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.	

CITY'S MEMORANDUM OF LAW IN IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendant City of Lowell hereby opposes Plaintiffs' motion for summary judgment.

INTRODUCTION

Two principles are at odds in this case. The first principle is that the activity of panhandling is protected under the First Amendment as an expression of the panhandlers' "need." The second principle is the ontological and empirical truth that panhandling is always at least minimally aggressive and is often significantly aggressive. The question in this case is whether the government may impose time, place and manner restrictions to mitigate the social cost and impact of panhandling. The City believes that such restrictions may be valid. Plaintiffs believe, in essence, that they cannot be.

It may be useful to examine briefly the legal lineage of the First Amendment protection accorded to panhandling. In *Village of Schaumburg v. Citizens for a Better Environment*, the Supreme Court held that charitable solicitation is protected because such solicitation is "more than solicit [ation] for money" but is connected to advocacy for economic political and/or social

causes. 444 U.S. 620, 634 (1980). The Second Circuit, in *Loper v. NYPD*, went further, holding that a bare expression of "need" is protectable under the First Amendment. 999 F.2d 699, 704 (2d Cir. 1993). The "need" need not even be reflected in actual speech: "Even with-out 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*. Three points might be made about this holding of *Loper*. Firstly, the holding is unusual insofar as it protects what is presumed to be a message arising partly from the mere appearance of the panhandler. A skyscraper likely projects an aura or "message" of power, authority and/or ingenuity, but no one would dispute that the government may legitimately regulates the height of buildings under zoning authority. Secondly, the *Loper* holding might invite inquiry as to whether the law would accord the same protection to instances of panhandling where the predominant latent "message" is one of aggression or force rather than "need" – or where "need" has effectively evaporated in what is essentially a business or chosen livelihood. Finally, the question arises whether the holding is ultimately consistent with the premise of *Village of Schaumburg* that entitlement to First Amendment protection rests on solicitation being more than mere "solicit[ation] for money." 444 U.S. at 634.

Regardless of such theoretical questions, panhandling has been presumed, after *Loper*, to constitute a protectable expression of "need." The solitary, silent person referenced in *Loper* might be said to represent one end of the spectrum of the activity of panhandling. At the other end of the spectrum, panhandling borders on theft.[1] That panhandling shares a border with theft is simply a fact about panhandling and the world. It is not exactly individual panhandlers'

[1] The City is not the first to utter this word in connection with panhandling. *See Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 706 (1992) (Kennedy, J, concurring).

"fault" that the activity they choose to engage in carries inevitable risks to the public. Yet such risks make panhandling legitimate target of reasonable regulation.

In light of the factual record, the City suggests that a certain re-adjustment within the protection afforded to panhandling may be in order. The factual basis – or to use another term, the imagery – upon which the courts have accorded protection to panhandling has shifted, tectonically: the image of the solitary panhandler soliciting spare change would appear to be no longer the modern face of panhandling. As a matter of law, as well, any manner of solicitation for money is always at least minimally aggressive.[2] All other things being equal (context, demeanor, tone of voice, etc.), an "expression" of panhandling is more aggressive than expression on any other "topic." The pushback by the City and by numerous other municipalities against generally aggressive panhandling behavior, in recent years, is not "discrimination" against a particular type of speech, let alone against a particular set of speakers; or rather, it is not an *unwarranted* discrimination against such speech. The irreducible component of aggression within panhandling means that the government should be entitled to view solicitation, as compared with other speech, with an iota of suspicion. This is not an un-leveling of the playing field but rather, because of the nature of panhandling, a leveling of that field.

[2] *See National Anti-Drug Coalition, Inc. v. Bolger*, 737 F.2d 717, 727 (1984). In reality, the warrant for permissible aggression within solicitation appears to serve, for many, as a springboard for a much more comprehensive attack on public sensibilities.

ARGUMENT

If strict scrutiny is found to be the applicable standard for assessment of the City's ordinance respecting panhandling (the "Ordinance"), the Ordinance should be found to pass muster under that standard. To wit, the City's interests, including economic revitalization, are indeed compelling. Meanwhile, both the City's socioeconomic interests and its safety concerns find narrowly tailored expression in the Ordinance.

I. The Nexus of the City's Business and Tourism Concerns, In an Environment of Economic Challenge, Are a Compelling Government Interest.

