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NEW JERSEY COALITION TO END HOMELESSNESS and JOHN FLEMING, Plaintiffs, v. CITY OF NEW BRUNSWICK, Defendant.	:	**SUPERIOR COURT OF NEW JERSEY** **CHANCERY DIVISION** **GENERAL EQUITY PART** **MIDDLESEX COUNTY** **DOCKET NO:**

BRIEF IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AN ORDER TO SHOW CAUSE WITH TEMPORARY RESTRAINTS

PRELIMINARY STATEMENT

Casting aside all constitutional free speech requirements, the City of New Brunswick deprives the poor and homeless of their freedom of speech by precluding them from peacefully requesting food or monetary assistance. Indeed, the City has arrested and jailed wheelchair bound plaintiff John Fleming merely because he held a sign stating "Broke -- Please Help -- Thank You God Bless You."

Plaintiffs, John Fleming and New Jersey Coalition To End Homelessness ask this Court to declare unconstitutional the two municipal ordinances that prohibit such speech -- where the messages conveyed involved a mere request for food or monetary assistance. They also seek temporary, preliminary and permanent injunctive relief barring enforcement of those New Brunswick Ordinances §9.04.050(A)(6) and §5.32.020 (sometimes collectively referred to as the "Ordinances"). Both violate the New Jersey Constitution, Article I, Paragraph 6 by precluding protected speech that occurs in a public space.

In this season of holiday cheer, we should remember that some of our residents live in fear. They fear they will not find their next meal, or a warm bed, or other basic human needs.

Even more important, a homeless person should not live in fear that his exercise of that most basic constitutional freedom – freedom of speech – will result in steep fines, criminal prosecution, and even jail time.

In New Brunswick, all of these fears are real.

While bell ringers may remind us to help the needy, a homeless person begging sends a stronger message – a compelling message that society's basic needs are not being met, such that

the homeless take to the streets to plead for assistance. Mr. Fleming's sign -- indeed his mere presence on the street -- reminds the public of the plight of the homeless.

Perhaps that is a message local governments would prefer not to hear and, perhaps, even some members of the public would like to ignore. But those concerns should not permit a government to suppress the free speech rights of New Jerseyans, however poor or destitute.

The Ordinances, on their face and as applied, violate the freedom of speech guarantees of Article I, Paragraph 6 of the New Jersey Constitution based upon the analogous First Amendment. The highest courts of this country have held that such violations – or even the threat of such violations – constitute irreparable harm mandating immediate injunctive relief. An overwhelming body of case law demonstrates that Plaintiffs will succeed on the merits because the Ordinances violate those constitutional guarantees. Certainly the city cannot contend that any balancing of the equities favors suppressing the speech of homeless and poor people and depriving them of their basic needs.

The challenged Ordinances prohibit and even criminalize the speech of homeless and poor people who engage in even the most peaceful verbal exchanges in the hope of obtaining money or food necessary for their basic human needs. Specifically, §9.04.050(A)(6) (the "Anti-Begging Ordinance") deems it "disorderly conduct" to beg for or solicit food or money "on any street or sidewalk" within New Brunswick. Section 9.04.050(B) attaches penalties, including a fine of up to $2,000.00 and incarceration for up to 90 days, or both.

Section 5.32.020 of the New Brunswick Code (the "Charitable Solicitation Permit Ordinance") separately prohibits individuals from engaging in speech that constitutes "charitable solicitation," including speech that communicates a request for money or food assistance, anywhere "within the city" without a permit. Although that Ordinance purports to require the

speaker receive a permit before engaging in such speech, it provides no avenue – in terms of substantive requirements or administrative process – through which an individual can obtain a permit; only a "bona fide organization" can do so. Id. at §5.32.030 - §5.32.050. As the experience of Plaintiff John Fleming illustrates, failure to comply can also result in criminal penalty. His experience also demonstrates that the two challenged Ordinances are enforced interchangeably to prohibit homeless and poor people from asking their neighbors for money or food assistance on the streets and sidewalks of New Brunswick.

The challenged Ordinances thus regulate what a person can say throughout an entire city, including on all public streets and sidewalks – the quintessential public fora – making certain words unlawful. This is true no matter how peacefully the speech is conveyed. No court in the country has upheld an anti-begging or solicitation permit law with such a broad reach. Based upon the foregoing, and for the reasons set forth below, Plaintiffs now seek to enjoin the City of New Brunswick from enforcing both laws in light of their unconstitutional reach.

