

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOHN MARTIN, RHONDA BREWER,
DAVID McCOY, MARY O'GRADY, and
MARISSA ELYSE SANCHEZ,

Plaintiffs,

v.

CITY OF ALBUQUERQUE,

Defendant.

Civil Action No. _____

COMPLAINT

Plaintiffs John Martin, Rhonda Brewer, David McCoy, Mary O'Grady, and Marissa Elyse Sanchez (collectively, "Plaintiffs"), by and through their attorneys, hereby allege as follows:

INTRODUCTION

1. In recent years, federal courts around the country repeatedly have struck down laws that – motivated by a desire to stop the poor and homeless from soliciting donations in highly-visible public locations – outlaw being present in traditional public forums for some or all types of speech. Plaintiffs bring this action under 42 U.S.C. § 1983, the First and Fourteenth Amendments to the United States Constitution, and Article II, § 17 of the Constitution of the State of New Mexico, for declaratory and injunctive relief against the City of Albuquerque (the "City"), in response to the City's recent adoption of such a law – Council Bill O-17-51, codified at Albuquerque Code of Ordinances § 8-2-7-2 (the "Ordinance"). Although framed as an effort to protect public safety, the Ordinance, which was published on November 22, 2017, plainly is

part of an attempt to drive so-called “panhandling” out of Albuquerque. Indeed, Albuquerque Councilor Trudy Jones, who proposed the Ordinance, said as much in remarks she made about the Ordinance to the staff of a homeless services center: “We can only help people who want to be helped, and we cannot allow this to keep degrading our city . . . We have to take our streets back. We have to . . . retake control of our city, and if that means they go to Tucson, or Phoenix, or Dallas or Colorado where the drugs are cheaper, so be it.” Far from advancing safety interests, the Ordinance unnecessarily prohibits a significant amount of speech from taking place in long-used traditional public forums, is not narrowly tailored to the asserted safety concerns, and hence is overbroad and unconstitutional.

2. The Ordinance contains three basic prohibitions. First, it prohibits *all speech* in a variety of places that constitute traditional public forums. It prohibits, within the entire City of Albuquerque, any person from standing on any street, defined by the Traffic Code to include any public way open to the use of the public for purposes of vehicular *or pedestrian* travel, including any public parking lot or public ground. This sweeping prohibition against standing even in pedestrian areas is entirely irrational and unconstitutional on its face.

3. Second, the Ordinance prohibits anyone from standing within six feet of a highway or controlled access roadway exit or entrance ramp except on a sidewalk or designated pedestrian way; and from standing within the landscaped area of “any street median” or within “any median not suitable for pedestrian use,” which includes medians less than six feet wide. § 8-2-7-2(A)-(C). (And, of course, a significant percentage of the medians in the City that are wider than six feet are landscaped, which means that the Ordinance bans standing on nearly all medians in the City.) But streets and adjacent areas such as medians are quintessential public forums and cannot be entirely shut off to speakers unless the enforcement of more narrowly

tailored laws – such as laws against obstructing traffic – is incapable of advancing the city’s legitimate public policy goals. The Ordinance presents no evidence that such is the case here.

4. And third, the Ordinance makes it “unlawful for any pedestrian to engage in any physical interaction or exchange with the driver or occupants of any vehicle within a travel lane” absent an emergency. In other words, the Ordinance prohibits panhandlers from receiving donations from occupants of vehicles, prohibits vehicle occupants from donating to panhandlers, prohibits political issue advocates from distributing political literature to vehicle occupants, and prohibits vehicle occupants from receiving political literature from issue advocates, on any street within the entire City of Albuquerque.

5. Plaintiffs are individuals who, while standing on medians or on the side of the road in areas affected by the Ordinance, regularly solicit charitable donations from vehicle occupants, provide charitable donations from their vehicles to those solicitors, or engage in political speech, including pamphleteering to motorists. In adopting the Ordinance, the City has significantly restricted Plaintiffs’ opportunities to engage in constitutionally-protected speech, in violation of the First and Fourteenth Amendments to the United States Constitution and Article II, § 17 of the Constitution of the State of New Mexico. Similar laws recently have been struck down throughout the country. *See, e.g., Cutting v. City of Portland, Maine*, 802 F.3d 79 (1st Cir. 2015); *Petrello v. City of Manchester*, No. 16-cv-008-LM, 2017 WL 3972477 (D.N.H. Sept. 7, 2017); *Thayer v. City of Worcester*, 144 F. Supp. 3d 218 (D. Mass. 2015); *Traditionalist American Knights of the Ku Klux Klan v. City of Deslodge*, 914 F. Supp. 2d 1041 (E.D. Mo. 2012).

