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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

SACRAMENTO HOMELESS ORGANIZING COMMITTEE, et al.,

Plaintiffs,

vs.

COUNTY OF SACRAMENTO, et al.,

Defendants.

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

PLAINTIFFS' REPLY IN SUPPORT OF PRELIMINARY INJUNCTION MOTION

DATE: August 28, 2014
TIME: 2:00 p.m.
COURTROOM: 2 (15th Floor)
JUDGE: Hon. Troy L. Nunley

INTRODUCTION

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Dept. of City of Chicago v. Mosely*, 408 U.S. 92, 95 (1972). The Aggressive and Intrusive Solicitation ("AIS") Ordinance is an unconstitutional content-based regulation of speech on two separate grounds, each of which calls for the facial invalidation of the Ordinance in its entirety. All the requisites for preliminary injunctive relief have been met.

I. THE ORDINANCE IS CONTENT-BASED BECAUSE IT DISTINGUISHES BETWEEN SOLICITORS BASED ON THE CONTENT, MESSAGE AND SUBJECT MATTER OF THEIR SPEECH

A. Panhandling versus Charitable Solicitation

If solicitors in the prohibited locations request a donation for themselves, they are in violation of the AIS Ordinance, but if they request a donation for a charitable purpose in the same location they are exempt. Defendants make no attempt to contest Plaintiffs' legal argument that this is an unconstitutional content-based regulation of speech. Instead, Defendants create a litigation fog around the charitable solicitation exemption, and then argue that Plaintiffs' focus on it is "misplaced" because the exemption does not mean what it says. Def.s' Opp. at 14 (ECF Doc. 8). In fact, Defendants are for purposes of this litigation rewriting the Ordinance (while ignoring its legislative history) to convince this Court that it should postpone any judicial action.

Defendants' argument flies in the face of the "plain language" of the Ordinance. In Section 9.81.050 (ECF Doc. 9-1 at 4-5), labeled clearly in bold as "**Exemptions**", the Ordinance lists two activities that will not be prohibited– first, the lawful vending of goods and services and, second, soliciting for charitable purposes in compliance with the charitable solicitors permit ordinance.

Defendants argue that the "Exemption" is not an exemption, but rather "evinces only an intent not to abrogate that section of the County Code [5.64], which does not give charitable solicitors the right to solicit anywhere they please." (Def.s' Opp. at 5, ¶ 3.) If the Board of Supervisors wanted to insure that the

AIS Ordinance was not construed to "abrogate" the Soliciting for Charitable Purposes Ordinance, they would have written something like this: "Nothing is this chapter abrogates any of the provisions of Chapter 5.64." And they would not have labeled that an "**Exemption**".

To defeat this Motion, Defendants are apparently prepared for a tradeoff- they will inject vagueness and uncertainty into their own Ordinance in order to obfuscate the discrimination in favor of charitable solicitors. Defendants' discussion of *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014) adds to the fog. In that case, the city adopted an Aggressive Panhandling Ordinance similar in many respects to the AIS Ordinance, without the charitable solicitation exemption. There was a separate Worcester ordinance that set up a permit system for "tag days", a practice that allowed charitable organizations, civic groups and political groups to solicit from traffic islands and medians. *Id.* at 65. Plaintiffs agree with Defendants that the repeal of the "tag day" ordinance was viewed by Justice Souter as curing the content-based discrimination in the panhandling ordinance. Def.s' Opp. at 14-15.

Plaintiffs are at a loss, however, to see how this supports Defendants' position in this case. Defendants have **not** repealed their charitable solicitation permit ordinance. More importantly, they have **not** repealed the charitable solicitation exemption in the AIS Ordinance. Justice Souter reached his conclusion because, as a result of the repeal, "Girl Scout cookie sellers and Salvation Army bell-ringers are as much subject to the Aggressive Panhandling Ordinance as the homeless panhandler." *Thayer*, 755 F.3d at 70. That is **not** true in Sacramento County under the AIS Ordinance.

