UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO REGIONAL COALITION TO END HOMELESSNESS; JAMES LEE CLARK; and SACRAMENTO HOMELESS ORGANIZING COMMITTEE, Plaintiffs, v. CITY OF SACRAMENTO, Defendant.	No. 2:18-cv-00878-MCE-AC **MEMORANDUM AND ORDER**

Through the present lawsuit, Plaintiffs challenge the constitutionality of an anti-solicitation ordinance adopted by Defendant City of Sacramento. According to Plaintiffs, the ordinance, by prohibiting what it terms "aggressive and intrusive solicitation" throughout the City, amounts to a content-based restriction on speech that is presumptively invalid under the First Amendment unless it can pass muster under an onerous "strict scrutiny" analysis. Now before the Court is Plaintiffs' Motion for Preliminary Injunction which asks that enforcement of the ordinance be enjoined for the duration of this matter on that basis. As set forth below, Plaintiffs' Motion is GRANTED.

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BACKGROUND

On November 14, 2017, Defendant enacted an anti-solicitation ordinance, No. 2017-0054 (hereinafter "Ordinance") which defines solicitation as including any kind of request, including both panhandling and charitable solicitation, for "an immediate donation of money or other thing of value." Sacramento City Code § 8.134.020 (2017). Solicitation activity is broadly defined as anything "using the spoken, written, or printed work, or bodily gestures, signs, or other means." Id. The ordinance establishes extensive no-solicitation buffer zones on public sidewalks, streets and other public places throughout the City, including anywhere within 30 feet of all banks, ATMs or other financial institutions, within 30 feet of the driveway of a business establishment when soliciting from the operator or occupant of a motor vehicle, and prohibits solicitation from persons in any outdoor dining area or from anyone stopped at a gasoline station. Id. at § 8.134.030 (B)-(G). The City justifies these buffer zones by alluding to "the implicit threat to both person and property" and the need to avoid "unwarranted and unavoidable confrontations." Id. at § 8.134.010.

The Ordinance further prohibits "aggressive" or "intrusive" solicitations in **any** public place, with those terms being defined as including conduct causing a reasonable person to fear bodily harm or loss of property, or in instances where the person has indicated they do not want to be solicited. Id. at § 8.134.030(A); § 8.134.020.

Violation of the Ordinance is an infraction, punishable by a fine, with three violations within a six-month period calling for greater sanctions, including up to six months in jail. Id. at § 8.134.040(B).

Plaintiffs bringing the present action include both an unemployed and homeless Sacramento resident, James Clark, and two organizations that work with the homeless and low-income community. Plaintiff Clark claims to rely mainly on solicitation from passerby individuals, at locations targeted by the Ordinance, in order to buy food and other life necessities. See Pls.' First Am. Comp. ("FAC"), ¶ 12, Clark Decl, ¶¶ 3-4.

Plaintiff Sacramento Regional Coalition to End Homelessness ("SRCEH"), on the other hand, is a nonprofit, charitable organization with a mission to end and prevent homelessness in the Sacramento region through policy analysis, community education, civic engagement, collective organizing and advocacy. FAC, ¶ 18, Decl. of Bob Erlenbusch, ¶ 3. SRCEH furthers that mission by advocating on behalf of people who happen to be homeless, and SRCEH contends the Ordinance will frustrate its goals by criminalizing the solicitation of funds by the poor and homeless and deterring them from exercising their constitutional right to request immediate assistance from members of the public. Erlenbusch Decl., ¶¶ 5, 7. SRCEH contends that it has already been forced to divert resources to help the homeless in order to oppose the Ordinance. Id. at ¶ 8, FAC, ¶ 23. The third and final named Plaintiff in these proceedings, the Sacramento Homeless Organizing Committee ("SHOC"), seeks to address problems of the homeless through advocacy, education, and bridging the gap between the homeless community and others in our society. Decl. of Paula Lomazzi, ¶ 3, FAC, ¶ 24. SHOC publishes a bi-monthly paper, the Homeward Street Journal, that it claims is intended to educate the public on poverty, homelessness, and other important social issues. Id. at ¶ 4, ¶ 25. The paper is distributed by homeless or nearly homeless individuals who solicit funds, a significant portion of which the individuals keep, which benefits both the solicitors and the newspaper itself. Lomazzi Decl, ¶ 5. SHOC contends that as a result of the Ordinance's enactment, its distributors are at risk of being ticketed, arrested, or harassed by the City. Id. at ¶ 6. SHOC contends that it too has already expended resources in opposing the Ordinance. Lomazzi Decl., ¶ 8.

