ACLU-NC V. CITY OF REDDING #172012
PRIGMORE V. CITY OF REDDING #172020

TENTATIVE RULING ON ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION: Plaintiffs seek a preliminary injunction enjoining implementation or enforcement of certain sections of the Outdoor Public Forum Policy, Resolution Number 2011-1 adopted by the Redding City Council on April 18, 2011, and hereafter referred to as *Library Policy Resolution*.[1] Plaintiffs also seek a preliminary injunction enjoining Defendants from enforcing certain ordinances of the Redding Municipal Code.

SECTIONS OF THE LIBRARY POLICY RESOLUTION AT ISSUE

- Section I (b) and (c): *Repetitive distribution of written material such as pamphlets, handbills, circulars, newspapers, magazines and other materials (Leafleting) to Library patrons may only be engaged in as follows:*

  ……
  b) if it does not involve the solicitation of funds;
  c) if material is distributed from within the area described in the attached diagram (free speech area).

- Section II: *No materials may be left on the windshields of automobiles parked on Library grounds.*

- Section IV (4) (c): *The exercise of free speech and assembly rights must comply with all applicable federal, state and local laws. In addition, such activities or any aspect of such activities, both within or outside the free speech area, shall be modified or shall cease after warning in accordance with any directive issued by Library staff, upon determination by Library staff that the behavior is:*

  ……..
  4) *Harassing persons in the immediate area of activity. A person shall be considered to harass another if he or she:*
  ……..
  c) In a public place, makes an offensively coarse utterance, gesture, or display, or addresses abusive language toward another person; ..

[1] In adopting the policy, the Redding City Council was acting as the Redding Municipal Library Board of Trustees. The Library Policy Resolution is properly viewed as the City of Redding's authoritative interpretation of Redding Municipal Code §2.42.120.A.5 as it relates to the Redding Municipal Library. [*Santa Monica Food Not Bombs v. City of Santa Monica* (2006) 450 F.3d 1022, 1035]. Accordingly, any violation of the Library Policy is subject to prosecution as a misdemeanor. *See* RMC §1.12.010.

……..

- Procedure: *Reservations for the limited outdoor public forum area space can be made through the on-line room reservation system at Reserve A Room at www.shastalibraries.org. Online reservations shall be taken up to six (6) months in advance and need to be made at least seventy-two (72) hours in advance. Reservations will be taken on a first-come, first-served basis. Reservations are limited to five (5) days per month in order to provide availability to others. If use of the space beyond five days in any given month is desired and no one has reserved the space by the 72-hour deadline, or if space is available and is desired on less than 72 hours' notice, a short notice reservation may be requested through Library staff outside the on-line reservation system. However, any such short notice request must be made during the normal business hours when the administrative office of the Library is open from Monday through Friday 9 a.m. to 5 p.m., excluding holidays. No such request is guaranteed for approval if it cannot be processed in time or in the event a competing request was made through the on-line reservation system prior to the 72-hour deadline during non-business hours and the request is pending processing and confirmation by Library staff. After any on-line request is made, library staff will confirm availability and follow-up as necessary. A confirmation is e-mailed to the requesting party.*

SECTIONS OF THE REDDING MUNICIPAL CODE AT ISSUE

- RMC §2.42.120.A.5: *It is unlawful for any person to engage in any of the following activities within or upon the premises of the Redding Municipal Library:*

  ……..

  5. *Seeking or obtaining signatures on any petition, conducting surveys or investigations, distributing printed materials, or soliciting within any enclosed areas, or outside of enclosed areas on the premises except in accordance with reasonable time, place and manner restrictions imposed by the library director;*

  ……..

- RMC §6.36.060: *No person shall throw, distribute or place in or upon any automobile or other vehicle in the city any handbill, dodger, circular, newspaper, paper, booklet, poster or any other printed matter or advertising literature.*

- RMC §6.36.080: *It is unlawful for any person to distribute any handbill which does not have printed on the cover, front or back thereof, the name and address of the following:*

  A. The person or organization who printed, wrote, compiled or manufactured the handbill; and

B. The person or organization who caused the handbill to be distributed.

- RMC §6.36.100: *It is unlawful for any person to distribute any handbill as follows:*

  A. Which may reasonably tend to incite riot or other public disorder or which advocates disloyalty to or the overthrow of the government of the United States or of this state or of the local government by means of any artifice, scheme or violence, or which urges any unlawful conduct or encourages or tends to encourage a breach of the public peace or good order of the community; or
  B. Which is offensive to public morals or decency or contains blasphemous, obscene, libelous or scurrilous language.

THE COMPLAINTS

Plaintiffs ACLU-NC, Yost and Oertel assert three causes of action and a request for injunctive and declaratory relief:[2]

Second Cause of Action: Violation of Right to Free Speech Guaranteed by the California Constitution, Article I, Section 2 – relating to the above-referenced sections of the Library Policy Resolution.

Third Cause of Action: Violation of Right to Assemble Guaranteed by the California Constitution, Article I, Section 3 – relating to the Library Policy Resolution, section I(c) and the Procedure section.

Fourth Cause of Action: Violation of California Code of Civil Procedure §526a -- Illegal and Wasteful Expenditure of Public Funds in Violation of the United States Constitution, First Amendment, and the California Constitution, Article I, Sections 2 and 3.[3]

Injunctive and Declaratory Relief: Plaintiffs seek to enjoin the implementation and enforcement of the aforementioned sections of the Library Policy Resolution, and also seek a declaration from this Court that

[2] The First Cause of Action was voluntarily dismissed, as was the prayer for an award of attorney fees pursuant to 42 U.S.C.§1988.

[3] CCP §526a provides as follows: *An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is liable to pay, or, within one year before the commencement of the action, has paid, a tax therein. This section does not affect any right of action in favor of a county, city, town, or city and county, or any public officer; provided, that no injunction shall be granted restraining the offering for sale, sale, or issuance of any municipal bonds for public improvements or public utilities. An action brought pursuant to this section to enjoin a public improvement project shall take special precedence over all civil matters on the calendar of the court except those matters to which equal precedence on the calendar is granted by law.*

those sections are unconstitutional under both the United States Constitution and California Constitution.

Plaintiffs Suann Prigmore, Bostonian Tea Party, and North State Tea Party Alliance assert three causes of action:

> First Cause of Action: Declaratory and Injunctive Relief relating to the entire Library Policy Resolution.
>
> Second Cause of Action: Declaratory and Injunctive Relief relating to Redding Municipal Code §2.42.120.A.5 and section IV the Library Policy Resolution.
>
> Third Cause of Action: Declaratory and Injunctive Relief relating to Redding Municipal Code sections 6.36.060, 6.36.080, and 6.36.100.

