to meet the significant, and even compelling, governmental interests of tourism, economic development and public safety. The Ordinance is not vague, and does not conduce to arbitrary enforcement; indeed, the Ordinance is designed to reduce police discretion. Nor does the Ordinance seek to target the homeless.

I. The Wording and Purposes of the Ordinance Pass Muster under the First Amendment.

As a preliminary matter, there are several potential exceptions or un-clarities as to the applicability of *Reed v. Gilbert*. As to the question of the City's intent in enacting the Ordinance, the City posits that its intent is none other than that which appears on the face of the Ordinance. If strict scrutiny is applied, the Ordinance should still withstand that more searching inquiry.

A. Certain Exceptions or Carve-Outs May Survive *Reed*

The First Amendment protects, at a minimum, discussion of various viewpoints and topics.[9] As noted *supra*, the Supreme Court in *Reed v. Gilbert* would appear to extend such protection to various types or categories of communications. *See* 135 S. Ct. 2218 (striking down a ordinance that distinguished between different types of signs). While purporting merely to clarify certain language in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the *Reed* court

[8] A complete, final copy of the Ordinance, as amended, is included in the City's Appendix of Exhibits at Exhibit 20. SOF ¶ 114.
[9] *See Consolidated Edison Co. v. Public Service Comm'n*, 447 U. S. 530, 537 (1980).

effectively announced what has been described as a "brand-new [legal] theory."[10] The decision in *Reed*, which was unanimous as to the judgment, reflects the manifest untenability, in the Justices' eyes, of the sign ordinance[11] that was before the Court. *Reed v. Gilbert*, 135 S. Ct. at 2239 (Kagan, J, *concurring*) (ordinance does not pass the "laugh test"). The *Reed* majority's dogmatism, however, has aroused consternation among certain concurring Justices as well as commentators, who have pointed out that *Reed* may sow confusion rather than clarity if *Reed* is applied without nuance to a variety of areas of jurisprudence.[12] Such an application could lead to consequences that seem unlikely to have been intended by the *Reed* court. *See Reed v. Gilbert*, 135 S. Ct. at 2236. The City respectfully suggests that the Court a narrow application of *Reed*. In particular, the City points out certain potential exceptions to the rule of *Reed*.

Firstly, *Reed* might or might not implicate various areas of law that do in fact rest upon some degree of content distinction – as that term is newly defined by *Reed*. Such areas would include securities disclosures, defamation law, fraud, extortion, child pornography, price-fixing, misleading advertising, professional malpractice and copyright, *inter alia*. Laws governing these areas have not been hitherto subject to strict scrutiny, the application of which could lead to considerable jurisprudential turmoil.[13] It is hardly clear that *Reed* intended such a result.

Secondly, it is not clear that the *Reed* court intended to overrule, or did overrule, the leading case of *Hill v. Colorado*, 530 U.S. 703 (2000). In that case, the Court considered a statute which prohibited "oral protest, education, or counseling" within a designated buffer zone. *Id*.

[10] Lyle Denniston, "Opinion analysis: the message determines the right," SCOTUSblog, June 18, 2015, http://www.scotusblog.com/2015/06/opinion-analysis-the-message-determines-the-right/, accessed on August 27, 2015.

[11] The ordinance in question contained 23 categories of signs, one of which was "Temporary Directional Signs Relating to a Qualifying Event." At oral argument, counsel for the defendant town stated that the ordinance's distinctions might be seen as "rather silly." http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-502_d1pf.pdf, retrieved on August 26, 2015.

[12] *See* Liptak, *supra*.

[13] *See* Liptak, *supra*, quoting a law professor as opining that a literalistic application of *Reed* "would roll consumer protection back to the 19th century."

The court held that the statute's "minor place restriction[s] on an extremely broad category of communications with unwilling listeners…" did not render the statute content-based. The court wrote that:

> "…the statute's restriction seeks to protect those who enter a health care facility from the harassment, the nuisance, the persistent importuning, the following, the dogging, and the implied threat of physical touching that can accompany an unwelcome approach within eight feet of a patient by a person wishing to argue vociferously face-to-face and perhaps thrust an undesired handbill upon her."