Finally, Plaintiffs contend that prior to enactment of the Ordinance, the Sacramento City Council was not presented with any statistics, testimony or other evidence that demonstrated a need for the Ordinance, or explained how persons requesting immediate donations were endangering public safety or creating traffic hazards. Erlenbusch Decl., ¶ 18; Lomazzi Decl., ¶ 9.

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Initial oral argument on Plaintiffs' request for preliminary injunction was held on June 28, 2018. At that point, counsel for the City represented that the City would withdraw the Ordinance to the extent it was targeted at designated areas, while standing by those portions prohibiting "aggressive" or "intrusive" solicitation. Because that proposal had been proffered on literally the day of the hearing, the Court continued the hearing until July 5, 2018 so that the City could formally propose modification of the Ordinance. By Statement filed July 3, 2018 (ECF No. 25), however, the City withdrew its prior offer, stating that it needed to conduct further study as to the appropriate scope of any necessary amendment and could not do so before the continued July 5, 2018 hearing date. Given the record currently before the Court, the undersigned granted Plaintiffs' request for preliminary injunction from the bench and indicated that this written Order would follow.

STANDARD

A preliminary injunction is an extraordinary and drastic remedy." Munaf v. Geren, 553 U.S. 674, 690 (2008). "[T]he purpose of a preliminary injunction is to preserve the status quo between the parties pending a resolution of a case on the merits." McCormack v. Hiedeman, 694 F.3d 1004, 1019 (9th Cir. 2012). A plaintiff seeking a preliminary injunction must establish that he is (1) "likely to succeed on the merits;" (2) "likely to suffer irreparable harm in the absence of preliminary relief;" (3) "the balance of equities tips in his favor;" and (4) "an injunction is in the public interest." Winter v. Natural Res. Defense Council, 555 U.S. 7, 20 (2008) "If a plaintiff fails to meet its burden on any of the four requirements for injunctive relief, its request must be denied." Sierra Forest Legacy v. Rey, 691 F. Supp. 2d 1204, 1207 (E.D. Cal. 2010) (citing Winter, 555 U.S. at 22). "In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" Winter, 555 U.S. at 24 (quoting Amoco Prod. Co. v. Gambell, 480 U.S. 531, 542

(1987)). A district court should enter a preliminary injunction only "upon a clear showing that the plaintiff is entitled to such relief." Winter, 555 U.S. at 22 (citing Mazurek v. Armstrong, 520 U.S. 968, 972 (1997)).

Alternatively, under the so-called sliding scale approach, as long as the plaintiff demonstrates the requisite likelihood of irreparable harm and shows that an injunction is in the public interest, a preliminary injunction can still issue so long as serious questions going to the merits are raised and the balance of hardships tips sharply in the plaintiffs' favor. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (concluding that the "serious questions" version of the sliding scale test for preliminary injunctions remains viable after Winter).

ANALYSIS

A. Probability of Success on the Merits

In analyzing the propriety of preliminary injunctive relief in this matter, the Court first turns to whether Plaintiffs have shown a likelihood that they will succeed on the merits of their claim. Solicitation, including panhandling, has long been considered a form of speech protected under both the First Amendment of the United States Constitution and Article I, Section 2 of the California Constitution. In Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980), the Supreme Court made it clear that charitable appeals for funds, on the street or door-to-door, involve a variety of speech interests entitled to First Amendment protections. The Ninth Circuit has further recognized that solicitation is a form of expression entitled to the same constitutional protections as traditional speech. ACLU of Nevada v. City of Las Vegas, 466 F.3d 784, 792 (9th Cir. 2006). Panhandling is as protected in that regard as other types of solicitation. See Loper v. New York City Police Dept., 999 F.2d 699, 704 (2d Cir. 1993).

