LEGAL SERVICES OF NORTHERN CALIFORNIA
Laurance Lee, State Bar No. 301482
Elise Stokes, State Bar No. 288211
Sarah Ropelato, State Bar No. 254848
515 12th Street
Sacramento, CA 95814
Telephone: (916) 551-2150
Facsimile: (916) 551-2196
E-mail: llee@lsnc.net

AMERICAN CIVIL LIBERTIES UNION
FOUNDATION OF NORTHERN CALIFORNIA, INC.
Abre' Conner, State Bar No. 306024
Alan Schlosser, State Bar No. 049957
William S. Freeman, State Bar No. 82002
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-8437
E-mail: aconner@aclunc.org

Attorneys for Plaintiffs Sacramento Regional Coalition to End Homelessness, James Lee Clark, and Sacramento Homeless Organizing Committee

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

SACRAMENTO REGIONAL COALITION TO END HOMELESSNESS, JAMES LEE CLARK, AND SACRAMENTO HOMELESS ORGANIZING COMMITTEE, Plaintiffs, v. CITY OF SACRAMENTO, Defendant.	Case No.: 2:18-CV-00878-MCE-AC **PLAINTIFFS' RESPONSE TO SACRAMENTO'S PROPOSAL REGARDING ORDINANCE NO. 8.134.030** **Hearing Date: July 5, 2018** **Time: 11:00 a.m.** **Courtroom: 7** **Judge: Hon. Morrison C. England, Jr.**

The City's proposal has two components: 1) it asks the Court to deny Plaintiffs' motion for preliminary injunction, but only as to provisions regarding "aggressive and intrusive solicitation" ("Section A") and 2) with respect to the location-based restrictions ("Section B"), the City now appears to be asking this Court for an indefinite extension of time for it to "further study and gather empirical data," presumably to try to justify these provisions. Plaintiffs will first address the second, which amounts to a brazen attempt to circumvent the procedures applicable to preliminary injunction motions so that the City can rescue the Ordinance from its constitutional infirmities.

1. **The issuance of a preliminary injunction should not be delayed while Defendant attempts to gather for the first time the objective evidence that was constitutionally necessary to adopt such a regulation of speech.**

Some context is required. Literally minutes before the hearing on Plaintiffs' motion, the City informed Plaintiffs' counsel that it was not going to defend the location-based restrictions in the Ordinance, Section B. During the hearing, the City several times stated to the Court and counsel that it was willing to accept those preliminary injunction provisions. Yet in its proposal, the City is again changing its position. Rather, the City is claiming that it needs an indefinite amount to time to conduct studies and gather data concerning the Ordinance. *See* City's Proposal at 1-2.

The City should not be allowed to kick the can down the road. The City has given no explanation of why the evidence that is needed to satisfy strict scrutiny (or even intermediate scrutiny) of the Ordinance was not submitted with their motion papers. The answer now seems obvious—that it does not exist and has to now be created. In other words, the City passed an Ordinance that regulated speech without doing the analysis that the First Amendment requires of legislators.

Furthermore, the City's proposal to create an evidentiary record after the Ordinance was adopted is doomed to failure. The law is clear that post-hoc rationalizations regarding why a City has adopted an ordinance cannot be created in

response to litigation and meet strict scrutiny standards. See *McLaughlin v. City of Lowell*, 140 F.Supp.3d 177, 189 (D.Mass. 2015). Because the City concedes it plans to now conduct "studies" regarding the viability of its Ordinance, it cannot prove that any rationale "was the legislature's actual purpose for the [Ordinance]" and not "invented post hoc in response to litigation." See *McLaughlin v. City of Lowell*, 140 F.Supp.3d 177, 189 (D.Mass. 2015); *see also Shaw* v. *Hunt*, 517 U.S. 899, 908 n. 4.

The City has the high burden of demonstrating that its Ordinance is actually necessary and the least restrictive means. The City is trying to divert attention from the fact that it adopted a content-based regulation of speech without the constitutionally necessary predicate findings. This Court should not reward them by delaying any further the grant of a preliminary injunction.

2. The City has not carried its heavy burden of showing that the "Aggressive and Intrusive" provisions are the least restrictive means and actually necessary to further its purposes.

