IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. **19-2565**

BLANCHE MARCELENO;
SUSAN EBBS;
EDWARD CAUSSADE; and
TYLER BRUNNER,

Plaintiffs,

v.

CITY OF GREELEY, COLORADO,

Defendant.

PLAINTIFFS' UNOPPOSED MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiffs Blanche Marceleno, Susan Ebbs, Edward Caussade, and Tyler Brunner move this Court for entry of a temporary restraining order and preliminary injunction, and state in support thereof as follows.

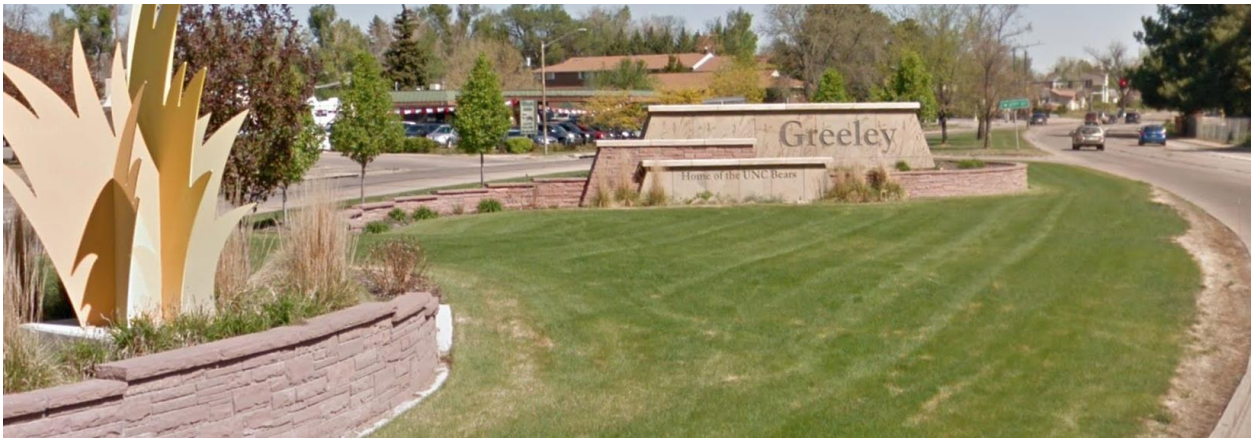
RULE 7.1 AND 65.1 CERTIFICATE

Pursuant to D.C.Colo.L.Civ.R. 7.1, undersigned counsel conferred with Greeley City Attorney, Doug Marek, counsel for Defendant. Counsel contacted Mr. Marek on Friday, September 6, 2019 and Monday, September 9, 2019 via telephone and discussed the pending filing. Final versions of all pleadings were sent to Defendant on September 10, 2019 prior to filing. Defendant has authorized undersigned counsel to state that the relief sought in this Motion is unopposed, and that Defendant does not object to the entry of a temporary restraining order and preliminary injunction, as set forth in the proposed order filed herewith.

INTRODUCTION

In this First Amendment case, Plaintiffs mount a facial challenge to Greeley Municipal Code § 11.01.809, which creates a blanket ban on pedestrians standing on any traffic median anywhere in the City for longer than is "reasonably necessary to cross the street." *See* Ex. 1, Ordinance No. 24, 2015. Through what will be referred to hereafter as the "Median Ban" or the "Ban," Greeley has prohibited all expressive activity by pedestrians on all medians in the City.

In Greeley, as is true across Colorado and across the country, medians have long been an important safe harbor to communicate constitutionally-protected speech to a sizeable and diverse audience. Raised medians, such as the one pictured below in Greeley, allow speakers to safely communicate messages to two-directional traffic.[1]



Although the challenged ordinance is aimed at purported risks to pedestrian and traffic safety, the record is clear that the true targets of the ban—as enacted and as enforced—are impoverished individuals seeking charity. Greeley enacted the Median Ban to take the place of a law that had explicitly targeted panhandling and solicitation. Indeed, the Police Chief, whom the City identified as the "staff contact" for the Median Ban, said publicly that the Ban was designed to target panhandling, and he openly disparaged those who engaged in this activity.

[1] All photographs submitted within this motion, as well as all exhibits submitted herewith, are authenticated via the Declaration attached as Exhibit 19.

While the Median Ban is intended to target impoverished solicitors, the reach of the Ban is much broader. It prohibits all expressive conduct, including distributing literature, displaying signs of protest, and urging passers-by to vote for particular candidates or ballot measures. Furthermore, the Median Ban applies to each and every median in Greeley, regardless of size, volume of traffic, speed of surrounding cars, time of day, or any other factor that might arguably impact pedestrian and driver safety.

The Median Ban falls woefully short of meeting the requirements of the First Amendment. Panhandling is clearly speech that is protected by the First Amendment; however, the Ban goes further and prohibits *all* expressive speech or conduct on *all* medians—public forums where the government's ability to restrict speech is at its weakest. Across the country, in the wake of caselaw striking down laws that directly and expressly regulate the speech of panhandlers, localities like Greeley are using seemingly content-neutral median restrictions to provide law enforcement an alternative tool to push impoverished solicitors out of sight. These laws are being challenged, with courts striking down all but the most narrowly-tailored ordinances. Only two courts have had an opportunity to address city-wide median bans such as Greeley's, and both found that these blanket city-wide bans do not survive constitutional scrutiny. *See Cutting v. City of Portland*, 802 F.3d 79, 92-93 (1st Cir. 2015); *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 237 (D. Mass. 2015).

Plaintiffs are four individuals who seek to communicate messages to the occupants of passing vehicles by holding signs while standing on Greeley's medians. Three are needy individuals who seek to solicit charity for themselves, and the fourth is a community activist and journalist who seeks to share political messages. They wish to engage in expression that is protected by the First Amendment but forbidden by the Greeley law that is challenged in this

case. Plaintiffs ask this Court to address the irreparable harm they suffer through interim injunctive relief halting enforcement of Greeley's Median Ban.

STATEMENT OF FACTS

I. The Median Ban Was Adopted to Replace Greeley's Bans on Solicitation in the Roadway and to Target a "Blight on Greeley's Image."

The law challenged in this case forbids pedestrians to remain on medians for longer than is "reasonably necessary to cross the street." The City's purpose in enacting the Median Ban is to target panhandling, speech that is clearly protected by the First Amendment. Greeley adopted the Median Ban to replace Greeley's ban on solicitation in the roadway, and it directed its police officers to "address panhandling" by relying on the Median Ban. The Police Chief, who was listed in City Council records as the staff contact for the Median Ban and who provided the only testimony to the City Council on the Median Ban's rationale, openly and vocally expressed his animus toward panhandlers' speech immediately after its passage. Although the preamble to the ordinance contains vague references to public safety, the City Council heard no specific evidence to support that purported justification.

A. The Median Ban

The Median Ban is titled "Pedestrians not to remain on medians," and is codified at Greeley Municipal Code § 11.01.809. It states: "No pedestrian may remain upon a median for longer than is reasonably necessary to cross the street."[2] A violation is punishable by a fine of up to $500. Greeley Municipal Code § 1.32.010.

[2] "Median" is defined as "any area of a street, roadway, or public driveway defined by painted, raised, or depressed channelization barriers or markers usually in the middle of the roadway, at driveways, or at intersections, which control turning movements or separate traffic lanes." Greeley Municipal Code § 11.01.102. The Median Ban has limited exceptions for "persons maintaining or working on the median for the government which owns the underlying road or public right-of-way or for a public utility," and for a median on "a street closed to vehicular traffic for the purposes of permitted activity on the street or roadway." Greeley Municipal Code § 11.01.809(b)-(c).

B. The Greeley City Council Passed the Median Ban to Replace Greeley's Ban on Panhandling and Solicitation in the Roadway.

