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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO REGIONAL COALITION TO END HOMELESSNESS; JAMES LEE CLARK,

Plaintiffs,

vs.

CITY OF SACRAMENTO,

Defendant.

Case No.: 2:18-cv-00878-MCE-AC

CITY OF SACRAMENTO'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Date: May 31, 2018
Time: 2:00 p.m.
Courtroom: 7

I.

INTRODUCTION

Plaintiffs seek a preliminary injunction to enjoin a Sacramento City Code § 8.134.020 which was enacted by the City to prohibit aggressive forms of solicitation. In relevant part, the challenged ordinance prohibits aggressive panhandling and solicitation in specified locations which are particularly intrusive or dangerous for both the solicitor and members of the public.

Plaintiff James Lee Clark is a homeless individual who resides in Sacramento County and alleges that he makes a living by panhandling. Plaintiff alleges the subject Ordinance violates his right to free speech and equal protection under the First Amendment and

Fourteenth Amendment, respectively, because the Ordinance prohibits panhandling in certain locations found to be dangerous to the public.

Defendant City respectfully submits that the preliminary injunction be denied on the grounds that it is neither facially nor as-applied unconstitutional and that Plaintiffs lack standing to sue under Article III of the Constitution.

II.

LEGAL STANDARD

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Plaintiffs requesting a preliminary injunction must establish that (1) they are likely to succeed on the merits; (2) they will likely suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Id*. at 22. Alternatively, Plaintiffs may demonstrate that "serious questions going to the merits were raised and the balance of hardships tip sharply in plaintiffs' favor." *Alliance for the Wild Rockies v. Cottrell*, 632 F. 3d 1127, 1134-35 (9th Cir. 2011) (quotation omitted). Even under this alternative standard, however, Plaintiffs must still establish that there is a likelihood of irreparable injury and that the injunction is in the public interest. *Id*. at 1135.

III.

ARGUMENT

I. Plaintiffs Are Not Likely to Prevail on the Merits

Plaintiffs allegations are inadequate to support a grant of a preliminary injunction as they are unable to establish that the Ordinance is unconstitutional and because Plaintiffs lack standing.

A. The Complaint Fails to Allege Facts That Would Establish the Ordinance is Facially Invalid

Plaintiffs do not sufficiently plead that the Ordinance is facially invalid. To prevail in a facial challenge, the plaintiff has the heavy burden of establishing the challenged law is unconstitutional under most or all circumstances. *U.S. v. Salerno*, 481 U.S. 739, 745 (1987).

In the First Amendment context, a plaintiff must still establish that a '"substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."' *U.S. v. Stevens,* 559 U.S. 460, 473 (2010) quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6 (2008).

The primary thrust of Plaintiff's First Amended Complaint ("FAC") seems to be directed toward the regulation of specific locations where solicitation has been prohibited by the Ordinance. As alleged, this is not a restriction on the content of speech or the ideas the conduct expresses such that it would render the Ordinance facially invalid. Rather, this is a time, place, and manner restriction, which (as discussed below) is valid and passes constitutional muster. *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989) quoting *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984); see also *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981).

B. Plaintiffs Failed to Allege Facts That Would Establish an As-Applied First Amendment Claim

The FAC also fails to allege facts that would establish the Ordinance violates Plaintiffs' free speech rights as-applied. In order to prevail on an as-applied challenge, the plaintiff must show that the law is unconstitutional as applied to their specific facts or some subset of its application that would include them. *Hoye v. City of Oakland*, 653 F. 3d 835, 857 (9th Cir. 2011); *Legal Aid Servs. Of Or. V. Legal Servs. Corp.*, 608 F. 3d 1084, 1096 (9th Cir. 2010) ["[f]acial and as-applied challenges differ in the extent to which the invalidity of a statute need be demonstrated."]

Here, Plaintiffs have failed to allege that the Ordinance has been applied against them in any manner whatsoever. The Ordinance has not been enforced against any of the Plaintiffs. On these grounds alone, Plaintiffs' claims must fail. *Doucette v. City of Santa Monica*, 955 F. Supp. 1192, 1200 (C.D. Cal. 1997) citing *American Library Ass'n v. Barr*, 956 F. 2d 1178, 1193 (D.C. Cir. 1992) ('"The question is how likely it is that the government will attempt to use the challenged provisions against the plaintiff, not merely how much the prospect of enforcement worries the plaintiff.'")

