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' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

I. INTRODUCTION

Defendant City of Sacramento's threadbare opposition memo misapprehends nearly every legal principle applicable to this motion.

First, the City fails to acknowledge the Supreme Court's ruling in *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015), that an ordinance is presumed invalid if the ordinance purports to regulate speech based on its content. The government (not the Plaintiff) has the burden to prove that the ordinance can survive strict scrutiny.

Second, by failing to present even a single fact in support of its opposition, the City completely ignores this Court's lesson in *Firearms Policy Coalition Second Amendment Defense Committee v. Harris*, 192 F. Supp. 3d 1120 (E.D. Cal. 2016) that the strict scrutiny test is "exacting" and requires the government to demonstrate, by presenting evidence, that the ordinance is narrowly tailored to further a compelling governmental interest.

Third, the City fails to acknowledge, let alone attempt to distinguish, the myriad post-*Reed* decisions striking down similar unconstitutional ordinances. The municipalities in these cases had done far more than the City to attempt to justify similar anti-solicitation ordinances.

Finally, the City misconstrues the doctrine of standing as it applies to First Amendment cases. Plaintiffs have clearly established standing through their declarations.

The law is settled and clear that this Ordinance cannot stand. The City's failure to present evidence in support of the Ordinance only underscores that Plaintiffs are entitled to the injunction they seek.

II. ARGUMENT

A. THE CITY FAILS TO ADDRESS, MUCH LESS REBUT, PLAINTIFFS' SHOWING THAT THE ORDINANCE IS CONTENT-BASED AND UNCONSTITUTIONAL ON ITS FACE

The City's brief does not address Plaintiffs' central argument that this is a content-based ordinance that is unconstitutional on its face, nor does it address *Reed*,

the most recent Supreme Court case that clarifies how to handle ordinances regulating content-based speech. The omissions from the brief are as damaging to the City's legal position as are the arguments it does make. A few examples illustrate the brief's major deficiencies:

The City's first argument is that "the complaint fails to allege facts that would establish the ordinance is facially invalid." Opp'n at 2. The City fails to grasp that the primary focus of a facial challenge to a statute is the text of the statute itself, which the City never cited to in its opposition brief. The text of the Ordinance establishes that the Ordinance is indeed content-based – i.e., that it targets only solicitations "for an immediate donation of money."[1] This statutory language demonstrates that the Ordinance, on its face, imposes special prohibitions and restrictions "that depend entirely on the communicative content" of the speech. *Reed*, 135 S.Ct. at 2227. And it is this language that has led a number of courts since *Reed* to conclude that virtually identical solicitation ordinances are content-based. Not once in its brief does the City respond to Plaintiffs' central argument, an omission made possible only because the City does not distinguish or even mention any of these post-*Reed* cases.[2]

The City next argues that Plaintiffs have "failed to allege facts that would establish an as-applied First Amendment claim." Opp'n at 3-4. This is an irrelevant diversion. Plaintiffs have not brought an "as applied" challenge, as is made clear in the very first paragraph of the First Amended Complaint.

Rather than grapple with the text of its Ordinance, the City proffers a frivolous argument that the locations targeted by the Ordinance are "nonpublic forums." Opp'n at 5. The City's assertion that the "forums in question" are financial institutions, ATM machines, transport stops, and shopping center driveways misrepresents the scope of

///

[1] SACRAMENTO CITY CODE § 8.134.020 (2017) (all "§" references are to this Code unless otherwise indicated).

[2] In ignoring *Reed* and the post-*Reed* cases, the City's brief follows the lead of the City Council, which similarly ignored the detailed presentation about this case law by SRCEH's executive director before the Ordinance passed. (Declaration of Bob Erlenbusch ¶¶ 8-16, Exhibits A-C.)

the Ordinance. Opp'n at 5. The very text of the Ordinance makes it clear that it prohibits Plaintiffs' protected speech activities in 30-foot buffer zones around these locations (§ 8.134.030 (B)), and it is equally clear that those zones will, and are intended to, include significant portions of the public sidewalk, the most traditional of public fora.[3] Failure to acknowledge these buffer zones is yet another example of how the City's argument is untethered from the statutory text and has no basis in law or fact. Opp'n at 4-5.

When the text of the Ordinance emerges from the fog created by the City's brief, it is clear that this is a presumptively invalid content-based restriction on speech.