Greeley adopted the Median Ban as a replacement and substitute for a law titled "Solicitation and panhandling in public rights-of way." This law had made it unlawful to solicit contributions from occupants of vehicles on roadways. At its July 7, 2015 meeting, the City Council repealed that solicitation law by adopting Ordinance No. 23, 2015, Ex. 2, and it enacted the Median Ban by enacting Ordinance No. 24, 2015, Ex. 1.[3]

Greeley City Council records reflect the close relationship between the two ordinances. The agenda for the June 16, 2015 meeting summarizes the then-proposed ordinances in identical fashion: "The proposed revisions and additions are intended to clarify impermissible conduct with a refocused emphasis on safety without limiting meaningful communication." Ex. 3 at 5, 11. The "council goals or objectives" listed in the City Council agendas for the two ordinances are also identical: (1) "safety," and (2) "[c]rime prevention & suppression." Ex. 3 at 5, 11. GPD Chief Jerry Garner is listed as the "key staff contact" for both ordinances. *Id.* at 5, 11.

At the July 7, 2015 meeting, with little discussion, the City Council enacted the Median Ban and repealed the ban on roadway solicitation. The only substantive content reflected in the minutes is the testimony of Chief Garner. With respect to the repeal of the roadway solicitation ban, the minutes state that "Jerry Garner, Police Chief, reported that the proposed revisions and additions are intended to clarify impermissible conduct with a refocused emphasis on safety without limiting meaningful communication." Ex. 4 at 4. With respect to the Median Ban, the minutes state that "Chief Garner reported that again this ordinance proposes revisions and

[3] The repealed law applied to roadway solicitation of "employment, business, contributions or sales" but did not apply to other speech directed to occupants of vehicles. Ex. 2. Greeley's decision to replace this content-based regulation with the facially content-neutral Median Ban may have been motivated by a ruling in a District of Colorado case. In 2014, this Court held that a portion of a Grand Junction ordinance substantially similar to Greeley's roadway solicitation ban was content-based and failed strict scrutiny. *See Browne v. City of Grand Junction,* 27 F. Supp. 3d 1161 (D. Colo. 2014).

additions that will aid officers when trying to enforce this law within the community, in particular dealing with distractions in the median and on corners where passing motorists are being solicited for money." *Id.*

C. The Greeley Police Chief's Comments Reflect the Bias Against Panhandlers' Speech That Drove the Passage of the Median Ban.

Immediately after securing the passage of the Median Ban, Chief Garner told the press that the Median Ban was intended to crack down on panhandling, an activity for which he expressed intense disdain—and a view he contended the community shared. According to a news article appearing in the *Greeley Tribune* the following day, July 8, 2015, Chief Garner said the Median Ban "addresses quality of life issues that have been raised by residents who, quite frankly, view panhandlers as a blight on Greeley's image." [4] Chief Garner further stated, "I've …received a lot of complaints about the number of bums citizens see on the street corners soliciting money. They don't want to see it in Greeley, and I happen to agree with them." *Id.* Chief Garner is quoted in the article voicing harmful and demeaning stereotypes of impoverished persons who ask the public for help, saying he thought the majority of panhandlers were not interested in improving their lives. *Id.* He said that in reality, they used the money they solicited on the street to feed their drug and alcohol addictions. *Id.* Chief Garner also said: "The majority of [panhandlers] are not victims that are down on their luck; they're petty criminals . . . . This truly is a form of fraud. I don't think it's fair and I hate to see kindhearted people victimized by these crooks." *Id.*

[4] Ex. 5, Joe Moylan, *Greeley panhandlers assaulted before City Council approves curbside solicitation changes*, Greeley Tribune, July 8, 2015, available at https://www.greeleytribune.com/news/crime/greeley-panhandlers-assaulted-before-city-council-approves-curbside-solicitation-changes/.

D. Greeley Expressly Directed Its Police Officers to Invoke the Median Ban to Target Panhandling.

Three weeks after the passage of the Median Ban, GPD directed its officers to invoke the Median Ban to target panhandling. That directive followed the Supreme Court's late-term decision in *Reed v. Town of Gilbert*, 576 U.S. ___, 135 S. Ct. 2218 (2015). That ruling, which clarified how courts must analyze whether regulations that directly address speech are content-based and therefore subject to strict scrutiny, *see* 135 S. Ct. at 2228-31, created a constitutional problem for Greeley's Municipal Code Section 10.24.045, titled "panhandling." Because that ordinance expressly prohibited panhandling in specific situations (not confined to roadways and occupants of vehicles), the *Reed* analysis meant that the ordinance was content-based on its face and therefore unconstitutional.[5] On July 28, 2015, Captain Mike Savage issued the directive in the form of a Department-wide email in which he stated:

> Today we received a written notice from the City Attorney's Office to suspend enforcement of the Panhandling Ordinance 10.24.045. This is being necessitated by recent Supreme Court decisions. The current ordinance will need to be repealed by the City Council. This does not affect those ordinances directed at panhandling in the roadway, specifically 11.01.809 [the Median Ban] and 11.01.810.[6]
>
> **Panhandling is still an issue in our community, please utilize those ordinances which are still applicable, 11.01.809/11.01.810, in resolving these complaints**.

Ex. 7 (emphasis added). This directive further confirms that Greeley's purpose and intent in adopting the Median Ban was to target panhandling.

[5] The City Council ultimately repealed the panhandling law, section 10.24.045, on October 18, 2016. Ex. 6, Ordinance No. 25, 2016.

[6] Greeley Municipal Code § 11.01.810 prohibits "[c]onduct in public rights-of-way distracting to drivers on the roadway." It was enacted together with the Median Ban through Ordinance No. 23, 2015. *See* Ex. 2.

E. Greeley's Broad Purported Safety-Related Justifications for the Median Ban Are Unsupported by Specific Evidence.

The evidence before the City Council of the public safety issues that the Median Ban purports to address is apparently limited to Chief Garner's broad statements at the July 2015 City Council meetings. The Median Ban's enacting ordinance states that "City staff members and peace officers are asked to address citizen complaints regarding public safety concerns associated with pedestrian lingering in medians that pose a danger to both pedestrian drivers." Ex. 1 at 1.[7] Despite these references in the enacting ordinance, Greeley has been unable to produce any documentary evidence of the "citizen complaints" or the "public safety concerns" that purportedly justified adoption of the Median Ban.

Counsel for Plaintiffs requested from the City and GPD, under the Colorado open records laws, all records supporting the purported public safety justification. These requests asked for documents reflecting information the City Council considered in passing the Median Ban, public complaints and statements about pedestrians on medians (as referenced in the implementing ordinance), and any support for Chief Garner's statements about "distractions" caused by solicitors on medians. *See* Ex. 8, 9. The entirety of Greeley's response was a mere two sets of email exchanges, both dated after the Median Ban was adopted. In the first, dated April 26-28, 2017, GPD's upper command staff discussed a Longmont ordinance that banned pedestrian presence on certain medians. Ex. 10.

The second email exchange began on July 5, 2017, when a citizen wrote to complain about the presence of panhandlers and said, "Greeley already struggles with its image in comparison to neighboring cities and this certainly doesn't help." Ex. 11 at 2. Captain Savage

[7] The ordinance repealing the ban on panhandling and solicitation in the roadway similarly stated: "City staff members and peace officers are asked to address a significant number of citizen complaints regarding public safety concerns associated with panhandling activities at busy intersections." Ex. 2 at 1.

