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11 UNITED STATES DISTRICT COURT
12 EASTERN DISTRICT OF CALIFORNIA
13 SACRAMENTO DIVISION

14 SACRAMENTO HOMELESS ORGANIZING
15 COMMITTEE, et al.,

16 Plaintiffs,

17 vs.

18 COUNTY OF SACRAMENTO, et al.,

19 Defendants.

Case No. 2:14-cv-01684-YLN-KJN

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION**

Hearing Date: August 28, 2014
Time: 2:00 p.m.
Courtroom: 2 (15th Floor)
Judge: Hon. Troy L. Nunley

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1 **INTRODUCTION**

2 In the hierarchy of First Amendment values, none is more paramount than the tenet that
3 government cannot regulate speech based on its content and its message. Plaintiffs are asking this
4 Court to issue a preliminary injunction to restrain enforcement of a newly-adopted Sacramento
5 County “solicitation” ordinance that on its face does just that. Such a content-based restriction of
6 constitutionally protected speech is “presumptively invalid.” *R.A.V. v. City of St. Paul, Minn.*, 505
7 U.S. 377, 390 (1992).

8 Sacramento County Code Sections 9.81.010-070 (the “Ordinance”) is content-based in two
9 distinct ways, each independently constituting an impermissible restriction on constitutionally
10 protected speech in a public forum:

11 First, the Ordinance imposes extensive restrictions on where solicitors can locate
12 themselves on the public sidewalks if they are seeking donations from the public, thereby creating
13 buffer zones between the solicitors and their intended audience. However, the Ordinance on its
14 face exempts from these buffer zone restrictions those who are soliciting donations for a charitable
15 cause. By creating this distinction between panhandlers and charitable solicitors, the Ordinance on
16 its face discriminates against speech based on its content.

17 Second, the Ordinance treats differently those who request a donation and those whose
18 request for the immediate attention of a member of the public has a different message. Asking a
19 passerby to stop and sign a petition, work for a candidate, or register to vote – none of these
20 messages are prohibited in the buffer zones created by the Ordinance. Only if your message is that
21 you are poor and could use help will your solicitation be criminalized.

22 Plaintiffs include homeless individuals who rely on soliciting donations for their basic
23 needs in the areas of the County affected by Ordinance as well as an organization of homeless
24 advocates, some of whose members, also unemployed and poor, distribute the organization’s
25 publication in exchange for donations for their own needs. If this Ordinance is not enjoined by this
26 Court, plaintiffs, and other persons in their situation, will face the choice of risking criminal
27

1 penalties or choosing to give up their First Amendment right to seek donations free from
2 unconstitutional restrictions.

3 **FACTUAL BACKGROUND**

4 **1. The Sacramento Anti-Panhandling Ordinance**

5 On May 13, 2014, the County, acting through its Board of Supervisors, adopted
6 Sacramento County Ordinance No. 1559, codified as Sacramento County Code Sections 9.81.010-
7 070 (the “Ordinance”; all references to “Section” refer to this Ordinance). The Ordinance took
8 effect on June 12, 2014. A true and correct copy of the Ordinance is attached hereto as “Exhibit
9 A.”

10 The Ordinance is labelled as a restriction on “aggressive and intrusive solicitation.”
11 However, it is both more and less than that. It does prohibit “aggressive and intrusive solicitation
12 in any public place,” Section 9.81.040(A), and defines these terms to include conduct such as
13 causing “a reasonable person to fear bodily harm,” intentionally touching without consent,
14 following a person after being informed that the person does not want to be solicited, using violent
15 gestures and blocking someone’s path. Section 9.81.030 (A)(1-4), (I).¹

16 However, the Ordinance goes far beyond the prohibition of aggressive and intrusive
17 conduct. It creates a number of buffer zones where solicitors in Sacramento County will not be
18 able to use the public sidewalks to communicate with members of the public with their message.
19 These buffer zones prohibit soliciting in the following locations: (1) from a vehicle occupant
20 within 35 feet of a driveway providing vehicular access to a shopping center, retail, or business
21 establishment; (2) from a vehicle occupant within 200 feet of an intersection; 3) within 50 feet of
22 any public transportation vehicle stop; (4) within 35 feet of any entrance to or exit from any
23 financial institution or automated teller machine (“ATM”); (5) on any median strip; and (6) from
24 any motor vehicle occupant stopped at a gasoline station or pump. Section 9.81.040(B). Any
25 person violating the Ordinance is guilty of an infraction. Section 9.81.060(A). Any person who

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27
28 ¹ Plaintiffs are not challenging these prohibitions on “aggressive and intrusive” conduct.