At no point does the FAC articulate how the **enforcement** of the Ordinance has led to violation of Plaintiffs' freedom of speech. Access to "charitable donations" are not protected under the First Amendment. Moreover, Plaintiffs seemingly overlook that they are permitted to panhandle in the areas not prohibited by the Ordinance. Plaintiffs do not allege that there has been a City-wide ban on panhandling. To the contrary, panhandling, solicitation, and demonstration of signage can still occur at multiple locations throughout the City.

C. The FAC Fails to Establish the Ordinance is Unconstitutional

Assuming *arguendo* that Plaintiffs have sufficiently alleged the Ordinance restricts rights to free speech, the FAC still fails to establish that the Ordinance is unconstitutional.

It is "well settled that the government need not permit all forms of speech on property that it owns and controls." *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992); *Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 129 (1981); *Greer v. Spock*, 424 U.S. 828 (1976). When a governmental entity places restrictions on its property, Courts evaluate those restrictions through the "forum based" approach. *Int'l Soc. for Krishna Consciousness, Inc.*, 505 U.S. at 678. Under this approach, whether the restriction is constitutional depends on the forum (i.e., the nature of the space in question). *Ibid*.

The Supreme Court has "identified three types of for a: the traditional public forum, the public forum created by government designation, and the nonpublic form." *Arkansas Educ. Television Comm'n v. Forbes*, U.S. 666, 677 (1998). In relevant part, nonpublic forums (i.e., locations that are not areas by tradition or designation that serve as a forum for public communication) need only "be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Id.* at 679; See also *Wright v. Incline Village General Improvement Dist.* (9th Cir. 2011) 665 F. 3d 1128 citing *Preminger v. Peake*, 552 F. 3d 757, 765 (9th Cir. 2008); see also *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 49 (1983) [stating that, with non-public forum, state has right "to make distinctions in access on the basis or subject matter and speaker identity."]

Applying the "forum based" approach at bar requires the Court to first look at the forums in question, which are the locations enumerated in § 8.134.030 of the Ordinance. Specifically,

the forums in question are financial institutions and ATM machines, median strips, driveways to business establishments, public transportation vehicles and stops, gasoline stations and fuel pumps and outdoor dining areas. As pled, these areas are nonpublic forums as these locations are not areas by tradition or designation that serve as a forum for public communication. As such, to allege a First Amendment violation, Plaintiffs must sufficiently allege that the Ordinance is unconstitutional because it is either unreasonable or it is not viewpoint neutral. *Int'l Soc. for Krishna Consciousness, Inc.,* 505 U.S. at 678; *Perry*, 460 U.S. at 49.

Under the "forum based" approach, Plaintiffs' First Amendment claim must fail. The FAC contains no allegations that the purpose of the Ordinance is unreasonable. In fact, the Ordinance states that it is directed at protecting the safety and welfare of the public. Furthermore, the FAC fails to state why soliciting in areas not prohibited by the Ordinance would be so much less effective that in those areas prohibited. In addition, there are no allegations that the Ordinance is not viewpoint neutral. To the contrary, the Ordinance prohibits all forms of solicitation, regardless of the speaker, their ideologies, or their motivation.

In response to this argument, the City anticipates that Plaintiffs will argue that they do not need to allege compliance with the "forum based" approach because they have already alleged the Ordinance is "content-based." This argument is unavailing. For the same reasons discussed above, the allegations that the Ordinance is content-based are conclusory, ambiguous and therefore insufficient. Moreover, even if (for the sake of argument) Plaintiffs successfully alleged the Ordinance is "content-based," that does not automatically prove a First Amendment violation. A "content-based" violation can still pass constitutional muster under the "strict scrutiny" test. *American Civil Liberties Union of Nevada v. City of Las Vegas*, 466 F. 3d 784, 792 (9th Cir. 2006). To survive strict scrutiny, the City must show the ordinance is the least restrictive means of furthering a compelling government interest. *United States v. Alvarez*, 567 U.S. 709 (2012). Here, as pled, the FAC fails to establish that the Ordinance would not survive strict scrutiny. Specifically, the FAC does not allege that public safety and welfare is not a compelling government interest. Although the FAC alleges that the Ordinance

is not the least restrictive means to achieve that interest, there is no allegation as to what the lesser restrictive means would be. In fact, the Ordinance is narrowly tailored to protect the safety of pedestrians, drivers, passengers and solicitors. The United States Supreme Court in *Reed v. Town of Gilbert, Arizona*, acknowledged that an ordinance narrowly tailored to protect the safety of pedestrians, drivers, and passengers might also survive strict scrutiny. *Id.* 135 S. Ct. 2218, 2223.

