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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

AMERICAN CIVIL LIBERTIES UNION OF IDAHO, INC., an Idaho nonprofit corporation, LARRY SHANKS, and TROY MINTON,

Plaintiffs,

vs.

CITY OF BOISE, an Idaho municipal corporation,

Defendant.

Case No. 1:13-cv-478

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

This fall, the defendant City of Boise adopted a new ordinance that literally regulates what you can say in public. The ordinance, by its very terms, restricts saying certain "words."[1] Whether one's words are illegal depends on the content of those words. Only words that request an immediate donation are prohibited. Any other words, said in the very same place, are officially, governmentally favored.

[1] A complete copy of the ordinance is at 1st Decl. Eppink ex. A. Within it, see Boise City Code § 6-01-07 [hereinafter "BCC § 6-01-07"], subsection (A)(7), for what words are restricted.

The ordinance, titled "Public Solicitation," has two components. One makes it illegal to solicit in an "aggressive manner." The plaintiffs do not challenge that component in this lawsuit. The other component, however, criminalizes *all* solicitation speech—even among friends—if uttered in the wrong place. Under the ordinance, "solicitation" means "to request, ask, or beg, whether by words, bodily gestures, signs, or other means, for an immediate donation of money or other thing of value . . . ." The ordinance makes that specific speech content illegal in certain "open public area[s]", including near outside cafés, people waiting in line, bus stops, taxis, and parking pay boxes. Plus, any solicitation speech, no matter how peaceful or where spoken, is illegal if it "may" delay a pedestrian from crossing a roadway.

The ordinance will take effect on January 2, 2014. The plaintiffs ask this Court to enjoin the City from enforcing it.

STANDARD

The standards for preliminary injunction motions involving *First Amendment* claims are slightly different than normal. Ordinarily, this Court would separately analyze four factors before issuing a preliminary injunction: whether (1) the movants are likely to succeed on the merits and (2) likely to suffer irreparable harm, (3) whether the balance of equities tips in the movants' favor, and (4) whether the injunction is in the public interest. *Winter v. Natural Resources Council*, 555 U.S. 7, 20 (2008). In freedom of speech cases, however, whether the plaintiffs are likely to succeed, whether they are likely to suffer irreparable harm, and whether an injunction is in the public interest are all effectively the same inquiry. *See Sammartano v. First Judicial District Court*, 303 F.3d 959, 973 (9th Cir. 2002); *Higher Taste v. City of Tacoma*, 755 F. Supp. 2d 1130, 1138 (W.D. Wash. 2010). Thus, in a *First Amendment* case, if there are even serious

questions going to the merits, a preliminary injunction is appropriate if the balance of equities tips sharply in the plaintiffs' favor. *See Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011). Also, although ordinarily the parties moving for a preliminary injunction bear the burden of showing likely success on the merits, in cases where the plaintiffs make a colorable *First Amendment* claim, the burden shifts to the defendant to justify its speech restrictions. *Thalheimer v. City of San Diego*, 645 F.3d 1109, 1116 (9th Cir. 2011). *First Amendment* claims must be given "special solicitude" in general. *Lovell v. Poway Unified School Dist.*, 90 F.3d 367, 370 (9th Cir. 1996).

ARGUMENT

I. The Plaintiffs are Likely to Succeed on the Merits.

A. The *First Amendment* Framework.

The City's ordinance selectively targets solicitation speech, which is protected *First Amendment* expression. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 945 (9th Cir. 2011) (en banc). Solicitation is rich with often complex meaning, as it "is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues . . . ." *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). Begging, in particular, "brings the problems of the poor off of the margins of society and into the mainstream," Helen Hershkoff and Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 914 (1991), and it "frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation," *Loper v. New York City Police Dept.*, 999 F.2d 699, 704 (2d Cir. 1993).