At the hearing, the City stated that its Section A, aggressive and intrusive, provisions were not content-based. However, neither in its Opposition Brief, nor in its argument at the hearing, nor in this Proposal, has the City made a serious response to Plaintiffs' argument that it is content-based, in light of *Reed v. Gilbert*, 135 S Ct. 2218 (2015) and at least three lower court cases that have applied *Reed* to ordinances very similar to Sacramento's.

In *Reed v. Town of Gilbert, Ariz*., the Supreme Court clarified that a law is content-based if it "'on its face' draws distinctions based on the message a speaker conveys." 135 S. Ct. at 2227. The restrictions under Section A are content-based because they all apply to one, and only one, category of speech: solicitations for immediate donations. Section A does not criminalize any purportedly aggressive or intrusive conduct unless it is accompanied by speech soliciting for "an immediate donation of money or other thing of value or for the direct and immediate sale of goods

or services." 8.134.030(A).

Under Section A, a person can approach a bystander and aggressively argue with them about politics, religion, or any other topic they wish. A political or religious solicitor does not violate the Ordinance, even if they make physical contact, cause someone to fear bodily harm, or block a person's path. One can even approach a bystander and aggressively implore them not to give to panhandlers. None of these acts, regardless of how aggressive or intrusive, would trigger section A. Only a solicitor seeking an immediate donation is subject to a criminal penalty if they engage in this conduct. That is the essence of content-based discrimination—to treat categories of people differently based on the content of their speech. Therefore, Section A is content-based and must meet the exacting standards of strict scrutiny.

The solicitation ordinances in the post-*Reed* cases discussed in Plaintiffs' briefs also included similar "aggressive and intrusive" prohibitions, barring solicitors from touching or making contact with the person being solicited, blocking a person's path of travel, and soliciting with conduct intended or likely to cause a reasonable person to fear bodily harm to oneself or to another. *McLaughlin v. City of Lowell*, 140 F. Supp. 3d at 182; *Thayer*, 144 F. Supp. 3d at 229; *Browne v. City of Grand Junction*, 136 F. Supp. 3d at 1281. Additionally, the ordinances in *McLaughlin* and *Thayer*—like Section A—banned following the person being solicited and making violent gestures toward a person while soliciting. *McLaughlin v. City of Lowell*, 140 F. Supp. 3d at 182; *Thayer*, 144 F. Supp. 3d at 229. Every single one of these prohibitions was found to be content-based and failed to meet scrutiny standards.

In *Thayer v. City of Worcester*, the City of Worcester passed an ordinance (Ordinance 9-16) that made it "unlawful for any person to beg, panhandle or solicit any other person in an aggressive manner." 144 F. Supp. 3d at 229. In *Thayer,* the Court found these provisions to be content-based, stating that "a protracted discussion of this issue is not warranted as substantially all of the courts which have addressed similar

laws since *Reed* have found them to be content-based and therefore subject to strict scrutiny" *Id*. at 234.

Section A purports to criminalize aggressive and intrusive solicitation, but it only does that when the solicitor's message is to request an immediate donation. Under *Reed*, Section A is facially content-based and therefore subject to strict scrutiny.

3. The City's Aggressive and Intrusive provisions also fail to meet the standards of intermediate scrutiny.

Even assuming arguendo that Section A is content-neutral, the City has utterly failed to meet its burden under the intermediate level of scrutiny that is required to be met if such laws are to pass constitutional muster. If the City cannot demonstrate the Ordinance is "narrowly tailored to serve a significant governmental interest" and that "it leave[s] open ample alternative channels for communication of the information," the plaintiffs are entitled to a preliminary injunction. *See Berger v. City of Seattle*, 569 F.3d 1029,1036 (9th Cir. 2009) (en banc).