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While the Ordinance's own prefatory language purports to justify it on public safety grounds, the Supreme Court's recent decision in Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015) made it clear that if a law on its face regulates speech based on its content, then it is subject to strict scrutiny regardless of the City's allegedly benign motive or content-neutral justification. Id. at 2228. In Reed, the Court considered a town's outdoor sign ordinance that applied different restrictions for "political signs," "ideological signs," and "temporary directional signs." Id. at 2224-25. The Court held that the ordinance was content-based on its face because its restrictions "depend entirely on the communicative content of the sign." Id. at 2227. And because the ordinance was content-based, there was no need to consider the government's justification or purpose in determining whether the ordinance was subject to strict scrutiny. Id. at 2227-28. Consequently, according to the Court, even if the claimed reasons for enacting the law had nothing to do with suppressing speech, those reasons could not transform a content-based law into a content-neutral law entitled to a reduced intermediate scrutiny standard. See id.

Here, of course, the Ordinance targets a particular form of expression: solicitation. In the wake of Reed then, and in considering solicitation ordinances similar to those enacted by the City of Sacramento, at least eight courts have ruled that those ordinances were content-based and were accordingly invalid on their face. In Thayer v. City of Worcester, 144 F. Supp. 3d 218 (D. Mass. 2015), for example, the court considered an ordinance similar to that confronted here in its definitions of "aggressive panhandling" and in its creation of buffer zones and other places where solicitation was prohibited. Although the lower courts had upheld the ordinance as content-neutral, the Supreme Court vacated and remanded in light of Reed, and the district court subsequently agreed that the ordinance's prohibitions were content-based thus violating the First Amendment because they singled out a request for the "immediate donation of money." Id. As Thayer recognized, "[p]ost Reed, municipalities must go back to the drafting board…. In doing so, they must define with particularity the threat to public

safety they seek to address, and then enact laws that precisely and narrowly restrict only that conduct which could constitute such a threat." Id. at 237 (emphasis omitted).

These stringent requirements are hardly surprising. Under strict scrutiny's demanding standard, "it is rare that a regulation restricting speech because of its content will ever be permissible." Brown v. Entertainment Merchants, 564 U.S. 786, 799 (2011). While the Ordinance purports to justify its content because of safety concerns, the mere expression of such concerns is insufficient to justify a content-based law. Instead, the entity enacting the Ordinance, here the City, has the burden of presenting facts showing that the problem exists because of solicitation and that it has a compelling interest in treating speech requesting an immediate donation differently than any other speech. See United States v. Alvarez, 567 U.S. 709, 725 (2012); Weinberg v. City of Chicago, 310 F.3d 1029, 1038 (7th Cir. 2002) ("In the context of a First Amendment challenge under the narrowly tailored test, the government has the burden of showing that there is evidence supporting its proffered justification."). A well-substantiated factual record is necessary in order for the City to meet that burden under strict scrutiny. See Blitch v. Slidell, 260 F. Supp. 3d 656, 669 (E.D. La. 2017). No such showing has been presented here. An amorphous and factually unsubstantiated concern about public safety does not suffice.

Moreover, even the City had met its burden in establishing a compelling interest, which it has not done based on the current record, the Ordinance would still fail to meet strict scrutiny unless it constitutes the "least restrictive means of achieving the identified compelling interest." McCullen v. Coakley, 134 S. Ct. 2518, 2530 (2014). The City has to show, for example, that existing laws are not sufficient to address the targeted behavior, and with regard to panhandling many other content-neutral laws like disorderly conduct, assault and battery, trespassing and the obstruction of sidewalks could apply. See Thayer, 144 F. Supp. 3d at 223. As Plaintiffs point out, Sacramento already has an arsenal of existing laws that could punish much of the conduct targeted by the

Ordinance, and the City has not shown that those existing laws are inadequate to address its concerns.

Tellingly, the City's opposition does not even address Reed and its ramifications, and it tries to argue that the Ordinance is a time, place and manner restriction that does not trigger strict scrutiny. In the wake of Reed, however, that contention is wholly unpersuasive. The Ordinance on its face targets a particular kind of speech (i.e., solicitation) and under Reed that subjects it to strict scrutiny. Perhaps most significantly, the City also does not try to argue how the Ordinance can survive strict scrutiny and instead appears to attempt to shift the burden in that regard to Plaintiffs even though the law is clear the burden squarely rests with the City.