1 violates the Ordinance more than two times within a six month period is guilty of a misdemeanor.
2 Section 9.81.060(B).

3 The Ordinance is a direct regulation of speech. The buffer zones only apply to persons who
4 make requests by spoken or written word “with the purpose of obtaining an immediate donation of
5 money or other thing of value.” Section 9.81.030(N). However, only certain requests and speakers
6 are targeted, depending on the content of their message. The Ordinance specifically exempts
7 charitable solicitors. Section 9.81.050(B).² And buffer zones in the Ordinance have no application
8 to speakers who are making other immediate requests from the public, such as signing a petition.
9 The only speakers who are covered by the Ordinance are those who are asking for financial
10 assistance for their own needs.

11 2. The Plaintiffs

12 Plaintiff William Murphy is unemployed and poor, and has only been able to secure
13 temporary employment for brief tenures over the course of the past year and a half. Murphy Decl.
14 ¶ 1. Other than food stamps, Mr. Murphy’s sole source of income between jobs comes from asking
15 for help while standing on the public sidewalks throughout the County of Sacramento where he
16 was born and raised and considers home. Murphy Decl. ¶¶ 1 and 7.

17 While panhandling, Mr. Murphy generally stands on sidewalks and street corners for two
18 to five hours at a time. Murphy Decl. ¶ 2. He uses a sign to ask for work or help, and does not
19 wave or do anything else to attract attention. Murphy Decl. ¶ 2. Mr. Murphy only approaches
20 vehicles when he has been summoned by their occupants. Murphy Decl. ¶ 2. An example of one of
21 Mr. Murphy’s signs read, “HOMELESS WILL WORK HAVE BIKE WILL TRAVEL [phone
22 number] PLEASE HELP.” Murphy Decl. ¶ 3.

23 When holding a sign asking for work or help, Mr. Murphy almost always stands on a
24 sidewalk near a driveway to a shopping area or an intersection. Murphy Decl. ¶ 3. He stands on the

25 ² “Nothing in this chapter shall be construed to prohibit soliciting for charitable purposes in
26 compliance with the requirements set forth in Title 5, Chapter 5.64 of this Code.” Sacramento
27 County Code Chapter 5.64 creates a permit system for charitable solicitors who are making
28 charitable appeals through a variety of means: in press announcements, at exhibitions and sporting
events, and by selling advertising space. 5.64.020(a)(1-4). There are no restrictions placed on the
conduct or locations of “charitable solicitors” in public forums in this ordinance.

1 exit side of the driveway. Murphy Decl. ¶ 4. He places himself there so that as many people as
2 possible will see him and his sign, and also because those people who want to make a donation can
3 safely stop and wave him over without obstructing traffic. Murphy Decl. ¶¶ 3-4.

4 Mr. Murphy has frequented different locations throughout the County of Sacramento
5 holding his signs, including in its unincorporated areas. Murphy Decl. ¶ 5. For example, in the past
6 year, Mr. Murphy has panhandled a few dozen instances on the public sidewalks outside both the
7 Starbucks and The Home Depot near the intersection of Madison and Manzanita Avenues in
8 Carmichael, an unincorporated area in the County of Sacramento. Murphy Decl. ¶ 5.

9 On March 10, 2014, Mr. Murphy was cited by the City of Citrus Heights police for
10 panhandling on the public sidewalk near a shopping center driveway. Murphy Decl. ¶ 6. He was
11 cited under an ordinance almost identical to Sacramento's. *See* Citrus Heights, Cal., Mun. Code §
12 78-52. After that experience, the fear of criminal charges and arrest have caused Mr. Murphy to
13 cease panhandling at all in Citrus Heights. Murphy Decl. ¶ 6. The enforcement of the Sacramento
14 County Ordinance will similarly cause Mr. Murphy to cease panhandling in the County because of
15 fear of being cited by Sheriff's deputies. Murphy Decl. ¶ 7. Because these restrictions will prevent
16 him from effectively communicating with people seeking their assistance, it will threaten his
17 ability to sustain himself with food and basic necessities. Murphy Decl. ¶ 7.

18 Plaintiff Sacramento Homeless Organizing Committee ("SHOC") is an organization that
19 tries to address the problems of homelessness and whose members include many persons who are
20 homeless. Lomazzi Decl. ¶¶ 2-3. SHOC seeks to address problems of homelessness through
21 advocacy and education, and by bridging the gap between the homeless community and others in
22 our society. Lomazzi Decl. ¶ 2.