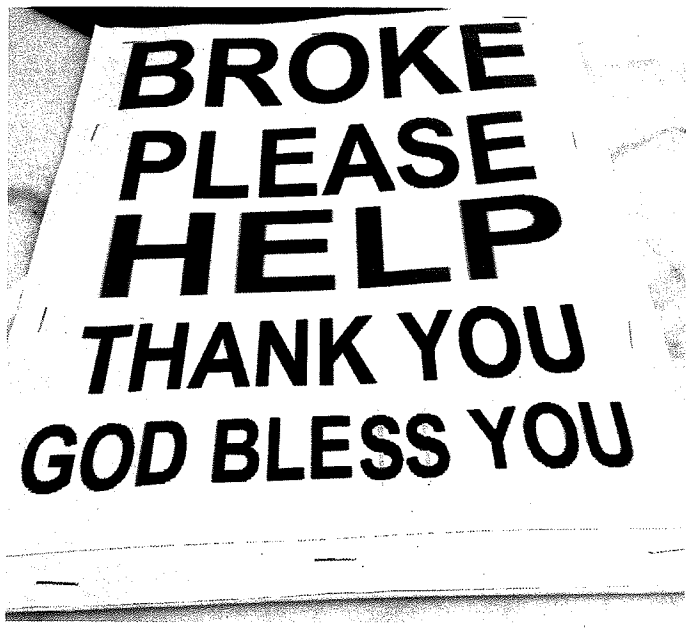
FACTS

Plaintiff New Jersey Coalition To End Homelessness ("the Coalition") is a non-profit corporation of New Jersey organized to advocate for homeless people in New Jersey and to eradicate homelessness in the state. It is tax-exempt under Section 501(c)(3) of the Internal Revenue Code. Verified Compl. ¶ 5. The Coalition has more than thirty organizational members including social service providers, religious and advocacy organizations, and for-profit businesses that provide grassroots assistance to homeless people and/or are committed to addressing the larger social, legal, economic, and political issues that affect the homeless. Id. at ¶6. The Coalition furthers its mission through public education, policy/legal work, and advocacy, including efforts to end the criminalization of poverty and homelessness. Id. At the core of its efforts is the goal of giving a voice to the state's homeless population. Id.

Plaintiff John R. Fleming ("Mr. Fleming"), age 50, spends time almost every day in New Brunswick and has previously been a resident of that city at various addresses and at different points of time during the last ten years. Id. at ¶7. He is now homeless, but continues to spend significant time in New Brunswick. Id. For the past several years, Mr. Fleming has been confined to a wheelchair due to a physical disability. Id. at ¶8.

Mr. Fleming has been adversely affected by the enforcement of both Ordinances challenged herein. Id. at ¶16. He currently receives limited public assistance (food stamps), and he has been forced to meet his most basic needs by asking passersby for money and food (*i.e.*, "panhandling" or "begging"), which he chooses to do on public streets and sidewalks in New Brunswick. Id. at ¶ 17. He began panhandling on a daily or near-daily basis starting in approximately August 2014, when he was evicted from his apartment and became homeless. Id.

His sole method of panhandling involves sitting in his wheelchair on public streets or sidewalks and holding a sign that reads:



Id. at ¶ 18; see also Verified Compl., Ex. A. Prior to October 2014, Mr. Fleming used a handwritten sign bearing these words. Id. at ¶ 18. Mr. Fleming then obtained and began using a printed sign bearing an identical message. Id.

On September 11, 2014, Mr. Fleming was panhandling on a public sidewalk on George Street, between Paterson Street and Bayard Street, in New Brunswick. Id. at ¶ 19. He did so while sitting in his wheelchair, holding his sign. Id. A member of the New Brunswick Police Department approached Mr. Fleming and issued him a ticket for "panhandling" in violation of the Charitable Solicitation Permit Ordinance. Id. There was no allegation that Mr. Fleming engaged in any unlawful conduct beyond the speech described. Id. Following the issuance of this ticket, Mr. Fleming continued to panhandle on the public streets and sidewalks of New Brunswick, using his sign to do so in the manner described. Id. at ¶20. He felt he had no choice: asking his passersby for help is his primary means of meeting his basic needs. Id.

On October 4, 2014, Mr. Fleming was sitting in his wheelchair on the corner of George Street and Church Street, engaging in panhandling, when two police officers approached him and told him to put away his sign. Id. at ¶21. When Mr. Fleming refused, an officer issued him a ticket for "disorderly conduct, begging for money" in violation of the Anti-Begging Ordinance. Id. The officers made no allegation that Mr. Fleming engaged in any unlawful conduct other than engaging in the speech described. Id.

On October 9, 2014, Mr. Fleming was approached by a police officer as he sat in his wheelchair engaging in panhandling on the corner of George and Somerset Streets. Id. at ¶ 22. The police told him to put away his sign. Id. When Mr. Fleming refused, the officer issued him a ticket for "panhandling" in violation of the Charitable Solicitation Permit Ordinance. Id. There was no allegation that he engaged in unlawful conduct beyond the speech described. Id.