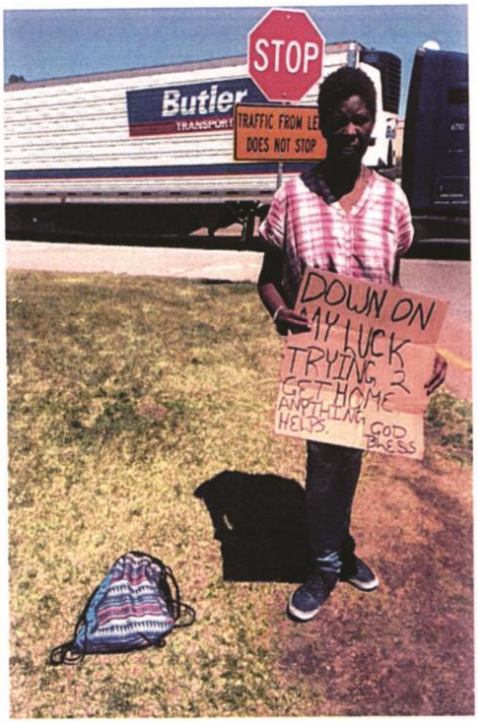
responded with reassurance that City officials were committed to maintaining Greeley's "positive image" and that GPD was enforcing Greeley's laws against panhandlers. *Id.* at 1. Neither set of email exchanges supports any safety-related justification for the Median Ban.

II. GPD Has Enforced the Median Ban as Intended—to Target Panhandling.

GPD Officers have followed departmental guidance by enforcing the Median Ban according to its true intent: to target panhandling. Counsel for Plaintiffs are aware of at least 14 citations for violation of the Median Ban issued since February 14, 2018. *See* Ex. 12, Median Ban Citations. Police officers issued all 14 citations to people who were holding signs with messages soliciting charity. *See id.* The officers wrote narrative descriptions explaining that the individuals were soliciting, and the officers carefully reproduced the text of the specific messages that appeared on the panhandlers' signs. *Id.* In most cases, the police officers also included photos of the individuals holding their signs. *See id.* Neither the fact that someone was panhandling, nor the specific message on the sign, has anything to do with whether the individual was violating the Median Ban, which simply forbids pedestrian presence on medians. Rather, the inclusion of this information in the citations confirms that the City intends, and the officers understand, that the Median Ban is a tool for targeting panhandlers.

Examples of panhandlers cited for violating the Median Ban include the following:

- The woman in the following picture holding a sign that read, "DOWN ON MY LUCK TRYING 2 GET HOME ANYTHING HELPS. GOD BLESS." *Id.* at 16-21. The citation noted that she was homeless with no phone, no car, and no job. *Id.* at 20.



- A man holding a sign saying "DREAMING OF A CHEESEBURGER." *Id.* at 22-28. The issuing officer noted that while he was talking to the man, "drivers pulled up to the stop sign and tried to give [him] money and told me to leave [him] alone." The officer further noted that the man had no car, no job, no house, and no phone number. *Id.* at 27.
- A man holding a sign that asked for "A LITTLE HELP." *Id.* at 36-41. According to the citation, he accused the officer of "ticketing him for trying to get something to eat." *Id.* at 40.
- A man holding a sign that read, "BRAIN INJURY, CAN'T WORK, ANYTHING HELPS! GOD BLESS . . . ." *Id.* at 42-47. The issuing officer noted that the man "said he was trying to make enough money to rent a hotel room to take a shower." *Id.* at 46.

- A woman who was "begging for money" according to the citation. *Id.* at 48-52. The issuing officer asked her "if she had a sign and was asking for money," and she responded in the affirmative. *Id.* at 52.

In addition to issuing citations, GPD Officers have frequently told people soliciting charity on Greeley's medians that they cannot panhandle there and need to move along. GPD does not generate written records of these oral orders. Nonetheless, some citations note previous warnings. *Id.* at 15, 75, 81. Numerous warnings from GPD to panhandlers violating the Median Ban are also described in the declarations submitted with this Motion. Ex. 13, Blanche Marceleno Decl. at ¶ 10; Ex. 14, Edward Caussade Decl. at ¶ 10. Such enforcement, accompanied by the implicit or explicit threat of citations, is a pervasive and constant threat to persons who solicit charity on Greeley's medians.

III. Plaintiffs Seek to Engage in Expressive Conduct That Is Forbidden by the Median Ban.

Plaintiffs Blanche Marceleno, Susan Ebbs, and Edward Caussade are among the people who have received citations for seeking charity while standing on Greeley medians. They are needy individuals who have safely panhandled on Greeley medians to help support their basic financial needs. When they panhandle, they hold signs on wide medians near stop signs, where the cars are stopped or moving slowly. Ex. 13, Marceleno Decl. at ¶ 7; Ex. 15, Susan Ebbs Decl. at ¶ 10; Ex. 14, Caussade Decl. at ¶ 7. Plaintiffs stay on the median and do not step into the street to accept donations. *Id.* Plaintiff Tyler Brunner is a community activist and journalist who wishes to spread his own messages by holding signs on Greeley's medians, in a safe manner as the other three Plaintiffs have done. Ex. 16, Tyler Brunner Decl. at ¶ 12.

Plaintiffs' declarations explain that they stand on medians because medians provide a uniquely effective location for communicating their messages to their desired audience.

Individuals engaged in speech activity on medians can reach a large audience in cars passing on both sides, including cars stopped at stop signs and traffic lights. *See* Ex. 14, Caussade Decl. at ¶ 7; Ex. 16, Brunner Decl. at ¶ 12. People on a median are frequently on the driver's side of the car. This means that they are more visible to drivers, and it also allows solicitors to receive donations safely without stepping into the street. Ex. 13, Marceleno Decl. at ¶ 8; Ex. 15, Ebbs Decl. at ¶ 10; Ex. 14, Caussade Decl. at ¶ 7.

All four Plaintiffs wish to engage and continue engaging in these safe and peaceful communicative activities on medians, but these activities are forbidden by the challenged ordinance. The continued enforcement of the Median Ban has infringed and threatens to continue infringing on Plaintiffs' First Amendment rights.

A. Blanche Marceleno

Plaintiff Blanche Marceleno is 57 years old. She has physical and mental health problems, including sciatic nerve damage that causes severe, chronic pain, that prevent her from working. Ex. 13, Marceleno Decl. at ¶ 2. Ms. Marceleno used to be homeless but was able to secure a tiny apartment in Greeley about two years ago. *Id.* at ¶¶ 3-5. She receives disability benefits, but almost all that income must go toward her rent and phone bill. *Id.* at ¶ 5. She relies on panhandling for most everything else, including food and Medicaid copays. *Id.* Ms. Marceleno used to panhandle on a very large, grassy median near 8th Avenue and 23rd Street, which she can see from the front door to her apartment. *Id.* at ¶ 6. She usually held a sign asking for help and sometimes mentioning that she did not drink or do drugs. *Id.* at ¶ 8.

After receiving multiple move-on orders by Greeley police officers, Ms. Marceleno received a citation for violating the Median Ban on October 18, 2018. *Id.* at ¶¶ 10-11. The

officer who cited Ms. Marceleno noted in his report that she was holding a sign saying, "PLEASE ANYTHING HELPS GOD BLESS." Ex. 12 at 2.

Ms. Marceleno used her meager earnings and relied on the help of a friend to pay her ticket. Ex. 13, Marceleno Decl. at ¶ 13. Out of fear of being ticketed again, she has not returned to the median near 8th Avenue and 23rd Street. *Id.* at ¶ 14. Instead, on occasion she has made the painful half-hour walk to panhandle on a street corner a mile away outside a King Soopers grocery store near Highway 34 and 11th Avenue. *Id.* at ¶ 15. Because of her disability, which makes walking difficult, Ms. Marceleno does not panhandle as frequently as she did before being ticketed. *Id.* Not being able to panhandle as often has made it harder to pay for clothes and medicine. She has had to break pills in half to make them last longer. *Id.* at ¶ 17. Ms. Marceleno wants to continue safely panhandling on medians, including the large median near her apartment, but she knows that by doing so she puts herself at risk of receiving another costly citation for violating the Median Ban. *Id.* at ¶ 18.