Id. at 724. The court's language is particularly apropos in connection with the behaviors associated with panhandling. *See* SOF ¶¶ 21, 24, 30, 32, 38. It is not clear that the totality of the Court's reasoning in *Hill* will survive *Reed* (in particular, the *Hill* court's reasoning concerning legislative intent), but by the same token, the *Reed* court did not purport to overrule *Hill*.

Finally, it is not clear that the court intended to eliminate the "secondary effects" doctrine arising from *Renton v. Playtime Theatres*, 475 U.S. 41 (1986), and other cases. The *Renton* court considered, under the First Amendment, a zoning ordinance that regulated adult movie theaters and that was designed to "prevent crime, protect the city's retail trade, maintain property values, and generally '[protect] and [preserve] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life.'" *Id.* at 49 (bracketing in original). The Court held that adult movie theaters created secondary effects that rendered the ordinance in question effectively content neutral. As with *Hill*, it is unclear that all of *Renton*'s reasoning survives *Reed*, but the secondary effects doctrine is an influential one, and its elimination is not to be lightly presumed. *See e.g. Boos v. Barry*, 485 U.S. 312, 320 (U.S. 1988).

If either *Hill* or *Renton* survives *Reed*, such a result would immunize the City's Ordinance concerning the question of content neutrality.

B. The Ordinance is Not Marred by Any Ill "Intent" Not Appearing on the Face of the Ordinance.

As a matter of logic, if the City prevails in his argument that the ordinance is content-neutral after *Reed*, the rule of *Ward* (as ostensibly clarified by *Reed*) could not render the Ordinance content-based. There is no daylight between the face of the Ordinance – which, with an absence of coyness, is styled "Panhandling" – and the City's intent to regulate panhandling. Nonetheless, the City will address here Plaintiffs' argument that the true intent of the Ordinance as to target the "speech" of "homeless" people (*see* e.g. Complaint, ECF No. 1).

Plaintiffs' polemic may be parsed into two possible arguments. The first argument would be that within the world of panhandling (as that term is colloquially understood), the City is targeting those panhandlers who are "homeless" – apparently, the visibly destitute. The City's rebuttal to this argument is twofold. Firstly, to the extent the record reflects a stray remark or two by individual City councilors connecting panhandling with homelessness, destitution and/or a generalized need for services, such remarks cannot be legally imputed to the legislative body as a whole. *See Soon Hing v. Crowley*, 113 U.S. 703, 710-11 (1885); *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 699 (1st Cir. 1994); *Knights of Columbus v. Town of Lexington*, 138 F. Supp. 2d 136, 139 (D. Mass. 2001). Secondly, the great weight of evidence, as well as common experience, suggests that the Ordinance was motivated by a breakdown of the old détente between the visibly destitute and the public. By contrast with the antique stereotype of the "homeless" panhandler, the modern panhandler is: (a) not necessarily destitute-looking; (b) not apparently out of her/his wits; and (c), assertive in the extreme, i.e., the reverse of miserable/helpless. *See generally* SOF ¶¶ 30. 32, 38, 89-90. The legislative record here indicates that the City was primarily concerned with the behavior associated with this new, more

problematic strain of panhandling.[14]

The second way to understand Plaintiffs' critique is as an effort to make hay of the Ordinance's former exemption for charitable organizations. Firstly, such organizations had not proved to be problematic, and as a matter of reason and law, the City had warrant for avoiding over-regulation. *See* SOF ¶ 115-116, 118; *see also ACLU v. City of Las Vegas*, 2009 U.S. Dist. LEXIS 52131, 39-40 (D. Nev. 2009) (invalidating, as overbroad, an ordinance that failed to exempt charitable organizations, in light of a record reflecting bad behavior only by non-charities). The City's subsequent repeal of the exemption was not an effort to "paper over" the true intent of the Ordinance (then as now, entitled "Panhandling"), but an effort to bring the Ordinance in line with the weight of legal precedent.[15] Concededly, the City vacillated between narrow regulation and even-handed regulation. The City's conflicting intuitions reached a happy resolution, however, in the final version of the Ordinance, which allowed sign-holding and/or musical performance by both panhandlers and charitable organizations. The final version effectively allowed the classic activities of the Salvation Army – or for that matter, the firemen with their "boot"[16] – as well as permitting the most peaceful version of panhandling. *See* SOF ¶¶113-114, 118.