Additionally, while the City tries to argue that Plaintiffs lack standing, that contention is equally unavailing. First, with regard to Plaintiff Clark, while the City claims he has not shown that he has actually been prosecuted, in another case this Court has already found that it is sufficient for standing purposes that a plaintiff intends to engage in a course of conduct, and that there is a credible threat that the challenged provision will be invoked. Italian Colors Restaurant v. Harris, 99 F. Supp. 3d 1199, 1206 (E.D. Cal. 2015). Moreover, with regard to the two organizational Plaintiffs, such a plaintiff has standing when it can show "a drain on its resources from both a diversion of its resources and frustration of its mission." Fair Housing Council v. Roommate,com, 666 F.3d 1216, 1219 (9th Cir. 2012). Here, both homeless organizations named as Plaintiffs satisfy that standard.

In sum, although being approached for money by so-called panhandlers on the street may be unwanted and unwelcomed by much of the populace, any personal aversion to such practices either on the part of the undersigned or by the community at large cannot trump the constitutional rights of those who choose to engage in such solicitation, and it is the job of this Court to protect rights so guaranteed. Consequently, under the circumstances of this case as presented at this time, the Court finds that

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Plaintiffs have established a likelihood of prevailing on the merits in their challenge to the City's Ordinance. This militates in favor of granting their requested injunction.

B. Irreparable Injury

Where serious First Amendment questions are raised, as is the case here, the potential for irreparable injury clearly exists. Community House, Inc. v. City of Boise, 490 F.3d 1041, 1059 (9th Cir. 2007). As the Supreme Court has recognized, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury" that supports a preliminary injunction. Elrod v. Burns, 427 U.S. 347, 373 (1976). Consequently, the Court finds that Plaintiffs have demonstrated that without an order from this Court they may suffer immediate and irreparable harm from the enforcement, or threatened enforcement, of the Ordinance. Consequently, this factor also weighs in Plaintiffs' favor.

C. Balance of the Equities and the Public Interest

The law is clear that upholding the First Amendment is a matter falling squarely within the public interest. See, e.g., Klein v. City of San Clemente, 584 F.3d 1196, 1208 (9th Cir. 2009); Melendres v. Arpaio, 695 F.3d 990, 1002 (9th Cir. 2012) (noting that "it is always in the public interest to prevent the violation of a party's constitutional rights"). Even more specifically, in Valley Del Sol, Inc. v. Whiting, 709 F.3d 808 (9th Cir. 2013), where, like the present matter, an anti-solicitation ordinance was at issue, the court found that an injunction against enforcement of the ordinance was in the public interest because the law would infringe upon "the First Amendment rights of many persons who are not parties to the lawsuit." Id. at 829. Here, the Court finds that to the extent the Ordinance is intended to further a compelling governmental interest, the City has not demonstrated that less restrictive means can protect such interests. The Court therefore finds that the balance of equities tips in favor of granting a preliminary injunction, that doing so is in the public interest, and that the balance of harms tips sharply in Plaintiffs' favor under the facts currently before the Court.

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CONCLUSION

For the reasons set forth above, Plaintiffs' Motion for Preliminary Injunction (ECF No. 8) is GRANTED. Defendant, its officials, officers, agents, employees, contractors, and any other persons acting for it, with it, through or on its behalf are prohibited and enjoined during the pendency of this litigation from enforcing Sacramento Ordinance No. 2017-0054, codified in Sacramento City Code in Chapter 8.134.

No bond will be required since Plaintiffs are poor, or represent the poor and homeless, have alleged infringements of constitutional rights, and the relief they seek serves to protect the public interest. There is no realistic likelihood of monetary harm to the Defendant from the issuance of this preliminary injunction, which prevents the enforcement of what appears to be an unconstitutional law.

Should the City develop additional evidence that demonstrates that the Ordinance is in fact narrowly tailored to be the least restrictive means for addressing a compelling governmental interest, it can submit such evidence to the Court showing that continuing to enjoin enforcement of the Ordinance is improper.

IT IS SO ORDERED.

Dated: July 18, 2018

MORRISON C. ENGLAND, JR
UNITED STATES DISTRICT JUDGE