The City's ordinance also selectively restricts solicitation speech in "open public area[s]," including streets, sidewalks, and parks. BCC §§ 6-01-07(A)(2), (B)(3)–(6), (8)–(11).[2] These are all "quintessential traditional public forums" for protected expression. *ACLU of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1099 (9th Cir. 2003) [hereinafter *ACLU of Nevada I*]. The City's ability to restrict expressive speech and conduct in these places is "sharply circumscribed." *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 555 (4th Cir. 2013) (quoting *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983)). Freedom of speech is so especially important in open public areas because they are accessible to all. *See Grossman v. City of Portland*, 33 F.3d 1200, 1205 (9th Cir. 1994) (noting importance of public forums as "a free forum for those who cannot afford newspaper advertisements, television infomercials, or billboards."). The government bears the burden of proving the constitutionality of any regulation of expressive activity in a public forum. *Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009) (en banc). That burden is "extraordinarily heavy," *NAACP v. City of Richmond*, 743 F.2d 1346, 1355 (9th Cir. 1984), and such restrictions on speech in traditional public forums are subject to "the highest scrutiny," *ISKCON v. Lee*, 505 U.S. 672, 678 (1992).

Criminal laws regulating speech, like the City's new ordinance, must be scrutinized with particular care. *See Speet v. Schuette*, 726 F.3d 867, 873 (6th Cir. 2013) (quoting *City of Houston v. Hill*, 482 U.S. 451, 459 (1987)). Even the infraction penalty for first time offenses, BCC § 6-01-07(D)(1), is criminal under Idaho law. *State v. Bennion*, 112 Idaho 32, 35 (1986).

Because the plaintiffs raise both facial and overbreadth *First Amendment* challenges, they may argue the new ordinance's impact on their own speech as well as the speech of other parties

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[2] Unless otherwise noted, all references to "BCC § 6-01-07" are to the provisions of City

not before this Court. *Perry v. Los Angeles Police Dept.*, 121 F.3d 1365, 1368 (9th Cir. 1997). Overbreadth challenges, in particular, "are allowed not primarily for the benefit of the litigant, but for the benefit of society—to prevent the statute from chilling the First Amendment rights of other parties not before the court." *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 790 n.9 (9th Cir. 2006) [hereinafter *ACLU of Nevada II*] (internal quotation marks omitted).

B. The Ordinance is Content-Based.

On its face, the ordinance singles out for punishment only some solicitation having a particular content: immediate requests for donations of money or things of value. BCC § 6-01-07(A)(7). Because its provisions say nothing about other types of solicitation or nonsolicitation speech, "they are therefore classic examples of content-based restrictions." *Valle del Sol Inc. v. Whiting*, 709 F.3d 808, 819 (9th Cir. 2013). That is, "[w]hether 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." *Clatterbuck*, 708 F.3d at 556; *see also Speet*, 726 F.3d at 870 (holding solicitation ban to be content-based). In the Ninth Circuit, that alone means that the ordinance is content-based. *Berger*, 569 F.3d at 1051.

Because the ordinance "by its very terms, singles out particular content for differential treatment," it is content-based for that reason alone. *Id*. This Court is "not required to find a content-based purpose in order to hold that a regulation is content-based." *ACLU of Nevada II*, 466 F.3d at 793. In *ACLU of Nevada II*, in fact, the Circuit held that an anti-solicitation

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Ordinance No. ORD-34-13, a completely copy of which is at 1st Decl. Eppink ex. A.

regulation was content-based, despite finding no content-based purpose behind it. *Id.* at 793–794. It did the same in *Berger*. 569 F.3d at 1051. Yet, in this case, this Court could also hold that the Boise anti-solicitation ordinance is content-based for the alternative reason that "the underlying purpose of the regulation is to suppress particular ideas . . . ." *Id.*

The new ordinance is the latest component of the City's affirmative campaign to suppress the idea that anyone should give direct donations of money to the needy and homeless. In explaining the new anti-solicitation ordinance, the City told the public that it is "trying to divert all those funds that would go to panhandling, to real organizations that can provide change for people that are homeless and in need."[3] Just before the City Council held a public hearing on the ordinance, the City reiterated that "[w]hat we've always tried to do is divert charitable donations away from panhandlers . . . ."[4] Indeed, upon launching its "Have a Heart, Give Smart" campaign against direct donations, the Mayor exhorted in a press release for Boiseans to "please refrain from donating to panhandlers" and to give out a government brochure rather than anything of value.[5] The City's website instructs people in Boise to "[p]olitely say 'No' or 'Sorry'" to panhandlers and that "[i]f you'd like to help people in need, please donate to any of the organizations listed here."[6] The purpose of the campaign is expressly for "discouraging panhandling."[7] Ironically, the City's website also contends that "[i]t is important to note that street vendors, outdoor performers and other people providing a legitimate service are not

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[3] 1st Decl. Eppink ex. F.

[4] *Id.* at ex. G.