COURT'S OBLIGATION TO DECIDE CONSTITUTIONAL CHALLENGES

State and local governments have allowed their sovereignty to be limited and restricted by the Constitution of the United States. [*Ableman v. Booth* (1859) 62 U.S. 506, 516.] Courts have the exclusive responsibility for deciding constitutional challenges to legislation:

> *It has long been the law that courts have inherent authority to determine whether statutes enacted by the Legislature transcend the limits imposed by either federal or state Constitutions. [Citation.] This power of the courts to pass on the constitutionality of legislative enactments is not derived from any specific constitutional provision, but is a necessary consequence of our system of government. It is the duty of courts to maintain supremacy of the Constitution. [Citations.]*

[*Byers v. Board of Supervisors of San Bernardino County* (1968) 262 Cal.App.2d 148, 157.]

If a portion of a statute is deemed constitutionally infirm, reviewing courts will only strike down that portion and preserve the remaining portions: "The fact that a statute is unconstitutional in part does not necessarily invalidate the entire statute. The remaining parts of the statute may be preserved if they can be separated from the unconstitutional part without destroying the statutory scheme or purpose." [*People v. McCaughan* (1957) 49 Cal.2d 409, 416.]

STANDING OF PLAINTIFFS TO CHALLENGE THE ORDINANCES AND RESOLUTION

Defendants do not challenge the standing of Plaintiffs in either of the cases.

To maintain a challenge to the provisions of an ordinance, or the implementing administrative interpretation, Plaintiffs must establish constitutional standing with regard to the provisions challenged. To do so, they must show (1) a "distinct and palpable" injury-in-fact that is (2) "fairly traceable" to the challenged provision or interpretation and (3) would "likely … be redressed" by a favorable decision. [*Santa Monica Food Not Bombs v. City of Santa Monica* (2006) 450 F.3d 1022, 1033 (citations omitted).]

Additionally, special standing principles apply in First Amendment cases. Plaintiffs seeking to vindicate their own constitutional rights may argue that an ordinance is unconstitutionally vague or impermissibly restricts a protected activity. It is sufficient for standing purposes that the plaintiffs intend to engage in a course of conduct arguably protected by constitutional rights, and there is a credible threat that a provision challenged as being unconstitutional will be invoked against the plaintiffs. [Citations omitted.] [*Santa Monica Food Not Bombs v.City of Santa Monica,* 450 F.3d at 1034.]

The Court finds that Plaintiffs in both cases have standing to challenge the provisions of the ordinances and the Library Policy Resolution.

STANDARD FOR ISSUANCE OF PRELIMINARY INJUNCTION AND BURDEN OF PROOF

Plaintiffs have the burden of proof. Plaintiffs must prove two things:

1. A reasonable probability of prevailing on the merits of their claims; and

2. Irreparable harm to Plaintiffs if the injunction is not issued which outweighs any potential harm which might be sustained by defendants if the preliminary injunction issues.

[*Best Friends Animal Society v. Macerich Westside Pavilion Property LLC* (2011) 193 Cal.App.4th 168.]

Additionally, when considering imposition of an injunction, the Court considers the goal of preservation of the status quo until a final determination of the merits of the action. [*Continental Baking Co. v. Katz* (1968) 68 Cal.3d 512, 528.]

REASONABLE PROBABILITY OF PREVAILING ON MERITS

Plaintiffs contend they have a reasonable probability of prevailing on the merits of their claim that certain sections of the Library Policy Resolution and Redding Municipal Code are unconstitutional under the First Amendment of the United States Constitution and Sections 2(a) and 3(a) of Article I of the California Constitution. As set forth below, the Court finds there is a reasonable probability that Plaintiffs will prevail on the merits of their claims.

Constitutional Provisions

The First Amendment of the United State Constitution states:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.*

Article I, Section 2(a) of the California Constitution states:

> *Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.*

Article I, Section 3(a) of the California Constitution states:

> *The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.*

"As a general matter, the liberty of speech clause in the California Constitution is more protective of speech than its federal counterpart." [*Griset v. Fair Political Practices Com.* (1994) 8 Cal.4th 851, 866, fn. 5.] Federal and California state court cases have found the free speech protections in the California Constitution to be broader and more protective than those provided by the First Amendment of the United States Constitution. [*Kuba v. 1-A Agricultural Ass'n* (9th Cir. 2004) 387 F.3d 850; *Best Friends Animal Society, supra*.] For example, under the California Constitution, a shopping mall was found by the California Supreme Court to be a public forum; whereas the First Amendment of the United States Constitution has been interpreted by the United States Supreme Court as not according shopping malls the designation of a public forum. [*Fashion Valley Mall* (2007) 42 Cal.4th 850, 869-70; *Hudgens v. NLRB* (1976) 424 U.S. 507, 519-521.] In *Fashion Valley Mall*, the California Supreme Court recognized the greater protections afforded its citizens by its Constitution:

> *Our decision that the California Constitution protects the right to free speech in a shopping mall, even though the federal Constitution does not, stems from the differences between the First Amendment to the federal Constitution and article I, section 2 of the California Constitution. We observed in Gerawan Farming, Inc. v. Lyons (2000) 24 Cal.4th 468, 486, 101 Cal.Rptr.2d 470, 12 P.3d 720, that the free speech clause in article I of the California Constitution differs from its counterpart in the federal Constitution both in its language and its scope. "It is beyond peradventure that article I's free speech clause enjoys existence and force independent of the First Amendment's. In section 24, article I states, in these very terms, that '[r]ights guaranteed by [the California] Constitution are not*

> *dependent on those guaranteed by the United States Constitution.' This statement extends to all such rights, including article I's right to freedom of speech. For the California Constitution is now, and has always been, a 'document of independent force and effect particularly in the area of individual liberties.' [Citations.]" (* Gerawan Farming, Inc. v. Lyons*, supra, 24 Cal.4th at pp. 489–490, 101 Cal.Rptr.2d 470, 12 P.3d 720.) "As a general rule, ... article I's free speech clause and its right to freedom of speech are not only as broad and as great as the First Amendment's, they are even 'broader' and 'greater.' [Citations.]" (* Gerawan Farming, Inc. v. Lyons*, supra, 24 Cal.4th 468, 491, 101 Cal.Rptr.2d 470, 12 P.3d 720.)*

[*Fashion Valley Mall, LLC v. NLRB,* 42 Cal.4th at 862-863.]

California has a right to afford greater protection and broader rights to its citizens than is afforded under the United States Constitution. [*Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 365-366; *Raven v. Deukmejian* (1990) 52 Cal.3d 336, 352-354, citing *People v. Longwill* (1975) 14 Cal.3d 943, 951, fn. 4 (overruled on other grounds).] The construction of the California Constitution remains a matter of California law regardless of the narrower manner in which decisions of the United States Supreme Court may interpret provisions of the Federal Constitution. [*People v. Pettingill* (1978) 21 Cal.3d 231.]