B. Susan Ebbs

Plaintiff Susan Ebbs is 51 years old and a longtime Colorado resident. Ex. 15, Ebbs Decl. at ¶ 2. In 1997, she suffered a horrific car accident that caused severe injuries including to her back. *Id.* at ¶ 4. She continues to suffer from multiple herniated discs and the frequent re-fracturing of other discs. *Id.* Ms. Ebbs has not been able to work since the accident, and her Supplemental Security Income does not provide enough to cover all her expenses. *Id.* at ¶ 5-6. Four years ago, Ms. Ebbs was living in Fort Lupton, Colorado, when she lost her home to foreclosure and became homeless for a period of time. *Id.* at ¶ 5.

Ms. Ebbs currently lives in a mobile home in Gilcrest, Colorado, about a 15-minute drive from the large median where an officer cited her for violating the Median Ban on May 25, 2018.

Id. at ¶¶ 6-7. At the time, she was holding a sign that said, "NEED HELP ANYTHING HELP'S THANK YOU." *Id.* at ¶ 9. The officer included a photo of Ms. Ebbs with her sign in his narrative. Ex. 12 at 9. The officer also told her to go panhandle in nearby Garden City. Ex. 15, Ebbs Decl. at ¶ 12. He pointed in the direction of a group of homeless people in the distance and said, "You see that trash standing down there? Go stand there with them." *Id.*

Since receiving the citation, Ms. Ebbs sells plasma instead of relying on panhandling to help pay her bills. *Id.* at ¶ 18. It took her close to a year to pay off the ticket, and even longer to get caught up on her bills. *Id.* at ¶16. Ms. Ebbs wants to engage in peaceful, safe panhandling at medians, but doing so puts her at risk of receiving another costly citation for violation of the Median Ban. *Id.* at ¶¶ 18-19.

C. Edward Caussade

Plaintiff Edward Caussade is 33 years old and has lived in Greeley for eight years. Ex. 14, Caussade Decl. at ¶ 2. Mr. Caussade has adenocarcinoma, a form of cancer. *Id.* at ¶ 3. He became unemployed and homeless after receiving his diagnosis. *Id.* Mr. Caussade turned to asking for charity on Greeley's medians in order to help pay for food and medical costs. *Id.* at ¶ 4. He usually holds a sign that says, "CANCER PATIENT. HOMELESS. PLEASE HELP." *Id.* at ¶ 6.

GPD officers have enforced the Median Ban against Mr. Caussade on multiple occasions, usually by ordering him to move on and threatening the prospect of citations. *Id.* at ¶ 10. Police have told him he should go panhandle in nearby Garden City. *Id.* at ¶ 12. In early April, an officer cited him for violating the Median Ban. *Id.* at ¶ 13; Ex. 12 at 10-15. The officer's narrative said Mr. Caussade was standing "next to a stop sign holding a cardboard sign apparently begging for money." Ex. 12 at 15. Mr. Cassaude wants to be able to ask for charity

on Greeley's medians without risk of getting another costly citation for violating the Median Ban. Ex. 14, Caussade Decl. at ¶ 15.

D. Tyler Brunner

Plaintiff Tyler Brunner is a 32-year-old community activist and independent journalist who has lived in Greeley his entire life. Ex. 16, Brunner Decl. at ¶¶ 2, 9. Mr. Brunner was in high school during the September 11, 2001 attacks, which proved to be a formative event in is life. *Id.* at ¶ 3. He was particularly struck by the strong reactions to the event that those around him exhibited, notwithstanding their lack of knowledge and perspective toward the targets of their hatred. *Id.* at ¶ 5.

Mr. Brunner came out of that experience wanting to challenge people's understanding of issues. *Id.* at ¶ 6. He sees it as his patriotic duty to inform. *Id.* at ¶ 7. Mr. Brunner runs the website greeleyindie.com, a local independent news outlet dedicated to simplifying complex topics and explaining how national issues play out in Greeley. *Id.* at ¶ 9. Mr. Brunner seeks to engage Greeley residents from across the political spectrum on issues such as criminal justice, income equality, and voting rights. *Id.* He is also frustrated with what he has perceived throughout his life to be efforts by the City to quash free speech in public spaces, such as laws barring panhandling. *Id.* at ¶ 11.

Mr. Brunner wants to stand on a median to promote his website and display political messages to Greeley residents. *Id.* at ¶ 12. But he cannot do so without violating the challenged Ordinance. If the Ordinance were not in place, Mr. Brunner would display the following messages: "Casino capitalism is killing us all," "I'm pro-life and pro state-sanctioned child kidnapping," "Stop Iraq 2.0 before it begins," and "Why does Greeley government want to stop this action?" *Id.* at ¶ 13.

Like the other Plaintiffs, Mr. Brunner wishes to be free to engage in expression that is prohibited by the Median Ban. *Id.* at ¶ 14. Without this Court's intervention, Plaintiffs are forced to choose either to violate the Median Ban or to forego their constitutionally-protected communicative activities.

IV. By Prohibiting All Expression on Each and Every Median in the City, the Median Ban Prohibits a Significant Amount of Expressive Conduct That Does Not Pose a Threat to Public Safety.

There are dozens of raised medians of various sizes and lengths throughout the City of Greeley, some spanning the length of a city block and others stretching back multiple cars lengths from intersections. Some medians have wide open areas, manicured lawns, landscaping, or large signs. The medians vary dramatically in length and width; some medians are dozens of feet wide. The Median Ban applies to each and every one of these medians, no matter how wide or how slow the surrounding traffic, and without regard to any arguable risk to public safety. The absence of a safety nexus is especially apparent, for example, at a set of four expansive, manicured medians located at the 2300 block of 8th Avenue, where 8th Avenue merges with Business Highway 85. The following image from Google Maps represents a bird's-eye view of these medians. The top of the image represents north. Black arrows represent the flow of traffic, and a red X represents where panhandlers often stand, near a stop sign[8]:

[8] The photo of the woman that appears with the narrative portion of the citation described on pages 9-10, *supra*, was taken at this location, where there was plenty of room for panhandlers to stand and for police to interact with them.

The large volume of cars moving northbound on 8th Avenue must stop at this stop sign near the red X above. Persons soliciting charity are able to approach the drivers-side windows of stopped vehicles and accept donations without stepping off the median. This median is flat, grassy, and more than one hundred feet wide,[9] leaving ample room for people to be present safely.

[9] *See* Ex. 19, Jahanian Decl., at ¶ 6.

The City uses the similarly wide and grassy median just to the north to express a message, through a sculpture as well as a landscaped stone sign with the engraved messages "Greeley," and "Home of the UNC Bears" (referring to the University of Northern Colorado).[10]

By barring presence on all of Greeley's medians, the Median Ban prohibits a wide array of safe speech activity, not just panhandling. For example, it bars Mr. Brunner from standing on medians to spread the social and political messages he seeks to convey. In addition, in this facial challenge, the Court is not limited to considering only the harm posed to Plaintiffs' speech; it must also consider the First Amendment rights of others not before the Court.[11] The challenged ordinance prohibits demonstrators from displaying American flags as they hold signs saying "Support the Troops." Such a demonstration occurred in 2007 (years prior to the passage of the

[10] A photo of this median is included in the introduction to this Motion, on page 2. The photo here is taken from a further distance to provide a better sense of its size.

[11] Because Plaintiffs' claims "are rooted in the First Amendment, they are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own." *Schad v. Mount Ephraim*, 452 U.S. 61, 66 (1981); *see also Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150, 166 n.14 (2002).