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[14] Plaintiffs' attempted conflation of panhandling and homelessness is so much obfuscation, in light of the absence of clarity as to whether any given panhandler is in fact homeless in the highly vexed question (very much present in the mind of the average panhandler) as to the degree of actual need and the actual use to which any donated funds will be put.

[15] In other respects, too, the City's legislative enactments clearly reflected in an element of copying the provisions of other municipality's ordinances that had been deemed (at the time) to pass legal muster. *See*, with regard to the aggressive panhandling ban, *Thayer v. City of Worcester*, 979 F. Supp. 2d 143 (D. Mass. October 24, 2013) ("*Thayer I*"), *aff'd by, remanded by Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014) ("*Thayer II*"), *vacated by, remanded by, motion granted by Thayer v. City of Worcester*, 135 S. Ct. 2887 (2015); with regard to the geographical extension of his aggressive panhandling ban, *Thayer II*; and with regard to the exemption for sign-holding, *Otterson v. City of Springfield*, 768 F.3d 713 (7th Cir. 2014), *reversed by, remanded by Norton v. City of Springfield*, 2015 U.S. App. LEXIS 13861 (7th Cir. 2015). Imitation of other municipalities and attempted avoidance of litigation costs are mundane goals – neither high-minded nor sinister – and are an inevitable concomitant of operating with limited legal and other resources

[16] The boot, along with the Salvation Army's crimson tripod, would fall within the ordinances phraseology, "… other indication that the donation is being sought."

C. The Ordinance Would Survive Strict Scrutiny if Such Scrutiny is Applied.

Even if the Ordinance is found to contain a content distinction, the Ordinance would still survive the more exacting standard of "strict scrutiny" ostensibly required by *Reed*. That is, the interests behind the City's Ordinance are not only substantial but "compelling."[17]

A mechanical application of strict scrutiny, however, will not serve the City's Ordinance fairly. The conventional view of strict scrutiny is that it is "generally fatal" – "like a Civil War stomach wound."[18] The City notes that the Court itself has animadverted against such a "bumper sticker"-level of analysis. *See* ECF No. 43, pp. 42-43. As a preliminary matter, the City notes that at least one solicitation regulation was recently found to survive strict scrutiny. *See Williams-Yulee v. Fla. Bar*, 575 U.S. ___ (2015), 135 S. Ct. 1656 (2015) (upholding a regulation against direct solicitation of donations for a judicial election). As the City will argue, a proper application of strict scrutiny would require examination not only of the City's asserted interests in the abstract, but the extremely severe impingement of panhandling on those interests.

1. Public Safety is a Compelling Interest

There can be little doubt that public safety is a compelling government interest. *See RAV v. St. Paul*; *Mackey v. Montrym*, 443 U.S. 1, 19 (1979). As a preliminary matter, public safety has consistently been found to pass muster under "intermediate scrutiny." *See Heffron v. Int'l Soc. for Krishna Consciousness*, 452 US 640, 652-654 (1981); *Ward v. Rock Against Racism*, 491 U.S. 781, 796-97 (1989); *Madsen v. Women's Health Ctr.*, 512 US 753, 768 (1994); *McCullen v. Coakley*, 134 S. Ct. 2518, 2535 (2014). The lack of discussion on the topic would

[17] For reasons of economy, the City will not separately argue, under the potentially applicable standard of intermediate scrutiny, that the City's interests, as detailed *infra*, are "substantial." *A fortiori*, if the City's interests are compelling, they are also substantial. During the briefing of Plaintiff's' motion for preliminary injunction, Plaintiffs did not fundamentally contest the ontological status of the City's asserted interests (e.g., tourism), but rather contended, in essence, that those interests were being stretched too far. *See* ECF No. 37, pp. 4-5.