Presumption of Constitutionality

As a general matter, acts of a legislative body are presumed constitutional. [*County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 336.] The burden is on the challenger to show otherwise. [*California Taxpayers' Assn. v. Franchise Tax Bd.* (2010) 190 Cal.App.4th 1139, 1146-1147.] Courts must "'uphold a statute unless its unconstitutionality clearly, positively, and unmistakably appears; all presumptions and intendments favor its validity.'" [*People v. Manning* (2008)165 Cal.App.4th 870, 877, quoting *People v. Hansel* (1992) 1 Cal.4th 1211, 1219.] The exercise of legislative power is afforded considerable deference:

> *[T]he Legislature … may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution. [Citations.] In other words, we do not look to the Constitution to determine whether the legislature is authorized to do an act, but only to see if it is prohibited … [¶][A]ll intendments favor the exercise of the Legislature's plenary authority: If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action.*

[*State Personnel Board v. Dept. of Personnel Administration* (2005) 37 Cal.4th 512, 523, internal quotations marks removed, citing *Methodist Hosp. of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691.]

However, a content-based restriction is an exception to the general rule of the presumption of constitutionality of statutes. If a statute or ordinance is a "prior restraint" on the exercise of free speech rights, the legislative body comes to the Court "bearing a heavy presumption against its constitutional validity." [*Vance v. Universal Amusement Co., Inc.* (1980) 445 U.S. 308, 317.] "This heavy presumption is justified by the fact that 'prior restraints on speech … are the most serious and the least tolerable infringement on First Amendment rights.' [citation]" [*Grossman v. City of Portland* (9th Cir. 1994) 33 F.3d 1200, 1204.] Also, the government bears an extraordinarily heavy burden to regulate speech in public forums. [*Id,* quoting from *NAACP v. City of Richmond* (9th Cir. 1984) 743 F.2d 1346, 1355.]

Nature of the Property
Public Forum Issue

To determine the issues presented, the Court first must address whether the space at issue is a public forum.

The specific areas implicated are: (1) the public open space on the entry side of the Library, (2) the entry and exit door area to the Library, and (3) the adjacent parking lot.[4] The areas are City-owned, controlled, and maintained.

If the area is a traditional or designated public forum, and the restrictions result in excluding the content of speech, the City must show that the regulation is necessary to serve a *compelling* government interest and that it is narrowly drawn to achieve that end. [*Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.* (1983) 460 U.S. 37, 45, (citing *Carey v. Brown* (1980) 447 U.S. 455, 461); *International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles* (2010) 48 Cal.4th 446, 457; *San Leandro Teachers Association v. Governing Board of the San Leandro Unified School District* (2009) 46 Cal.4th 822, 838.] This is referred to as the "strict scrutiny" test, which is the highest level of free speech protection.

If the area is a traditional or designated public forum, but the restriction is content-neutral and relates only to time, place and manner of speech, an "intermediate scrutiny" test applies, meaning that the regulations survive only if they are narrowly tailored to serve a *significant* (as opposed to *compelling*) government interest and leave ample alternative channels of communication. [*Perry Educ. Ass'n. v. Perry Local Educators' Ass'n., supra; International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles, supra; San Leandro Teachers Association v. Governing Board of the San Leandro Unified School District, supra*.]

[4] Defendants devote a few pages of its opposition to the interior of the library. However, the areas implicated in this case do not involve the inside of the library. It is the City's *Outdoor* Public Forum Policy which is at issue.

For all remaining public property, sometimes referred to as "nonpublic forums," the challenged regulation "need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." In other words, the restriction must be "viewpoint neutral." [*Clark v. Burleigh* (1992) 4 Cal.4th 474, 483.]

Public places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks are considered to be public forums. Such places have, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. [*International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles,* 48 Cal.4th at 455; *Santa Monica Food Not Bombs v. City of Santa Monica,* 450 F.3d at 1036 and cases cited therein.][5]

The following three factors have been emphasized "in considering whether an area constitutes a traditional public forum: (1) the actual use and purposes of the property, particularly status as a public thoroughfare and availability of free public access to the area [citations]; (2) the area's physical characteristics, including its location and the existence of clear boundaries delimiting the area [citations]; and (3) traditional or historic use of both the property in question and other similar properties [citations]. … Use of a forum as a public thoroughfare is often regarded as a key factor in determining public forum status. [citations]" [*ACLU of Nevada v. City of Las Vegas* (9th Cir. 2003) 333 F.3d 1092, 1101.]

Defendants contend that the area outside the library is not a traditional public forum. Defendants argue that the City never intended that this area be a public forum. Paradoxically, the Policy is entitled "Outdoor *Public Forum* Policy – Redding Municipal Library." [Emphasis added.] Putting aside that apparent inconsistency, the City's intent is not a factor in determining whether the area is a traditional public forum. [*ACLU of Nevada v. City of Las Vegas,* 333 F.3d at 1105.] Once it is determined that an area is a traditional public forum, the area is open for expressive activity regardless of the government's intent. [*Arkansas Educ. Tele. Comm'n. v. Forbes* (1998) 523 U.S. 666, 678.]

Courts interpreting the free speech provisions of the California Constitution have held the following areas to be public forums:

- Private shopping malls [*Fashion Valley Mall, supra*];

[5] Defendants cite *U.S. v. Kokinda* (1990) 497 U.S. 720 as standing for the proposition that a postal sidewalk constructed solely to assist postal patrons to negotiate the space between the parking lot and the front door of the post office was a non-public forum. That was not the holding the case. Four members of the court came to that conclusion. However, the holding of the case was that the regulation was content-neutral. Justice Kennedy provided the fifth vote for the majority and wrote in a concurring opinion that he found it unnecessary to reach a conclusion whether it was a traditional public forum, but found the walkway to be more than a non-public forum.

- Parking lot and walkways around convention centers [*Kuba v. 1-A Agricultural Ass'n.,* 387 F.3d at 857];
- Parking lot and walkways around Anaheim Stadium [*Carreras v. City of Anaheim* (9th cir. 1985) 768 F.2d 1039 (reversed on other grounds)];
- Visitor's center at a weapons lab [*UC Nuclear Weapons Labs Conversation Proj. v. Lawrence Livermore Laboratory* (1984) 154 Cal.App.3d 1157];
- Parking lot at a prison [*Prisoners Union v. Department of Corrections* (1982) 135 Cal.App.3d 930].

The area outside the library in this case is similar to the area outside a library in the case of *Coe v. Town of Blooming* Grove (S.D.N.Y. 2008) 567 F.Supp.2d 543, 559. The court in *Coe* determined the area to be a traditional public forum.