[5] *Id.* at ex. H.

[6] *Id.*at ex. I.

[7] *Id.*at ex. J.

panhandlers," acknowledging that the City is fine with the speech of vendors, performers, and other kinds of solicitors who take up sidewalk space.[8] And lest there be any doubt that the anti-solicitation ordinance shares the same purpose as its "Have a Heart, Give Smart" campaign, the City expressly stated it in its own press release announcing the new ordinance proposal that "[t]he ordinances expand on the City's 'Have a Heart, Give Smart' campaign ,"[9] and in a formal presentation to the City Council explaining the ordinance proposal, the City's Police Chief said that the ordinance "builds on the City's 'Have a Heart, Give Smart' campaign."[10] The purpose of the City's "Have a Heart, Give Smart" campaign, including the campaign's latest expansion—the new anti-solicitation ordinance—is to suppress particular ideas: namely, that it can be helpful and humane for Boiseans to give money directly to the needy.

Old holdings that solicitation bans are content-neutral have either been overruled or relied upon that overruled precedent. *ACORN v. City of Phoenix*, 798 F.2d 1260, 1267 (9th Cir. 1986), *overruled in part by Comite de Jornaleros*, 657 F.3d at 942, 947 n.5; *Doucette v. City of Santa Monica*, 955 F. Supp. 1192, 1204 (C.D. Cal. 1997).[11] The en banc court in *Comite de Jornaleros* overruled the *ACORN* court because it had misinterpreted an ordinance stating: "No person shall

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[8] *Id.*at ex. K.

[9] *Id.* at ex. L; *see also id.* at ex. M (quoting City spokesman's statement that the City began internally discussing an anti-solicitation ordinance as part of creating the "Have a Heart, Give Smart" campaign). The plaintiffs do not contend, here, that the City cannot take official viewpoints. Rather, they are pointing out that the purpose of the campaign and the purpose of the anti-solicitation ordinance are the same—the ordinance is an expansion of the campaign, by the City's own admission—and the shared purpose is content-based.

[10] The City's official videorecording of this meeting is available from the City online at http://boisecityid.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=1044&MinutesID=1035&FileFormat=pdf&Format=Minutes&MediaFileFormat=wmv. The Chief's quoted remark is found at 57:39 through 57:46 on that video.

stand on a street or highway and solicit, or attempt to solicit, employment, business or contributions from the occupants of any vehicle," *ACORN*, 798 F.2d at 1262. *Comite de Jornaleros*, 657 F.3d at 947 n.5. The *ACORN* court misinterpreted that ordinance as regulating only solicitation *conduct*. *Id.* As the Circuit made clear in *ACLU of Nevada II*, regulations that separate out "*words of solicitation* for differential treatment" are content-based. 466 F.3d at 794. The ordinance in *ACORN* did apply to words of solicitation, *Comite de Jornaleros* holds, and it is clear that the Boise ordinance does, too. BCC § 6-01-07(A)(7) ("Solicit or solicitation means *to request, ask, or beg,* whether *by words*, bodily gestures, or other means . . . ." (emphasis added)). The later instruction of *Berger*, 569 F.3d at 1051, and most recently *Valle del Sol*, 709 F.3d at 819, make that even clearer. Indeed, the provisions struck down in *Valle del Sol* do not even expressly mention words of solicitation,[12] yet Boise's ordinance does, and the Circuit still held that the *Valle del Sol* provisions were content-based on their face. *Id.* at 819. The Boise ordinance, just as the regulation in *Berger*, actually *allows* the conduct of the exchange of money, and instead restricts only speech. *See Berger*, 569 F.3d at 1051. It specifically restricts people

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[11] Beyond relying on the overruled *ACORN*, *Doucette* also confuses viewpoint- and content-neutrality. *Compare Doucette*, 955 F. Supp. at 1204, *with Berger*, 569 F.3d at 1051 n.21.

[12] The provisions in *Valle del Sol* stated:

> A. It is unlawful for an occupant of a motor vehicle that is stopped on a street, roadway or highway to attempt to hire or hire and pick up passengers for work at a different location if the motor vehicle blocks or impedes the normal movement of traffic.
>
> B. It is unlawful for a person to enter a motor vehicle that is stopped on a street, roadway or highway in order to be hired by an occupant of the motor vehicle and to be transported to work at a different location if the motor vehicle blocks or impedes the normal movement of traffic.