What has been referred to as "tourism" or "business" interests, mentioned in the abstract, does not capture the totality of what the City has been trying to attain – and avoid – in the downtown area. At stake is not mere hauteur toward panhandlers, but rather, *inter alia*: the willingness of the non-panhandling public to venture downtown, *inter alia* to patronize businesses; the willingness of businesses to locate in Lowell and in the downtown area in particular, thereby *inter alia* providing employment opportunities; the willingness of individuals, including young professionals, to relocate to Lowell and to reside in the downtown area; the reduction of crime; the protection and enhancement of the "golden goose" of tourism dollars arising from the City's heritage; and accessing the benefits arising from a positive feedback cycle of economic development, including the benefits of increased access to governmental and charitable funding for further development. And conversely, the City is concerned to avoid unemployment, increased crime, boarded-up storefronts, and a lack of socioeconomic diversity in the downtown area. *See* SOF ¶¶ 9-18, 49-50. Various City departments, including the Department of Planning and Development and the Police Department, have been pursuing initiatives to bolster the City's economic and social vibrancy. *See* SOF ¶¶ 9-18, 98, 110, 119, 122. An irony is that a vibrant, attractive downtown area, full of unintimidated pedestrians, is

presumably a boon, not to say a necessity, for those engaging in panhandling. Yet a culture of more or less threatening behavior among panhandlers is a direct challenge to the "bright" vision of the City's future.

In the context of intermediate scrutiny, tourism has been found to easily clear the bar as a significant government interest. *See New Orleans v. Dukes*, 427 U.S. 297, 304 (1976); *Smith v. City of Fort Lauderdale, Fla*. 177 F.3d 954, 956 (11th Cir. 1999); *Waikiki Small Bus. Ass'n v. Anderson*, 1984 U.S. Dist. LEXIS 16714, 16 (D. Haw. 1984). What renders the tourism interest compelling in the City's case is the sheer volume of tourism income.[3] *See* SOF ¶ 7. Plaintiffs misleadingly compare Lowell to other municipalities with some degree of historic character. *See* Memorandum of Law in Support of Plaintiffs' Motion for Summary Judgment ("Plaintiffs' Memo"), p. 14. On the contrary, relatively few communities have historic districts that are: recognized by an act of the legislature; embodied in a national park situated in the downtown area; architecturally and physically pervasive (such that the "Lowell experience" is reflected, above, in a distinctive skyline and, below, by a unique canal system); and critical to the local economy.[4]

Plaintiffs' admission[5] that public safety and the avoidance of coercion are compelling interests ties into the City's assertion of its interest in economic revitalization. The City's efforts to reinvigorate the downtown area as a vibrant space for residents, tourists, businesses, and indeed, panhandlers themselves, is effectively undermined where threats to public safety are rampant on City sidewalks. SOF ¶¶ 9-18, 21-25, 30-35, 38, 56. The City's evidence includes

[3] In the era prior to *Reed v. Gilbert*, when partial restrictions on panhandling were by and large evaluated as being content-neutral, it was only necessary for courts to evaluate whether tourism rose to the level of a significant interest. Where tourism is the cornerstone of a local economy, it is hardly clear that tourism would not be a compelling interest. *See generally Smith*, 177 F.3d at 955 (noting that 4 million visitors visit Fort Lauderdale annually).
[4] Boston, for instance, has an industrial and employment base that is more diverse than Lowell's. *See* Exhibit 26.
[5] Plaintiffs' Memo, p. 17.

testimony that rampant, generally aggressive panhandling is undermining public confidence in the ability of the police to maintain public order. SOF ¶¶ 102-104. *See generally Rosenfeld v. New Jersey*, 408 U.S. 901 (1972) (Burger, J., dissenting) ("[t]he important underlying aspect of these cases goes really to the function of law in preserving ordered liberty… History is replete with evidence of what happens when the law cannot or does not provide a collective response for conduct so widely regarded as impermissible and intolerable.")

Added to these interests is the manifest precariousness of the City's economic, educational and industrial base. As a "gateway municipality," the City faces the challenges of below-average household income and educational attainment. *See* M.G.L. Ch. 23A, § 3A; *see also* SOF ¶ 8. The City has made significant strides despite these obstacles. SOF ¶¶ 9-13. Such strides should not obscure, for purposes of this Court's inquiry, an underlying environment of challenge, and indeed, of crisis. SOF ¶¶ 21-25, 30-35, 38, 94, 97-106.