Median Ban), on a median at 10th Street and 35th Avenue in Greeley.[12] The following is a photo of this now-forbidden demonstration:

The Median Ban, also prohibits firefighters from using medians in their "fill the boot" campaigns to solicit charity for organizations like the Muscular Dystrophy Association. A photograph from a recent such campaign in another city[13] is shown here:

[12] *Operation Infinite Freep Greeley, Colorado 4-7-07*, Free Republic (Apr. 7, 2007), http://www.freerepublic.com/focus/f-news/1813719/posts, attached as Exhibit 17.

[13] Jackie Renzetti, *Firefighters 'Fill the Boot' for muscular dystrophy*, Woodbury Bulletin (Apr. 4, 2019), https://www.woodburybulletin.com/community/events/4593455-firefighters-fill-boot-muscular-dystrophy, attached as Exhibit 18.

Other examples of prohibited speech activity abound. The Median Ban prohibits a youth sports team from soliciting donations to help them travel to a tournament, and others from promoting businesses, charitable organizations, political campaigns, and events. It prohibits nonprofit organizations like Planned Parenthood or Focus on the Family from distributing literature. It would have prohibited this gentleman from displaying his flag to drivers on both side of the median to see:

Thus, the reach of the Median Ban is extremely broad. It applies to all medians and restricts a wide range of safe, expressive activity throughout the City of Greeley.

ARGUMENT

I. Legal Standard for Interim Injunctive Relief

The Tenth Circuit applies a four-prong test in evaluating whether an interim injunction is warranted. The moving party must generally demonstrate (1) a likelihood of success on the merits; (2) a likelihood that the movant will suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in the movant's favor; and (4) that the injunction is in the public interest. *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1252 (10th Cir. 2016). Plaintiffs here easily satisfy this test.[14]

II. Plaintiffs Are Substantially Likely to Succeed on the Merits of Their Constitutional Claims.

Greeley's Median Ban is unconstitutional on its face. It prohibits all pedestrian presence, and therefore virtually all speech, on medians, which are traditional public forums entitled to the highest levels of protection under the First Amendment. The Median Ban was passed because of Greeley's disapproval of the message conveyed by panhandlers. It is therefore a content-based law that cannot survive strict scrutiny. Indeed, it cannot survive even the intermediate scrutiny applied to content-neutral regulations of expression. Unsupported by evidence, but rather fueled by animus toward the message of poor persons asking for charity, the Median Ban is not narrowly tailored to advance the purported governmental interest in public safety. The Median Ban therefore fails to meet the requirements of the First Amendment.

[14] Interim injunctive relief is "disfavored" and requires a heightened standard if "(1) it mandates action (rather than prohibiting it), (2) it changes the status quo, or (3) it grants all the relief that the moving party could expect from a trial win." *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 797 (10th Cir. 2019). The interim relief Plaintiffs request is prohibitory rather than mandatory, and it would not give Plaintiffs all the relief expected from prevailing in a full trial; it merely provides temporary protection for their First Amendment rights until this Court can issue a final judgment. In the event that Greeley can establish that Plaintiffs seek to change the status quo, Plaintiffs easily satisfy the heightened standard. As demonstrated below, Plaintiffs make the required "strong showing" on the likelihood-of-success-on-the merits and the balance-of-harms factors. *See id.*

A. The Median Ban Prohibits Plaintiffs' Constitutionally-Protected Speech Activity in a Public Forum, Where the Government's Power to Regulate Speech Is at Its Weakest.

Greeley's Median Ban forbids Plaintiffs from exercising their First Amendment rights on public forums. With regard to Plaintiffs Marceleno, Ebbs, and Caussade, it is well-settled that the peaceful solicitation of charity is speech protected by the First Amendment. *See, e.g., Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) ("[C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment."). In a challenge to a regulation of panhandling in Grand Junction, Colorado, the federal district court explained:

> This Court believes that panhandling carries a message. Often, a request for money conveys conditions of poverty, homelessness, and unemployment, as well as a lack of access to medical care, reentry services for persons convicted of crimes, and mental health support for veterans.

Browne v. City of Grand Junction, No. 14-cv-00809-CMA-KLM, 2015 U.S. Dist. LEXIS 73834, at *12-13 (D. Colo. June 8, 2015); *accord Loper v. N.Y. Town Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993) ("Begging frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation."). Similarly, the signs with political messages that Mr. Brunner seeks to display are also protected by the First Amendment. *E.g., City of Ladue v. Gilleo*, 512 U.S. 43, 48 (1994).

It is also well-established that traffic medians are public forums along with parks, streets, and sidewalks. *See Warren v. Fairfax Cty.*, 196 F.3d 186, 196 (4th Cir. 1999) (en banc) ("Median strips, like sidewalks, are integral parts of the public thoroughfares that constitute the traditional public fora."); *Reynolds v. Middleton*, 779 F.3d 222, 225 (4th Cir. 2015) ("There is . . . no question that public streets and medians qualify as traditional public forums.") (internal

quotation marks and alterations omitted); *Cutting*, 802 F.3d at 83; *Satawa v. Macomb Cty. Road Comm'n*, 689 F.3d 506, 521 (6th Cir. 2012) ("[T]he median is a public space, which is, and apparently long has been, available to all comers."); *Leatherman v. Watson*, No. 17-cv-05610-HSG, 2019 U.S. Dist. LEXIS 27929, at *5-6 (N.D. Cal. Feb. 21, 2019) ("Streets, sidewalks, and traffic medians are traditional public fora."); *Martin v. City of Albuquerque*, No. CIV 18-031 RB/JFR, 2019 U.S. Dist. LEXIS 119774, at *13 (D.N.M. July 18, 2019) (noting that courts have found medians "to be, without question and without particularized analysis, traditional public fora"). "Because public forums occupy a 'special position in terms of First Amendment protection due to their historic role as sites for discussion and debate,' the government's power to restrict speech in a traditional public forum is 'very limited.'" *McDonnell*, 878 F.3d at 1253 n.2 (quoting *McCullen v. Coakley*, 573 U.S. 464, 476 (2014)).

"When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *McCutcheon v. FEC*, 572 U.S. 185, 210 (2014). Where the regulation of speech is content-based, strict scrutiny applies, and the government must prove that the law is "narrowly tailored to serve a compelling state interest[]." *Reed*, 135 S. Ct. at 2226. If the law is content-neutral, it is subject to intermediate scrutiny, and the government must prove that it is "narrowly tailored to serve a significant government interest" and "leave[s] open ample alternative channels for communication of the information." *McCullen*, 573 U.S. at 477.

As Plaintiffs demonstrate below, the Median Ban is a content-based regulation that fails strict scrutiny. (Subsection B.) Even if the Median Ban is regarded as content-neutral (and it is not), it nevertheless fails the test of intermediate scrutiny. (Subsection C.)

B. The Median Ban Is a Content-Based Regulation Targeting the Activity of Panhandling, and It Cannot Survive Strict Scrutiny.

On its face, the Median Ban appears to be a content-neutral regulation, but First Amendment caselaw requires courts to look behind the text. The Supreme Court recognizes a "category of laws that, though facially content neutral, will be considered content-based regulations of speech." *Reed*, 135 S. Ct. at 2227. This category includes "laws that were adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Id*. (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); *accord Evans v. Sandy City*, 928 F.3d 1171, 1178 (10th Cir. 2019). As *Reed* instructs, these types of laws, "like those that are content-based on their face, must also satisfy strict scrutiny." 135 S. Ct. at 2227. In this case, Greeley adopted the Median Ban because of disagreement with the message that panhandling, the targeted speech, conveys. Thus, as *Reed* and *Ward* require, the law must be regarded as content-based. It therefore must be presumed unconstitutional, unless Greeley can satisfy the test of strict scrutiny, which it cannot do.