Based on the above legal precedent, this Court finds that plaintiffs have a reasonable probability of prevailing on their claim that all three areas in question -- the public open space on the entry side of the Library, the entry and exit door area to the Library, and the adjacent parking lot -- are traditional public forums. There is substantial, indeed overwhelming, evidence which supports this finding. The Library occupies an important center of the City's intellectual, cultural, and political consciousness. The Library was built with State money and funds passed by public vote. The Library sits at the intersection of three public parks and is part of the general municipal area that surrounds City Hall. It serves as a gathering place for a wide cross-section of the community. The area in front of the entrance is similar to a sidewalk area, but encompasses even a larger area than a sidewalk, allowing enough space for communicative activity that does not impede entry or exit. The designation of the outside of the library as a traditional public forum for communicative activity is not incompatible with the use of the library. The reasonable expectation is that citizens entering the Library are doing so for the primary purpose of being exposed to information which will add to their base of knowledge and ideas. It is reasonable to conclude that some citizens are entering for the intellectual stimulation derived from testing or challenging the foundation for their base of knowledge and ideas. The library is an area dedicated to the free exchange of ideas.

The designation of these areas as public forums will guide the Court's analysis of the constitutionality of the challenged restrictions. Notwithstanding the primacy of public forums as locations for communicative activity among citizens, regulating competing uses of public forums is necessary and permissible. Thus, time, place, and manner restrictions are permissible. [*International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles,* 48 Cal.4th at 455.] Plaintiffs concede this point. It is the extent of the restrictions which are at issue in this case.

In the sections which follow, each of the challenged sections is addressed separately. In addressing each of the constitutional challenges, the Court is

mindful of the well-established legal precedent expressing the intent of the constitutional right of free expression, recently re-affirmed by the California Supreme Court in the *International Society for Krishna Consciousness of California, Inc.*:

> *The constitutional right of free expression is an essential ingredient of our democratic society. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests. [Citations.] The airing of opposing views is fundamental to an informed electorate and, through it, a free society.*

[*International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles,* 48 Cal.4th at 454 (citations and internal quotations omitted).]

"Annoyance and inconvenience … are a small price to pay for preservation of our most cherished right." [*Wirta v. Alameda-Contra Costa Transit Dist.* (1967) 68 Cal.2d 51, 62.]

Section I(b) of the Library Policy Resolution Prohibiting Written Materials Which Solicit Funds

This section of the policy prohibits the solicitation of funds by leafleteers. Because the purpose of the Library Policy Resolution is to address leafleting activity, this section does not prohibit solicitation of funds by non-leafleteers.

Speech that solicits funds is protected by the First Amendment. [*International Soc. For Krishna Consciousness, Inc. v. Lee* (1992) 505 U.S. 672, 677.] However, "the regulation of solicitation long has been recognized as being within the government's police power." [*Los Angeles Alliance for Survival v. City of Los Angeles,* 22 Cal.4th at 378.] "Regulations … that single out the public solicitation of funds for distinct treatment should not be viewed as content based." [*Los Angeles Alliance for Survival v. City of Los Angeles,* 22 Cal.4th at 378.] The regulation is not based on the content of the idea sought to be communicated. It is unconcerned with the literal content of the spoken or written words. [*International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles,* 48 Cal.4th at 456.] The kind of content-based distinctions that are suspect, and therefore found not to be content-neutral, are those that involve government censorship of subject matter or governmental favoritism among different viewpoints. [*Los Angeles Alliance for Survival v. City of Los Angeles,* 22 Cal.4th at 377.]

Because the restriction is content neutral, the "intermediate scrutiny" test is applicable. [*Los Angeles Alliance for Survival v. City of Los Angeles,* 22 Cal.4th

at 357.] Using the "intermediate scrutiny" standard, the restrictions must be narrowly tailored to serve a significant governmental interest and must leave open ample alternatives for communication. [*Dulaney v. Municipal Court* (1974) 11 Cal.3d 77, 84-85; *International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles,* 48 Cal.4th at 456-457.]

The government may reasonably and narrowly regulate solicitations in order to prevent fraud or to prevent undue harassment of passersby or interference with the business operations being conducted on the property. [*Los Angeles Alliance for Survival v. City of Los Angeles,* 22 Cal.4th at 376.]

Defendants cite *International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles, supra,* as standing for the proposition that the leafleting restriction imposed by the City of Redding is reasonable and therefore constitutional. The case does not stand for that proposition. The *International Society for Krishna Consciousness of California, Inc.* case involved the Los Angeles airport and an ordinance which prohibited solicitation and *immediate* receipt of funds at the airport when the solicitation and receipt of funds is conducted in a continuous and repetitive manner. The City of Los Angeles ordinance at issue specifically set forth that the ordinance was not "intended to prohibit the distribution of flyers, brochures, pamphlets, books, or any other printed or written matter as long as such distribution is not made with the intent of immediately receiving funds…" [*International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles,* 48 Cal.4th at 450, fn. 2.]

Other cases have distinguished verbal, "on demand" solicitations for the immediate exchange of funds from other forms of solicitation. In *United States v. Kokinda* (1990) 497 U.S. 720, a challenged "on demand" solicitation restriction which barred such solicitations on a walkway on postal department property leading from a parking lot to a post office was found to be proper. However, as pointed out by Chief Justice George, writing for the majority of the California Supreme Court in *Los Angeles Alliance for Survival* at p. 371, Justice Kennedy, in his concurring opinion in *Kokinda* "stressed the narrow purpose and scope of the regulation, observing that it 'expressly permits the respondents and all other to engage in political speech on topics of their choice and to distribute literature soliciting support, including money contributions, provided there is no in-person solicitation for payments on the premises…'" [*Los Angeles Alliance for Survival v. City of Los Angeles,* 22 Cal.4th at 371.]

Defendants contend that this regulation is necessary to serve the significant governmental interest of protecting passersby from unwanted speech. If the goal is to protect library patrons from aggressive or intrusive solicitation, allowing solicitations by leafleting actually serves the purpose of furthering that goal because it provides an alternative to the sometimes more confrontational verbal solicitations. Courts have recognized that verbal solicitations, by their nature, demand an immediate response to a request for money, and that such

solicitations are a more aggressive and intrusive form of solicitation which has the potential for being more disruptive to patrons when compared to a leaflet which is handed to a patron and contains a solicitation for money. [*Los Angeles Alliance for Survival v. City of Los Angeles,* 22 Cal.4th at 369; *ACORN v. City of Phoenix* (9TH Cir. 1986) 798 F.2d 1260, 1268-69.] In the case of *ACLU of Nevada v. City of Las Vegas* (9th Cir. 2006) 466 F.3d 784, the Ninth Circuit upheld an ordinance banning verbal requests for donations, but struck down one prohibiting the peaceful, unobstructive distribution of handbills requesting future support of a charitable organization.