6. Plaintiffs seek a judgment under 42 U.S.C. § 1983 and 28 U.S.C. § 2201 that the Ordinance violates Plaintiffs’ rights to freedom of speech under the First and Fourteenth

Amendments to the U.S. Constitution and Article II, § 17 of the Constitution of the State of New Mexico. Plaintiffs also seek preliminary and permanent injunctive relief in the form of an order enjoining the City from enforcing the Ordinance.

THE PARTIES

7. Plaintiff John Martin has lived in Albuquerque for a decade and, until recently, solicited donations from motorists on City roadways while offering motorists bottles of water as a means of making enough to cover rent, utilities, food, and other necessities for himself and his wife. He has tried soliciting exclusively from pedestrians in other areas of the City, but made far less and was in danger of being unable to afford his family's rent. Mr. Martin was recently arrested under a previous version of the Ordinance, and is currently subject to a deferred prosecution agreement. He has therefore currently stopped soliciting donations out of concern for future arrest under the Ordinance, and is finding it difficult to make ends meet.

8. Plaintiff Rhonda Brewer is a 66-year-old woman who has been a resident of Albuquerque since 2011. Ms. Brewer lived in a shelter and public housing from 2011 until 2015. She has been homeless since 2015. Ms. Brewer solicits passersby for money several times per week to help pay for food and other necessities. She typically stands at stoplights on medians or along freeway entrances and exits holding a sign that says, "Work is slow, anything will help." Ms. Brewer has previously attempted to panhandle from a sidewalk. She does not do so anymore, however, because it proved to be ineffective.

9. Plaintiff Mary O'Grady is a semi-retired writer and journalist who has been a resident of Albuquerque since 2014. For at least the past eight years she has donated to individuals seeking donations on the streets. Ms. O'Grady had her own experience with homelessness when she was 19 years old and donates out of a personal calling to help those in

need. Ms. O'Grady donates multiple times nearly every day and generally donates cheese sticks, water bottles, or packages of toiletry items. When she interacts with panhandlers, she talks to them if safety permits to tell them that she used to be homeless and to encourage them that things will get better. Ms. O'Grady typically donates to panhandlers from her car while stopped at a red light at numerous places affected by the Ordinance, including freeway entrance and exit ramps, medians, and intersections in downtown Albuquerque.

10. Plaintiff David McCoy is an Army veteran who has been a resident of Albuquerque since 2006. For the past 12 years, he has donated to individuals seeking donations on the streets of Albuquerque out of a personal calling to help those in need. Mr. McCoy donates to panhandlers approximately three or four times per week and donates a variety of items, including money, water bottles, protein and candy bars, leftover food from restaurants, and occasionally clothing or medicine. Mr. McCoy has provided these types of donations at numerous places affected by the Ordinance, including next to freeway exit or entrance ramps, intersections with medians less than six feet in width, and landscaped medians used extensively by panhandlers. He typically provides donations from his vehicle while stopped at a red light.

11. Plaintiff Marissa Elyse Sanchez is a resident of Albuquerque who is extensively involved in political demonstrations with the Act Now to Stop War and End Racism ("ANSWER") coalition. She engages in political issue advocacy throughout the City numerous times per year. As part of her political demonstrations, Ms. Sanchez prepares posters, signs, and educational literature for distribution to the public, including occupants of vehicles stopped at red lights. She typically engages in political speech on sidewalks, street corners and medians near heavily-trafficked intersections in Albuquerque in order to disseminate her viewpoint to the largest possible audience. Political issue advocacy in a median is particularly effective for Ms.

Sanchez because she can direct her message at, and provide literature to, interested pedestrian and vehicular traffic on both sides of the street at the same time.