[18] Liptak, *supra*.

suggest that it is, in fact, almost taken for granted. *See, e.g.*, *McCullen,* 134 S. Ct. at 2535 (simply stating that courts had previously recognized the legitimacy of the government's interests in ensuring public safety and order.); *Madsen*, 512 U.S. at 768 (simply stating that the state has a strong interest in ensuring public safety and order.) There is nothing to suggest that the same interest would not also be deemed compelling. Indeed its common sense that public safety the compelling interest.

The Ordinance is calculated to serve that interest. Justice Kennedy has written:

> In-person solicitation of funds, when combined with immediate receipt of that money, creates a risk of fraud and duress that is well recognized … [I]n-person solicitation has been associated with coercive or fraudulent conduct. … [R]equests for immediate payment of money create a strong potential for fraud or undue pressure … [Q]uestionable practices associated with solicitation can include the targeting of vulnerable and easily coerced persons, misrepresentation of the solicitor's cause, and outright theft.

Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672, 705-6 (1992) (Kennedy, J, concurring) (internal citations omitted). Or, in another case, again Justice Kennedy: "[a]s residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information." *United States v. Kokinda,* 497 U.S. 720, 733-34 (1990) (Kennedy, J, concurring),

As a matter of fact as well as law, the predominant effect of modern panhandling, as documented in the City's records, is not one of need but of aggression. *See* SOF ¶¶ 20, 21, 23, 29, 31, 33, 34, 37, 61, 75, 95. The request for cash may serve as a toehold for prolific, prolonged hassling and/or for harassment that is not specifically pecuniary. See SOF ¶¶ 20, 23, 39, 84. Citizens are regularly accosted on the sidewalks, intimidated by groups of panhandlers, and subjected to aggressive panhandling behavior. SOF ¶¶ 20, 21, 23, 29, 31, 33, 37, 63. There is

the fear among many that even the most innocent of requests can quickly escalate into something more. SOF ¶ 61, 83, 114. These fears are not without foundation: panhandlers often revert to profanity and threats when refused a donation. SOF ¶¶ 29, 78, 84, 95. Even the former Superintendent of the Lowell Police Department holds this fear. SOF ¶ 83. Panhandlers knock on car windows for donations and reach into cars. SOF ¶¶ 21, 37. They bang on the windows of businesses. SOF ¶ 29. They bother and harass customers coming in and out of businesses. SOF ¶ 23. If the business requests that the panhandler(s) leave, they often refuse. SOF ¶ 22. Citizens have been spat at (SOF ¶ 29), grabbed (SOF ¶ 29), screamed at (SOF ¶ 31) and followed (SOF 37). If there is a code of conduct amongst panhandlers, many are not following it. SOF ¶¶ 41-43.

Plaintiffs continually refer to "peaceful solicitation." See Complaint, ECF No. 1, *passim* and Plaintiffs' motion for preliminary injunction, ECF No. 3, *passim*. But as a matter of law, the term is intrinsically oxymoronic. Solicitation, "by its very nature, is inherently more assertive and aggressive than other forms of speech…." *National Anti-Drug Coalition, Inc. v. Bolger*, 737 F.2d 717, 727 (1984). A political invective, for instance, does not, and really cannot, carry the same degree of personal threat as an equivalent instance of panhandling. Indeed, because of the nature of panhandling, the only thing that could fully vacate any element of threat is the activity suggested by the ordinance, namely sign-holding.[19]

[19] Within court opinions addressing solicitation regulations, the predominant image of the panhandler appears to be that of a hapless, helpless individual driven by need and not predation. See e.g. *Loper v. New York City Police Dep't*, 999 F.2d 699 (2d Cir. 1993). The *Loper* court wrote that:

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

Id.; see also *Benefit v. City of Cambridge*, 424 Mass. 918, 923 (1997) (citing *Loper*). This old-school image of a Depression-era panhandler, as it were, may represent one pole within the spectrum of the activity of panhandling. At

2. Economic Revitalization is a Compelling Interest

There is a compelling governmental interest in combating urban blight and decline. *See e.g. Islip v. Caviglia*, 73 N.Y.2d 544, 567 (N.Y. 1989). *Islip* was a zoning case; the court wrote that:

> The governmental interest supporting the ordinance is the eradication of the effects of urban blight and neighborhood deterioration and furtherance of the general underlying purpose of zoning, the enhancement of the quality of life for the Town's residents". Studies relied on and prepared by the Town demonstrated that the location of adult businesses in certain areas heightened public apprehension about entering them, thus driving out traditional downtown businesses as customers avoided locations near adult bookstores, increased criminal activity and lowered nearby residential property values.