Next, on October 24, 2014, the police approached Mr. Fleming on a public sidewalk outside of the George Street entrance to the train station, where he was sitting in his wheelchair, engaging in panhandling in the manner described. Id. at ¶ 23. An officer informed him he was being arrested. Id. He explained that the arrest was based on a warrant issued when he did not appear in court on a ticket he received for violating the Charitable Solicitation Permit Ordinance. Id. The officer further based the arrest on a warrant for a traffic violation in Watchung, New Jersey, more than ten years ago. Id.

In each of the three instances in which Mr. Fleming received tickets, and on the occasion of his arrest, his so-called illegal speech occurred on the public streets or sidewalks of New Brunswick. Id. at ¶24.

After being arrested and booked on October 24th, Mr. Fleming was moved to the Middlesex County Adult Correctional Facility where he was detained for three weeks due to both

his inability to pay bail and the warrant from Watchung. Id. at ¶25. He was finally released on November 14th. Id. Since his release, Mr. Fleming's financial situation is unchanged: he is homeless and wheelchair-bound, and continues to use a sign to ask passersby for money and food on the public streets and sidewalks of New Brunswick. Id. at ¶26.

Mr. Fleming is not the only homeless or poor person who faces this treatment: enforcement of the challenged Ordinances threatens every individual who asks their fellow citizens for money or food in New Brunswick. Id. at ¶28. By preventing poor and homeless people from begging or soliciting money or food, the Ordinances also adversely affect the Coalition's efforts to advance the best interests of the homeless. Id. at ¶29. Moreover, the Ordinances – and the criminalization of poverty that result therefrom – force the Coalition to redirect its mission and expend additional resources to help homeless people maintain their constitutional right to ask their fellow citizens for money and food assistance. Id.

LEGAL ARGUMENT

THIS COURT SHOULD ENJOIN ENFORCEMENT OF THE ORDINANCES

This Court should grant temporary, preliminary, and permanent injunctive relief barring enforcement of the Ordinances. This Brief demonstrates (1) the need to prevent irreparable harm; (2) a reasonable probability of success on the merits; and (3) that balancing of the equities and consideration of the public interest weighs in favor of the requested relief. Crowe v. DeGioia, 90 N.J. 126, 133-34 (1982).

I. Continued Enforcement of the Ordinances Constitutes Irreparable Harm.

Plaintiffs satisfy the irreparable harm prong on several independent bases.

First, it is well established that the loss of First Amendment freedoms, for even minimal periods, constitutes irreparable injury. Elrod v. Burns, 427 U.S. 347, 373 (1976). In this context, irreparable injury is implicated "where free speech is 'either threatened or in fact being impaired at the time the relief [is] sought.'" Davis v. Dep't of Law & Pub. Safety, 327 N.J. Super. 59, 69 (Law Div. 1999) (quoting Elrod, 427 U.S. at 373). Mr. Fleming's right to speak freely has been and continues to be directly thwarted by the enforcement of the challenged ordinances. See, e.g., Valle Del Sol Inc. v. Whiting, 709 F.3d 808, 828-29 (9th Cir. 2013) (holding solicitation law unlawfully causes irreparable harm where plaintiffs lose First Amendment freedoms); accord Kelly v. City of Parkersburg, 978 F. Supp. 2d 624, 631 (S.D. W.Va. 2013) (holding same for anti-begging statute).

Second, the Ordinances threaten to deprive Mr. Fleming, and others like him, of their freedom to ask their fellow citizens for help in meeting their basic human needs. (Mr. Fleming is homeless, receives limited public assistance, and his continued panhandling in New Brunswick helps him obtain basic necessities, including food). Verified Compl. ¶ 17. This constitutes

irreparable harm. See, e.g., St. John's Evangelical Lutheran Church v. City of Hoboken, 195 N.J. Super. 414, 420 (Law. Div. 1983) (finding harm caused by closing shelter is "obvious, imminent and severe" because the homeless occupants would be left without food or shelter); Kelly, 978 F. Supp. 2d at 631 ("[T]he infringement of ... First Amendment freedoms and the plaintiff's need to solicit donations to cover basic living expenses constitute irreparable harm.").

Third, the loss of personal liberty creates irreparable harm. See, e.g., Jefferson v. Rose, 869 F. Supp. 2d 312, 318 (E.D.N.Y. 2012) (recognizing in preliminary injunction context that "[e]ven threats of arrest or being told to 'move along' by the police violate Plaintiff's rights and constitute actual injury."); accord Kelly, 978 F. Supp. 2d at 631. Mr. Fleming was recently jailed for more than three weeks following an arrest for engaging in the speech at issue here, and he must appear in municipal court regarding the alleged violation of the Chartable Solicitation Permit Ordinance. As he must continue to engage in panhandling to meet his needs, Verified Compl. ¶ 26, the threat of further prosecution continues to loom. This threat constitutes irreparable harm in the preliminary injunction analysis.