12. The Defendant City of Albuquerque is a municipal corporation incorporated under the laws of New Mexico.

JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, and 1988, as this action arises under the Constitution and laws of the United States, including 42 U.S.C. § 1983. The Court also has jurisdiction to grant declaratory relief pursuant to 28 U.S.C. § 2201. The Court has supplemental jurisdiction over the state-law claims pursuant to 28 U.S.C. § 1367.

14. This Court has personal jurisdiction over the City because it is a resident of New Mexico.

15. Venue in this district is proper under 28 U.S.C. § 1391(b)(1) and (2) because the City of Albuquerque is located within this district, and the events or omissions giving rise to the claims occurred within this district.

FACTS

The Challenged Ordinance

16. For more than a decade, the City has engaged in efforts to suppress panhandling. In January 2004, the City adopted the “Safety in Public Places Ordinance,” which placed numerous and broad restrictions on panhandling within the City limits – making more than 25 behaviors illegal and subject to criminal sanctions. Albuquerque Code of Ordinances, Ch. 12, Art. 2, § 12-2-7 (enacted Jan. 13, 2004) (repealed). That ordinance was enjoined by a state court shortly after it was adopted. Temporary Restraining Order, *ACLU of N.M. v. City of*

Albuquerque, No. CV 2004-00355 (N.M. Dist. Ct. Apr. 9, 2004). Shortly thereafter, the panhandling-related sections of § 12-2-7 were repealed, and the City enacted an ordinance that made unlawful a much narrower set of conduct that constituted “aggressive panhandling.” Albuquerque Code of Ordinances, Ch. 12, Art. 2, § 12-2-28 (repealed Nov. 6, 2017).

17. In the summer of 2017, again faced with a perceived problem with panhandling, City Councilor Trudy Jones sponsored a measure (Council Bill O-17-51) purportedly aimed at making streets safer. Based on media reports, Councilor Jones had spoken publicly numerous times regarding her opposition to panhandling, saying to staff of a homeless services center that panhandlers were “degrading our city” and that it was important to “take our streets back.” Councilor Jones also had complained that panhandling had increased so much in Albuquerque that it had become “a safety issue – they’re very aggressive, and it’s not safe.” To address these concerns, Councilor Jones proposed an initial version of the Ordinance.

18. There was surprisingly little public discussion and debate about the Ordinance. Publicly-available City records reflect that at one Finance and Government Operations Committee meeting, the City Attorney “addressed the legal aspects and enforceability of the bill” but there are no comments regarding the bill or detailed minutes in the publicly-accessible legislative record. After two substitutions of the bill’s text, the City Council considered and approved the Ordinance by a vote of 8 to 0 (one Councilor was excused) on November 6, 2017, again with very little discussion.

19. The preamble states that the Ordinance was adopted in response to pedestrian safety concerns based on (i) statistics from the National Highway Traffic Safety Administration identifying New Mexico as one of the States with the highest rate of pedestrian fatalities, and (ii) a study by the University of New Mexico (“UNM Study”) commissioned by the City to study the

occurrences and possible causes of pedestrian- and bicyclist-involved crashes. A representative of the City explained at the November 6, 2017 City Council Meeting that the six-foot-width median provision (in subsection 8-2-7-2(C)(2)) was based on engineering manuals developed by traffic organizations that recommend a minimum width of at least six feet when the median is intended to accommodate a pedestrian refuge from traffic.

20. At the same time that Council Bill O-17-51 was passed, the City Council also passed O-17-52, which repealed the 2004 ban on “aggressive panhandling.” When introducing Council Bill O-17-52 for a vote, Councilor Jones said that it was necessary as a “clean up” measure, because Council Bill O-17-51 “replaces” the 2004 aggressive panhandling ban.

21. The Ordinance contains three prohibitions: it prohibits any speech in any street in Albuquerque (subsection 8-2-7-2(A)); it prohibits any speech alongside roadway ramps or on most medians in Albuquerque (subsections 8-2-7-2(B)-(C)); and it prohibits individuals from providing or soliciting donations to or from vehicles on any street in Albuquerque (subsections 8-2-7-2(D)-(E)).