The fog created by the Defendants around the charitable exemption is dispelled when the legislative history is taken into account. The transcript of the public hearing before the Board of Supervisors meeting on April 22, 2014 shows that Defendants' current interpretation has been newly-minted for this litigation. During the Board hearing, the following colloquy took place between a woman named Melinda Eppler, the executive director of the Fulton Avenue Association, and Board member Susan Peters:

> EPPLER: I'm a little bit concerned about the term "solicitor" versus "panhandler," because I've heard both here today and I've seen both in the verbiage, and I think the ordinance is really well-written, but at some of these establishments there are solicitors that are not

> necessarily endorsed by—say—Trader Joe's, but they're representatives of Greenpeace, for example. They're not a person asking for a hand-out. So, I think that there needs to be some delineation between "solicitor" versus "panhandler," because I think there is a difference.
> PETERS: So, we don't want to arrest the Girl Scouts (overlapping)
> EPPLER: Correct.
> PETERS: (Overlapping) selling cookies?
> EPPLER: I don't think that that would be a good idea. Girl Scouts, Greenpeace—and, you know, as we all know, we can choose to say "no" to Greenpeace, if we wish, or with Girls Scouts or what have you, but it's easier to say "no" to someone that you think is just reaching out for a dollar to get a beer or whatever it is that they're reaching out to get.

Later, during the same public meeting, this exchange occurred between Supervisor Peters and Sacramento County Counsel John F. Whisenhunt:

> PETERS: Can I ask the County Counsel, or Captain Morgan, on the definitions here, item "N," where the solicit—so we can get the—kind of—the girl scout versus the intrusive panhandler?
> WHISENHUNT: Well the—I think the response—we talk—"panhandling" is specifically identified in the definition. But if you look at 9.81.050 there are exemptions from the prohibitions—
> PETERS: Oh. Ok.
> WHISENHUNT: (Overlapping) that I think cover those types of activities.
> PETERS: Ok.[1]

The legislative intent behind the charitable exemption is clear. A member of the business community who was a supporter of the Ordinance as applied to panhandlers, did not want it to apply to groups like the Girl Scouts and Greenpeace. Supervisor Peters agreed, and asked the County Counsel for clarification. The County Counsel reassured her (and the director of the business association) by explaining that "there are exemptions from the prohibitions which 'cover these types of activities.'" *Id.*

II. THE ORDINANCE IS CONTENT-BASED BECAUSE IT PROHIBITS SPEECH BASED UPON WHETHER THE SPEAKER REQUESTS AN IMMEDIATE DONATION

Defendants refer repeatedly to their Ordinance as prohibiting "the act of solicitation" (Def.s' Opp. at 5, 6, 8), but this cannot change the fact that on its face the AIS Ordinance targets speech, and only speech. In *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 945-46 (9th Cir. 2011), the city also argued that its solicitation ordinance should be construed to "regulate only solicitation *conduct*, not solicitation *speech*, such that the Ordinance prohibits the *acts* of …exchanging money." The

[1] *See* Decl. of Paul Masuhara ISO Reply to Def.s' Opp. to Mot. For Prelim. Inj.

Ninth Circuit disagreed: "The Ordinance applies to more than an actual physical exchange… '[A] solicitation is nothing more than a request in which the solicitor communicates, in some fashion, his desire that the person solicited do something, such as give money…'" *Id.* at 946 (internal citations omitted). The same is true here – the AIS Ordinance regulates solicitation speech, not solicitation conduct.

Defendants are mis-stating the legal landscape with respect to this issue. There is no "binding precedent" that controls this Court's decision because neither the United States Supreme Court nor the Ninth Circuit has issued a decision resolving this question. As Plaintiffs pointed out in their Opening Brief (ECF Doc. 5-1), Justice Kennedy's opinion in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 703-09 (1992) joined by no other Justice, is certainly not "binding"; in fact it is introduced by the Justice himself with "it is my view, however…" (*Id.* at 703). The airport regulation Justice Kennedy was addressing restricted the "solicitation *and* receipt of funds", and thus was "directed only at the physical exchange of money" (*Id.* at 705 (emphasis added)), which the Sacramento County Ordinance most assuredly is not. The dicta relied on by Defendants from *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009) only underscores the critical distinction that Defendants are ignoring: "…the ordinance at issue in *ACORN*, like that in *Lee, prohibited only the immediate physical exchange of money*. Such a regulation is not a content-based regulation of speech, and so does not run afoul of the content neutrality requirement." *Berger*, 569 F.3d at 1052, fn. 23 (emphasis added).