It is noted that verbal "on demand" solicitations for the immediate exchange of funds are not prohibited by the policy. It is the inclusion of such a solicitation in a leaflet which is prohibited. Defendants point to RMC §2.42.120.A.5 and argue that "on demand" solicitations indeed are prohibited. However, RMC §2.42.120.A.5 does not specifically restrict "on demand" solicitations. RMC §2.42.120.A.5 restricts certain conduct, including soliciting, *except* in accordance with reasonable time, place and manner restrictions imposed by the library director. The ordinance leaves entirely to the library director the unfettered discretion whether to allow solicitations. Therefore, whether "on demand" solicitations for the immediate exchange of funds would be prohibited by RMC §2.42.120.A.5 is uncertain, apparently to be decided on a case-by-case basis by the library director, a private sector employee who, under this ordinance, has been given unfettered discretion to determine who may solicit, what may be solicited, when the solicitation may occur, and the manner of solicitation.

If the City deems it not necessary to specifically restrict, without exception, the more confrontational verbal "on demand" solicitations, then the City has not demonstrated the necessity to restrict the more peaceful, unobstructive distribution of leaflets requesting future support for an organization.

There is a reasonable probability that Plaintiffs will prevail on their claim that the prohibition on speech in this section of the policy does not pass the "intermediate scrutiny" standard, and therefore is unconstitutional.

Section I(c) of the Library Policy Resolution
Free Speech Area

Plaintiffs contend the "free speech area" constitutes an unconstitutional burden on free speech. This section of the policy confines the distribution of materials to a designated area. The designated area is depicted in the attachment to the policy and is described in the attachment as being an area four feet to the south of the entry doors and covering no more than 30 square feet within the shaded area in the diagram. The wording in the attachment is not consistent with the wording in the policy. The policy confines the *distribution* of materials to the designated area, whereas the attachment references *displays or tables*. In view of the inconsistent wording of the policy versus the attachment, it is unclear

whether it was the intent of the drafters of the policy to limit all distribution of materials, regardless of whether a display or table is involved. However, because the wording in the policy is more prohibitive than the wording in the attachment, the Court will use the more prohibitive wording in the policy in analyzing the constitutionality of this section.

Using the wording in the policy, citizens are allowed to distribute materials only if they are in an area four feet to the south of the entry doors and using no more than 30 square feet within the area shaded on the diagram. Plaintiffs contend that realistically there is room for only one group to distribute materials at any given time due to the limited size of the area.

As set forth in the previous section, time, place, and manner restrictions which are content-neutral bear a lighter burden because the purpose is the coordination of use, not the preclusion of particular expression. Using the "intermediate scrutiny" standard, the restrictions must be narrowly tailored to serve a significant governmental interest and must leave open ample alternatives for communication. [*Forsyth County v. Nationalist Movement,* 505 U.S. 130.]

Defendants contend that this section of the policy serves the significant governmental interest of (1) guarding against the risk of public safety problems due to congestion, and (2) protecting library users from harassment.

As to the first contention, there is no evidence to support the contention that there are public safety problems due to congestion. First Amendment activities can be prohibited in areas "normally subject to congestion, such as ticket windows and turnstiles", and "[p]ersons can be excluded entirely from areas where their presence would threaten personal danger or block the flow of passenger or carrier traffic, such as doorways and loading areas". [*In re Hoffman* (1967) 67 Cal.2d 845, 853.]

Ironically, the City chose to locate the free speech area adjacent to the entry doors of the library. The restriction does not leave open ample alternatives for communication given the size the area on the entrance side of the building. The restriction also is not narrowly tailored to serve the interest in regulating pedestrian flow in congested areas or in areas where their presence would threaten personal danger or block the flow in areas such as doorways or loading areas. The Court notes that Section IV (2) of the Policy prohibits the obstruction of the flow of pedestrian or vehicular traffic. This section is not challenged by Plaintiffs and serves the City's interest in guarding against the risk of public safety problems due to congestion.

Perhaps unintentionally, the policy prohibits citizens from expressing themselves in areas which would be less likely to affect pedestrian flow and use of the library, and instead limits the citizens to an area close to the entrance which clearly may affect pedestrian flow in and out of the library. Because citizens are prohibited

from distributing materials in the more expansive areas outside the library, the restriction prevents far more speech than is necessary to serve the significant governmental interest. [*Kuba v. 1-A Agricultural Ass'n,* 387 F.3d at 861-862.] Rather than serving a governmental interest, the prohibition does a disservice to the governmental interest by forcing citizens wishing to distribute materials to do so closer to the entrance compared with other alternative areas on the entrance side of the library. Defendants have not presented any evidence that distributing materials in the more expansive areas outside the library would disrupt or obstruct normal library operations or create public safety problems.

As to the second contention, there is no substantial evidence that library users are being harassed. Neither city officials nor a few citizens may play the role of deciding which speech, or what manner of communication, is unwanted by passersby. Yet, this is precisely the role the City is attempting to play by banning leafleting outside the "free speech" area. Speakers communicating their message from a megaphone outside the "free speech" area are not prohibited; authorized speakers may use this form of communication. [Policy Section IV (3).] Speakers offering someone a leaflet outside the "free speech" area, even if done politely and quietly, are prohibited without exception. If the City's goal is to protect passersby from harassment, the restriction is not narrowly tailored to serve that purpose.

Even if there was substantial evidence that certain passersby did not want to be subjected to being offered a leaflet, this has never been the legal standard in determining reasonable time, place and manner restrictions. As set forth *supra,* annoyance and inconvenience are a small price to pay for preservation of our most cherished right. [*Wirta v. Alameda-Contra Costa Transit Dist.,* supra.]

There is a reasonable probability that Plaintiffs will prevail on their claim that the prohibition on speech in this section of the policy does not pass the "intermediate scrutiny" standard, and therefore is unconstitutional.

Section II of the Library Policy Resolution
Leafleting Automobiles the Parking Lot

Plaintiffs contend the prohibition contained in the Library Policy Resolution on leaving materials on windshields of automobiles parked on Library grounds is not narrowly tailored and therefore unconstitutional.

Because this section of the policy is content neutral, the "intermediate scrutiny" standard applies. The restrictions must be narrowly tailored to serve a significant governmental interest and must leave open ample alternatives for communication.