Contra Plaintiffs' verbiage, the City is not trying to quash "unwelcome" or "uncomfortable" speech or even "offensive," "insulting," and" "outrageous" speech – that is, at least where the "offens[e]," "insult[]" or "outrage[]" in question does not rise to the level of deliberate physical or emotional harm to a specific person, for instance, an individual passerby. Plaintiffs consistently fail to acknowledge this latter distinction. The adjectives just quoted *supra* arise from case law concerned with basically political, religious, or commercial speech that is free of the potential for individualized threat. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014); *Boos v. Barry*, 485 U.S. 312, 322 (1988); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209 (1975).[6]

[6] Plaintiffs' citation to *McCullen*, and to the protection afforded to of the "marketplace of ideas" cannot but elicit a double-take in this context. *See* 134 S. Ct. at 2529. The concept that an individual needs money, or claims to need money, is only the barest fragment of an "idea." It is unclear what manner of "truth will … prevail" as a result of the average instance of panhandling. *See id*.

The case of *ACLU of Idaho, Inc. v. City of Boise*, cited by Plaintiffs, is wrongly decided, in the City's view. 998 F.Supp. 2d 908, 917 (D. Idaho 2014). The *Boise* case wrongly minimizes, or fails to consider, the cumulative deleterious impacts of the type of panhandling for which the term "vocal" is an almost comical understatement. *See* SOF ¶¶ 21-25, 30-35, 38, 94, 97-106; *see generally Rosenfeld,* 408 U.S. at 906 (Powell, J, dissenting) ("a verbal assault on an unwilling audience may be so grossly offensive and emotionally disturbing as to be the proper subject of criminal proscription").

II. The Ordinance is Narrowly Tailored to the City's Interests.

Both the historic district restriction and the aggressive panhandling ban are tailored to the substantial evidence of the conduct subject to regulation. Neither portion of the ordinance runs afoul of the "least restrictive means" test, properly understood.

A. The Downtown Historic District Restriction is Narrowly Tailored.

Contrary to Plaintiffs' assertion that the City's evidence is merely speculative, the record indicates voluminous and multi-faceted evidence of the negative impact of panhandling, including the impact upon local businesses. *See* SOF ¶¶ 23-24, 30, 33, 46-56. The City introduced evidence from three local business leaders who described the impact of panhandling upon businesses they are affiliated with and/or businesses they are aware of. *See* SOF ¶¶ 46-52. The City's documentary evidence also includes numerous instances of direct impact upon businesses. SOF ¶¶ 23-24, 30, 33, 48-49, 63, 73, 82-88. The City's evidence includes specific indication that panhandling influences the willingness of citizens to venture into the downtown area. SOF ¶ 49. More broadly, the improper and threatening conduct of panhandlers within the City, as documented by the City's records, would necessarily have a negative impact on the business environment or any environment. SOF ¶¶ 21-25, 30-35, 38. The record of calls to the

police department, of course, necessarily reflects only a fraction – half? a quarter? a tenth? – of the total actual instances of similar behavior over the relevant period of time; common knowledge and common sense would suggest that the large majority of such instances were not called in.

The follow-on effects of public disorder have been well-documented elsewhere.[7] The City should not have to experience an actual economic decline in order to demonstrate the negative effects of generally aggressive and/or hyper-aggressive panhandling.

Many if not most of the reported problematic behaviors involving panhandling are "vocal" in character. SOF ¶¶ 21, 24, 30, 32-34. The Ordinance isolates what is effectively the only element that is reasonably susceptible to regulation, and which indeed is deserving of regulation. *See id.* The City disagrees with Plaintiffs' assertion that *McCullen* mandates a *pro forma* adoption (as it were) of "less intrusive" measures prior to enacting more stringent ones. *See* Plaintiffs' Memo, pp. 15-17, quoting *McCullen*, 134 S. Ct. at 2539. Even if Plaintiffs' reading of *McCullen* were accurate, there are no less restrictive measures that could have addressed the City's concerns with the culture of panhandling as experienced in the City. The City cannot effectively legislate within the domains of gesture, tone of voice, volume, physical proximity between panhandler and passerby, ratio of physical size, speed of approach, innuendo, or other intangibles that are inevitable components of the panhandling transaction. *See generally* SOF ¶¶ 21-25, 30-35, 38.

The Historic District restriction is a reasonable, and constitutionally permissible, balance between the competing interests at stake. The Supreme Court has found that even within strict scrutiny, a balancing between the government's interest and speech rights must take place. *See*

[7] See e.g. James Q. Wilson and George L. Kelling, "Broken Windows," *Atlantic Monthly*, March 1982; Malcolm Gladwell, *The Tipping Point* (Back Bay Books, 2002), p. 140 et seq.