The facts clearly show that Greeley enacted the Median Ban specifically to restrain the First Amendment activities of impoverished individuals soliciting charity. As demonstrated thoroughly above, the City Council introduced and passed the facially-content neutral Median Ban to replace Greeley's content-based ban on panhandling and solicitation in the roadway. The Greeley Police Chief, who was City Council's "key staff contact" while it considered this legislative action, testified that the Median Ban would help officers deal with what he characterized as "distractions" presented by the solicitation of passing motorists for money. Immediately following the Median Ban's passage, the Chief told the local newspaper that the ban was part of an effort to rid Greeley of the "blight" on the City's image that is panhandling. He referred panhandlers as "bums," "crooks," and fraudsters. GPD then issued a directive

instructing officers to rely on the Median Ban to target panhandlers, and it referred to the Median Ban as "an ordinance directed at panhandling in the roadway." Officers have complied with that directive. The record makes clear that Greeley enacted the Median Ban because of disagreement with and disapproval of the First Amendment activities of impoverished persons asking for charity. *Cf. Browne*, 2015 U.S. Dist. LEXIS 73834, at *12-13 (concluding that regulation of panhandling was a content-based "attempt to restrain the expression of conditions of poverty") (denying motion to dismiss).[15]

Because the Median Ban is a content-based regulation, Greeley must prove that it is both "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' Assn*, 460 U.S. 37, 45 (1983). Further, to survive strict scrutiny, the Median Ban must be the "least restrictive means among available, effective alternatives." *United States v. Alvarez*, 567 U.S. 709, 725 (2012). Even if Greeley's generalized interest in "public safety" were deemed compelling, Greeley will be unable to prove that its Median Ban satisfies the exactingly close fit between ends and means that strict scrutiny requires. Indeed, as the following section demonstrates, Greeley will be unable to demonstrate that its Median Ban satisfies the more lenient test of narrow tailoring that applies to a content-neutral regulation of speech.

C. Even if the Median Ban Were Content Neutral, the Median Ban Fails the Test of Intermediate Scrutiny.

Even if the Median Ban were considered a content-neutral regulation on speech—which it is not—it still would not survive intermediate scrutiny. A content-neutral regulation of expression must be "narrowly tailored to serve a significant government interest" and must also "leave open ample alternative channels for communication." *McCullen,* 573 U.S. at 477.

[15] The court subsequently granted summary judgment to the plaintiffs. 136 F. Supp. 3d 1276, 1289-94 (D. Colo. 2015).

Greeley cannot carry its burden to prove either of these two essential requirements of intermediate scrutiny.

1. The Median Ban Is Not Narrowly Tailored to the Purported Public Safety Interest.

To be narrowly tailored, a content-neutral regulation cannot "burden substantially more speech than is necessary to further the government's legitimate interests." *McCullen*, 573 U.S. at 486 (quoting *Ward*, 491 U.S. at 799). Unlike a content-based restriction of expression, a content-neutral regulation of speech need not be the least restrictive means of serving the government interest, but Greeley "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id.*; *accord Verlo v. Martinez*, 820 F.3d 1113, 1135 (10th Cir. 2016). Put another way, the regulation must "focus[] on the source of the evils the city seeks to eliminate . . . and eliminate[] them without at the same time banning or significantly restricting a substantial quantity of speech that does not create the same evils." *Ward*, 491 U.S. at 799 n.7. "In short, 'fit matters.'" *iMatter Utah v. Njord*, 774 F.3d 1258, 1266 (10th Cir. 2014) (quoting *McCutcheon*, 572 U.S. at 219).

According to its enacting ordinance, the Median Ban was enacted to address "public safety concerns associated with pedestrian lingering in medians that pose a danger to both pedestrians and drivers . . . ." While advancing public safety is certainly a significant governmental interest, the Median Ban falls well short of being narrowly tailored to this overly general justification. *See Martin*, 2019 U.S. Dist. LEXIS 119774, at *36 ("[W]hile the existence of a significant government interest may be adequately supported by prior caselaw and common sense, the government must present case-specific evidence that the restriction actually serves the stated goal without burdening too much speech in order to satisfy the narrow tailoring inquiry."). For example, in *Verlo*, the Tenth Circuit considered a content-neutral ban on expressive activity

around a courthouse, which the government justified by its interest in "unhindered ingress and egress and public safety." 820 F.3d at 1137. The court had no trouble finding those interests legitimate but still held that "the district court did not abuse its discretion in concluding the means chosen to achieve those interests—a total ban on expressive activity—is not narrowly tailored, as even content-neutral regulations in a public forum must be." *Id.*

a. The Median Ban fails narrow tailoring because it does not address a real harm in a direct and material way.

"When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply posit the existence of the disease sought to be cured. It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) (internal quotations and citations omitted). Here, Greeley has not demonstrated and cannot demonstrate that the purported "public safety concerns" associated with pedestrian presence on medians are real harms that the Median Ban alleviates in any "direct and material way."

When it enacted the Median Ban, neither the City Council nor the City staff had actual evidence of any safety problem to be prevented or resolved related to pedestrian presence on medians, nor any evidence that the Median Ban would reduce any arguable risks to public safety. The City Council did not consider any accident reports, analyses, or studies showing that pedestrians on all, or even some, medians in Greeley, or anywhere else, posed any danger to themselves or to drivers. Even a few years later, when Plaintiffs' counsel sent a public records request asking for any and all documents or evidence to support the purported public safety justification for the Median Ban, Greeley produced nothing supportive of that justification.

A similar evidentiary deficiency was evident in a First Amendment challenge in federal court to an ordinance restricting pedestrians from interacting with occupants of vehicles:

> The City compiled no relevant data and conducted no studies prior to passing the Ordinance. . . . As such, the City adopted a sweeping ban on expressive activity to address traffic flow and safety problems that—on this record—do not exist, or, at best, are limited to only a few streets or intersections in Manchester. **Due to the lack of evidence in the record of citywide problems related to roadside exchanges, the only reasonable conclusion is that the Ordinance burdens substantially more speech than is necessary to further the City's interests**.

Petrello v. City of Manchester, No. 16-cv-008-LM, 2017 U.S. Dist. LEXIS 144793, at *61 (D.N.H. Sept. 7, 2017) (emphasis added). A similar conclusion is warranted here. Greeley is unable to demonstrate both that there is a non-conjectural, city-wide safety concern related to pedestrian presence on medians in Greeley *and* that the Median Ban actually reduces the risk to public safety in a direct and material way. As a result, the Ban *necessarily* burdens substantially more expression than is necessary to advance the City's interest in public safety and, thus, fails narrow tailoring. Put another way, because Greeley cannot show that its Median Ban actually advances public safety, the City fails narrow tailoring because it has regulated expression "in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *McCullen*, 573 U.S. at 486 (quoting *Ward*, 491 U.S. at 798, 799).

b. The Median Ban fails narrow tailoring because it burdens substantially more expression than is necessary to address public safety.

The Median Ban is an expansive blanket prohibition of all pedestrian speech on each and every median in Greeley. It covers every median regardless of size, location, time of day, speed of passing vehicles, or any other factor that could arguably inform the analysis whether pedestrian presence in a particular spot poses a risk to public safety that is sufficiently significant to justify suppressing expression. As the First Circuit concluded when it evaluated a nearly

identical ordinance, such a blanket citywide prohibition is not narrowly tailored to serve the City's interest in protecting public safety. *See Cutting*, 802 F.3d at 82.