Defendants either ignore or distort the cases cited by Plaintiffs. Plaintiffs are making no claim that these cases are "binding." However, these courts directly addressed ordinances that restricted the immediate solicitation of donations but not the immediate solicitation for votes or petition signatures. Plaintiffs believe that these courts got it right when they found these ordinances content-based. *See Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 556 (4th Cir. 2013) ("Whether the Ordinance is violated turns solely on the nature or content of the solicitor's speech: it prohibits solicitations that request immediate donations of things of value, while allowing other types of solicitations, such as those that

request future donations, or those that request things which may have no 'value'– a signature or a kind word, perhaps."); *Kelly v. City of Parkersburg*, 978 F.Supp.2d 624, 630 (S.D. W. Va. 2013) ("A solicitor of votes presumably presents the same traffic safety concerns as a solicitor of money or contributions. Yet only solicitors requesting money or contributions are regulated by the Ordinance."); *Browne v. City of Grand Junction*, 2014 WL 1152020 (D. Colo. Mar. 21, 2014) at *3 (ban on soliciting contributions or employment or business "directly from the occupant of any vehicle" is a content-based restriction on speech because "[i]t does not prohibit people from offering motorists political or religious literature, asking for directions or engaging in speech on any topic other than requests for money, employment or other 'contributions'.").

III. THE REQUISITES FOR PRELIMINARY INJUNCTIVE RELIEF HAVE BEEN MET

A. Standing

Defendants challenge SHOC's standing.[2] An organizational plaintiff may assert standing in two ways: (1) on behalf of the organization itself, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982), or (2) on behalf of the members of the organization, *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 342 (1977). SHOC has established its standing in both capacities.

Defendants have completely ignored the "unique standing considerations" that are applied in First Amendment challenges. *Arizona Right to Life Political Action Committee v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003). "…[I]n recognition that 'the First Amendment needs breathing space', the Supreme Court has relaxed the prudential requirements of standing in the First Amendment context." *Canatella v. State of California*, 304 F.3d 843, 855 (9th Cir. 2002).

[2] Defendants make passing reference to Plaintiff William Murphy's standing in a footnote, implying he lacks standing because he has not alleged that he intends to continue panhandling in the future. Def.s' Opp. at 16, fn. 3. However, no such requirement to establish standing exists. *See Libertarian Party of Los Angeles County v. Bowen*, 709 F.3d 867 (9th Cir. 2013). Plaintiff Murphy has explicitly stated that his ability to panhandle has been chilled by adoption and prospective enforcement of the Ordinance. (Murphy Dec., ECF Doc. 5-3 at 2:9-16.) Additionally, filed concurrently with this brief, Plaintiff Murphy has stated his intent to continue to panhandle in the future. (Supplemental Murphy Dec. at 1:25.)

When determining the standing of an organization on its own behalf, courts "conduct the same inquiry as in the case of an individual[.]" *Havens Realty Corp.*, 455 U.S. at 378. In a First Amendment pre-enforcement challenge, standing is established if plaintiff alleges "a credible threat of prosecution". *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979).

Applying the "same inquiry" to SHOC, the organization has "direct standing to sue [when] it show[s] 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, LLC*, 666 F.3d 1216, 1219 (9th Cir. 2012). SHOC has alleged that it will be forced to spend resources and staff time to educate its vendors to prevent violations of the Ordinance and consequent legal problems. (Lomazzi Dec., ECF Doc. 5-5 at ¶ 7). That SHOC's expenditure of resources is prospective no more eliminates its standing to bring this pre-enforcement challenge than does the fact the William Murphy's injury is prospective, as they are both tied to a "credible threat of prosecution." *Babbitt*, 442 U.S. at 298.