Finally, the Coalition advocates for, and represents the interests of, a homeless population that face the very same irreparable harm. See generally, So. Burlington County N.A.A.C.P. v. Mount Laurel Twp., 92 N.J. 158 (1983) (allowing organizational plaintiff to challenge zoning ordinance on behalf of poor people whose interests group advocates for and might not otherwise be represented)[1]; see also Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 634 (1980) (recognizing that "a litigant whose own activities are unprotected may nevertheless

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[1] Injunctive relief was ordered in an earlier iteration of this case. See So. Burlington County N.A.A.C.P. v. Mount Laurel Twp., 119 N.J. Super. 164 (Ch. Div. 1972), modified sub nom., 67 N.J. 151 (1975).

challenge a statute by showing that it substantially abridges the First Amendment rights of other parties not before the court").

Any one of the above factors would alone be sufficient to meet the first prong of the preliminary injunctive standard. The presence of multiple factors, however, demonstrates the severity of the irreparable harm suffered here.

II. Plaintiffs Will Succeed in Demonstrating the Challenged Ordinances Violate Fundamental Constitutional Commands.

For the reasons discussed below, Plaintiffs are likely to succeed on the merits with regard to their challenges to the Anti-Begging Ordinance and the Charitable Solicitation Permit Ordinance because both impermissibly burden protected speech in violation of Article I, Paragraph 6 of the New Jersey Constitution.

A. Both Challenged Ordinances Contravene Fundamental And Well-Established Free Speech Principles.

It is well established that the kind of speech that is targeted by both Ordinances — begging or soliciting food or money – enjoys "the full protective force of the First Amendment." See Village of Schaumberg, 444 U.S. at 632 (striking ordinance requiring permit for solicitation by certain targeted charitable organizations).[2] That is so because such speech is "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues...." Id. As such, courts that have invalidated anti-begging and solicitation permit laws consistently recognize that the highly expressive nature of the kind of speech targeted here must be given

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[2] Article I, ¶ 6 provides commensurate or, in certain circumstances, greater protection than the First Amendment. New Jersey courts thus equally rely on federal free speech jurisprudence when interpreting Article I, Paragraph 6. See, e.g., Karins v. City of Atlantic City, 152 N.J. 532, 547 (1998); Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 266 (1998). As such, Plaintiffs interchangeably refer to the law governing Article I, ¶ 6 and the First Amendment.

serious weight in the constitutional analysis. Id.; accord Riley v. Nat'l Found. of the Blind of North Carolina, Inc., 487 U.S. 781, 796 (1988) (invalidating ordinance imposing licensing requirement on professional fundraisers engaging in charitable solicitations); Loper v. New York City Police Dep't, 999 F.2d 699, 704 (2d Cir. 1993) (striking law banning begging in New York City and recognizing expressive content of such speech: "[b]egging frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation.... [T]he presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance."); A.C.L.U. of Nevada v. City of Las Vegas, 466 F.3d 784, 792 (9th Cir. 2006) (overturning ban on begging in portions of downtown Las Vegas).

Moreover, the unfettered reach of the two Ordinances into quintessential public fora violates the most fundamental free speech mandates. The Anti-Begging Ordinance bans begging "on any street or sidewalk within the city," see §9.04.050(A)(6), while the Charitable Solicitation Permit Ordinance prohibits unpermitted solicitations anywhere "within the city," see §5.32.020. These laws thus contravene the vital principle that public streets and sidewalks are "traditionally public forums" that therefore "occupy a 'special position in terms of First Amendment protection... [in that] the government's ability to restrict expressive activity is very limited.'" State v. DeAngelo, 197 N.J. 478, 485–486 (2009) (quoting Boos v. Barry, 485 U.S. 312, 318 (1988)).

The United States Supreme Court has always held that speech in these quintessential public fora deserves the highest protection because such spaces "'have immemorially been held in trust for the use of the public... [and] 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)).

To protect speech in the public forum, courts have invariably invalidated ordinances that prohibit all begging/solicitation speech in an entire city, or in every street and sidewalk within a city. See, e.g., Loper, 999 F.2d at 705 (striking law that banned begging in all of New York City, admonishing against constitutionality of a "statute that totally bans begging in all public places" within a city); Speet v. Schuette, 726 F.3d 867 (6th Cir. 2013) (invalidating law precluding begging "in a public place" in Michigan); Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 657 F.3d 936, 949 (9th Cir. 2011) (invalidating law prohibiting soliciting from occupant of any vehicle "on a street or highway because "[t]he Ordinance is ... applies citywide to all streets and sidewalks in the City...in [ ] a sweeping manner.").