23 SHOC publishes the newspaper the Homeward Street Journal ("Homeward"), a bi-monthly
24 publication covering issues and stories about homelessness, poverty, and other important social
25 issues and news. Lomazzi Decl. ¶ 3. SHOC distributes Homeward through its "vendor" programs.
26 Lomazzi Decl. ¶ 5. SHOC vendors, some of whom are SHOC members, consist of mostly low-
27 income or homeless individuals who rely upon the vendor program and the financial benefit it
28

1 provides for their basic needs. Lomazzi Decl. ¶ 5. Vendors can receive up to sixty (60) copies of
2 Homeward per week for free, and then the vendors try to distribute them in public places to
3 members of the public in return for donations. Lomazzi Decl. ¶ 5. SHOC vendors frequently solicit
4 for donations in the unincorporated areas of the County of Sacramento to which the Ordinance
5 applies. Lomazzi Decl. ¶ 8.

6 ARGUMENT

7 I. Standard for Preliminary Injunctive Relief

8 “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on
9 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
10 balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v.*
11 *Natural Res. Def. Council*, 555 U.S. 7, 20 (2008) (internal citations omitted). Plaintiffs meet all the
12 prongs of this test, and are entitled to preliminary injunctive relief.

13 II. Plaintiffs are Likely to Succeed on the Merits Because the Ordinance 14 Discriminates Against Speech Based On Its Content and Message and Is 15 Unconstitutional on its Face

16 Content-based restrictions of speech in public forums are "presumptively invalid" because
17 they raise the specter of official disfavor and discouragement of certain messages and speakers.
18 *R.A.V.*, 505 U.S. at 390.³ A regulation is content-based if "either the underlying purpose of the
19 regulation is to suppress particular ideas *or if the regulation, by its very terms, singles out*
20 *particular content for differential treatment.*" *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th
21 Cir. 2009) (emphasis added) (citation omitted). This Court does not need to determine whether the
22 underlying purpose of the County's Ordinance is to suppress or to discourage particular messages
23 or speakers. Rather, this Ordinance on its face "singles out particular content for differential

24 _____
25 ³ The Ordinance imposes significant and burdensome restrictions on where solicitors may be on
26 the public sidewalks, and these restrictions are not narrowly tailored because they “burden
27 substantially more speech than is necessary” to further the County’s interest in traffic safety. *Ward*
28 *v. Rock Against Racism*, 491 U.S. 781, 798-99 (1989). However, this Motion does *not* raise the
issue of whether the Ordinance fails to meet this intermediate test for a content-neutral time, place
and manner regulation. Because the Ordinance is content-based, it must be adjudged by the higher
strict scrutiny standard, and it is on those grounds that this Motion is made.

1 treatment", and thus is unconstitutional on its face.⁴

2 **A. The Ordinance Targets Only Those Solicitors Who Are Panhandlers**
3 **Requesting Donations for Their Own Needs**

4 This Ordinance constitutes a regulation of speech based on its content because of the
5 distinction it draws between persons who ask for donations for their own basic needs and persons
6 who solicit for a charitable purpose. That the requests for donations by the poor and the homeless
7 are the targets of this ordinance is plain in its own definition of "solicitation" – "Solicit' shall
8 mean to ask, *beg*, request, and/or *panhandle* using the spoken, written, or printed word, or bodily
9 gestures, signs or other means with the purpose of obtaining an immediate donation of money or
10 other thing of value or soliciting the direct and immediate sale of goods or services." Section
11 9.81.030(N) (emphasis added). If there were any doubt that charitable solicitors can completely
12 disregard this Ordinance, Section 9.81.050(B) includes a specific exemption for those who solicit
13 for charities.

14 The issue posed by this Motion is not a new one to come before the courts. A number of
15 principles have emerged from the case law, which compel the conclusion that Sacramento
16 County's anti-panhandling law is constitutionally invalid on its face:

17 1. The solicitation of donations in public forums is a form of non-commercial speech
18 fully protected by the First Amendment. *Village of Schaumburg v. Citizens for a Better*
19 *Environment*, 444 U.S. 620, 632 (1980).

20 2. Individuals who seek donations for their own personal needs and survival are
21 entitled to the same degree of constitutional protection as persons who solicit for others causes.
22 "Panhandlers" and persons who "beg" – categories singled out by the Ordinance – are not relegated
23 to some lower rung of the First Amendment. *See, e.g., Speet v. Schuette*, 726 F.3d 867, 874-77 (6th

24 ⁴ Discrimination against speech or speakers based on the content of the message, also violates the
25 Equal Protection Clause, and thus the arguments that plaintiffs make in this Motion with respect to
26 the violation of its First Amendment rights apply to support Plaintiffs' claim for preliminary
27 injunctive relief under the Equal Protection Clause. "Necessarily, then, under the Equal Protection
28 Clause, not to mention the First Amendment itself, government may not grant the use of a forum to
people whose views it finds acceptable, but deny use to those wishing to express less favored or
more controversial views." *Police Department of Chicago v. Mosely*, 408 U.S. 92, 96 (1972);
Carey v. Brown, 447 U.S. 455 (1980); *see* Complaint (ECF No. 1) at ¶¶ 41-43.