"[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. Defendants argue that SHOC does not have standing on behalf of its members because its membership policy is "too speculative" and its organizational purpose "is too vague to show a connection to the issues in this litigation." Def.s' Opp. at 16:15-20. Defendants are trying to impose the kind of rigid standing requirements that are not used by the courts in First Amendment challenges. The distribution of the Homeward newspaper is at the heart of SHOC's mission. (Lomazzi Dec., ¶ 3-6). SHOC members who have and will distribute the paper in Sacramento County in exchange for donations have the same standing as William Murphy. The only case cited by Defendants, *Kukui Gardens Ass'n v. Jackson*, 2007 U.S. Dist. LEXIS 2308 (D. Haw. 2007), is inapposite.

B. Ripeness

The Supreme Court has provided legislators with a guiding principle when speech is being regulated: "Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975). In disregard of that admonition, Defendants' brief has attempted to create uncertainty and confusion around the AIS Ordinance's charitable solicitation exemption. Defendants' purpose is clear – by calling into question the precision and clarity of its own Ordinance, Defendants hope to convince the Court that it should wait until some later stage of the litigation before the merits of this case are considered.

Defendants' argument that this facial challenge is "premature" is not supported by the case law. Def.s' Opp. at 8, 15. The case Defendants cite, *Foti v. City of Menlo Park*, 146 F.3d 629 (9th Cir. 1998), does lay out the standards for a facial challenge, but Defendants have not applied them correctly. The *Foti* Court explained:

> An ordinance may be facially unconstitutional in one of two ways: either [ ] it is unconstitutional in every conceivable application, or [ ] it seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad.

Foti, 146 F.3d at 635 (internal citations eliminated). Defendants' discussion of *Foti* and *Thayer* is exclusively an argument as to whether the second type of facial challenge – substantial overbreadth– can be made in this case (Def.s' Opp. at 15-16). But this discussion is irrelevant, because plaintiffs' facial challenge is not based on substantial overbreadth, but rather on the first type of facial challenge identified in *Foti*, *i.e.*, that the Ordinance can never be constitutionally applied because of the content-based distinction on its face.[3]

The fundamental flaw of a statute that is content-based on its face is that it is an official act of

[3] The United States Supreme Court has also recognized these "two analytically distinct grounds" for a facial challenge, and described the first in terms directly applicable to this case: "One is that the measure in effect restricts too little speech because *its exemptions discriminate on the basis of the sign's message*." *City of Ladue v. Gilleo*, 512 U.S. 43, 50-51 (1994) (emphasis added).

government that favors some speech over others based on its content, message or subject. Such a statute can never be applied in a constitutional manner, for the damage to the First Amendment has already taken place – the Ordinance reflects an "improper attempt[] to value some forms of speech over others." *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994). That is why such laws are "presumptively invalid." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992); *Gilleo*, 512 U.S. at 58 (O'Connor, J., con. Op.) ("With rare exceptions, content discrimination in regulations of the speech of private citizens on private property or in a traditional public forum is presumptively impermissible, *and this presumption is a very strong one*.") (emphasis added). In spite of Defendants' efforts to relegate Plaintiffs to an as applied challenge in the future, this is a facial challenge that is ripe for judicial review. Defendants' "let's wait and see" approach, is inconsistent with First Amendment standards.

C. Severability

Defendants suggest that if the Court concludes that the charitable solicitation exemption is content-based, then the Court should just strike the exemption, leaving the rest of the law intact (Def.s' Opp. at 20). However, such a judicial rewriting of the Ordinance is not appropriate; federal courts "will not rewrite a state law to conform it to constitutional requirements." *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 397 (1988). This Court should invalidate the statute in its entirety, so that the Board of Supervisors and the interested members of the public will have an opportunity to discuss and debate whether they want to impose these kind of restrictions to non-panhandler solicitors.