That the Ordinances purported to ban protected speech -- throughout the entire city of New Brunswick (the Charitable Solicitation Permit Ordinance) and all public streets and sidewalks therein (the Anti-Begging Ordinance) -- render them invalid under these most fundamental free speech principles.

B. The Anti-Begging Ordinance Constitutes An Unconstitutional Regulation of Protected Speech.

The Anti-Begging Ordinance makes it "unlawful for any person within the city of New Brunswick to . . . beg or solicit food or monies on any street or sidewalk within the city when not otherwise authorized to do so[.]" See §9.04.050(A). Section 9.04.050(B) penalizes such speech: "[a]ny person found guilty of violating any of the provisions of this section, upon conviction, shall pay a fine not to exceed two thousand dollars ($2,000.00) and/or be subject to imprisonment for not more than ninety (90) days, or both." The challenged Ordinance apply equally to peacefully communicated speech.

Criminal laws regulating speech – like the Anti-Begging Ordinance – must be scrutinized with particular care. See, e.g., Speet, 726 F.3d at 873 (holding unconstitutional statute that made it disorderly conduct to beg in public places in Michigan) (citing City of Houston v. Hill, 482 U.S. 451, 459 (1987)); see also Redondo Beach, 657 F.3d at 944 (laws imposing criminal sanctions are particularly chilling of protected speech). More specifically, and for the reasons described below, the Ordinance is unconstitutional when considered under the doctrines of overbreadth and vagueness.

1. The Anti-Begging Ordinance Cannot Survive the Strict Scrutiny Applied to Content-Based Regulations and Is Impermissibly Overbroad.

The threshold question in determining constitutionality is whether the challenged law is a content-based or content-neutral regulation. See, e.g., DeAngelo, 197 N.J. at 486. A law is content based if authorities must "necessarily examine the content of the message that is conveyed" to determine whether the ordinance was violated. FCC v. League of Women Voters, 468 U.S. 364, 383 (1984). A content-based regulation "suppresse[s], disadvantage[s], or impose[s] differential burdens upon speech because of its content[,]" and thus is subject to the most exacting scrutiny." Id. (internal quotations omitted).

Numerous courts have invalidated anti-begging laws as improper content-based restrictions. For example, the Fourth Circuit concluded that an even more geographically limited law prohibiting begging in certain areas of Charlottesville, Virginia was an unlawful content-based restriction because it:

> [P]lainly distinguishes between types of solicitations on its face. Whether the Ordinance is violated turns solely on the nature or content of the solicitor's speech: it prohibits solicitations that request immediate donations of things of value, while allowing other types of solicitations, such as

> ... things which may have no 'value' – a signature or a kind word, perhaps.

Clatterbuck v. City of Charlottesville, 708 F.3d 549, 556 (4th Cir. 2013); accord City of Las Vegas, 466 F.3d at 794 (holding prohibition on panhandling in certain areas of Las Vegas unconstitutional; enforcement of content-based regulation turns on necessary examination of the content of the message); Loper, 999 F.2d at 705 (finding unlawful prohibition on begging throughout New York City "is not content neutral because it prohibits all speech related to begging"); A.C.L.U. of Idaho, Inc. v. City of Boise, 998 F. Supp. 2d 908, 916–917 (D. Idaho 2014) (invalidating ordinance that "treat[ed] this speech content different than other solicitation speech;" it did "not restrict solicitation of signatures for petition on a matter of public concern, political support solicitation, [or] religious solicitation," but only "solicitation speech for donations of money or property."); Kelly, 978 F. Supp. 2d at 629 (invalidating prohibition on speech based on "nature or content of the solicitor's speech; financial solicitations are proscribed, while solicitations for "votes...to enter free raffles, or ... to register for a church mailing list" would be permitted); Benefit v. City of Cambridge, 679 N.E.2d 184, 189 (Mass. 1997) (rejecting law that "directly targets the content of [ ] communications, punishing requests by an individual for help with her or her basic human needs while shielding from government chastisement requests for help made by better-dressed people for other, less critical needs....the content of the individual's message determines criminal guilt or innocence"); Cutting v. City of Portland, No. 13–cv–359, 2014 WL 580155, at *9 (D. Me. Feb. 12, 2014) (invalid law permits certain messages and prohibits others).