1 Cir. 2013); *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 553 (4th Cir. 2013) (“We agree
2 that begging is communicative activity within the protection of the First Amendment”); *Smith v.*
3 *City of Fort Lauderdale*, 177 F.3d 954, 955-56 (11th Cir. 1999) (“[I]ike other charitable
4 solicitation, begging is speech entitled to First Amendment protection.”); *Loper v. New York*
5 *Police Department*, 999 F.2d 699, 706 (2d Cir. 1993). These courts have recognized, **as**
6 **apparently Sacramento County has not**, that beggars and panhandlers are also communicating
7 messages and information that are entitled to be heard in public forums.

8 3. Accordingly, a law which targets panhandlers and exempts charitable solicitors
9 from its restrictions is content-based discrimination based on the solicitor’s message. An indicia of
10 a content-based regulation of speech is if “a law enforcement officer must read a [printed
11 communication’s] message to determine if the [printed communication] is exempted from the
12 ordinance.” *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 795-96 (9th Cir. 2006) (citing
13 *Foti v. City of Menlo Park*, 146 F.3d 629, 636 (9th Cir. 1998)). That is the case here – to enforce
14 this Ordinance, a Sheriff’s deputy must read the solicitor’s sign or approach and ask the solicitor
15 what he or she is communicating to the listeners. If the solicitor is seeking a donation for the
16 Cancer Society or the Salvation Army or the Police Benevolent League, then they are free to be as
17 close to an ATM, a bus stop, a driveway or an intersection as they desire in order to be effectively
18 reach the intended audience. Only panhandlers have to carry tape measures to be sure they are not
19 in violation.

20 This Ordinance is a vivid illustration of why content-based regulations of speech are
21 “presumptively” unconstitutional. The Ordinance not only targets and discriminates against
22 panhandlers, but it does so by a direct attack on speech of political and social import:

23 Even without particularized speech, however, the presence of an unkempt and
24 disheveled person holding out his or her hand or a cup to receive a donation itself
25 conveys a message of need for support and assistance. We see little difference
26 between those who solicit for organized charities and those who solicit for
27 themselves in regard to the message conveyed. The former are communicating the
28 needs of others while the latter are communicating their personal needs. Both
solicit the charity of others. The distinction is not a significant one for First
Amendment purposes.

1 *Loper*, 999 F.2d at 704.

2 For purposes of this Motion, this Court does not have to decide whether Sacramento
3 County intended to discourage the presence of panhandlers and beggars on the County's sidewalks,
4 although it seems clear that that is the case. The impermissible discrimination against speech and
5 speakers because of the content of their message is plain on the law's face. In striking down a law
6 that also singled out beggars and panhandlers, the Massachusetts Supreme Court spoke to the heart
7 of the matter:

8 By prohibiting peaceful requests by poor people for personal financial aid, the
9 statute directly targets the content of their communications, punishing requests by
10 an individual for help with his or her basic human needs while shielding from
11 government chastisement requests for help made by better-dressed people for
12 other, less critical needs. The statute is thus necessarily content based because the
13 content of the individual's message determines criminal guilt or innocence.

14 *Benefit v. City of Cambridge*, 424 Mass. 918, 924 (1997).⁵

15 **B. The Ordinance Singles Out Only Those Solicitors Who Are Seeking An
16 Immediate Donation of Money**

17 Charitable solicitors are not the only speakers favored by this ordinance. It also draws a
18 constitutionally impermissible distinction between those who use the public forums to ask for
19 donations and those who make other requests for the immediate attention or assistance of the
20 public on the public streets and sidewalks.

21 That the transfer of money is involved in solicitation does not change the fact the
22 communicative elements are “intertwined” with the transfer of money, thus requiring that
23 solicitation of donations must be regulated in accordance with First Amendment principles. *Village
24 of Schaumburg*, 444 U.S at 632. “[C]haritable appeals for funds on the street or door to door,
25 involve a variety of speech interests – communication of information, the dissemination and
26 propagation of views and ideas, and the advocacy of causes - that are within the protection of the
27 First Amendment.” *Id.* at 632; *see also, Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S.