709 F.3d at 815 n.2.

"from communicating a particular set of messages—requests for donations," and for that reason alone the Boise ordinance is content-based. *Id.*

Because the City's ordinance is content-based, it is presumptively unconstitutional and would have to withstand the "most exacting scrutiny" to survive. *Watters v. Otter*, 854 F. Supp. 2d 823, 829 (D. Idaho 2012). Permitted content-based restrictions are "confined to the few historic and traditional categories [of expression] long familiar to the bar" like child pornography, defamation, and true threats. *U.S. v. Alvarez*, ___ U.S. ___, ___, 132 S. Ct. 2537, 2544 (2012) (internal quotation marks omitted). The City must not only prove that its ordinance is the *least* restrictive means of furthering a compelling government interest, *ACLU of Nevada II*, 466 F.3d at 797, it also must show that the ordinance is "actually necessary" to achieve that interest, *Alvarez*, ___ U.S. at ___, 132 S. Ct. at 2549. There is no way that its content-based ordinance can withstand strict scrutiny. *See Berger*, 569 F.3d at 1053. Moreover, because the ordinance is the City's expansion of its "Have a Heart, Give Smart" campaign, the ordinance is invalid even to the extent it regulates speech in nonpublic forums, because it is an effort to suppress expression because the City opposes the views of those who ask and advocate for direct donations to needy individuals on the streets. *See Preminger v. Peake*, 552 F.3d 757, 765 (9th Cir. 2008). The plaintiffs are likely to succeed.

C. The Ordinance is Not Narrowly Tailored.

Even if the City recrafted its ordinance to be content-neutral, the solicitation prohibitions could not survive the scrutiny given content-neutral speech restrictions. It must prove that its restrictions are (1) narrowly tailored (2) to serve a substantial government interest that is (3) unrelated to the suppression of expression, and that they (4) contain narrow, objective standards

to cabin any discretionary permitting and (5) require that all discretionary permitting be explained in writing, all while (6) leaving open ample alternatives for communication. *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011, 1023–1025 (9th Cir. 2008). The ordinance must "target[] and eliminate[] no more than the exact source of the 'evil' it seeks to remedy," *Frisby v. Schultz*, 487 U.S. 474, 485 (1988), without significantly restricting a substantial amount of speech that does not create the same evils, *Comite de Jornaleros*, 657 F.3d at 947. Not only are speech restrictions invalid if not narrowly tailored; courts are also especially skeptical of "underinclusive" regulatory schemes that exempt activities implicating the same concerns as regulated speech. *See Chaker v. Crogan*, 428 F.3d 1215, 1227 (9th Cir. 2005).

1. *The ordinance is overbroad and not narrowly tailored.*

Comite de Jornaleros, where the court assumed for sake of argument that the anti-solicitation ordinance there was content-neutral, demonstrates why the Boise ordinance would be invalid even if it were assumed to be content-neutral. The ordinance there, just like the one in this case, made it unlawful to solicit contributions in certain public places. *Comite de Jornaleros*, 657 F.3d at 941. The en banc court acknowledged that promoting traffic flow could be a significant governmental interest. *Id.* at 947–948. The question, however, was whether the Redondo Beach ordinance was actually tailored narrowly to achieve those purposes. *Id.*at 948. Because there were obvious examples of how overinclusive the Redondo Beach solicitation restriction was, the court held it was not narrowly tailored. *Id.* There are just as many obvious examples of overinclusivity here. Under Boise's ordinance, if two acquaintances are sitting at a bus stop, one cannot ask the other for change to cover his fare. BCC § 6-01-07(B)(10). A businessman cannot ask his coworker, as they get out of a car together next to a parking pay box,

for a dollar to pay the fee. BCC § 6-01-07(B)(11). A teenager cannot ask for $10 as her classmate withdraws cash from an ATM. BCC § 6-01-07(B)(4). A child can't ask her friend's dad for a movie ticket if she spots him in the box office line. BCC 6-01-07(B)(3). The ACLU's Development Director cannot ask for a contribution to the ACLU from someone she just had lunch with at a sidewalk café, as she leaves their lunch meeting. BCC § 6-01-07(B)(5).[13] In fact, because sidewalk cafés are all on public sidewalks, BCC §§ 5-06-01 *et seq.*,[14] each one is also an "open public area" where solicitation is banned, BCC § 6-01-07(A)(2). That means that the ACLU Development Director cannot even ask her dining partner for a donation to the ACLU *while they are having lunch* at that sidewalk café. BCC § 6-01-07(B)(5). Just as the *Comite de Jornaleros* court noted, the City's ordinance hardly provides the "breathing space" that the freedom of speech needs to survive. 657 F.3d at 949 n.7.