See Speet v. Schuette, 889 F. Supp. 969 (W.D. Mich. 2012) (conceding for the sake of argument that "protecting business and tourism" might be a compelling state interest.)

Within Massachusetts, Lowell has been identified as a "gateway city," defined as a municipality facing significant economic challenges. See SOF ¶ 8; *see also* ALM GL ch. 23A, § 3A (statutory definition of "gateway city"). One of the most significant municipal tools in keeping urban blight at bay is strong economic development policies and practices. In Lowell economic revitalization is commonly credited with the City's success. See SOF ¶ 9.

The record is replete with the negative impact of panhandling on downtown businesses. SOF ¶¶ 44-88. One customer opined that panhandling was "just another reason not to come to downtown Lowell." SOF ¶ 49.

Panhandling threatens the revenue stream connected to tourism. The numbers alone – more than $39 million annually – guarantee that tourism has a compelling impact on the City.

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the other end of the spectrum is an opposite, highly aggressive pole, wherein the putative ideational content (alleged "need") is so overshadowed by an aggressive affect as, arguably, to constitute "no essential part of any exposition of ideas, and [to be] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed by the social interest in order and morality." See *Chaplinsky v. N.H.*, 315 U.S. 568, 572 (1942). The "average" instance of solicitation may lie somewhere in between. Yet the law should not be derived solely from consideration of one of the two poles.

See SOF ¶6. The CEO of the Greater Merrimack Valley Chamber of Commerce testified that she had spoken with tourists who complained about panhandling in the City. SOF ¶ 54. There is no obvious mechanism for collecting data about the impact of panhandling on tourism, but that impact is largely one of common sense: an environment experienced by the locals as harassing is unlikely to acquire any special luster in the eyes of tourists.

The problem extends to a growing perception that the police is unable to protect its citizens in the public spaces. In his deposition, Superintendent Taylor spoke directly to this concern. SOF ¶¶ 109-113. He explained that when citizens are put in fear in public places, they see the police as being ineffective purveyors of the public peace. SOF ¶ 111. No more is needed to defeat the City's significant efforts in community revitalization.

II. The Ordinance Does Not Overly Restrict Speech.

The Ordinance is narrowly tailored toward the City's asserted interests. Conversely, ample alternative modes remain available for the "expression" of panhandling.

A. The Ordinance is Narrowly Tailored

The City – or at least, the present City Council itself – did not define the contours of the Downtown Lowell Historic District. *See* SOF ¶ 2. It was eminently appropriate for the City to align the proscription of verbal requests with the pre-existing outlines of the Historic District. The City's historic character extends across the downtown district, not just around famous tourist sites – or at least, such was the opinion of the Massachusetts legislature. The historic character encompasses the City's distinctive skyline and its unique canal system, both of which are not coterminous with particular street addresses. That the historic district may contain some individual locations that are not themselves historic does not render the Ordinance "substantially

overbroad."[20] *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

Likewise, the aggressive panhandling ban is confined to specific behaviors that had been identified as highly problematic. The City's police records confirm the basic correspondence between the enumerated behaviors and the actual conduct of panhandlers within the City:

Behavior Designated in Ordinance:	**No. of Instances:**	**Page Numbers (Exhibit 7):**
(1) Intended or likely to cause fear of bodily harm or damage to or loss of property	40	23, 162, 74, 166, 19, 47, 49, 57, 61, 67, 69, 83, 88, 95, 99, 101, 101, 112, 118, 132, 133, 143, 144, 147, 150, 153, 153, 154, 155, 171, 182, 187, 190, 191, 191, 192, 192, 201, 202
(2) Continuing to engage after negative response		SOF ¶ 77
(3) Intentionally touching or causing physical contact without consent	2	49, 192
(4) Blocking or interfering with safe passage of person or vehicle	54	12, 22, 33, 36, 39, 41, 42, 48, 48, 48, 57, 60, 61, 66, 67, 77, 76, 80, 82, 92, 93, 102, 102, 103, 106, 109, 111, 120, 121, 122, 123, 125, 126, 126, 130, 134, 139, 142, 145, 147, 150, 153, 156, 157, 162, 165, 169, 170, 172, 177, 180, 198, 201, 202
(5) Volent or threatening language or gestures	17	23, 47, 69, 101, 121, 123, 129, 132, 133, 135, 143, 144, 146, 153, 166, 182, 191
(6) Following	5	12, 65, 102, 103, 107
(7) Panhandling someone waiting line for tickets, entry or other		SOF ¶ 96
(8) Conduct, words or gestures likely to cause fear of immediate bodily harm	40	23, 162, 74, 166, 19, 47, 49, 57, 61, 67, 69, 83, 88, 95, 99, 101, 101, 112, 118, 132, 133, 143, 144, 147, 150, 153, 153, 154, 155, 171, 182, 187, 190, 191, 191, 192, 192, 201, 202
(9) Panhandling in a group of 2 or more persons in an intimidating fashion	71	13, 24, 24, 26, 28, 28, 30, 34, 35, 37, 40, 42, 44, 46, 46, 48, 48, 50, 54, 56, 66, 67, 68, 69, 70, 71, 71, 73, 74, 75, 79, 77, 77, 78, 79, 79, 80, 81, 82, 83, 84, 86, 87, 90, 92, 94, 96, 98, 99, 100, 101, 108, 113, 115, 119, 123, 125, 128, 129,130, 134, 131,154, 156, 158, 160, 161, 166, 183, 185, 187, 188, 193,194
(10) Buffer zones	20	16, 19, 31, 36, 45, 57, 65, 65, 66, 68, 93, 107, 109, 112, 117, 146, 157, 186, 202 86

[20] In earlier briefing, Plaintiffs presented a parade of horribles as to the consequences if major cities with some historic dimensions were to proscribe panhandling. The City submits that a regulation of panhandling within a particular, historically distinctive section of a major city – for instance, Beacon Hill in Boston – should also survive a narrow tailoring inquiry.

At his deposition, Superintendent Taylor described the inadequacy of generic criminal statutes. *See* SOF ¶ 91-93, 101. Criminal statutes concerning disorderly conduct or harassment, for instance, are alternately too vague or too difficult to establish. *See id*. Certain proscribed behaviors, such as following someone else and persisting despite a rejection, do not fall at all within existing criminal provisions.

The buffer zones are narrowly tailored. Twenty feet is not a great deal of distance. It is approximately eight or nine average paces away.[21] Given that the buffer zones reflect the locations at which people are captive and at maximal exposure to intimidation or coercion, the distance is reasonable. *McCullen* is not to the contrary. That case involved a much larger buffer zone affecting, and indeed, effectively stifling, a group of speakers whose intended speech was quiet sidewalk counseling. There is much less legitimacy, indeed, hardly any legitimacy, to an intent to panhandle near at ATM.

In this litigation and in parallel lawsuits against similar ordinances, Plaintiffs' counsel of record has asserted that *McCullen* requires actual enactment of narrower ordinances prior to enactment of broader ones. This is a misreading of both *McCullen* and *Ward*. *Ward* held that the government need not use "the least restrictive or least intrusive means" for accomplishing a legislative purpose. 491 U.S. at 778. Plaintiffs would have it that *McCullen* effectively overrules *Ward* – which should be a highly unusual thing for the Court to do *sub rosa*. The relevant passage in *McCullen* has to do with the yawning gap between the ordinance under review – establishing a 35 foot buffer zone – and the much narrower statutes which the Court cited as an example. In the matter before the *McCullen* court, it would have been obvious for the government to have enacted a narrower statute. The Court's use of this comparison was

[21] *See* http://www.scientificamerican.com/article/bring-science-home-estimating-height-walk/: "On average, adults have a step length of about 2.2 to 2.5 feet."

polemical and illustrative, rather than being an announcement of a new mandate.[22]

B. The Ordinance Allows Manifold Alternative Channels for the Plaintiff's Speech

The Ordinance bans verbal panhandling in the Downtown Lowell Historic District, and all types of panhandling within the designated buffer zones. The City's evidence establishes that there are ample geographic alternatives for unrestricted panhandling outside the downtown district, and for panhandling outside the buffer zones – in particular, for panhandling (with a sign) in the non-buffer-zone areas of the downtown historic district. Further, the City submits that the requisite use of a sign in the downtown historic district is, as a matter of law, an adequate alternative to verbal requests.