In sum, Plaintiffs' First Amendment claim is conclusory and defective. Even if the Ordinance restricted protected speech, merely alleging the Ordinance violates their free speech rights is not enough to show it is invalid. To prevail, Plaintiffs need to establish the Ordinance does not pass constitutional muster which they fail to do.

D. Plaintiffs Lack Standing to Challenge the Ordinance

Article III standing is premised upon the Constitution's limitation of the judicial to "cases" or "controversies." *Hein v. Freedom From Religion Found, Inc.,* 551 U.S. 587, 597-98 (2007). The requisite elements of Article III standing are well-established: "A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id*. (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). The injury, moreover, must constitute "an invasion of a legally protected interest which is (1) concrete and particularized, and (2) actual or imminent, not merely conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A plaintiff must prove injury in fact "in the same way as any other matter on which plaintiff bears the burden of proof, *i.e.*, with the matter and degree of evidence required at the successive stages of litigation." *Lopez v. Candaele*, 630 F. 3d 775, 785 (9th Cir. 2010) (quoting *Lujan*, 504 U.S. at 561). At the preliminary injunction stage, "a plaintiff must make a clear showing of injury in fact." *Id*. (internal quotation mark omitted). At the pleading stage, the complaint must allege "specific facts" to satisfy all elements of standing for each claim he seeks to press. *Schmier v. United States Court of Appeals*, 279 F. 3d 817, 821 (9th Cir. 2001).

Constitutional challenges based on the First Amendment present unique standing considerations, and a plaintiff may therefore demonstrate an injury in fact without first

suffering a direct injury from the challenged restriction. *Lopez*, 630 F. 3d at 785. "In an effort to avoid the chilling effect of sweeping restrictions, the Supreme Court has endorsed what might be called a 'hold your tongue and challenge now' approach rather than requiring litigants to speak first and take their chances with the consequences." *Id.* (quoting *Ariz. Right to Life PAC v. Bayless*, 320 F. 3d 1002, 1006 (9th Cir. 2003)). In a pre-enforcement case such as this one, where a plaintiff has *not yet* been subject to prosecution resulting from allegedly affected speech, the injury in fact can be established by "demonstrate[ing] a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Lopez*, 630 U.S. at 785 (quoting *Babbitt v. UFW Nat'l Union*, 442 U.S. 289, 298 (1979)). According to the Ninth Circuit, a realistic danger of a direct injury is demonstrated by establishing three elements. First, plaintiffs must show a reasonable likelihood that the government will enforce the challenge against them. *Lopez*, 630 F. 3d at 786. Second, plaintiffs must establish, with some degree of concrete detail, that they intend to violate the challenged law. *Id.* Finally, they must show that the challenged law applies to them. *Id*. Finally, they must show that the challenged law applies to them. *Id*. The subject Ordinance by its terms applies to all the plaintiffs and so the third factor is not an issue in this case.

1. Plaintiffs Allege No Credible Threat of Adverse State Action

The FAC fails to allege a credible threat of adverse state action sufficient to establish standing. The FAC states only that Plaintiff "fears" the Ordinance will be enforced against him (FAC at ¶ 19). This allegation does not resemble a credible threat of enforcement sufficient to satisfy the *Lopez* standard.

Preliminary efforts to enforce a speech restriction or past enforcement of that restriction constitute "strong evidence" that pre-enforcement plaintiffs face a "credible threat of adverse state action." *Lopez*, 630 F. 3d at 786. *Lopez* explains that a threat of prosecution might be credible if the government "has indicted or arrested plaintiffs," if authorities have "communicated a specific warning or threat to initiate proceedings" under the subject speech restriction, or if there is a "history of past prosecution or enforcement under the challenged statute" to plaintiffs or similarly-situate individuals. *Id*. (quoting *Thomas v. Anchorage Equal*

Rights Comm'n, 220 F. 3d 1134, 1139 (9th Cir. 2000)). In contrast, "general threat[s}" by state officials to enforce "those laws which they are charged to administer" do not suffice. *Id.* at 787 (quoting *United Pub. Workers of Am. v. Mitchell*, 330 U.S. 75, 88 (1947) (alteration in original). Similarly, "mere allegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Id.* (quoting *Liard v. Tatum*, 408 U.S. 1, 13-14 (1972)).