Burson v. Freeman. 504 U.S. 191 (1992). In *Burson*, the court examined a scenario where, as is ostensibly the case here, two fundamental interests are at stake. 504 U.S. 191, 198 (1992) ("despite the ritualistic ease with which we state this now familiar standard [of strict scrutiny], its announcement does not allow us to avoid the truly difficult issues involving the First Amendment.") The Court examined, and upheld, a statute banning political speech within a 100-foot buffer zone around voting locations. As here, the rights of certain speakers were undoubtedly affected by such a restriction. In light of the competing compelling government interest that were also involved, the restriction was found to be valid. The same analysis and result should govern here.

B. The Aggressive Panhandling Ban is Narrowly Tailored.

The ten elements of the aggressive panhandling ban may be subdivided into three categories: provisions that are alleged to overlap with existing criminal statutes; those elements that appear not to overlap; and the buffer zones, which warrant separate and detailed consideration. Each category of proscription passes constitutional muster.

1. <u>The "non-overlapping" provisions are warranted and valid</u>.

The conduct prescribed by certain subsections is not ostensibly covered by existing criminal provisions. Those sections are:

> (2) Continuing to engage in panhandling toward a person after the person has given a negative response to such soliciting;
> (5) Using violent or threatening language and/or gestures toward a person or toward his or her property, which are likely to provoke an immediate violent reaction from that person;
> (6) Following a person with the intent of asking that person for money or other things of value;
> (7) Panhandling toward anyone who is waiting in line for tickets, for entry to a building or for any other purpose;
> (9) Panhandling in a group of two or more persons in an intimidating fashion;

The behaviors in question may be fairly described as coercive and are narrowly defined on their face. It is not entirely clear that Plaintiffs intend to press the issue as to these provisions. It is possible to construe Plaintiffs' papers as alleging, for instance with regard to (5) or (9), that the behaviors in question are encompassed by "disorderly conduct." *See* Plaintiffs' Memo, p. 19. However, the City's police superintendent provided credible and extensive testimony that disorderly conduct is effectively a nullity, both in general and in the context of panhandling. *See* SOF ¶93.

2. The "overlapping" provisions are not thereby rendered invalid.

Four provisions within the aggressive panhandling ban are arguably partially or entirely "covered" by existing criminal statutes:

> (1) Approaching or speaking to a person, or following a person before, during or after soliciting if that conduct is intended or is likely to cause a reasonable person to fear bodily harm to oneself or to another or damage to or loss of property or otherwise to be intimidated into giving money or other thing of value;
> (3) Intentionally touching or causing physical contact with another person or their property without that person's consent;
> (4) Intentionally blocking or interfering with the safe or free passage of a pedestrian or vehicle by any means, including unreasonably causing a pedestrian or vehicle operator to take evasive action to avoid physical contact;
> (8) Panhandling in a manner with conduct, words or gestures intended or likely to cause a reasonable person to fear immediate bodily harm, danger or damage to or loss of property or otherwise be intimidated into giving money or any other thing of value.

As a preliminary matter, the criminal law is rife with overlapping provisions, which does not create a constitutional infirmity. *See U.S. V. Henderson*, 857 F. Supp. 2d 191, 202 (2012) ("two statutes which overlap and express partial redundancy may still be fully capable of coexisting" (citing *United States v. Batchelder*, 442 U.S. 114, 118, 122 (1979)) (internal quotations omitted)). In any case, it is hard to see how a duplicative provision barring already illegal conduct could constitute an impermissible "burden" on "speech." *See* Plaintiffs Memo, p. 19.

Superintendent Taylor described these provisions and others as providing a useful clarifying function for both the public and panhandlers. SOF ¶¶ 109, 117-123. It is unclear that such a hortatory function of the law, where already illegal activity has become particularly problematic in a given context, is beyond constitutional bounds.

3. The buffer zones are narrowly tailored.

The buffer zone provision reads:

> (10) Panhandling within 20 feet of the entrance to, or parking area of, any bank, automated teller machine, automated teller machine facility, check-cashing business, mass transportation facility, mass transportation stop, public restroom, pay telephone or theater, or any outdoor seating area of any cafe, restaurant or other business.

The relevant inquiry here is whether the buffer zones subtract any substantial square footage from the territory available for panhandling. Contrary to Plaintiffs' characterization, the buffer zones do not subtract "countless" areas from the territory available for panhandling. *See* Plaintiffs Memo, p. 19. The City has made an effort to "count" the buffer zones, in the downtown area at least, where the "triggers" for such zones might be presumed to be relatively more frequent. *See* SOF ¶ 127. The evidence indicates that buffer zones represent only a small fraction of the total geographic area. *See id*.