B. BY FAILING TO PRESENT ANY EVIDENCE, THE CITY CONCEDES THAT IT CANNOT MEET THE "EXACTING" STRICT SCRUTINY TEST

Once a plaintiff has established that an ordinance regulating speech is content-based, it is "presumptively unconstitutional" and subject to strict scrutiny, and the burden shifts to the defendant to establish constitutionality by presenting evidence. *Reed*, 135 S.Ct. at 2226, 2231. While the City recognizes that "[t]o survive strict scrutiny, the City must show the ordinance is the least restrictive means of furthering a compelling governmental interest," Opp'n at 5:24-25, the City immediately reverts to its flawed contention that *Plaintiffs* carry the burden of proof. *See Reed,* 135 S.Ct. at 2231; Opp'n at 5:27-6:2. By arguing that Plaintiffs have the burden to provide the least restrictive alternative, the City is attempting to take the "strict" out of strict scrutiny and abdicate its obligations.

Unlike nearly every other case cited in Plaintiffs' Opening Memorandum, where the governmental defendant presented facts showing that it was trying to advance an important governmental interest by the least restrictive means possible, the City has made no such attempt. The sum total of its effort is the rote recitation that "the

///

[3] In the City's opposition, the City neglects to consider its Ordinance's definition of prohibited activity since the City defines prohibited solicitation activity to include "public places…not limited to…sidewalks" in § 8.134.020. Indeed, by fixating on location-based restrictions and ignoring that the Ordinance prohibits solicitation in an "aggressive or intrusive manner," it totally sidesteps that this expansive restriction on all public property is facially unconstitutional. § 8.134.030 (A); *See* Opening Memo at 15-17.

Ordinance is narrowly tailored to protect the safety of pedestrians, drivers, passengers and solicitors," and the claim that the *Reed* Court suggested that a "narrowly tailored" ordinance directed toward these goals "might survive strict scrutiny." Opp'n at 6:2-3. However, courts considering solicitation ordinances like the City's have repeatedly stated that mere assertions of "public safety and motor vehicle safety" as compelling interests is not sufficient to meet the government's burden under strict scrutiny. *Rodgers v. Bryant*, 2017 WL 6513162 at *4 (E.D. Ark. Sept. 26, 2017); *Blitch v. Slidell*, 260 F. Supp. 3d 656, 669 (E.D. La. 2017).

Indeed, this Court in *Firearms Policy Coalition* considered, and rejected, that defendant's proffered justification for restricting speech – the desire to eliminate "grandstanding" by politicians speaking to the camera while on the floor of the Legislature – observing both that this goal would not be furthered by the restriction, and that other, less speech-restrictive means were available to pursue the goal. 192 F.Supp. 3d at 1127.

Here, the City points to no evidence that there is a threat to public or motor vehicle safety because of the speech activity in question, nor are there facts demonstrating a compelling interest in treating requests for immediate donations differently. Moreover, even assuming that protecting public safety is an important goal, the City fails to carry its burden to show that the Ordinance represents a "narrowly tailored" effort to further it. *See* Opening Memo at 12-17.

C. PLAINTIFFS HAVE ESTABLISHED THAT THEY HAVE STANDING

The City erroneously argues that Plaintiffs cannot have standing because they have not alleged "a reasonable likelihood that the government will enforce the [law] against them" or that "they intend to violate the challenged the law." Opp'n at 7:11-13. This argument, however, is disposed of by this Court's ruling in *Italian Colors Restaurant v. Harris*, 99 F. Supp. 3d 1199, 1206 (E.D. Cal. 2015) in which the court stated:

///

> In First Amendment cases, '[i]t is sufficient for standing purposes that the plaintiff intends to engage in a course of conduct arguably affected with a constitutional interest and that there is a credible threat that the challenged provision will be invoked against the plaintiff.'

See also Firearms Policy Coal., 192 F. Supp. 3d at 1125. Plaintiff Clark has sufficiently alleged that he solicits in areas covered by the Ordinance's geographic restrictions (Clark Dec. ¶¶ 4-5, 8-9); that he needs to continue to do so to survive (*Id.* ¶ 14); and that the threat of enforcement confronts him with an impossible choice between being arrested for soliciting where he has the best chance of receiving donations, or moving to places where he cannot sustain himself in order to avoid arrest. *Id.* ¶ 15. Plaintiff Clark further alleges that he "cannot voluntarily move to a new place to solicit because [his] locations are both safe and effective." *Id.* He has therefore shown "intent to engage in a course of conduct affected with a constitutional interest" and "a realistic danger of sustaining a direct injury" from enforcement of the statute. *Italian Colors Rest.*, 99 F. Supp. 3d 1199, 1206.

The City's claim that Plaintiffs lack standing is almost solely based on *Lopez v. Candaele*, 630 F.3d 775 (9th Cir. 2010), but in that case, the court found no standing because the student plaintiff's fears that his school's sexual harassment policy would be enforced against him (because of a classroom speech) were not supported by any record facts. In addition, the student had "not adequately proven his intent to violate the policy because [he had] not shown that the sexual harassment policy even arguably applie[d] to his past or intended future speech." 630 F.3d at 790. Here, by contrast, the plain language of the Ordinance demonstrates that Mr. Clark has standing because Mr. Clark has clearly stated that he solicits in areas where the Ordinance prohibits it. Clark Dec. ¶¶ 4-11. In addition, the court in *Lopez* held that "plaintiffs may establish an injury in fact without suffering a direct injury from the challenged restriction." 630 F.3d. at 785.