The downtown historic district occupies approximately 4.3% of the geographic area of the City of Lowell. SOF ¶ 5. Assuming that pedestrian traffic related to shopping is a primary target of panhandlers, there are numerous businesses outside the downtown historic district. See SOF ¶¶ 27, 29. The record shows that, in point of fact, such businesses – including Target and Market Basket – are a frequent resort of panhandlers. SOF ¶¶ 26, 28. The plaintiffs' testimony and the City's police records and CAD calls indicate that panhandling occurs in are many other places in Lowell outside the Historic District. SOF ¶¶ 26-29, 39, 127-129, 131. Thus for those panhandlers who are absolutely committed to verbal requests, there are ample alternatives outside the downtown area.

Nor do the buffer zones constitute an oppressive burden on the practice of panhandling. The buffer zones triggered by the aggressive panhandling portion of the ordinance leave a great majority of the downtown available for panhandling. SOF ¶ 127-128. Plaintiff Kenneth

[22] In *Reynolds v. Middleton*, 779 F.3d 222 (4th Cir. 2015) – a case in which plaintiffs' counsel herein was on brief – the Court, citing *McCullen*, agreed with the plaintiffs that the government "must" show that it tried narrower alternatives. But the word "must" appears nowhere in the relevant passage in *McCullen*.

McLaughlin agrees that even with the buffer zones, there are "plenty of places" in downtown Lowell to panhandle. SOF ¶ 128. A map generated by the City supports his assertion. SOF ¶ 127. It does not take an expert to see that large portions of the downtown are still available to panhandlers. SOF ¶ 127. It is certainly more than enough space to enable the Plaintiffs and others to communicate their message and a reach the downtown audience. *Renton v. Playtime Theaters*, 475 U.S. 41, 53-54 (1986) (finding that "respondents must fend for themselves in the real estate market" and that more than five percent of the city remaining open to use left reasonable alternative avenues of communication)*; Young v. New York City Transit Auth.*, 903 F.2d 146 (1990) (finding that ample alternatives exist where panhandling was prohibited only in the subway, and not in the rest of New York City).

Within the Historic District, sign-holding is an effective alternative channel. *Gresham v. Peterson*, 225 F.3d 899. In *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984), the Supreme Court found that while posting of signs may have been prohibited, the right to speak and distribute literature in the same space remained. This case is the mirror image of *Vincent*. The First Amendment does not guarantee the Plaintiffs every possible method of communication available. *Id.; see also Globe Newspaper Co. v. Beacon Hill Architectural Comm'n*, 100 F.3d 175, 193 (1996) (ordinance prohibiting newsracks in the historic Beacon Hill area left ample alternative channels where street vendors could still sell the papers on the same streets in question.) The contention that plaintiffs' expression may be slightly diminished is not enough – as some amount of diminishment is inherent in any restriction. *National Amusement v. Town of Dedham*, 43 F.3d 731 (1995).

III. The Ordinance is Not Vague.

The term "discretion" has somehow come into disrepute in the context of law enforcement. *See generally* SOF ¶ 93. But this is unfortunate. Police are and should be problem-solvers, train to de-escalate situations and avoid arrests where possible. SOF ¶ 119. Plaintiffs seek to torture the issue of discretion, apparently advocating a policy of "arrest everyone or none." Yet arrests should be made only when they serve the general purpose of public order and safety. Thus the hypothetical motorist who (however improbably in this day and age) asks passersby for change for the parking meter would and should escape with a warning, under the Ordinance. The serial panhandler repeatedly hassling pedestrians in the Historic District, despite warnings, would eventually face arrest. Such a result is in keeping with the general purposes of the Ordinance and does not render the latter vague or arbitrary.