28 ⁵ The recent First Circuit decision in *Thayer v. City of Worcester* 2014 WL 2782178, (1st Cir., June 19, 2014) is not to the contrary. In *Thayer*, the court upheld a solicitation ordinance, but the court stressed that the ordinance was “evenhanded” because it applied to “Girls Scout cookie sellers and Salvation Army bell-ringers” as well as panhandlers. *Id.* at *7. This Ordinance does not.

1 781, 789 (1988).

2 As the Ninth Circuit recently noted in an en banc decision striking down a vehicular
3 solicitation law, “solicitation is nothing more than a request in which the solicitor communicates in
4 some fashion his desire that the person solicited do something such as give money.” *Comite de*
5 *Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 946 (9th Cir. 2011) (citing
6 *Berger*, 569 F.3d at 1090). This underscores a critical point. The Sacramento Ordinance is *not* a
7 regulation of conduct with an indirect effect on speech; it is a *direct regulation of speech*. It does
8 not prohibit the actual transfer of money nor punish the person who gives the money or the person
9 who receives it. Rather, the criminal act is the speech alone, and the Ordinance goes out of its way
10 to define the speech so as to include every form of communication imaginable – “the spoken,
11 printed, or written word, or bodily gestures, signs or other means.” Section 9.81.030(N). However,
12 this broad spectrum of the means of communication is only criminalized if the speaker is
13 communicating “with the purpose of obtaining an immediate donation of money or other thing of
14 value or soliciting the direct and immediate sale of goods or services.” Section 9.81.030(N). Other
15 speakers on the same public sidewalks who are making other requests for the immediate attention
16 of the public – “sign my petition,” “sign up to work for my candidate,” or “register to vote”– are
17 not targeted because their message is different. This constitutes impermissible content-based
18 discrimination.

19 Courts have recognized the First Amendment infringements inherent in this distinction, and
20 have struck down ordinances on their face for this constitutional flaw. In *Clatterbuck v. City of*
21 *Charlottesville*, the Fourth Circuit held that an ordinance that prohibited solicitation for the
22 immediate payment of money at a downtown mall was content-based:

23 The Ordinance plainly distinguishes between types of solicitation on its face.
24 Whether the Ordinance is violated turns solely on the nature or content of the
25 solicitor’s speech; it prohibits solicitation that requests immediate donations of
26 things of value, while allowing other types of solicitation, such as those that request
27 future donations, or that request things which may have no ‘value’- a signature or
28 a kind word, perhaps.

708 F.3d at 556.

1 In *ACLU of Idaho v. City of Boise*, 2014 WL 28821 (D. Idaho January 2, 2014), plaintiffs
2 sought a preliminary injunction against an ordinance very similar to Sacramento’s ordinance; the
3 restrictions included prohibitions on soliciting within 20 feet of an ATM, and on a public
4 transportation vehicle. *Id.* at *3. Because the Boise ordinance only prohibited requests for “the
5 immediate donation of money or other thing of value,” the court found that it was content-based:
6 “The ordinance does not restrict solicitation of signatures on a petition on a matter of public
7 concern, political support solicitation, religious solicitation, etc. in the same public areas. It only
8 restricts solicitation of speech for donations of money or property.” *Id.* at *5.

9 In *Kelly v. Parkersburg*, 978 F.Supp.2d 624, 629 (S.D. W.Va. 2013), the district court
10 issued a preliminary injunction enjoining enforcement of an ordinance prohibiting solicitation of
11 money within 20 feet of an intersection, holding that it was content-based: “A solicitor holding a
12 sign that says ‘Please donate’ violates the Ordinance while a solicitor holding a sign that says
13 ‘Vote for the Mayor’ does not.” *Id.* at 629.

14 In *Browne v. City of Grand Junction*, 2014 WL 1152020 (D. Colo. March 21, 2014), the
15 ordinance prohibited soliciting for employment or “contributions” directly from the occupant of
16 any vehicle on certain main thoroughfares. *Id.* at *3. The court found it to be content-based:

17 [I]t does not prohibit people from offering motorists political or religious literature,
18 asking for directions, or engaging in speech on any topic other than requests for
19 money, employment, or other ‘contributions’. This provision, by its very terms
20 singles out particular content for differential treatment and thus constitutes a
content-based restriction on speech.

21 *Id.* at *3 (citations omitted); *but see, Thayer v. City of Worcester* 2014 WL 2782178, (1st
22 Cir., June 19, 2014) (ordinance restricting all solicitations for immediate payment of money is
23 content neutral).