The Blanket Prohibition on Expressive Activities in Streets

22. Subsection 8-2-7-2(A) provides:

It is unlawful for any person to stand on a street, highway, or controlled access roadway or the exit or entrance ramps thereto;

23. In the City’s Traffic Code, in which the Ordinance is codified, “Street” means the same thing as “Public Way,” which is defined as:

The entire width between the property lines of every way publicly maintained (including easements maintained for public use) when any part thereof is open to the use of the public for purposes of vehicular *or pedestrian* travel, notwithstanding that same may be temporarily closed for the purpose of construction, reconstruction, maintenance, alteration or repair. The public way shall include the unused right of way, publicly owned parking lots normally open to the public and public grounds.

Albuquerque Code of Ordinances § 8-1-1-2 (emphasis added).

24. The term “Public Grounds” is defined as

All public grounds owned and under the control of the city or any other governmental agency that are open to the use of the public.

Id.

25. These definitions make clear that subsection (A) of the Ordinance applies not only to myriad street ramps throughout the city, but also more broadly to *every* street, parking lot, and public ground owned or operated by the City and “open to the use of the public.”

The Blanket Prohibition on Expressive Activities on Medians and Near Entrance/Exit Ramps

26. Subsections 8-2-7-2(B)-(C) provide:

(B) It is unlawful for any person to access, use, occupy, congregate or assemble within 6 feet of a travel lane of a highway exit ramp or other controlled access roadway exit or entrance ramp, except on a grade separated sidewalk or designated pedestrian way, unless reasonably necessary because of an emergency situation where such area provides the only opportunity for refuge from vehicle traffic or other safety hazard;

(C) It is unlawful for any person to access, use, occupy, congregate, or assemble within the landscaped area of any street median, or within any median not suitable for pedestrian use, unless reasonably necessary during an otherwise lawful street crossing at an intersection or designated pedestrian crossing, or because of an emergency situation where the median provides the only opportunity for refuge from vehicle traffic or other safety hazard.

27. The Traffic Code defines a “roadway” as the “portion of a street or highway improved, designed, or ordinarily used for vehicular travel, exclusive of the berm or shoulder,” and it defines “controlled access street” as “[e]very highway, street or roadway in respect to which owners or occupants of abutting property or lands and other persons have no legal right of access to or from the same.” Albuquerque Code of Ordinances § 8-1-1-2. This means that subsection (A) of the Ordinance, which prohibits standing within 6 feet of any “controlled access

roadway exit or entrance ramp” applies to myriad street ramps throughout the city, not merely those exiting or entering a major interstate freeway.

28. Subsection 8-2-7-2(C) defines a “median not suitable for pedestrian use” as any median that:

- (1) Is located within a roadway designated as a Minor Arterial or greater intensity by the Albuquerque Major Thoroughfare Plan or within twenty-five feet of an intersection with such a roadway; and
- (2) Has less than a six-foot-wide, paved (with concrete or equivalent material), grade-separated surface with an average slope of less than 9%; or
- (3) Is otherwise identified as not suitable for pedestrian use by the City Traffic Engineer based on identifiable safety standards.

29. Most medians in Albuquerque are less than six feet in width (or are landscaped), and many of the most common areas for panhandling and political leafleting – locations that panhandlers and political activists have found to be most effective for communicating with persons in automobiles – are next to freeway on-ramps or off-ramps, or on medians near freeway on-ramps or off-ramps.

The Blanket Ban on Soliciting or Providing Donations from Vehicles on Roadways

30. Subsections 8-2-7-2(D)-(E) provide:

- (D) It is unlawful for any pedestrian to engage in any physical interaction or exchange with the driver or occupants of any vehicle within a travel lane unless reasonably required because of an emergency situation.
- (E) It is unlawful for any occupant of a motor vehicle within any travel lane or intersection to engage in any physical interaction or exchange with a pedestrian unless reasonably required because of an emergency situation.

31. The Ordinance thus prohibits anyone from making donations from a vehicle, receiving donations from a vehicle, or distributing political literature to a vehicle occupant on

any street within the City of Albuquerque's nearly 190 square miles. But the Ordinance does not prevent drivers and pedestrians from engaging in any exchange that does not involve a physical interaction – *e.g.*, a driver asking a pedestrian for directions, or a participant in a voter registration drive encouraging a driver to vote in an upcoming election – no matter how time consuming or disruptive to other traffic, so long as no object changes hands.