Also just as in *Comite de Jornaleros*, the City has many laws already at its disposal that help it achieve its interests without burdening speech. *See id.* at 949. It has two existing ordinances prohibiting anyone from impeding pedestrians or vehicle traffic. BCC § 9-10-01[15] and § 6-01-07(2)[16]. Like Redondo Beach, the City can also ticket for various kinds of jaywalking, I.C. §§ 49-701 through 49-708, stopping a car in ways that obstruct traffic, I.C. §§

[13] *See* Decl. Hansen ¶¶ 3, 6,7; Decl. Hopkins ¶¶ 9, 11.

[14] 1st Decl. Eppink ex. D.

[15] 1st Decl. Eppink ex. C.

[16] This reference to BCC § 6-01-07 is to the existing ordinance located at that code section. A copy is at 1st Decl. Eppink ex. B. Despite that the City contends that this ordinance is unenforceable, the City's own records reveal that it is often enforced, and the Boise Police Department issued a citation under it recently. *Id.* at exs. R, S.

49-659 and 49-650, or loitering near cars, BCC § 9-10-05.[17] *See Comite de Jornaleros*, 657 F.3d at 949–950. And the plaintiffs do not challenge, here, the validity of regulating aggressive solicitation under the ordinance, BCC § 6-01-07(B)(1), which the City can use to address conduct that actually threatens public safety. *See Berger*, 569 F.3d at 1053 ("If the City desires to curb aggressive solicitation, it could enforce an appropriately worded prohibition on aggressive behavior."); *see also id.* at 1045 (noting "disorderly conduct" offense in Seattle); *cf.* I.C. § 18-6409(1) (defining "disturbing the peace" offense in Idaho).

Moreover, the City's claimed interest in traffic flow is not substantial enough to justify a speech restriction except in the case of large groups. *See Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1039 (9th Cir. 2006); *Rosen v. Port of Portland*, 641 F.2d 1243, 1247–1248 (9th Cir. 1981). Even *groups* of people can form mass assemblies without interfering with free traffic flow. *Santa Monica Food Not Bombs*, 450 F.3d at 1039. The impact of a single person taking up space on a sidewalk or roadway is "trivial." *Id.* at 1039. Only "*serious* traffic, safety, or competing use concerns" could justify the City's ordinance. *Id.* The ordinance restricts the speech of even single individuals standing on the sidewalk, citing concerns about traffic safety.[18] Those concerns are not adequate to justify such broad restrictions.

The City's other purported concerns, for public safety, are apparently about the discomfort some feel when asked for money on the street.[19] But discomfort always accompanies

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[17] The text of BCC § 9-10-05 can be found at 1st Decl. Eppink ex. C. The plaintiffs do not concede that any of these statutes or ordinances mentioned in this sentence is constitutional either facially or as applied, but do not challenge them in this action.

[18] 1st Decl. Eppink ex. A at 1.

[19] A councilmember explained that the ordinance was meant to curb "undue pressure from solicitation." The City's official video of this meeting is available online at

unpopular speech. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 509 (1969). The City cannot restrict speech to "shield the sensibilities of listeners," for "[w]e are expected to protect our own sensibilities simply by averting [our] eyes." *U.S. v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000); *see also Baldwin v. Redwood City*, 540 F.2d 1360, 1370 (9th Cir. 1976) ("To a large extent the intrusion may be avoided at the will of the observer."). As the en banc Ninth Circuit has said, "we cannot countenance the view that individuals who choose to enter [traditional public forums], for whatever reason, are to be protected from speech and ideas those individuals find disagreeable, uncomfortable, or annoying." *Berger*, 569 F.3d at 1054. Moreover, everyone is entitled to hear solicitors' pleas, or to reject them, without City interference, for "[i]t is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and society. It is through speech that our personalities are formed and expressed." *Playboy Entertainment Group*, 529 U.S. at 817. The City's ordinance regulates where Boiseans can get information about individuals and causes in need of immediate donations. By the City using its power "to command where a person may get his or her