The case cited by Defendants in support of its severance argument provides the very reason why this Court should **not** sever the exemption. In *United Food & Commercial Workers Local 99 v. Bennett*, 934 F.Supp.2d 1167 (D. Ariz. 2013), the court acknowledged the principles of judicial restraint that must be considered when a court is asked to facially invalidate a statute. However, the court then explained why those same principles of judicial restraint led it to conclude that it would **not** sever the unconstitutional language in the case before it, and its reasoning applies with equal force to the instant case:

> Nevertheless, such a severance would criminalize speech by a much broader range of speakers than actually designated by the legislature, and thus restrict a larger amount of speech, than does the statute in its present form. Further, to the extent it was the Legislature's intent to criminalize particular speech by labor unions only, which it appears to the Court it was, the severance would not maintain the Legislature's intent. … Absent a compelling reason to do so, this Court will not assume that it would be consistent with the Legislature's intent for the Court, in severing part of a statute, to criminalize a broader scope of speech than the Legislature designated as criminal. Thus, the unconstitutional applications cannot be severed from § 23–1322(B) and the subsection is struck in its entirety.

Id. at 1195 (emphasis added) (internal citations omitted).

Striking down only the exemption, as the Court is invited to do by Defendants, would in effect extend the prohibitions of the AIS Ordinance to charitable solicitors by judicial order. It is quite clear that in this instance the Board of Supervisors chose **not** to impose the prohibitions on charitable solicitors, and thus it is unclear whether the Board of Supervisors would have passed, or will pass in the future, such an ordinance if it was not targeting only panhandlers. This is an issue that should be decided by the elected representatives of the Sacramento County Board of Supervisors after public debate, not by this Court.

D. Balance of Harms

Defendants' remaining arguments with respect to the requisites for a preliminary injunction are entirely based on the premise that this is not a content-based Ordinance. Def.s' Opp. at 5, 8. They have presented the Court with no reason why a preliminary injunction should not issue if the Court finds that the Ordinance is content-based.

All the requisites have been met. If this Ordinance is unconstitutional on its face, then the First Amendment rights of Plaintiffs are abridged each day it remains on the books – both because it represents an impermissible choice by government to favor the speech of charitable solicitors over the speech of panhandlers, and also because it chills the exercise of First Amendment rights to solicit. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Foti,* 146 F.3d at 643. Defendants describe no emergency that will be created if this Court's invalidation of the Ordinance sends this issue back to the Board for their deliberations. The status quo is not affected

because the Ordinance has not yet gone into effect, as Defendants have postponed enforcement for months.

The primacy of First Amendment rights, and the irreparable nature of the harm done to the Plaintiffs and the public when they are abridged, has led many courts to issue preliminary injunctions after concluding that solicitation ordinances were violations of the First Amendment. See, e.g., *Foti*, 146 F. 3d at 643; *Valle Del Sol, Inc. v. Whiting*, 709 F.3d 808, 828-29 (9th Cir. 2013) ("…[T]he court correctly found that an injunction is in the public interest because the day laborer provision, if enforced, would infringe on the First Amendment rights of many persons who are not parties to this lawsuit."); *Cutting v. City of Portland*, 2014 WL 580155 at *10 (D. Me. Feb. 12, 2014) (preliminary injunction issued to enjoin content-based solicitation ordinance; "Plaintiffs' interest in avoiding interference with their rights to free speech outweighs the City's interest in enforcing an unconstitutional ordinance."); *Browne*, 2014 WL 1152020 at *3 (TRO issued to enjoin content-based solicitation ordinance; "When a law is likely unconstitutional, the government's interest in enforcing the law does not outweigh that of individuals in securing the protection of their constitutional rights."). This Court should act now.

CONCLUSION

For all the foregoing reasons, Plaintiffs motion for a preliminary injunction should be granted.

DATED: August 21, 2014

Respectfully Submitted,

By: /s/ Alan L. Schlosser
Alan L. Schlosser

Attorneys for Plaintiffs