The Anti-Begging Ordinance contains a content-based restriction: it prohibits all speech on public sidewalks and streets in New Brunswick where the speaker's message involves a request for money or food. Those enforcing the law thus must examine the content of the speech

to determine whether it is prohibited. Where a speaker requests food or money, he can be jailed, subjected to a steep fine (which few, if any, poor/homeless people could ever pay), or both. However, if the same speaker requests something other than food or money – *e.g.*, signatures, votes, to enter free raffles, or to register for a church mailing list, for example – no criminal sanctions could be threatened under the Ordinance. Indisputably, the content of the speaker's message determines whether the speech is permissible or unlawful.

Courts apply strict scrutiny to content-based laws. That strict scrutiny requires New Brunswick to demonstrate that the Anti-Begging Ordinance furthers a compelling governmental interest and that it is the least restrictive means to do so. See Perry, 460 U.S. at 45. New Brunswick cannot satisfy that strict test. As the Second Circuit aptly stated when invalidating an analogous law: "it does not seem to us that any compelling state interest is served by excluding those who beg in a peaceful manner from communicating with their fellow citizens." Loper, 999 F.3d at 705.

Certainly New Brunswick cannot preclude begging based upon "a listener's annoyance or offense" at being asked for money or food cannot justify such speech, especially on public streets and sidewalks where "people are free to ignore or walk away from the beggar's request...." Benefit, 679 N.E.2d at 190. That would violate the "bedrock principle underlying the First Amendment" that a city "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Id. (citing Texas v. Johnson, 491 U.S. 397, 408-409 (1989); accord City of Boise, 998 F. Supp. 2d at 917 ("Business owners and residents simply not liking panhandlers in acknowledged public areas does not rise to a significant government interest.").

Even assuming arguendo that New Brunswick could identify a compelling interest to justify the Anti-Begging Ordinance, its limitless scope – prohibiting begging on every public street or sidewalk in New Brunswick regardless of the specific time of day, location, or how peacefully the request is conveyed, cannot be seriously deemed "the least restrictive means" to achieve any such interest. As the Second Circuit recognized in invalidating a New York City anti-begging law, the geographic reach of such a law into all public fora within a city constitutes a "total prohibition" that cannot be considered narrowly tailored. See Loper, 999 F.2d at 701-702, 704-705 ("[e]ven if the state were considered to have a compelling interest in preventing the evils sometimes associated with begging, a statute that totally prohibits begging in all public places cannot be considered 'narrowly tailored' to achieve that end"). Moreover, the possibility of narrow tailoring is also undermined by the fact that the Anti-Begging Ordinance bans peaceful speech. Id. (New York City law not narrowly tailored because it sweeps within its ambit peaceful speech); City of Las Vegas, 466 F.3d at 797 (prohibition of panhandling in certain downtown areas not narrowly tailored; prohibits even peaceful solicitations and thus is "not [ ] the least restrictive means" of achieving goals related to safety, order and protecting local economy); accord City of Boise, 998 F. Supp. 2d at 917 (same, law banning non-aggressive panhandling); Kelly, 978 F. Supp. 2d at 630; Clatterbuck, 708 F.3d at 560. To the extent New Brunswick could identify some governmental interest associated with begging, it could promote that interest by enforcing existing criminal laws that proscribe misconduct rather than speech. See Loper, 999 F.2d at 702 (government interests can be served by enforcing laws regarding harassment, fraud, or menacing: "[T]he distinction between [these criminal laws] and the challenged statute is that the former prohibit conduct and the latter prohibits speech...."); accord Village of Schaumberg, 444 U.S. at 639.

In short, the Anti-Begging Ordinance cannot withstand constitutional scrutiny. Plaintiffs can find no court in the country that has upheld an anti-begging law that so broadly bans requests for monetary/food assistance.[3]

2. The Anti-Begging Ordinance Is Also Unconstitutionally Vague.

As an independent matter, the Anti-Begging Ordinance is void for vagueness. It is well settled that a law is facially unconstitutional under the vagueness doctrine if it "'forbids ... an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" Karins, 152 N.J. at 541 (quotations omitted); see also Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (stating law is void for vagueness "if its prohibitions are not clearly defined."). The United States Supreme Court has made clear that the general test of vagueness should be applied using "[s]tricter standards" where a challenged law has "a potentially inhibiting effect on speech...because the free dissemination of ideas may be the loser." Hynes v. Mayor and Council of Borough of Oradell, 425 U.S. 610, 621 (1976).

The Anti-Begging Ordinance states that a person may obtain permission to beg, yet offers no indication whatsoever about how to do so – other than to say only that an individual is prohibited from begging "when not otherwise authorized to do so." See Section 9.04.050(A)(6). The law thus offers no guidance whatsoever regarding how a person may become "authorized" to engage in such speech. That statutory gap renders the Ordinance impermissibly vague because its "coverage is unclear," its applicability is "not explain[ed]," and "the ordinance does not sufficiently specify what those within its reach must do to comply." Id. at 621.