Like strict scrutiny, the complete absence of any evidentiary record is fatal to the City's claim that Section A is a constitutional time, place and manner regulation. In its motion papers, the City failed to submit any declarations, any police reports or records of complaints, any statistics or other data or any legislative history. Yet the cases make clear that, "[i]n 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." *Weinberg v. City of Chicago*, 310 F. 3d 1029, 1038 (7th Cir. 2002). For example, in *Traditionalist American Knights of Klu Klux Klan v. City of Desloge, Missouri*, 914 F. Supp 2d 1041 (E.D. Missouri 2012), the district court granted a preliminary injunction against a content-neutral solicitation ordinance because the City failed to meet its "burden of producing evidence in support of its proffered justification for the restriction, including objective evidence showing that the restriction serves the interests asserted." *Id*. 1051. In *Watseka v. Illinois Public Action Council*, the Court

struck down a solicitation ordinance under the intermediate standard of review because the City failed to offer any substantive evidence that the ordinance furthered the city's substantial interests. 796 F.2d 1547, 1556-7 (7th Cir 2002). The lack of a record in the instant case by itself shows that the City cannot meet its burden of justifying the Ordinance.

The City has the burden of showing that the Ordinance is narrowly tailored. The Ninth Circuit explained that, under narrow tailoring, the government must show that the Ordinance "does not 'burden substantially more speech than is necessary' to achieve a substantial government interest… It must target […] and eliminate […] no more that the exact source of the 'evil' it seeks to remedy.'" *Berger*, 569 F. 3d at 1041. A law that is "geographically over inclusive" is not narrowly tailored because it burdens more speech than is necessary. *Comite de Jornaleros de Redmond Beach v. City of Redondo Beach*, 657 F. 3d 936, 949. Section A applies its restriction to the entire city, without any showing that the problem that it is addressing is a city-wide problem. It is the City's burden to prove that restricting speech across the entire City does not burden substantially more speech than necessary under the intermediate test. Without a record, the City cannot justify that it has not burdened more speech than necessary.

4. The City's Ordinance is duplicative of existing law

Many of the prohibitions in Section A are simply duplicative of existing criminal laws.

The City has not demonstrated that enforcement of existing criminal laws that do not directly burden speech would be insufficient to advance its interests. *See McCullen v. Coakley*, 134 S. Ct. 2518, 2538–39, 189 L. Ed. 2d 502 (2014); *Loper v. New York City Police Dep't*, 999 F.2d 699, 701 (2d Cir. 1993); *Reynolds v. Middleton*, 779 F.3d 222, 231-32 (4th Cir. 2015). The City has not provided any evidence that existing laws, such as laws against trespassing, assault, and battery are inadequate in combating safety concerns purportedly linked to solicitation. Thus, the City's lack of justification

makes clear that it cannot justify how this Ordinance will not burden speech more than is necessary.

In *McLaughlin,* the Court expressed concern in "giv[ing] Lowell law enforcement officials the option to seek an additional penalty on a panhandler who commits assault or obstructs the sidewalk, one which might be exercised in addition to existing laws or instead of them." 140 F. Supp. 3d at 193. The Court held that the defendant "may not deem criminal activity worse because it is conducted in combination with protected speech, and it certainly may not do so in order to send a message of public disapproval of that speech on content based grounds."

The same reasoning applies to content-neutral laws. As the Ninth Circuit held in *Comite*, "[t]he City has various other laws at its disposal that would allow it to achieve its stated interests while burdening little or no speech… Even under the intermediate scrutiny 'time, place or manner' analysis, we cannot ignore these readily available alternatives." 657 F. 3d at 649-50.

These decisions are based on the "animating First Amendment principle that government must consider pursuing its interests through conduct-based regulations before enacting speech-based laws." *Val del Sol Inc v. Whiting*, 709 F. 3d 808, 827 (9th Cir. 2013). The City has presented no evidence that it has followed this principle before adopting this Ordinance. "If the First Amendment means anything, it means that regulating speech must be a last-and not first-resort." *Thompson v. W. State Med*. Ctr., 535 U.S. 357, 373 (2002).

For the reasons above, the City has still failed to meet its burden of demonstrating the Ordinance is actually necessary or the least restrictive means to further its interest. Moreover, the City fails to meet its burden under strict or intermediate scrutiny. In light of the City's lack of a record, the Plaintiffs are entitled to the immediate issuance of a preliminary injunction of the entire ordinance.

Dated: July 5, 2018

LEGAL SERVICES OF NORTHERN CALIFORNIA

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.

By: */s/ Abre' Conner*
ABRE' CONNER

Attorneys for Plaintiffs