The analysis of buffer zones in *McCullen* is inapposite. In *McCullen*, the statute in question had interposed a 35-foot buffer zone between "sidewalk counselors" and their intended audience, namely women potentially seeking abortions. The Court held that the statute had "entirely foreclosed" the speakers' intended speech. Panhandling near an ATM is different. The target audience is available to panhandling everywhere except within the buffer zones. Indeed, the choice to panhandle in the immediate vicinity of an ATM is, according to the Ordinance and to logic, predation *per se*. Even to hypothesize a "target audience" of "those withdrawing cash

from an ATM" is to reaffirm the legitimacy of the Ordinance's proscription.

Plaintiffs proffer several ordinances from other jurisdictions establishing 10-foot buffer zones. Given that the relevant inquiry is not the target audience within the buffer zone (for there is no proper target audience within the zones) but rather the entire scope of territory outside the buffer zones, the City submits that as a matter of law, the difference between a 10- and 20- foot radius is not significant enough to run afoul of the "least restrictive means" test. In any case it cannot possibly be the case that the narrowest existent statute must necessarily invalidate any nominally broader statute anywhere (as if for instance, a jurisdiction that enacted a 5-foot buffer zone would automatically invalidate any 10-foot buffer zones everywhere else). Different jurisdictions may differ as far as the amount of territory subtracted by the buffer zones – does Boston have a greater concentration of ATMs? – And/or the severity of the threat of coerction in any particular jurisdiction. Again, *Burson* is instructive: *Burson* employed what is essentially a reasonableness inquiry – even within strict scrutiny – to uphold a buffer zone of a given size. 504 U.S. at 198. While *McCullen* establishes that certain buffer zones are manifestly too large, *Burson* establishes that the courts need not delve into minutiae of whether the precise dimensions of a buffer zone are warranted, provided that those dimensions are reasonable. *See id*.

Nor should the lack of an exception for sign-holding be fatal to the buffer zones. Given the wide surrounding expanse of territory available for panhandling, a decision to hold a sign within the better zone around an ATM is, however slightly, a kind of provocation. In "gotcha!" fashion, Plaintiffs make much of an aspect of the deposition of the City's Mayor, namely that the Mayor inadvertently confused the scope of the Ordinance's exemption for sign-holding. Concededly the Ordinance has various "moving parts": panhandling is permitted without restriction in most of the City; panhandling is permitted with signs in the downtown historic

district; and no panhandling (with or without signs) is permitted within the buffer zones (both inside and outside the downtown historic district). Exhibit 20. At a deposition convened in the late afternoon after a "long day," the Mayor apparently became briefly flustered about the mechanics of the Ordinance. *See* Plaintiffs' Exhibit 3, 28. The confusion likely stemmed from the fact that "aggressive panhandling," as defined by the Ordinance, is a term of art that differs from colloquial usage in the case of the buffer zones, insofar as the proscribed behavior in that instance is rendered "aggressive" not by overt actions on the part of the panhandler, but rather by the location in which that panhandling occurs.[8] The Mayor did variously deny that "the sign-holding exception "appl[ied] to activities that qualify as aggressive panhandling," and agree that "the passive panhandling and performance exception only applies to the ban on all panhandling in downtown Lowell "and not to the ban on aggressive panhandling" *See id*., 70-71, 84. In any case, there is a certain pointlessness, not to mention indecorousness, to asking a public official concerning a putative meaning that an ordinance could not possibly have, based on the face of the ordinance.

4. The Ordinance is not over-inclusive.

As the City pointed out in its motion for summary judgment, the ordinance in its final version essentially does not impinge upon the typical activities of charities known to solicit in the downtown area. *See* Memorandum in support of City's motion for summary judgment, p. 11; SOF ¶¶ 115-116. Nor is there credible evidence that panhandling is "welcomed" by its audience especially (not) within the buffer zones. *See* City's response to Plaintiffs' statement of

[8] *See e.g*. Plaintiffs' Exhibit 3, 86-87:

> Q. And that's also true that … it was the Council's intent to allow people to hold signs requesting donations of money within 20 feet of a line for a theater?
> A. Yes. It's the aggressive panhandling that is the primary concern.

The context makes clear that the Mayor had in mind the colloquial rather than the technical sense of "aggressive panhandling."

undisputed material facts, ¶ 3. Given Plaintiffs' stated concerns about the alleged content-specific and/or discriminatory aspects of the Ordinance, Plaintiffs' accusation of over-inclusiveness effectively boils down to in an unserious and nihilist posture that all regulation is intrinsically incoherent.

CONCLUSION

For the foregoing reasons, the City of Lowell requests that the Court deny Plaintiffs' motion for summary judgment.

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September 11, 2015

Respectfully submitted,
CITY OF LOWELL, DEFENDANT
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing document was filed on September 11, 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
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