24 The examples of constitutionally impermissible distinctions raised by these courts are all
25 present in the Ordinance before this Court. Persons seeking signatures for petitions, requesting
26 political support, or seeking religious converts are all free to ignore the time, place, and manner
27 restrictions in the Ordinance. They can peacefully hold signs or advocate orally near bus stops and
28

1 ATM machines, at intersections and adjacent to driveways – as long as their signs or direct pleas
2 stay away from a prohibited message, such as “I am homeless. Please help,” or “Vietnam Vet –
3 Can You Spare Some Change.” This is a line that cannot be drawn consistent with the First
4 Amendment.

5 Plaintiffs are aware of *International Society for Krishna Consciousness v. Lee*, 505 U.S.
6 672 (1992), a case in which the United States Supreme Court upheld a regulation prohibiting the
7 "solicitation and receipt of funds" inside New York area airport terminals. *Id.* at 675. In *Lee*,
8 Justice Kennedy wrote a concurring opinion in which he stated that regulations that singled out
9 "[i]n-person solicitation of funds, when combined with the immediate receipt of that money,"
10 constitute a permissible content-neutral time, place, and manner regulation of speech. *Id.* at 705.
11 However, as recognized both explicitly and implicitly by the lower courts in the decisions
12 discussed above, each of which ruled that an “immediate solicitation” law was content-based,
13 neither the *Lee* decision nor Justice Kennedy’s concurrence is determinative of the question before
14 this Court, for the following reasons:

15 First, the Court in *Lee* ruled that an airport terminal was not a public forum, and therefore
16 the regulation of solicitation “need only satisfy a requirement of ‘reasonableness,’” the far less
17 protective test that applies to speech in nonpublic forums. *Lee*, 505 U.S. at 683. The Court’s
18 opinion did not rule on speech restrictions in public forum, as is the case here. *Id.* at 683.

19 Second, Justice Kennedy’s concurrence would not support the Sacramento Ordinance. The
20 *Lee* regulation prohibited the “solicitation *and* receipt of funds.” *Lee*, 505 U.S. at 676 (emphasis
21 added). Justice Kennedy placed great emphasis on the fact that the airport regulation was “directed
22 only at the physical exchange of money” and “permits expression that solicits funds...” *Id.* at 705.
23 However, as discussed above, the Sacramento Ordinance does the opposite – it does *not* prohibit
24 the “actual exchange of money” and *only* prohibits the solicitation of money.

25 Third, Justice Kennedy was speaking only for himself when he addressed in his *Lee*
26 concurrence the constitutionality of regulations that singled out the immediate solicitation of
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1 donations in a public forum; no other Justice joined that part of his opinion.⁶

2 In *Speet v. Schuette*, the Sixth Circuit struck down “an anti-begging statute” as a facially
3 invalid content-based restriction, and explicitly addressed Justice Kennedy’s opinion and
4 explained why it declined to follow its reasoning:

5 First, to the extent that Part II of Justice Kennedy's concurrence argues that the
6 ‘physical exchange of money’ may be isolated from the act of solicitation, it runs
7 contrary to *Schaumburg's* holding that solicitation of charitable donations is
8 ‘characteristically intertwined with informative and perhaps persuasive speech[.]’
9 *Schaumburg* does not suggest that the physical exchange may be isolated; it is
10 ‘intertwined’ with speech that the First Amendment protects. Second, Part II of
11 Justice Kennedy’s concurrence is not *Lee's* holding. And third, Justice Kennedy
12 wrote Part II without another Justice joining him.

13 726 F.3d at 876 (citation omitted).

14 The Ninth Circuit has not directly addressed this specific issue. In its recent en banc
15 decision in *City of Redondo Beach*, the Court struck down an ordinance that prohibited standing on
16 a street and soliciting contributions or employment from occupants of vehicles. 657 F. 3d at 940.
17 The court chose not to address the question of whether it was content-based, and struck it down as
18 not meeting the lower test for content-neutral time, place, and manner rules. *Id.* at 947-50.
19 However, in a concurring opinion, Judge M. Smith (joined by Judges Thomas and Graber), went
20 further and concluded that the ordinance was also content-based. *Id.* at 951. Judge Smith's
21 reasoning is consistent with the decisions discussed above and directly applies to the Sacramento
22 Ordinance:

23 Under the Ordinance, individuals may not stand on Redondo Beach streets or
24 sidewalks and communicate with motorists to ‘[s]olicit[] alms and contributions,’
25 solicit clients for their business, or solicit contributions to political fund. They
26 may, however, stand on those same streets or sidewalks and communicate with
27 motorists to solicit votes; solicit support for pending legislation; solicit
28 membership in a church, labor union or other organization; or . . . solicit moral
support (as occurs at labor pickets and political rallies, for example).