With regard to the aggressive panhandling ban, Superintendent Taylor testified that the ordinance functions effectively to reduce discretion by delimiting precise behaviors that are out of bounds. SOF ¶ 121-123. The Ordinance is far more detailed in its guidance to police officers than a catch-all provision such as "disorderly conduct." SOF ¶ 93, 122, 123. The Ordinance effectively functions to narrow criminal liability, rather than expand it.

With regard to various ambiguities as to various terms within the Ordinance, Superintendent Taylor testified that the scope of the Ordinance's provisions would be clarified prior to any enforcement. SOF ¶ 126. The same is presumptively true of certain potential infelicities in the interaction between the Ordinance with other city ordinances. As a general rule, laws are to be interpreted harmoniously if possible. *See McCuin v. Secretary of Health and Human Services*, 817 F.2d 161 (1st Cir. 1987) (court must interpret statutes in such a way that gives the statutory provisions a harmonious, comprehensive meaning and effect when possible).

IV. The Ordinance Does Not Target the Homeless.

It is unclear how intensively Plaintiffs intend to pursue their Equal Protection claim. The city has adequately rebutted that claim in its arguments, *supra*. Nonetheless, the City devotes additional space here to establish that the City has no animus against homeless people, but on the contrary, has made significant investments in helping them.

The City of Lowell is highly cognizant of the fact that homelessness is an issue in Lowell. It is not an issue that the City wishes to sweep under the rug, but rather an issue that the City has actively tried to combat for years. Since 2008, the City has put ending homelessness at the forefront of its policy agenda. SOF ¶¶ 134-138. At that time, the City changed its strategy in tackling homelessness from a shelter-focused strategy to a prevention and "housing-first" plan. SOF ¶ 134. The City put forward an eight-point plan, identified challenges, potential solutions and action steps to be taken. SOF ¶¶ 136-138. The fifty-seven page report demonstrates the City's serious commitment to ending homelessness in Lowell and supporting its neediest residents. SOF ¶¶ 134-138.

One of the most prominent ways the City is attempting to reduce homelessness is through the seeking and distribution of federal funds. SOF ¶ 139. By allocating federal grants to targeted programs, the City hopes to reduce and even prevent homelessness in Lowell. SOF ¶¶ 140-142. In total, the City has directed over half a million dollars to be spent on homelessness prevention over the next five years. SOF ¶ 141. That is in addition to money being spent in broader categories such as affordable housing and health services to low-income residents. SOF ¶ 142. These funds are allocated to programs that address the issues surrounding homelessness, whether that is actual shelter, low-employment skills, hunger or economic instability. SOF ¶ 142. For example, the Lowell Housing Authority received $70,000 for their homeless prevention program,

which provides emergency short-term assistance to households. SOF ¶ 142. Another program, Hope Chest of The House of Hope, received $8,000 to provide internship opportunities to homeless and recently re-housed parents who have little or no job experience. SOF ¶ 147. The Merrimack Valley Food Bank received $10,000 for its Food Distribution Program, which distributes food to soup kitchens, pantries, shelters and other organizations serving low income individuals and families. SOF ¶ 148. These are a just a sample of the eighty-seven different projects to which the City distributed federal funds. SOF ¶ 142-148..

The City also seeks to provide services to the homeless population from its own budget. SOF ¶ 149. For example, the City largely funds the Career Center of Lowell, which provides career services to many people, including low-income and homeless populations. SOF ¶ 150. The Veterans Affairs office issues payments to prevent evictions of veterans whose rental payments are in arrears. SOF ¶ 151. The City also has a commission on hunger and homelessness that meets once a month. SOF ¶ 152. To suggest that the City of Lowell holds an animus against its homeless population is unfair and untrue.

CONCLUSION

For all of the foregoing reasons, the City of Lowell respectfully requests that the Court grant summary judgment in the City's favor.

August 28, 2015

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was filed on August 28, 2015 through the Electronic Case Filing System for filing and electronic service to the registered participants as identified on the Notice of Electronic Filing.

/s/ C. Michael Carlson
C. Michael Carlson, Assistant City Solicitor