Moreover, the City has not claimed (as the defendant in *Italian Colors Rest.* unsuccessfully attempted to do) that it has no intention of enforcing the Ordinance, likely

///

because it cannot.[4] *See Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988) (plaintiff has standing where the "State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise.").

In cases challenging solicitation statutes that impose similar restrictions on First Amendment activities, courts have consistently found a "credible threat" when the statute covers activities in which Plaintiff solicitors seek to engage. In *American Civil Liberties Union of Idaho v. City of Boise*, 998 F.Supp.2d 908 (D. Idaho 2014), the court found that the ACLU had standing to challenge a solicitation ordinance based on the affidavits of its solicitors that they solicited for donations in areas prohibited by the law. *Id.* at 914. The court reached this conclusion despite the fact that the ordinance had not yet become effective (*Id.* at 912) and that the record showed that the primary target of the law was panhandling and not fundraising by nonprofits. *Id.* at 914. "The ACLU has standing even if prosecution is only 'remotely possible." (Citation omitted.) *Id.* at 914. And in *Clatterbuck v. City of Charlottesville*, 708 F.3d 549 (4th Cir. 2013), a case involving a similar solicitation ordinance that prohibited solicitation within 50 feet of vehicular crossings at a downtown mall, the court upheld plaintiff solicitors' standing:

> Although the Complaint does not allege that Appellants have begged or plan to beg specifically within the fifty-foot buffer zones, it does, more generally, allege that Appellants regularly beg on the Downtown Mall, and that they suffer harm by being prevented from fully exercising their First Amendment rights. *Id.* at 554.

The City's claim that standing requires "specific threats of enforcement" (Opp'n at 8) has been rejected time and again in cases involving First Amendment rights. *See, e.g., Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1015, n.5 (9th Cir. 2013) ("We have never held that a specific threat is necessary to demonstrate standing."). In *Cal-Pro Life Council v. Getman*, 328 F.3d 1088, 1094 (9th Cir. 2003), the court also rejected this argument:

---

[4] Plaintiffs' counsel recently learned of one citation that was issued on March 22, 2018 for a violation of the Ordinance. Declaration of Laurance Lee in Support of Motion for Preliminary Injunction ("Lee Dec."), ¶ 5. The Sacramento Superior Court Public Case access system does not allow the search for violations by Ordinance, so Plaintiffs cannot determine how many other citations may have been issued. *Id.* ¶ 4.

> The district court's decision implied that absent a threat, or at least a warning, that California might prosecute CPLC for its publications, CPLC could not possibly have suffered an injury-in-fact sufficient to give it standing. . .Our ruling in *Thomas* did not purport to overrule years of Ninth Circuit and Supreme Court precedent that recognizes the validity of pre-enforcement challenges to statutes infringing upon constitutional rights.

Furthermore, the City has ignored that Plaintiffs are claiming that the Ordinance is substantially overbroad and should be invalidated on its face. Opening Memo at 17-18. That provides an additional ground for standing:

> Where, as here, a plaintiff raises an overbreadth challenge to a statute under the First Amendment, standing arises 'not because [the plaintiffs'] own rights of free expression are violated, but because of a judicial prediction or assumption that the [challenged statute's] very existence may cause others not before the court to refrain from constitutionally protected speech or expression.' (Citation omitted).

Canatella v. State of California, 304 F.3d 843, 853 (9th Cir. 2002).

The City does not even address (or mention) the two organizational Plaintiffs who have standing independent of Plaintiff Clark. An organizational 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 of San Fernando Valley v. Roommate.com*, 666 F.3d 1216, 1219 (9th Cir. 2012). In *Valle del Sol v. Whiting*, 732 F. 3d 1006 (9th Cir. 2013), two organizations that ran programs serving unhoused individuals and residents who were undocumented were found to have standing to challenge a harboring statute because they had "to divert resources to educational programs to address its members and volunteers' concerns about the law's effect." *Id.* at 1018. And in *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011), the court held that a day laborer organization had standing to challenge a solicitation ordinance by showing that the ordinance "frustrates the organization's goals and requires the organization to expend resources in representing clients they otherwise would spend other ways." *Id.* at 943.