Not all medians are created equal. While common sense would dictate that, at certain locations, "standing near moving traffic on the shoulder of an exit or entrance ramp . . . is an inherently risky activity," *Martin*, 2019 U.S. Dist. LEXIS 119774, at *46, at other medians, this tried-and-true venue for expressive activity has not been shown to pose any public safety risk whatsoever. "Although the City need not necessarily employ the least-restrictive alternative, it may not select an option that unnecessarily imposes significant burdens on First Amendment-protected speech." *Id.* (internal quotation and alteration omitted). By ignoring entirely the variety of safe medians for panhandling and other expressive activity in Greeley, the Median Ban makes no attempt whatsoever at narrow tailoring so as not to unnecessarily burden protected speech.

The court in *Cutting* characterized the median ban in that case as "truly exceptional" in its breadth and said it imposed "serious burdens" on speech. 802 F.3d at 87 (quoting *McCullen*, 573 U.S. at 487). The court explained:

> The ordinance prohibits virtually all activity on median strips and thus all speech on median strips . . . . [I]t is hard to imagine a median strip ordinance that could ban more speech. . . . The ordinance restricts speech in all median strips in the entire City of Portland. And the actual "strips" range widely in terms of their size and character. . . .

Id. at 88. The court reasoned that the ordinance both was geographically overinclusive and banned substantially more speech than necessary because it encompassed all medians in the City, including medians where pedestrians posed no danger to themselves or drivers. *Id*. That is precisely the case with the Greeley Median Ban.

Even if Greeley were able to demonstrate that pedestrian presence at certain medians actually presented some risk to safety, that does not justify a blanket ban on presence at all medians in all situations. For example, in *Thayer v. City of Worcester*, 144 F. Supp. 3d 218 (D. Mass. 2015), the City persuaded the court, based on documentary evidence in the record, that at several specific medians, "pedestrian use should be prohibited in the interest of public safety." *Id*. at 237. Nevertheless, the court held that such evidence did not justify the city's "sweeping" ban that prohibited all pedestrian presence on all medians, and thus the ordinance failed the test of narrow tailoring. *Id*. Similar holdings abound in cases concluding that city-wide or county-wide regulations of expression are not sufficiently tailored to the government's evidence of a harm to be addressed. *See, e.g.*, *Reynolds*, 779 F.3d at 231 ("The County's evidence, however, established, at most, a problem with the roadway solicitation at busy intersection in the west end of the county. Given the absence of evidence of a county-wide problem, the county-wide sweep of the Amended Ordinance burdens more speech than necessary . . . ."); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 947-50 (9th Cir. 2011) (en banc) (ban on solicitation of occupants of cars not narrowly tailored where city produced evidence only with respect to a small number of streets and medians); *Rodgers v. Stachey*, No. 6:17-cv-06054, 2019 U.S. Dist. LEXIS 55438, at *23 (W.D. Ark. Apr. 1, 2019) (ordinance barring "physical interaction" between pedestrians and vehicles not narrowly tailored where city had not presented evidence that risk to pedestrian safety was same on every street and roadway).

It is telling that a district court in the Tenth Circuit recently found that a median ordinance drawn much more narrowly than Greeley's still was not narrowly tailored to the city's interest in public safety. In *Martin v. City of Albuquerque*, the court considered a ban on pedestrian presence on medians that are less than six feet wide, near roads with a posted speed

limited of at least 30 miles per hour, or otherwise not suitable for pedestrian use as determined by the City Traffic Engineer. The court found that the ordinance was not sufficiently tailored to public safety interests, where the evidence considered by the city was limited to police officer's anecdotal "observations and perceptions of safety risks" and "general traffic safety design principles that highlight the dangers associated with standing in proximity to moving traffic." 2019 U.S. Dist. LEXIS 119774, at *43, 56.[16]

Greeley's Median Ban, which prohibits pedestrian presence on all medians in the City, fails the test of narrow tailoring because it bars a substantial amount of speech that does not pose any danger to public safety. It prohibits Plaintiffs Marceleno, Ebbs, and Caussade from soliciting donations from drivers of stopped vehicles while standing on wide, safe medians. It forbids Plaintiff Brunner from holding signs to communicate messages to occupants of passing cars. It prohibits other activists from distributing literature to occupants of vehicles pausing at stoplights or stop signs. It forbids a wide array of advocacy organizations, businesses, and political candidates from engaging in a variety of communicative and expressive activities that pose no risk to pedestrians or drivers. Rather than focusing squarely "on the sources of the evils the city seeks to eliminate," Greeley has banned and significantly restricted "a substantial quantity of speech that does not create the same evils." *Ward*, 491 U.S. at 799 n.7. It thus fails the test of narrow tailoring.

[16] The ruling in *Martin* followed *Evans v. Sandy City*, in which the Tenth Circuit upheld a city ordinance prohibiting sitting or standing on medians that are unpaved or less than 36 inches wide. 928 F.3d 1171 (10th Cir. 2019). The city had passed this ordinance after the police chief and city prosecutor had conducted surveys of the city's medians. The court noted, "The Ordinance only prohibits sitting or standing on narrow or unpaved medians where it would be dangerous to do so. This is the sort of close fit the narrow tailoring requires." *Id.* at 1181. The holding in *Evans* demonstrates a narrower ordinance passing constitutional scrutiny, in contrast to citywide bans unsupported by evidence, like Greeley's Median Ban.

c. The Median Ban also fails narrow tailoring because there are obvious and substantially less speech-restrictive means for advancing Greeley's interest in public safety.

"To meet the requirement of narrow tailoring [in the context of content-neutral regulations], the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Verlo*, 820 F.3d at 1135 (quoting *McCullen*, 573 U.S. at 495); *accord U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1238 n.11 (10th Cir. 1999) ("[A]n obvious and substantially less restrictive means for advancing the desired government objective indicates a lack of narrow tailoring."). "That is, the government may not 'forgo[] options that could serve its interests just as well,' if those options would avoid 'substantially burdening the kind of speech in which [Plaintiffs'] wish to engage.'" *Verlo*, 820 F.3d at 1135 (quoting *McCullen*, 573 U.S. at 490); *accord Doe v. City of Albuquerque*, 667 F.3d 1111, 1134 (10th Cir. 2012) (holding that narrow tailoring is not satisfied where "[o]ther possible, less restrictive approaches potentially suggest themselves").

In *Cutting*, the court noted numerous less speech-restrictive alternatives to the blanket median ban it struck down as failing the narrow tailoring inquiry. *See* 802 F.3d at 92. The same analysis applies here. There are numerous obvious and less speech-restrictive alternatives to the Median Ban that would address the arguable risk to public safety posed by pedestrians on Greeley medians.

- Greeley could have limited pedestrian presence on medians only at dusk, or at night, when pedestrians are more difficult for drivers to see. *See id.*
- Greeley could have restricted pedestrian presence only when adverse weather conditions increase the risk of vehicles veering off the roadway. *See id.*
- Greeley could have limited its ban on pedestrian presence to the narrowest medians. *See id.*; *Evans*, 928 F.3d 1171 (ordinance prohibited presence on medians narrower

than 36 inches in width); *Martin*, 2019 U.S. Dist. LEXIS 119774, at *48-52 (invalidating ban on presence on medians less than six feet wide where targeting narrower medians was a possible alternative).

- Greeley could have limited pedestrian presence on specific medians on the basis of evidence that they pose a heightened risk of safety issues. *See Cutting*, 802 F.3d at 92.

- Greeley could have banned pedestrian presence only on narrow medians that divide streets with elevated speed limits.

The readily apparent availability of numerous less speech-restrictive alternatives further demonstrates that the Median Ban is not narrowly tailored.

2. The Median Ban Does Not Leave Open Ample Alternative Channels for Communication.

Finally, the Median Ban fails intermediate scrutiny because it does not "leave open ample alternative channels for communication of the information." *McCullen*, 573 U.S. at 477. Alternative channels of communication are inadequate if they do not allow the speakers to reach their target audience. *See, e.g.*, *Startzell v. City of Philadelphia*, 533 F.3d 183 (3d Cir. 2008) ("An alternative is not ample if the speaker is not permitted to reach the intended audience.") (quoting *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990). Given that the challenged ordinance is a blanket ban on expression on all medians, the City *a fortiori* has not left open ample alternative means of communication.