Thus, the Ordinance is facially content based: some solicitation speech is

⁶ While the three dissenting Justices joined Part I of his concurrence wherein he expressed the view that an airport terminal was a public forum, none of these three- or any other Justice- joined Part II of Justice Kennedy’s opinion where he addressed whether the solicitation rule met the standards for regulating speech in a public forum.

1 permitted and other solicitation speech is restricted. Individuals are subject to the
2 Ordinance ‘depending on what they say.’ If they request ‘employment, business,
3 or contributions’ they are subject to criminal sanction, but if they request anything
4 else, they are unaffected.

5 *Id.* at 953 (citations omitted).

6 Sacramento has not regulated the conduct involved in a hand-to-hand exchange of money.
7 The Ordinance regulates and criminalizes only the speech involved. The evidence of the offense
8 will be spoken words, a sign, a tin cup, an open guitar case, a bodily gesture, or any “other means”
9 of communication that conveys the message that “I need your help.” For a panhandler, the offense
10 is committed by just being in one of the prohibited locations with the wrong sign or gesture – it
11 does not matter whether there is any interaction or transfer of funds, or whether any passerby in a
12 car or on foot even sees the offending sign, much less feels threatened or coerced. This the First
13 Amendment does not allow.

14 **C. The Ordinance Cannot Survive Strict Scrutiny**

15 Because content-based restrictions on speech in the public forum raise the central concern
16 of the First Amendment, such restrictions must meet the highest level of judicial scrutiny. The
17 government has the heavy burden of showing that there are no “less restrictive alternatives” to
18 further a “compelling Government interest.” *United States v. Playboy Entertainment Group, Inc.*,
19 529 U.S. 803, 813 (2000).

20 Defendants cannot meet this burden in this case. This Ordinance is not the least restrictive
21 means necessary to protect the public or the County’s interests in traffic safety from Plaintiff
22 Murphy or other peaceful and passive panhandlers like him. To deal with panhandlers, or any
23 other solicitors, who act aggressively or intrusively in ways that threaten public or pedestrian
24 safety, there are a number of alternatives that the courts have found adequate. In *McCullen v.*
25 *Coakley*, __ U.S. __, 134 S. Ct. 2518 (2014), the Supreme Court found that a law creating buffer
26 zones on the sidewalks in front of abortion clinics burdened “substantially more speech than
27 necessary to achieve the Commonwealth's asserted interests.” *Id.* at 2537. This conclusion was
28 based in part on the availability of local ordinances preventing obstruction of sidewalk traffic that
were “less intrusive” on First Amendment rights. *Id.* at 2539. The Court added, “All of the

1 foregoing measures are, of course, in addition to available generic criminal statutes forbidding
2 assault, breach of the peace, trespass, vandalism, and the like.” *Id.* at 2538.

3 In *Redondo Beach*, the Ninth Circuit found that a vehicle solicitation law could not meet
4 even the lower intermediate test for content-neutral regulations of speech because of the
5 alternatives:

6 The City has various other laws at its disposal that would allow it to achieve its
7 stated interests while burdening little or no speech. The City need only enforce
8 laws against jaywalking, Cal. Veh. Code § 21954, stopping in traffic alongside a
9 red-painted curb, *id.* § 22500(c), and stopping a car ‘so as to obstruct the normal
10 movement of traffic,’ *id.* § 22651(b). Or the City could enforce its own ordinances
11 that provide that ‘[n]o person shall stand in any roadway, other than in a safety
12 zone or in a crosswalk, if such action interferes with the lawful movement of
13 traffic[,]’ and ‘[n]o pedestrian shall stop or stand on a sidewalk except as near as
14 is physically possible to the building line or the curb line at any place in the
15 Central Traffic District or any business district.’ Redondo Beach Municipal Code
16 §§ 3–7.1004, .1005. Even under the intermediate scrutiny ‘time, place, and
17 manner’ analysis, we cannot ignore the existence of these readily available
18 alternatives.

19 *Comite de Jornaleros de Redondo Beach*, 657 F.3d at 949-950 (footnote omitted).