Defendants contend that this prohibition serves the significant governmental interest of curbing litter. This contention already has been addressed by courts,

and the cases do not support Defendants' position. The Ninth Circuit Court in *Klein v. City of San Clemente* (9th Cir. 2009) 584 F.3d 1196, 1202-1203, addressed this issue as follows:

> *The city would have to show some nexus between leaflets placed on vehicles and a resulting substantial increase in litter on the streets before we could find that the City's asserted interest in preventing littering on the street justifies a prohibition on placing leaflets on windshields. As both this court and the Supreme Court have repeatedly emphasized, "merely invoking interests ... is insufficient. The government must also show that the proposed communicative activity endangers those interests." Kuba, 387 F.3d at 859 (citation omitted); see also Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 73, 75, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981) (rejecting city's asserted zoning interests because it "presented no evidence"); Bay Area Peace Navy v. U.S., 914 F.2d 1224, 1228 (9th Cir.1990) ("[The government] is not free to foreclose expressive activity in public areas on mere speculation about danger"); S.O.C., Inc., 152 F.3d at 1146 ("[N]o evidence exists in the present record ... to support an assumption that commercial handbillers are the inherent cause of Clark County's pedestrian flow problems."); Sammartano, 303 F.3d at 967 ("There must be evidence in the record to support a determination that the restriction [on speech] is reasonable."); Berger v. City of Seattle, 569 F.3d 1029, 1049 (9th Cir.2009) ("A governmental body seeking to sustain a restriction must demonstrate that the harms it recites are real.") (citation omitted).*
>
> *Applying this evidentiary requirement and assuming that litter prevention can constitute a sufficiently significant government interest to justify an interference with free speech,FN5 the record in this case is plainly inadequate to support the government's asserted interest in restricting Klein's speech. We note that preventing a marginal quantity of litter is not a sufficiently significant interest to restrict leafletting. Discarded paper, coffee cups and food wrappers can also add to litter, but we remain free to carry beverages and candy bars on public streets, indicating that municipalities do not usually endeavor to eliminate all possibilities of litter. So the City must show not only that vehicle leafletting can create litter, but that it creates an abundance of litter significantly beyond the amount the City already manages to clean up.*

[*Klein,* 584 F.3d at 1202-1203.]

Defendants cite the case of *International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles, supra*, as standing for the proposition that restrictions on leafleting in parking lots for safety reasons have survived even intermediate scrutiny by the courts. That is not the holding of the case. As set forth *supra,* the restriction at issue in that case related to the aggressive, "on-demand" solicitation of funds at an airport. The Court noted that other forms of expression, such as leafleting, were not prohibited by the City's ordinance.

Defendants also cite the case of *Savage v. Trammell Crow Co.* (1990) 223 Cal.App.3d 1562 in support of the constitutionality of its leafleting ban in the parking lot. However, the *Savage* case involved a private shopping mall, was

decided before the California Supreme Court found private shopping malls to be public forums, and was decided before the *Klein* case set forth above, which found a ban on leafleting in a parking lot to be unconstitutional, questioning whether litter prevention can constitute a sufficiently significant government interest to justify an interference with free speech.

There is a reasonable probability that Plaintiffs will prevail on their claim that the prohibition on speech in this section of the policy does not pass the "intermediate scrutiny" standard and therefore is unconstitutional.

Redding Municipal Code sections 6.36.060, 6.36.080, and 6.36.100 Leafleting Prohibitions

Plaintiffs also contend that the Redding Municipal Code sections relating to leafleting activity also are not narrowly tailored and therefore unconstitutional.

RMC §6.36.060 is a general leafleting prohibition. For the reasons set forth in the preceding section, plaintiffs have demonstrated a reasonable probability of prevailing on their claim that the prohibition is unconstitutional because there is no evidence of a substantial increase of litter. Even if there were some evidence of an increase of litter, preventing a marginal quantity of litter is not a sufficiently significant interest to restrict leafleting. [*Klein v. City of San Clemente, supra*.]

RMC §6.36.080 requires the persons or groups involved in distributing the leaflets, including the author, printer, compiler and manufacturer, to identify themselves on the leaflet. This forced identification prohibits anonymous speech and has been held to be unconstitutional. [*Talley v. California* (1960) 362 U.S. 60, 61-64.] "The requirement that those desiring to exercise free speech rights identify themselves and supply the names, addresses, and telephone numbers of sponsoring or responsible persons … has a "chilling effect" on free speech, and is unconstitutional." [*Rosen v. Port of Portland* (9th Cir. 1981) 647 F.2d 1243, 1250.] Therefore, plaintiffs have a reasonable probability of prevailing on this claim.

RMC §6.36.100 restricts the content of leaflets. The ordinance makes it unlawful to engage in speech or conduct which may reasonably tend to, among other things, incite public disorder, advocate disloyalty to the government, or encourage a breach of good order of the community. The ordinance also prohibits any speech which, among other things, is offensive to public morals or decency, or contains scurrilous language.

This restriction is not content neutral. Because the ordinance restricts the content of leaflets, it is a prior restraint of speech. "Discrimination against speech because of its message is presumed to be unconstitutional." [*Rosenberger v. Rector and Visitors of Univ. of Va.* (1995) 515 U.S. 819, 828.] Prior restraints of speech must meet the "strict scrutiny" test. Unlike the "intermediate scrutiny" test

involving a showing of significant governmental interest and discussed in many of the foregoing sections relating to content-neutral regulations, to meet the "strict scrutiny" test, Defendants must show that the regulation is necessary to serve a *compelling* (as opposed to *significant*) governmental interest and that it is narrowly drawn to achieve that end. [*Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. at 45, (citing *Carey v. Brown* (1980) 447 U.S. 455, 461).] This is the highest level of free speech protection. The regulation of speech protesting government action was addressed in *Long Beach Area Peace Network v. City of Long Beach* (9th Cir. 2009) 574 F.3d 1011:

> *We have recognized that certain types of speech enjoy special status. See, e.g., Nat'l Adver. Co. v. City of Orange, 861 F.2d 246, 248 (9th Cir.1988) ("The first amendment affords greater protection to noncommercial than to commercial expression."). Political speech is core First Amendment speech, critical to the functioning of our democratic system. The Peace Network's protest of the United States military action in Iraq is the type of speech that "rest[s] on the highest rung of the hierarchy of First Amendment values." See Carey v. Brown, 447 U.S. 455, 467, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980); see also Garrison v. Louisiana, 379 U.S. 64, 74-75, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."); Thornhill, 310 U.S. at 95, 60 S.Ct. 736 ("Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion.").*

[*Long Beach Area Peace Network v. City of Long Beach,* 574 F.3d at 1021.]

Defamation, incitement and obscenity are classes of speech which may be prohibited. [*Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 245-246.] Government may ban the simple use of so-called 'fighting words,' "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." [*Cohen v. California* (1971) 403 U.S. 15, 20, citing *Chaplinsky v. New Hampshire* (1942) 315 U.S. 568.] Words which, by their very utterance inflict injury or tend to incite an immediate breach of the peace, may be prohibited. [*Chaplinsky v. New Hampshire* (1942) 315 U.S. 568.]

However, "the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense." [*Cohen v. California* (1971) 403 U.S. 15, 21.] "The ability of government, consonant with the Constitution, to shut off discourse solely to protect others from hearing it is … dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner. Any broader view of this authority would effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Id.* An "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." [*Tinker v. Des Moines Indep. Community School Dist.* (1969) 393 U.S. 503, 508.]

As speech strays further from the values of persuasion, dialogue and free exchange of ideas, and moves toward willful threats to perform illegal acts, the state has greater latitude to regulate expression. [Citation.]" [*In re M.S.* (1995) 10 Cal. 4th 698.]