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http://boisecityid.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=1061&MinutesID=1046&FileFormat=pdf&Format=Minutes&MediaFileFormat=wmv, with the quoted remark found at about 18:50 through 18:55. The Police Chief told the City Council that the ordinance was meant to prevent "behaviors in certain places that leave our citizens feeling unsafe." The official video of this remark is online at http://boisecityid.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=1044&MinutesID=1035&FileFormat=pdf&Format=Minutes&MediaFileFormat=wmv, with the quoted remark found at 57:00 through 57:16. When the ACLU asked the City for all of its records supporting its conclusion that solicitation causes public safety concerns, the City confessed that its conclusion was based merely "on undocumented observations and impressions of police officers verbally communicated" to the City's attorneys. 1st Decl. Eppink ex. Q.

information or what distrusted source he or she may not hear, it uses censorship to control thought." *Citizens United v. FEC*, 558 U.S. 310, 356 (2010). "This is unlawful." *Id.*

The ordinance's prohibitions even criminalize speech that "may" delay a pedestrian. BCC § 6-01-07(B)(9). The term "may" is too chilling for use in speech restrictions. *See Santa Monica Food Not Bombs*, 450 F.3d at 1041. The word's "nearly infinite elasticity" sweeps into the ordinance "too many circumstances that do not, as matters actually turn out, implicate the governmental interests" that the City could advance. *Id.* at 1041. After all, *every* request for an immediate donation "may" delay a pedestrian, because any pedestrian might stop and give. But the City's cognizable traffic safety interest is only to prevent "activities that significantly alter the usual flow of traffic, making it difficult or impossible for citizens to reach their destinations without hindrance." *Id.* at 1042 n.16. The City has obvious alternatives for promoting efficient traffic flow, including its existing street obstruction ordinance. BCC § 9-10-01.[20] The ordinance is likely invalid.

2. *The ordinance is underinclusive.*

The City's concern about traffic safety is just a content-based sham, though, because its new ordinance is also substantially underinclusive. *See Valle del Sol*, 709 F.3d at 823–824. Sidewalk cafés get preferential treatment under the ordinance, which banishes solicitation from anywhere within 20 feet of them. BCC § 6-01-07(B)(5). (The City's existing "Obstructing Streets" ordinance contains a similarly tell-tale exception, exempting all sidewalk cafés. BCC § 9-10-01.[21]) But sidewalk cafés (along with mobile and street vendors) are just commercial

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[20] 1st Decl. Eppink ex. C.

[21] *Id.*

obstructions of Boise's public sidewalks. BCC § 5-06-01(U)[22] (defining "sidewalk café" as a retailer's sitting area "located in whole or in part on a sidewalk"); *see also* BCC §§ 5-12-11 through 5-12-13[23] (allowing street vendors to obstruct sidewalks). Laws that favor commercial speech over noncommercial speech are invalid. *See G.K. Ltd. Travel v. City of Lake Oswego*, 436 F.3d 1064, 1081 (9th Cir. 2006). The en banc Ninth Circuit in *Berger* considered provisions, similar to those in the City's ordinance, banning speech near people dining or waiting in line. *Berger*, 569 F.3d at 1035. Those provisions, the court said, gave more protection to commercial speech than noncommercial speech. *Id.* at 1055. "This bias in favor of commercial speech is, on its own, cause for the rule's invalidation." *Id.*

Also revealing the ordinance's substantial underinclusiveness is its exemption for the "lawful exercise of one's constitutional right to picket, protest, or stand on the sidewalk even when doing so makes passage less convenient for others having to walk around the person picketing, protesting, or standing." BCC § 6-01-07(C); *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (noting that exemptions in a speech regulation "may diminish the credibility of the government's rationale for restricting speech in the first place"). Right off of the bat, this exception underscores just how content-based this ordinance is: it singles out certain content—picketing and protesting—for different treatment. *See Berger*, 569 F.3d at 1051. When "exceptions to the restriction on noncommercial speech are based on content, the restriction itself is based on content." *National Advertising Co. v. City of Orange*, 861 F.2d 246, 249 (9th Cir. 1988). The exception also reveals that the City's purported interest in traffic flow is just a

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[22] *Id.* at ex. D.

[23] *Id.* at ex. E.

pretext. The City not only expressly allows for certain types of speech to impede a sidewalk, it prioritizes the freedom of standing pedestrians not engaged in any *First Amendment* activity at all above that of solicitors engaged in pure, protected speech. *ACLU of Nevada II*, 466 F.3d at 792 ("It is beyond dispute that solicitation is a form of expression entitled to *the same* constitutional protections as traditional speech." (emphasis added)).