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[3] Loper, 999 F.2d 699 (2d Cir. 1993) (striking law that criminalized begging throughout New York City); Speet, 726 F.3d 867 (6th Cir. 2013) (invalidating law that prohibits begging in public places in Michigan); Benefit, 679 N.E.2d 184 (Mass. 1997) (same, begging in public places).

C. The Second Law Challenged Here, the Charitable Solicitation Permit Ordinance, Also Is Unconstitutional.

Under the Charitable Solicitation Permit Ordinance, individuals must obtain a permit from New Brunswick before engaging in speech that involves a request for money or food (or anything else of value). See §5.32.020 ("[n]o person ... shall solicit charitable or philanthropic contributions within the city without first obtaining a permit") and §5.32.010 (defining solicitation as "the request, directly or indirectly, of money, credit, property, financial assistance and other things of value on the plea or representation that [such] will be used for a charitable and philanthropic purpose;" things of value further defined as "alms, food, clothes, money, subscription or property of any nature or kind."). It is the speech itself that is burdened by this law: solicitation is prohibited regardless of whether the solicitor receives a contribution. Id. For the reasons set forth above, and as further explained below, Plaintiffs are entitled to injunctive relief barring enforcement of this Ordinance in the context of individuals[4], because the law violates the free speech protections embodied in Article I, Paragraph 6.

1. The Charitable Solicitation Permit Ordinance Is Void For Vagueness.

As discussed at Section II.B.2, supra, a law is impermissibly vague when it its "coverage is unclear," its applicability is "not explain[ed]," or it "does not sufficiently specify what those within its reach must do to comply," Hynes, 425 U.S. at 621. The Charitable Solicitation Permit Ordinance is void under the vagueness doctrine because, while it prohibits individuals from soliciting money or food without a permit (Section 5.32.020), it provides no avenue for an individual – as opposed to an organization – to obtain a permit. Specifically:

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[4] While Plaintiffs believe the Ordinance is also unconstitutional as applied to organizations, this case challenges the law only in respect of the burdens it places on individuals' speech rights.

- Section 5.32.030(B) sets forth certain requirements for the permit application, yet the language of that subsection is plainly geared toward organizational applicants, and not individuals. For example, the permit application "require[s]": a statement of "purpose for which the solicitation is to be made and the estimated funds proposed to be raised," id. at (B)(1); "[t]he name and address of the person or persons who will be in direct charge of conducting the solicitation, id. at (B)(3); the "amount of any wages, fees, commissions or expenses to be paid to any person or organization for conducting the solicitation and [their] ... addresses," id. at (B)(7); "[a] full statement of the character and extent of the charitable and philanthropic work conducted," id. at (B)(8); and a "[c]opy of the applicants' current registration with the state division of charitable registration or certification of exemption from registration, id. at (B)(11).

- Although §5.32.030(B) references application requirements set forth in § 5.04.020 of the municipal Code of Ordinances, that provision speaks only to the administrative requirements governing general license applications, and provides no guidance on what an individual speaker must do to obtain a permit to engage in solicitation speech.

- Section 5.32.040 governs the process for investigating permit applications, yet it references only the requirements governing organizational applicants. For example, the section states that the chief of police must determine whether the applicant "is a bona fide charitable or philanthropic organization," and further provides that if the chief fails to make a written report within 48 hours, "the application is deemed to be a bona fide organization."

- Section 5.32.050 sets forth the process for approving or disproving a permit application, yet it similarly refers only to organizational applicants. Specifically, it provides that the city clerk shall place a resolution authorizing the permit where the police director/chief of police "indicates that the applicant is a bona fide organization." By contrast, disapproval of the application is said to be appropriate where the applicant is found "not a bona fide organization."

- Section 5.32.060 governs the "Appeal of disapproval" and requires a hearing on the appeal to "determine whether the application is incomplete or if the organization is a bona fide organization."

The Ordinance thus fails to set forth either substantive criteria or administrative processes for an individual seeking a permit. Nor does it provide any standards to govern the relevant municipal officials' review of an individual's permit application. As such, any reasonable reading of the statutory language should prompt one to ask whether New Brunswick intended that the Ordinance apply only to charitable organizations and individual employees working on the organizations' behalf, and not to homeless and poor people asking for financial and food

assistance. Despite that reasonable reading and the questionable intent of the law, however, Mr. Fleming's experience demonstrates that the Ordinance is being applied to individual speakers in this context. See Verified Compl. ¶ 24.