32. A violation of the Ordinance is a petty criminal misdemeanor and is punishable “by a fine of not more than \$500 or by imprisonment for not more than 90 days or by both such fine and imprisonment.” Albuquerque Code of Ordinances § 8-1-3-99. A law enforcement officer has the discretion to either arrest an individual for violating the Ordinance or issue a citation “in lieu of booking him at the police station.” *Id.* § 8-1-3-6(A).

The Effect of the Ordinance on Plaintiffs and Others Who Receive or Provide Donations

33. Under the City's new Ordinance, Plaintiffs will be unable to engage in their constitutionally protected expressive conduct without fear of citation or criminal prosecution.

34. Mr. Martin's and Ms. Brewer's expressive conduct soliciting donations from others falls squarely within each of the three prohibitions contained in the Ordinance. Mr. Martin solicited donations while standing on the roadside at a stoplight near the off-ramp at the intersection of I-40 and Rio Grande Boulevard. Ms. Brewer regularly requests donations from vehicle occupants while standing on medians that are typically between two and four feet wide, and by the side of the road at stoplights near the entrances to I-25 and I-40. Under the new Ordinance, Mr. Martin's and Ms. Brewer's expressive conduct is a violation of subsection 8-2-7-2(A), which prohibits standing on any public way in the City; subsections 8-2-7-2(B)-(C), which prohibit standing on most medians in the City and near entrance and exit ramps; and subsection 8-2-7-2(D), which prohibits panhandlers from receiving donations from a vehicle occupant.

35. Ms. O’Grady’s and Mr. McCoy’s expressive conduct donating to the homeless likewise will be affected by each of the three prohibitions contained in the Ordinance. Like most Albuquerque residents, Mr. McCoy and Ms. O’Grady often stand in the City’s public ways, including when they provide donations to panhandlers – expressive conduct that is now illegal under subsection 8-2-7-2(A). Ms. O’Grady and Mr. McCoy also regularly provide donations from their vehicles to panhandlers standing on medians and at stoplights near entrance and exit ramps. Under the new Ordinance, this same expressive conduct will now be illegal under subsection 8-2-7-2(E).

36. Both Mr. McCoy and Ms. O’Grady would be unlikely to be able to continue their expressive conduct if they were permitted to donate to panhandlers only if they pull off the road and pull into a parking lot or parking spot. In many areas in Albuquerque where panhandling occurs, there are few, if any, parking lots to pull into. Moreover, requiring drivers to drive to an isolated parking lot to donate to a panhandler is both impractical and presents more significant safety concerns than does simply handing a donation out a car window while at a stoplight.

37. Mr. McCoy’s and Ms. O’Grady’s opportunities for providing roadside donations will also be significantly decreased because of the median and ramp bans contained in subsections 8-2-7-2(B)-(C). Since the Ordinance was enacted and publicized, they have already seen a significant decline in the number of panhandlers standing on medians and near entrance and exit ramps, and they believe that the Ordinance is already having a severe chilling effect on the First Amendment rights of panhandlers and individuals who donate to panhandlers.

38. Ms. Sanchez’s political speech likewise runs afoul of the Ordinance’s three prohibitions. She engages in political issue advocacy on sidewalks, street corners and medians less than six feet wide near busy intersections in the City, and she routinely hands literature –

such as pamphlets containing educational information about the topic of her political advocacy, or fliers with information about upcoming demonstrations and ways for the recipient to become involved in ANSWER's activities – to any interested occupant of a vehicle stopped at a red light. Ms. Sanchez's expressive conduct violates subsection 8-2-7-2(A), which prohibits standing on any public way in the City; subsection 8-2-7-2(B), which prohibits standing on medians less than six feet wide; and subsection 8-2-7-2(D), which prohibits her from distributing literature to a vehicle occupant.

The Ordinance Is An Unconstitutional Restriction on Speech

39. The United States Supreme Court “has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and [is] not lightly used.” *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939) (footnote omitted). In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive conduct are sharply circumscribed. These places include streets and medians, which ““have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)); *Cutting v. City of Portland, Maine*, 802 F.3d 79, 81 (1st Cir. 2015) (collecting cases holding that medians are traditional public forums).