3. *The ordinance confers unbridled discretion to local officials.*

The ordinance also fails time, place, and manner scrutiny because it delegates standardless discretion to government officials. The City carves out exceptions for solicitation "authorized pursuant to I.C. § 49-709(2)." BCC § 6-01-07(B)(8), (9). Under I.C. § 49-709(2), a person can legally stand on a highway and solicit "if authorized to do so in writing by the local authority . . . ." Yet, neither the City's ordinance nor I.C. § 49-709(2), which it references, contain any standards guiding the "local authority" in authorizing highway solicitors. This is unconstitutional, for "a time, place, and manner regulation [must] contain adequate standards to guide the official's decision and render it subject to effective judicial review." *Kaahumanu v. State of Hawaii*, 682 F.3d 789, 807 (9th Cir. 2012) (quoting *Thomas v. Chicago Park District*, 524 U.S. 316, 323 (2002)). The City's ordinance is invalid without both "narrow, objective, and definite standards to guide the licensing authority" and provisions requiring that all permitting decisions be explained. *Long Beach Area Peace Network*, 574 F.3d at 1025. It contains neither.

4. *The ordinance does not leave open ample alternatives for communication.*

The City's burden also requires it to prove that its ordinance will leave solicitors with ample alternatives for their speech. *Lim v. City of Long Beach*, 217 F.3d 1050, 1054 (9th Cir. 2000). An alternative is not "ample" unless the speaker can reach his intended audience. *Bay*

Area Peace Navy v. U.S., 914 F.2d 1224, 1229 (9th Cir. 1990). Places where people "habitually gather together" are especially important for speech because they provide an inexpensive way for individuals to reach a cross-section of the community. *Galvin v. Hay*, 374 F.3d 739, 747–748 & n.6 (9th Cir. 2004). As well, the City "must consider the actual conditions speakers encounter when it restricts their speech" *Hoye v. City of Oakland*, 653 F.3d 835, 843 (9th Cir. 2011).

The City knows well that Boise's downtown core is the "civic, economic, educational, social, and cultural center of the city and region," featuring concentrated, high density activity.[24] Yet, a map of only some of the sweeping zones where the ordinance forbids disfavored speech reveals that the law will substantially limit the locations available for free speech in the downtown core.[25] For solicitors, downtown Boise is the best avenue for reaching a broad cross-section of the public.[26] The City itself describes it as "a vibrant and walkable business core" with a "lively street environment."[27] Downtown Boise is the "largest employment center in the State of Idaho," and home to 22 percent of Boise's jobs, drawing commuters from across the region. *Id.* at DT-1, 2, 5. Boise's downtown also features a "thriving commercial district," *id.* at DT-2, offering more than 300 retailers, restaurants, and service locations.[28] Indeed, Boise's Mayor has spoken poignantly about the importance of downtown and the need to "HOLD OUR GROUND" against forces trying to push community activity away from the downtown core.[29] The City's

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[24] 1st Decl. Eppink at N at DT-9.

[25] *Compare* Decl. Gunderson ex. A *with id.* at ex. B. This map depicts less than half of the no-solicitation zone types established by the ordinance. *Id.* at ¶ 5.

[26] *See* Aff. Minton ¶¶ 7, 9, 10; Aff. Shanks ¶ 8.

[27] 1st Decl. Eppink at ex. N at DT-2.

[28] *Id.*at ex. O.

[29] *Id.*at ex. P.

ordinance pushes speech out of the downtown core, at significant expense to the needy who otherwise would beg for alms and assistance there.[30] Cost and convenience are special factors in the ample alternatives analysis. *Long Beach Area Peace Network*, 574 F.3d at 1025. The ultimate effect, apparently intended by the City, is to make solicitors disappear from the downtown core. Because solicitors cannot reach their intended audience nearly as well, the ordinance is likely invalid. *See City of Ladue*, 512 U.S. at 57.

D. The Ordinance is Unconstitutionally Vague.

Vague laws are objectionable because they fail to provide fair warning, lend themselves *ad hoc* and subjective enforcement, and can inhibit the exercise of *First Amendment* freedoms. *California Teachers Association v. Board of Education*, 271 F.3d 1141, 1150 (9th Cir. 2001). Criminal offenses, like the City's ordinance, are "more searchingly examined for vagueness" than other laws. *Levas & Levas v. Village of Antioch*, 684 F.2d 446, 452 (7th Cir. 1982). Speech restrictions require even closer scrutiny, because those laws must be written with "narrow specificity." *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002).