Here, Plaintiffs allege only general, subjective "fears" of prosecution under the subject Ordinance and do not allege any specific threats of enforcement against them as defined n *Lopez*. Plaintiffs also do not allege that the City has ever arrested anyone for violating the Ordinance, do not allege that the City's agents have communicated a specific warning or threat to initiate proceedings under the challenged Ordinance, and do not allege any history of past prosecution or enforcement since the Ordinance was enacted. Plaintiffs' allegation that they have a subjective, generalized fear of prosecution is insufficient to confer standing under *Lopez.*

2. Plaintiffs Have Alleged No Specific Intent to Violate the Law

To establish standing, a plaintiff's allegations require "something more than a hypothetical intent to violate the law. . . ." *Lopez*, 630 F. 3d at 787 (internal citations and quotations omitted, alterations in original). Indeed, Plaintiffs "must articulate[] a concrete plan to violate the law in question." *Id.* (internal citation and quotation marks omitted). Here, Plaintiffs do not allege any facts or provide any evidence establishing an intent with concrete detail to violate the law. With insufficient allegations and no concrete, detailed plan that they intend to violate the statute, these plaintiffs cannot establish Article III standing to bring their First Amendment claims.

II. Plaintiffs Are Not Likely to Suffer Irreparable Harm in the Absence of Preliminary Relief

Plaintiffs have not established that they will suffer irreparable harm in the absence of preliminary injunctive relief. First, as previously stated they have made no allegation that the Ordinance is being enforced or that there has even been a credible threat of enforcement. Secondly, even assuming that plaintiffs have made a technical legal showing of likelihood of

harm, that harm carries minimal weight because the Ordinance is so narrowly tailored to restrict solicitation only in the enumerated locations. Panhandlers may still solicit "for the everyday necessities of life such as food" in the non-restricted areas. Plaintiffs therefore would suffer no real harm, much less irreparable harm, if they were required to comply with the Ordinance.

Plaintiffs, relying on *Elrod v. Burns*, 427 U.S. 347, 373 (1976), argue that any loss of First Amendment freedom constitutes irreparable injury. Contrary to plaintiffs' argument, however, there is nothing in *Elrod* to suggest that the Supreme Court "intended to do away with the traditional prerequisites for injunctive relief simply because First Amendment freedoms were implicated." *Anderson v. Davila*, 125 F. 3d 148, 164 (3rd Cir. 1997). To the contrary, the Supreme Court in *Elrod* concluded that injunctive relief was warranted because "plaintiffs' First Amendment injuries were 'both threatened and occurring at the time of respondents' motion.'" *Id*. (quoting *Elrod*, 427 U.S. at 374); see also *Eller Media Co. v. City of Oakland*, No. C98-2237 FMS, 1998 WL 549494, at *7 (N.D. Cal. Aug 28, 1998) ("Plaintiffs are not entitled to a finding of 'irreparable injury' by virtue of pleading a constitutional claim."). As such, plaintiffs therefore are unlikely to suffer irreparable harm in the absence of an injunction.

III. The Balance of Equities Does Not Tip in Plaintiffs' Favor and an Injunction is Against Public Interest

In exercising sound discretion, a district court "must balance the competing claims of injury and consider the effect of granting or withholding the requested relief, "paying particular regard for the public consequences in employing the extraordinary remedy of injunction." *Winter*, 555 U.S. at 24 (quotation marks and citation omitted). An injunction prohibiting the enforcement of the Ordinance would be against the public interest because it would compromise the City's compelling interest to protect the safety and welfare of the public.

Balancing this compelling public interest with the very limited prohibition of solicitation in the areas restricted by the Ordinance, it is clear that the equities tip away from Plaintiffs and in favor of the City.

III.

CONCLUSION

For all the reasons provided above, the Court should deny Plaintiffs' Motion for Preliminary Injunction.

DATED: May 14, 2018

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