40. While the state may enforce content-neutral regulations on the use of traditional public forums, such regulations must be “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” *Perry Educ. Ass’n*, 460 U.S. at 45. To satisfy the narrow tailoring requirement, “the Government . . . bears the burden

of showing that the remedy it has adopted does not ‘burden substantially more speech than is necessary to further the government’s legitimate interests.’” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). Furthermore, alternative channels that “involve more cost and less autonomy” to speakers and that “may be less effective media for communicating the message,” do not constitute ample alternative channels for protected speech. *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 93 (1977).

41. Here, the City’s newly adopted Ordinance is, on its face, overly broad and unconstitutionally infringes Plaintiffs’ rights to exercise freedom of speech and expression in traditional public forums by restricting a substantial volume of constitutionally protected speech without adequate justification.

42. First, by making it unlawful for any person to “stand” on any “street, highway, or controlled access roadway or the exit or entrance ramps thereto,” subsection 8-2-7-2(A) prohibits all expressive conduct on every “public way” throughout the entire City, which includes streets, public parking lots, and any public ground “open to the use of the public.” Far from merely preventing pedestrians from standing in the middle of a major intersection, the Ordinance bars neighbors from having a conversation on the street outside their homes and even prohibits residents from gathering outside City Hall.

43. Second, by making it unlawful “for any person to access, use, occupy, congregate or assemble” along roadways near highway exit or entrance ramps; on any median less than six feet in width; on the landscaped area of any median; and on any median vaguely designated as “not suitable for pedestrian use,” the Ordinance cuts off all expressive conduct in many traditional public forums throughout the City.

44. Third, by prohibiting any physical exchange, including of donations or literature, between any pedestrian and any vehicle occupant anywhere within the City's nearly 190 square miles, the Ordinance effectively bans panhandling and pamphleteering along roadways, a traditional public forum. Such a broad spatial restriction on protected speech is not necessary to address whatever legitimate concerns may exist about traffic and pedestrian safety.

45. To justify the Ordinance, its preamble refers extensively to public safety concerns identified by the UNM Study. The UNM Study focuses on ten intersections with high numbers of pedestrian and bicyclist-involved crashes and identifies various "contributing factors" that accounted for crashes at those intersections, including "Pedestrian Error," "Poor Driving," "Alcohol/Drug" involvement, and "Mechanical Defect." It also makes numerous recommendations for improving pedestrian safety at those intersections.

46. The UNM Study does not, however, identify any crashes that were caused by soliciting or providing donations to panhandlers, and none of its recommendations include banning panhandling in the City. Furthermore, the geographic scope of the Ordinance is not limited to the ten intersections identified by the UNM Study as particularly dangerous. Thus, the broad prohibitions contained in the Ordinance are not narrowly tailored to the safety harms identified.

47. By depriving individuals of the use of traditional public forums to engage in expressive activity, the Ordinance forces individuals to take their speech to other locations that are less effective channels for communicating protected speech. By doing so it does not leave open reasonable alternative channels for protected speech.

48. Because the Ordinance restricts a substantial amount of constitutionally protected speech without sufficient justification, it cannot survive review under the First and Fourteenth

Amendments to the United States Constitution and Article II, § 17 of the Constitution of the State of New Mexico.

The Ordinance Is an Unconstitutional Content-Based Restriction on Speech

49. “[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Dep’t of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Government regulations that are based on content are therefore “presumptively invalid” and subject to strict scrutiny. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). A law is content-based if it is, on its face, “targeted at specific subject matter . . . even if it does not discriminate among viewpoints within that subject matter.” *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2230 (2015). A law can also be content-based if, “though facially content neutral,” the “purpose and justification for the law are content based,” or if the government adopted the regulation “because of disagreement with the message [it] conveys.” *Id.* at 2227-28 (citation omitted).

50. The Ordinance challenged here is content-based because it was proposed and adopted not out of true safety concerns but rather because of the City Council’s desire to significantly decrease panhandling – a form of expression that falls squarely within the First Amendment’s protections. Thus, the Ordinance is constitutional only if the City can demonstrate that it is “the least restrictive means of achieving a compelling state interest.” *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014).