RMC §6.36.100 restricts speech, some of which is protected because it falls within protected speech of persuasion, dialogue and free exchange of ideas, and some of which falls within classes of speech which may be prohibited. Because the ordinance includes protected speech, it runs afoul of both the federal and California state constitutions. Therefore, plaintiffs have a reasonable probability of prevailing on this claim.

Section IV(4)(c) of the Library Policy Resolution Prohibiting Offensively Coarse Utterance, Gesture, or Display

Plaintiffs contend the section of the policy which prohibits "offensively coarse utterance, gesture, or display" is unconstitutional because it is a vague and unconstitutionally overbroad prohibition. Such conduct is deemed by the policy to constitute harassment of another. The policy states that the library staff shall make the determination of whether someone's utterance, gesture, or display is offensively coarse, but does not specify who among the library staff is charged with that responsibility.[6]

This restriction is not content neutral. As set forth in the preceding section, discrimination against speech because of its message is presumed to be unconstitutional. Prior restraints of speech must meet the "strict scrutiny" test. Defendants must show that the regulation is necessary to serve a compelling governmental interest and that it is narrowly drawn to achieve that end.

The word "coarse" has various meanings. Among the various meanings are: (1) of ordinary or inferior quality or value; common; (2) not precise or detailed with respect to adjustment; (3) crude or unrefined in taste, manners, or language; (4) harsh, raucous, or rough in tone. [*www.merriam-webster.com/dictionary/coarse]* Depending on how the word "coarse" is interpreted by whomever is charged with enforcing the policy, the enforcement would lead to prohibiting protected speech.

This section of the policy is so vague and lacking in standards that it leaves the public uncertain as to the conduct it prohibits. [*City of Chicago v. Morales* (1999) 527 U.S. 41, 56.] Ordinances must define criminal offenses with sufficient definiteness so that ordinary people can understand what conduct is unlawful. Also, vague penal ordinances cannot authorize or encourage arbitrary and discriminatory enforcement. [*City of Chicago v. Morales,* 527 U.S. at 56; *Kolander v. Lawson* (1983) 461 U.S. 352, 357.] This section of the policy

[6] Whether the members of the library staff would be acting as government officials as opposed to private sector employees has not been determined. This is addressed further by the Court under the section on RMC §2.42.120.A.5, *supra.*

authorizes any member of the library staff to enforce the prohibition. Thus, any member of the staff has the authority to determine if someone's speech is of ordinary or inferior quality, crude or unrefined, or rough in tone. Based on such a determination, the speaker may be subject to a criminal charge because any violation of the Library Policy is subject to prosecution as a misdemeanor under the City's statutory scheme.

The government may not assign to certain words or phrases the generalized label that such words or phrases are offensive and therefore prohibited "either upon the theory … that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove offensive words from the public vocabulary." [*Cohen v. California,* 403 U.S. at 22-23 (holding unconstitutional the conviction of defendant for wearing a jacket bearing words "F**k the Draft").] "The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within narrowly limited classes of speech." [*Chaplinsky v. State of New Hampshire,* 315 U.S. at 571.] Defamation, incitement and obscenity are such classes of speech which may be prohibited. [*Ashcroft v. Free Speech Coalition* (2002) 535 U.S. 234, 245-246.] Specific examples include (1) threats of violence against persons based on race, color, religion or sexual orientation [*In re M.S.* (1995) 10 Cal.4th 698]; and (2) pornography involving real children [*Ashcroft v. Free Speech Coalition*, *supra*]. "Offensively coarse" utterances, gestures, or displays do not fall within the narrow class of speech which may be prohibited.

A prohibition on speech which encompasses constitutionally protected speech is facially invalid. [*Lewis v. New Orleans,* 415 U.S. 130.] Plaintiffs have a reasonable probability of prevailing on their claim that section IV(4)(c) of the Library Policy Resolution prohibits constitutionally protected speech, does meet the "strict scrutiny" test, and therefore is unconstitutional.

The Procedure Section of the Library Policy Resolution
Advance Reservation Procedure

Plaintiffs contend the advance reservation requirement must be enjoined because it is an unconstitutional prior restraint of speech. Plaintiffs contend that the reservation system operates like a permit in that those wishing to engage in communication must get library authorization to express themselves on the library property regardless of the size of the group or whether it is a single speaker. Moreover, the reservations are on a first-come, first-served basis. Therefore, prospective speakers who are not the first to reserve a particular date and time are completely restrained from exercising their free speech rights regardless of the size of the competing groups or number of individuals. Also, the policy applies only to leafleteers, but does not apply to people who choose to vocally broadcast their message.

"Advance notice or registration requirements drastically burden free speech. They stifle spontaneous expression. They prevent speech that is intended to deal with immediate issues." [*Rosen v. Port of Portland,* 647 F.2d at 1249.]

The advance reservation must be made by those intending to distribute leaflets, but is without regard to the content of the speech. Therefore, the Court finds that the advance reservation procedure is a content-neutral restriction. Because this section of the policy is content neutral, the "intermediate scrutiny" standard applies. The restrictions must be narrowly tailored to serve a significant governmental interest and must leave open ample alternatives for communication. To comport with the First Amendment, a permitting ordinance must provide some alternative for spontaneous expression concerning fast-breaking events. [*Santa Monica Food Not Bombs v.City of Santa Monica,* 450 F.3d at 1047.]

As it relates to anonymous, spontaneous, and competing speech the advance reservation procedure is not narrowly tailored to serve a significant governmental interest. The policy does not leave open ample alternatives for communication by those wishing to do so spontaneously or anonymously, or for those wishing to express a point of view or provide facts contrary to those being expressed by the person or group first in line. There is a reasonable probability that Plaintiffs will prevail on their claim that the advance reservation procedure does not pass the "intermediate scrutiny" standard and therefore is unconstitutional.

Redding Municipal Code section 2.42.120.A.5
Discretion of Library Director to Impose Time, Place, and Manner Restrictions on Free Speech Activity

Plaintiffs contend that the ordinance gives the Library Director the sole authority to determine the time, place and manner restrictions which will be imposed on speech, thus rendering the ordinance facially unconstitutional. The ordinance does not set forth any time, place and manner restrictions. Instead, the Library Director has the unfettered discretion to determine the restrictions. This is tantamount to a prior restraint of speech since the parameters are not defined.

In *People v. Fogelson* (1978) 21 Cal.3d 158 the California Supreme Court ruled that an ordinance was unconstitutional on its face because it granted public officials "wide or unbounded discretion," thereby permitting "officials to base their decisions on the content of the ideas sought to be expressed." [*Id.* at 166.] The ordinance was struck down because it contained "absolutely no standards to guide licensing officials in exercising their discretion to grant or deny applications to solicit on city property. Thus, the ordinance gives officials unbridled power to prohibit constitutionally protected forms of solicitation." [*Id.* at 167.]