20 These alternatives are all available to Sacramento County.

21 Of course, as with many laws that directly affect the homeless and panhandlers, a
22 consideration for the legislative body may have included the discomfort and upset that some
23 people feel by the presence of obviously poor and homeless people on the public streets. That may
24 include owners of businesses and their customers. Certainly to the extent that this upset and
25 concern generates public complaints about threatening or aggressive conduct, then that is certainly
26 a compelling governmental concern. However, in traditional public forums like the sidewalks, the
27 government may not “selectively . . . shield the public from some kinds of speech on the ground
28 that they are more offensive than others.” *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 209
(1975). A law that is “concerned with undesirable effects that arise from ‘the direct impact of
speech on its audience’ or ‘[l]isteners’ reactions to speech’” would not be a content neutral law.
McCullen, 134 S. Ct. at 2531-32 (quoting *Boos v. Barry*, 485 U.S. 312, 321(1988)). “Suffice it to

1 say that if protecting people from unwelcome communications . . . is a compelling state interest,
2 the First Amendment is a dead letter.” *Hill v. Colorado*, 530 U.S. 703, 748-49 (2000).

3 **III. Plaintiffs Face Irreparable Harm**

4 “When contesting the constitutionality of a criminal statute, ‘it is not necessary that [the
5 plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute
6 that he claims deters the exercise of his constitutional rights.’” *Babbitt v. United Farm Workers
7 Nat’l Union*, 442 U.S. 289, 299 (1979) (quoting *Steffel v. Thompson*, 415 U.S. 452,459 (1974)).
8 The Ordinance has already chilled the First Amendment rights of peaceful panhandlers such as
9 William Murphy who seek to engage in this constitutionally protected activity in public places in
10 Sacramento County without being singled out for unconstitutional restrictions and the threat of
11 criminal sanctions. *See* Murphy Decl. ¶ 7, Lomazzi Decl. ¶ 8. “The loss of First Amendment
12 freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod
13 v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion); *see also*, *Valle Del Sol, Inc. v. Whiting*, 709
14 F.3d 808 (9th Cir. 2013); *Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009).

15 **IV. The Balance of Equities is in Plaintiffs’ Favor and a Preliminary Injunction
16 Protecting First Amendment Rights Serves the Public Interest**

17 When an injunction is sought against the government, these last two prongs “are largely the
18 same” and can be considered together. *Scott v. Roberts*, 612 F.3d 1279, 1290 (11th Cir. 2010).
19 Many courts have recognized that public interest is served when the constitution is upheld. *See e.g.*
20 *Klein*, 584 F.3d at 1208 (public interest favors upholding First Amendment); *Giovani Carandola,
21 Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (“upholding constitutional rights surely serves the
22 public interest”).

23 Last year the Ninth Circuit affirmed a preliminary injunction barring enforcement of an
24 Arizona day-laborer solicitation law that constituted an unconstitutional content-based restriction of
25 commercial speech on its face. *Valle Del Sol, Inc. v. Whiting*, 709 F.3d at 820. Even under the
26 reduced protection that the First Amendment affords commercial speech, the Court held that the test
27 for a preliminary injunction barring enforcement of the law was met:

1 The [district] court correctly found that the equities tip in favor of the plaintiffs
2 because they have a significant First Amendment and economic interest in engaging
3 in solicitation speech and Arizona need not impede that speech in order to pursue
4 its traffic safety goals. Finally, the court correctly found that an injunction is in the
5 public interest because the day laborer provisions, if enforced, would infringe the
6 First Amendment rights of many persons who are not parties to this lawsuit.

Id. at 828-29.

7 The Court's reasoning applies fully and directly to the instant case. A preliminary
8 injunction barring enforcement of the Sacramento Ordinance should issue.⁷

9 CONCLUSION

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

DATED: July 25, 2014

Respectfully Submitted,

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22 _____
23 ⁷ No bond pursuant to Federal Rule of Civil Procedure Rule 65(c) is necessary in this case. First,
24 Plaintiffs are poor, or represent the poor and homeless. *See Barahona-Gomez v. Reno*, 167 F. 3d
25 1228, 1237 (9th Cir. 1999); *Orntes-Hernandez v. Smith*, 541 F. Supp 351, 385, n. 42 (C.D. Cal.
26 1982). Second, plaintiffs have a strong likelihood of success on the merits. *See Scherr v. Volpe*, 466
27 F.2d 1027, 1035 (7th Cir. 1972). Third, an injunction here would serve the public interest protecting
28 constitutional rights. *Advocacy Ctr. for Elderly & Disabled v. Louisiana Dep't of Health & Hospitals*, 731 F. Supp. 2d 603, 626-27 (E.D. La. 2010). Fourth, there is no realistic likelihood of harm to Defendants resulting from issuance of the injunction, which prohibits it from enforcing an unconstitutional ordinance statute; this may in fact benefit Defendants by reducing potential monetary liability. If the Court feels that the Bond requirement is mandatory, it should order the nominal amount of \$1.00.