51. The Ordinance fails the strict scrutiny test. The purported safety rationale that the City recited in the preamble to the Ordinance fails to justify the extraordinarily broad content-based city-wide restrictions because those concerns can be addressed through existing laws or less restrictive, content-neutral alternatives, *e.g.*, Albuquerque Code of Ordinances § 8-2-1-33

(“Vehicles, Pedestrians Not to Obstruct Streets”); *id.* § 8-2-3-6 (“no pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impossible for the driver to stop or yield”); *id.* § 8-1-2-31 (“Stopping, Standing, or Parking Near Hazardous or Congested Places”). *See McCullen*, 134 S. Ct. at 2538 (content-based speech restriction not justified by public safety concerns, including obstruction of public ways, where these issues could be addressed by content-neutral ordinances prohibiting any person from obstructing the free passage of travelers on streets and sidewalks).

52. Because the Ordinance is a content-based restriction on speech that is not narrowly tailored to any compelling government interest, it violates the First and Fourteenth Amendments to the United States Constitution and Article II, § 17 of the Constitution of the State of New Mexico. *State v. Garcia*, 294 P.3d 1256, 1262 (Ct. App. N.M. 2013) (“[T]he New Mexico Constitution provides greater protection with respect to content-based restrictions . . .”).

CLAIMS FOR RELIEF

Count I

Violation of 42 U.S.C. § 1983 & New Mexico Constitution, Art. II, § 17 (Free Speech)

53. Plaintiffs hereby re-allege Paragraphs 1 through 52 as though fully set forth herein.

54. 42 U.S.C. § 1983 provides that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.”

55. The First Amendment to the United States Constitution, as applicable to the States

through the Fourteenth Amendment, prohibits the making of any law that “abridg[es] the freedom of speech.”

56. Article II, § 17 of the Constitution of the State of New Mexico states, “Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.” Article II, § 17 provides *greater* protection with respect to content-based restrictions than does the First Amendment to the U.S. Constitution, and equivalent protection with respect to content-neutral restrictions. *Garcia*, 294 P.3d at 1262.

57. As alleged above, Albuquerque Code of Ordinances § 8-2-7-2, on its face and as applied to Plaintiffs, unconstitutionally infringes or imminently threatens to infringe Plaintiffs’ rights under the First and Fourteenth Amendments to the U.S. Constitution and Article II, § 17 of the Constitution of the State of New Mexico, including their rights to freedom of speech and expression.

58. Because the City has acted and threatened to act under the color of state law to deprive Plaintiffs of rights guaranteed by the Constitution and laws of the United States, Plaintiffs may sue and seek relief pursuant to 42 U.S.C. § 1983.

59. As a result, Plaintiffs are entitled to preliminary and permanent injunctive relief, a declaratory judgment, costs and attorney’s fees, and such other relief as the Court deems just.

Count II
Declaratory Judgment

60. Plaintiffs hereby re-allege Paragraphs 1 through 59 as though fully set forth herein.

61. 28 U.S.C. § 2201(a) provides that “[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may

declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”

62. As alleged above, Plaintiffs allege that Albuquerque Code of Ordinances § 8-2-7-2 violates the First and Fourteenth Amendments to the United States Constitution, and Article II, § 17 of the Constitution of the State of New Mexico.

63. Upon information and belief, the City will enforce Albuquerque Code of Ordinances § 8-2-7-2.

64. There is an actual controversy between the parties as to whether Albuquerque Code of Ordinances § 8-2-7-2 is unconstitutional.

65. Plaintiffs seek a declaration that Albuquerque Code of Ordinances § 8-2-7-2 is unconstitutional and violates Plaintiffs’ rights to freedom of speech under the First and Fourteenth Amendments to the United States Constitution, and Article II, § 17 of the Constitution of the State of New Mexico.

* * * * *

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the following relief:

- a) A declaratory judgment holding that the challenged Ordinance violates the United States Constitution, including the First and Fourteenth Amendments to the Constitution, and Article II, § 17 of the Constitution of the State of New Mexico;
- b) A preliminary and permanent injunction prohibiting the City from enforcing the challenged Ordinance;
- c) An award to Plaintiffs of costs and attorney’s fees; and
- d) Any such other and further relief that this Court deems just and proper.

Respectfully submitted,

John Martin, Rhonda Brewer, David McCoy, Mary
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