The City's ordinance lacks the required narrow specificity. First, the ordinance contains a murky exception for "passively standing . . . with a sign or other written indication that one is seeking donations without orally addressing the request to any specific person" BCC § 6-01-07(C). The term "passively," with the dictionary meaning of "accepting or allowing what happens or what others do, without active response or resistance,"[31] is so subjective and ambiguous that it easily lends itself to arbitrary and discriminatory enforcement. *See Grayned*,

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[30] *See* Aff. Minton at ¶¶ 1, 2, 6, 7, 9, 10; Aff. Shanks at ¶¶ 3, 5.

[31] CONCISE OXFORD ENGLISH DICTIONARY 1046 (2004).

408 U.S. at 108–109. Does a panhandler holding a sign that says "Please Help" stand "passively" if she reaches out to take change held out towards her? Is a street musician "passively standing" if he is also actively and energetically playing a fiddle at the same time? Can a performing dancer, bounding around a donation jar on the sidewalk, ever be considered "passively standing"? Can an ACLU volunteer, soliciting both donations and petition signatures as people wait in line for a film screening, even respond to a passerby's query without violating the ordinance? These questions all seem to be left to the "moment-to-moment judgment of the policeman on his beat." *Kolender v. Lawson*, 461 U.S. 352, 359 (1983). The second half of the ordinance's "Exception," which permits certain kinds of protected speech—picketing and protesting—but not others, similarly calls upon officials' subjective judgment, but even more directly illustrates just how content-based the ordinance is on its face. BCC § 6-01-07(C).

The ordinance's ban on solicitation "whenever the pedestrian being solicited . . . may be impeded from or delayed in crossing the roadway" is also unconstitutionally vague. *Id.* at § B.9. The term "may" necessarily implies "may not," so any solicitation speech could fall within the ban. After all, "may" includes situations where there is less than a 50% chance of any delay. *See Trans World Accounts, Inc. v. FTC,* 594 F.2d 212, 216 (9th Cir. 1979). A police officer could ticket any solicitor, anywhere, under the "may be . . . delayed" clause, creating a very real danger that an officer might resort to enforcing the ordinance only against solicitors that the officer or the public dislikes. *See Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998). The ordinance is likely void for vagueness.

II. The Plaintiffs Meet All of the Other Preliminary Injunction Requirements.

A colorable *First Amendment* claim is enough, alone to establish irreparable injury. *Sammartano*, 303 F.3d at 973. Likewise, there is a significant public interest in upholding *First Amendment* principles. *Id.* at 974. The balance of equities tips sharply in the plaintiffs' favor, as well, as they stand to lose basic freedoms and the funds they collect for basic necessities and nonprofit revenue,[32] while the City already has existing ordinances to police any unsafe conduct.

The F.R.C.P. 65(c) bond requirement should be waived here because "to require a bond would have a negative impact on plaintiff's constitutional rights, as well as the constitutional rights of other members of the public affected." *Baca v. Moreno Valley Unified School Dist.*, 936 F. Supp. 719, 738 (C.D. Cal. 1996). There is also no realistic chance of harm to the City. *See Johnson v. Couturier*, 572 F.3d 1067, 1086 (9th Cir. 2009). "Requiring a bond to issue before enjoining potentially unconstitutional conduct by a governmental entity simply seems inappropriate, because the rights potentially impinged by the governmental entity's actions are of such gravity that protection of those rights should not be contingent upon an ability to pay." *Bible Club v. Placentia-Yorba Linda School Dist.*, 573 F. Supp. 2d 1291, 1302 (C.D. Cal. 2008).

CONCLUSION

The Court should grant the motion and enter a preliminary injunction.

DATED this 4th day of November, 2013.

AMERICAN CIVIL LIBERTIES UNION OF IDAHO FOUNDATION

/s/ Richard Alan Eppink

Attorneys for Plaintiffs

[32] Decl. Hopkins ¶¶ 3, 4, 5, 9, 11; Aff. Minton ¶¶ 1, 2, 6, 7, 9, 10; Aff. Shanks ¶¶ 3, 5.