The City of Redding's ordinance gives a government official the entire discretion on time, place and manner of constitutionally protected free speech, with no

standards to follow in exercising such discretion. There is a reasonable probability that plaintiffs will prevail on their claim that this ordinance is facially unconstitutional.

Furthermore, it is not entirely clear that the discretion is vested in a government official. According to the declaration of Kimberly Niemer filed May 3, 2011, the City pays a private corporation, Library Systems and Services, LLC, to manage the library. According to the declarations of the Library Director, Jan Erickson, and her Administrative Assistant, David Brichacek, both are employed by Library Systems and Services, LLC. Therefore, the Library Director, as a private sector employee, is given the unbridled power to prohibit constitutionally protected forms of speech. Even if standards to guide her discretion were included in the ordinance, it is perhaps an issue of first impression as to whether granting to a private sector employee such discretion would be constitutional. The record is not fully developed on this issue, and the issue has not been briefed by the parties. Therefore, this issue is not addressed by the Court. Further development of the record would include evidence on the following: (1) the extent to which the library is managed and staffed by Library Systems and Services, LLC; (2) where Library Systems and Services is headquartered; (3) to whom the Library Director reports, and (4) who is authorized to take adverse employment action against the Library Director in the event the Library Director engages in conduct which is a deprivation of constitutional rights, such as intentionally, or with deliberate indifference, violating a temporary restraining order put in place to protect free speech privileges.

In addition to developing the evidentiary record on this issue, before the Court could address this issue, the Court would require further briefing on whether Jan Erickson, when acting in her capacity as Library Director with the sole discretion to determine time, place and manner restrictions on constitutionally protected speech, is (1) acting as a government official, (2) acting as a private citizen employed by a private sector company, or (3) acting in a hybrid position of private sector employee/government official. If the Library Director is acting in her capacity as a private citizen employed by a private sector company headquartered in another state in another part of the country, the Court would require further briefing on the legal consequences as it relates to this particular ordinance. Specifically, the issue is whether this ordinance allows one private citizen who has no official government position but who is employed by a private sector company headquartered in another part of the country to restrain the speech of another private citizen in Shasta County because the title “Library Director” has been conferred upon the individual. If the Library Director is not a government official, yet is given unfettered discretion to restrict speech, what recourse would a citizen have when that citizen believes he or she has been deprived of a constitutional right by someone purporting to act as a government official, but who in fact is a private sector employee?

Because Plaintiffs have met their burden of demonstrating a reasonable probability of prevailing on their claim that this ordinance is facially unconstitutional, the Court need not address at this time the issue of whether a private sector employee can be vested with any discretion relating to time, place and manner free-speech restrictions.

IRREPARABLE HARM

This Court has already determined that Plaintiffs have demonstrated irreparable injury for purposes of issuing the temporary restraining order. Defendants contend in their opposition that the Court "relied exclusively upon the holding in *Hillman v. H.E. Britton* (1980) 111 Cal.App.3d 810 in finding that Plaintiffs would suffer irreparable harm." [Defendants' Amended Memorandum of Points and Authorities in Opposition to Plaintiffs' Application for Preliminary Injunction, at p. 23.] Defendants are incorrect. The *Hillman* case was not the only case the Court relied upon. Although the Court specifically addressed the *Hillman* case at the time of the temporary restraining order hearing, and although the Court could have relied solely on *Hillman* to support its finding of irreparable harm, this was not the only case cited by Plaintiffs in their pleadings. On the other hand, Defendants have not cited a single case to support their contention that the loss of First Amendment freedoms does not constitute irreparable injury.

The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury. [*Hillman v. H.E. Britton*(1980) 111 Cal.App.3d 810, 826; *Elrod v. Burns* (1976) 427 U.S. 347, 373-374; *Smith v. Novato Unified School Dist.* (2007) 150 Cal.App.4th 1439; *Klein v. City of San Clemente* (2009) 584 F.3d 1196, 1207-1208; *Best Friends Animal Society v. Macerich Westside Pavilion Property LLC*, 193 Cal.App.4th at 185.] The irreparable injury is the irretrievably lost right to contribute to the uninhibited, robust, and wide-open debate on public issues necessary to secure an informed citizenry. [*New York Times v. Sullivan* (1964) 376 U.S. 254.] This same reasoning applies to the issuance of a preliminary injunction. Therefore, Plaintiffs have met this burden.

The Court is required to consider the harm likely to be sustained by the defendants if the preliminary injunction issues, and balance such harm against the irreparable harm to plaintiffs if the injunction is not issued. There is no evidence that the free-speech conduct has interfered with citizens' use of the library or has been disruptive. The record contains no evidence of even potential harm to defendants if the preliminary injunction issues. Accordingly, the Court finds that the irreparable harm to plaintiffs if the injunction is not issued far outweighs any potential harm which might be sustained by defendants if the preliminary injunction issues.

UNDERTAKING

Defendants are entitled to an undertaking in an amount sufficient to pay the defendants "such damages ... as [they] may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction." (CCP § 529, subd. (a).) The amount of the undertaking must be sufficient to pay to the party enjoined such damages as the party may sustain by reason of the injunction, if the court finally decides that the applicant was not entitled to the injunction. [*Hummell v. Republic Fed. Savings & Loan Assn.* (1982) 133 Cal.App.3d 49, 51; *Greenly v. Cooper* (1978) 77 Cal.App.3d 382, 390.] That estimation is an exercise of the trial court's sound discretion. [*Greenly*, supra, at p. 390; *Abba Rubber Co. v. Seaquist* (1991) 235 Cal.App.3d 1, 14.]

Defendants give no estimation of the amount of damages they may sustain by reason of the injunction. The argument for requiring a bond is based on pure speculation. Therefore, there is insufficient evidence to support any basis for the determination of an amount.

Furthermore, the purpose of the preliminary injunction is the protection of "our most cherished right." [*Wirta v. Alameda-Contra Costa Transit Dist.,* 68 Cal.2d at 62.] The exercise of a constitutional right is a privilege that Plaintiffs are entitled to enjoy without the burden of an undertaking. Therefore, the Court will not require the posting of a bond.

CONCLUSION

Plaintiffs have met their burden of proving that a preliminary injunction should issue. Issuing the preliminary injunction also serves the goal of preserving the status quo until a final determination of the merits of the action. Accordingly, the petition for preliminary injunction is granted. Defendants are enjoined from enforcing all of the foregoing sections of the Library Policy Resolution and from implementing and enforcing the foregoing sections of the Redding Municipal Code. By inference, this includes Redding Municipal Library's Code of Conduct to the extent that enforcement of the Code of Conduct would be inconsistent with the preliminary injunction.

The temporary restraining order issued May 4, 2011 will be dissolved upon the Court's issuance of the preliminary injunction.

The Court confirms the Case Management Conference currently set for **Monday, August 29, 2011 at 9:00 a.m. in Department 4.**