Like the plaintiffs in *Cutting*, Plaintiffs in this case "'believe they can accomplish [their] objective' best if they are permitted to speak from traffic medians." 802 F.3d at 88 (quoting *McCullen*, 573 U.S. at 489 (alteration in original)). On medians, Plaintiffs are visible to two directional traffic. *See, e.g.,* Ex. 16, Brunner Decl. at ¶ 12. Sign holders can also choose to remain on the driver's side of the median, which means they are in drivers' line of vision, and they can safely receive donations without stepping off the median and into the road. *See* Ex. 14,

Caussade Decl. at ¶ 8. Engaging in expressive conduct at other locations, such as street corners and sidewalks, does not allow Plaintiffs to reach their target audience as safely or effectively as when they are on medians. For example, sidewalks provide access to only one-directional traffic, are often obstructed by cars or bus stops, often force a solicitor to step into the street to collect a donation, and are often narrower than medians, making it more likely that displaying a sign may obstruct passage of pedestrians. *Id.* In *Cutting*, the First Circuit described how the plaintiffs in that case similarly found medians to be more effective locations for expression than other places:

> A protestor standing on a median with a double-sided sign may -- as appellee Wells Staley-Mays asserts, based on his own experience -- reach more people than he can standing on a sidewalk. And appellee Michael Cutting testified that there are "more interactions [with people] and acknowledgements on the median than from the sidewalk." According to Cutting, sidewalks also present obstacles to expression that medians do not: cars parked along sidewalks block drivers' views of him; storefronts and signs distract passersby from his message; and shop owners who line the sidewalks sometimes become agitated with his protest activities. In fact, appellee Alison Prior, who uses medians to panhandle, finds sidewalks so useless for her purposes that she now takes a bus to a different town in order to panhandle from medians. Similarly, parks may not enable protesters like Cutting and Staley-Mays, and panhandlers like Prior, to be seen by people constantly moving past them in both directions.

802 F.3d at 89 (alterations in original). In sum, although plaintiffs remain free to engage in expressive activities in parks and on sidewalks, that does not save the Greeley ordinance. "[One] is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Southeastern Promotions v. Conrad*, 420 U.S. 546, 556 (1974).

Given the breadth of the Median Ban, together with the evidence that medians are particularly effective locations for communication with Plaintiffs' target audience, the Ban does not leave open ample alternative means of communication of Plaintiffs' messages.[17]

Thus, the Median Ban violates the First Amendment. It is a content-based regulation of expression that fails strict scrutiny. Even if the Median Ban is analyzed as a content-neutral measure, it is not narrowly tailored to advance any significant government interest, and it fails to leave open ample alternative channels for the Plaintiffs to reach their target audience.

III. The Remaining Factors Strongly Support a Preliminary Injunction in Plaintiffs' Favor.

As the foregoing shows, Plaintiffs are substantially likely to succeed on the merits, which is the "determinative factor" in awarding interim injunctive relief in a First Amendment case. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013). Indeed, Plaintiffs have made a "strong showing," sufficient to satisfy the heightened standard for a "disfavored" interim injunction. *Free the Nipple*, 916 F.3d at 797. Plaintiffs also satisfy the remaining factors.

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[17] The Tenth Circuit's recent ruling in *Evans v. Sandy City*, 928 F.3d 1171(10th Cir. 2019) is consistent with Plaintiffs' arguments here. In *Evans*, the court upheld an ordinance that prohibited presence on medians narrower than 36 inches. In holding that the ordinance left open ample alternatives for communication, the court relied on the extensive availability of medians (over 7,000 linear feet) to which the challenged ordinance did not apply *and* on Evan's failure to "distinguish his ability to communicate with his target audience on affected or unaffected medians. *Id*. at 1183. The court highlighted that:

> A mere ten feet away from where [plaintiff] was cited, the median is wider than 36 inches and is therefore unaffected by the Ordinance. We simply cannot accept this ten-foot difference *on the same median* as a substantial burden on speech. In compliance with the Ordinance, Evans can stand on wide, paved medians to communicate effectively with his target audience.

Id. at 1180. In contrast, Greeley's Median Ban prohibits Plaintiffs from engaging in First Amendment activities on *all* medians, without exception.

A. Plaintiffs Will Suffer Irreparable Injury if an Interim Injunction Is Denied.

"The Supreme Court has instructed that '[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Verlo*, 820 F.3d at 1127 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) and citing *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012)). Indeed, "[m]ost courts consider the infringement of a constitutional right enough and require no further showing of irreparable injury." *Free the Nipple*, 916 F.3d at 805. Accordingly, when government action violates First Amendment rights, as in this case, there is a presumption of sufficient irreparable injury to warrant interim injunctive relief. *Cmty. Commc'ns Co. v. City of Boulder*, 660 F.2d 1370, 1376 (10th Cir. 1981).

B. The Balance of Equities Weighs Heavily in Plaintiffs' Favor.

Because Greeley is violating Plaintiffs' First Amendment rights, the balance of the harms favors the enjoining of further constitutional violation. "The injury to a plaintiff deprived of his or her First Amendment rights almost always outweighs potential harm to the government if the injunction is granted." *Verlo v. City & Cty. of Denver*, 124 F. Supp. 3d 1083, 1095 (D. Colo. 2015); *see also Free the Nipple*, 916 F.3d at 806 (holding that heightened standard was satisfied because "[w]hen a constitutional right hangs in the balance . . . even a temporary loss usually trumps any harm to the defendant . . . . "[T]he City has no interest in keeping an unconstitutional law on the books."); *Awad*, 670 F.3d at 1131 ("[W]hen the law that voters wish to enact is likely unconstitutional, their interests do not outweigh Mr. Awad's in having his constitutional rights protected."); *American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999) ("[T]he threatened injury to Plaintiffs' constitutionally protected speech outweighs whatever damage the preliminary injunction may cause Defendants' inability to enforce what appears to be an unconstitutional statute").

C. The Injunction Is in the Public Interest

A temporary injunction preserving Plaintiffs' First Amendment rights serves the public interest. "Vindicating First Amendment freedoms is clearly in the public interest." *Pac. Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005); *see also Elam Constr. v. Reg. Transp. Dist.*, 129 F.3d 1343, 1347 (10th Cir. 1997) ("The public interest . . . favors plaintiffs' assertion of their First Amendment rights"); *Free the Nipple*, 916 F.3d at 807 (holding that it is "always in the public interest to prevent the violation of a party's constitutional rights").

D. No Security Should Be Required

"Trial courts have wide discretion under Rule 65(c) in determining whether to require security," *RoDa Drilling Co. v. Siegal*, 552 F.3d 1203, 1215 (10th Cir. 2009) (internal quotations omitted), and may decline to require security in appropriate cases. *See, e.g., Winnebago Tribe of Neb. v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003) (no bond necessary where there was no showing of harm from injunction); *Moltan Co. v. Eagle-Picher Indus., Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (finding no bond necessary where plaintiff had strong likelihood of success on merits). This is a case in which Plaintiffs have a strong likelihood of success on the merits, and Greeley will suffer no harm from an interim injunction. Accordingly, no security should be required.

CONCLUSION

For the foregoing reasons, the motion for interim injunctive relief should be granted. The Court should enjoin Greeley from enforcing Greeley Municipal Code § 11.01.809, "Pedestrians not to remain on medians," until this Court issues a final judgment on the merits of Plaintiffs' claims.

Respectfully submitted this 10th day of September 2019.

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