The declarations of Paula Lomazzi ("Lomazzi Dec.") and Bob Erlenbusch ("Erlenbusch Dec.") meet these criteria for establishing the standing of Plaintiffs SHOC

and SRCEH, and the City presents not one iota of evidence to rebut their standing. SRCEH is a charitable organization whose mission is to prevent homelessness through policy analysis and community engagement. It furthers its mission by advocating and commenting on proposed legislation and ensuring that the civil rights of homeless persons are not infringed upon by local governments. Erlenbusch Dec. ¶¶ 3, 5. Laws, such as the Ordinance, that criminalize the life-sustaining activities of homeless persons frustrate the mission of SRCEH to improve the living conditions of the homeless. *Id*. ¶¶ 5, 7. SRCEH has already diverted significant resources to trying to educate the public and the homeless community by having its Executive Director give public testimony on three different occasions about the Ordinance, explaining the policy and constitutional concerns that formed the basis of their opposition. SRCEH also prepared written materials for the Council members. *Id*. ¶¶ 8-17. If the Ordinance remains, SRCEH will have to monitor its implementation and try to mitigate the harm to homeless persons who will be impacted by the Ordinance. *Id.* ¶ 8.

SHOC is an organization that seeks to address problems of homelessness through advocacy and education, and trying to bridge the gap between the homeless community and the public. Lomazzi Dec. ¶ 3. SHOC has established that the Ordinance would frustrate its mission by interfering with the dissemination of the Homeward Street Journal by its distributors, who solicit donations in locations covered by the Ordinance. *Id.* ¶¶ 4-6. The Ordinance will require SHOC to divert resources to educating distributors about the criminal prohibitions and to assist them if they are cited or threatened with arrest. *Id*. ¶ 7. SHOC has already diverted resources so that Paula Lomazzi, the Executive Director, could give public testimony at multiple meetings of the City Council and its Committee. *Id*. ¶ 8.

D. PLAINTIFFS HAVE ESTABLISHED ALL OF THE ELEMENTS REQUIRED TO OBTAIN INJUNCTIVE RELIEF

The City's misguided logic in its Opposition does not change the fact that Plaintiffs have established all three prongs for a preliminary injunction in its Opening

Memorandum. For the reasons outlined above and in their Opening Memo, Plaintiffs are likely to succeed on the merits.

The City argues that it has not enforced the Ordinance, and thus there is no credible threat of enforcement to meet the irreparable harm prong. Opp'n at 7-8. But the Ninth Circuit has held that "[t]he fact that the plaintiffs have raised 'serious First Amendment questions compels a finding that there exists 'the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in [the plaintiffs'] favor." *Community House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007). The City fails to acknowledge that it adopted an Ordinance that is facially unconstitutional. Further, the City's own argument that an injunction would compromise its ability to protect the public belies any claim that there is no credible threat of enforcement of the Ordinance. *See* Opp'n at 9:23-25. Moreover, the City *has* enforced the Ordinance – prior to drafting its Opposition brief – by issuing a citation.[5]

The City also claims that the balance of equities tips in its favor because of "very limited prohibition of solicitation" across the City. Opp'n at 9:26. Other cities have unsuccessfully tried to reason that limited prohibition tips in the favor of the defendant. A federal district court stated: "[t]his type of theory, often referred to as 'the theory of the *de minimis* constitutional violation,' suggests that criminalizing protected speech is an insignificant violation of the Constitution. Criminalizing protected speech is never insignificant." *Rodgers*, 2017 WL 6513162 at *6. Additionally, the City fails to acknowledge that courts have held there is a "significant public interest in upholding First Amendment principles." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002). The expansive nature of this Ordinance will surely chill the "First Amendment rights of many persons who are not parties to [that] lawsuit." *Valle de Sol*, 709 F.3d at 829.

///

[5] *See Lee* Dec. ¶ 5. In the City's Opposition brief, the City alleges it had not enforced the Ordinance as its key argument regarding why Plaintiff did not meet the prong for irreparable harm. Opp'n at 8-9.

The City also states, without any evidence, that the balance of equities tips in the favor of the City merely because it claims an injunction would "compromise the City's compelling interest to protect the safety and welfare of the public." Opp'n at 9. However, this Court has reasoned that regarding an injunction on an Ordinance, a defendant's "parade of horribles," without evidence, did not meet the standard of proof for demonstrating that the balance of hardships and public interest tipped in the defendant's favor. *Firearms Policy Coal.*, 192 F.Supp.3d at 1129. Here, the City has not tried to provide evidence, much less a "parade" of reasons, for why the Ordinance should not be enjoined. The City's unsubstantiated rationale does not negate the powerful reasons for granting the Plaintiff's preliminary injunction.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Preliminary Injunction should be granted.

Dated: May 24, 2018

LEGAL SERVICES OF NORTHERN CALIFORNIA

AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA, INC.

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

Attorneys for Plaintiffs