Lacking any statutory guidance regarding how – or even whether – an individual may obtain a permit, the Charitable Solicitation Permit Ordinance provides no notice regarding how to comply with its terms, and no meaningful direction to those charged with enforcing it. As such, the Ordinance is unconstitutionally vague and is unenforceable in the context of individual speakers. See Hynes, 425 U.S. at 621-622 (striking permit law that did not explain which entities are covered not sufficiently specify "what those within its reach must do in order to comply").

2. The Charitable Solicitation Permit Ordinance Also Constitutes An Unconstitutional Prior Restraint On Speech.

Even if the Charitable Solicitation Permit Ordinance contain a mechanism through which an individual could obtain a permit, it would nonetheless fail to satisfy constitutional scrutiny because it is an unconstitutional prior restraint and vests unacceptable discretion in municipal officials considering permit applications.

The United States Supreme Court has declared that a permit requirement constitutes a prior restraint on speech triggering a "heavy presumption" against constitutionality. See, e.g., Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992) (quotations omitted). The Court emphatically declared this presumptive invalidity :

> It is offensive – not only to the values protected by the First Amendment, but the very notion of a free society – that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so. Even if the issuance of permits by [municipal officials] is a ministerial task that is performed promptly and at no cost to the

> applicant, a law requiring a permit to engage in [solicitation] speech constitutes a dramatic departure from our national heritage and constitutional tradition.

Watchtower Bible and Tract Soc'y of New York, Inc. v. Village of Stratton, 536 U.S. 150, 165-166 (2002). Prior restraints, the Court warned, clash with basic constitutional principles because they have a chilling effect on speech. Id. at 166, 169 (striking solicitation permit requirement for canvassing door-to-door; recognizing that registration requirements dissuade potential speakers by chilling anonymous speech and spontaneous speech).

The Supreme Court has expressed particular hostility towards solicitation permit ordinances that vest too much discretion in municipal officials. See, e.g. Staub v. City of Baxley, 355 U.S. 313, 324 (1958) (striking law prohibiting solicitation of members for organization without permit; warning that "[i]t is settled...that an ordinance which...makes the peaceful enjoyment of [constitutional freedoms] contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld at the discretion of such official – is an unconstitutional...prior restraint"). Thus, a permit requirement constitutes an unconstitutional prior restraint where it contains no "semblance of definitive standards or other controlling guides governing the [municipal decision-maker] in granting or withholding a permit." Id.; see Cantwell v. Connecticut, 310 U.S. 296, 305 (1940) (invalidating statute requiring government approval of solicitation for religious or charitable purposes where, inter alia, the designated official was empowered to "withhold his approval if he determines that the cause is not a religious one").

Even if a permit requirement can be applied to an organization, it cannot apply to individual speech. The Ninth Circuit Court -- in an en banc decision striking down a permit requirement for street performers -- held that such laws restricting an individual's speech in a

public forum, where the right to free speech is at its zenith, are particularly suspect. See Berger v. City of Seattle, 569 F.3d 1029, 1038-1039 (9th Cir. 2009). The Berger court, after discussing Supreme Court's hostility to solicitation permit requirements, observed "it is therefore not surprising that we and almost every other circuit to have considered the issue have refused to uphold registration requirements that apply to individual speakers or small groups in a public forum." Id. (citations omitted).

Here, the Charitable Solicitation Ordinance contains a prior restraint on protected speech. It cannot withstand constitutional scrutiny. That is so because New Brunswick officials have unfettered discretion to decide how to address a permit application (assuming an individual can figure out how to file it, given the lack of direction as to that process) in that the Ordinance provides no standards for such decisions. The reference to §5.04.020, contained in the Charitable Solicitation Ordinance §5.32.030, does not help. To the contrary, the only "standards" that could be conceivably applied via reference to §5.04.020 suggest that an individual's general license application can be rejected based on criminal history or an inability to demonstrate "good character and responsibility." See §5.04.020(G) and (H). In that case, the unfettered discretion given to municipal officials to decide – without any standards – when a rejection is appropriate based on undefined issues related to criminal background or character would render the Charitable Solicitation Ordinance constitutionally infirm. See, e.g., Cantwell, 310 U.S. at 305 (invalidating permit requirement for solicitation for religious or charitable purposes where the designated official was empowered to deny the application simply if he determines that the cause "is not a religious one.").

The unfettered discretion the Charitable Solicitation Ordinance places in New Brunswick officials to approve or disapprove permits renders the law an unconstitutional prior restraint. As such, it can no longer be enforced as to individual speech.

3. The Charitable Solicitation Permit Ordinance Is Not a Constitutionally Valid "Time, Place, And Manner Restriction."

Regulations governing the time, place or manner of speech may be reasonable provided they are "justified without reference to the content of the regulated speech, [ ] they are narrowly tailored to serve a significant government interest, and [ ] they leave open ample alternative channels for communication." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quotations omitted). But a narrowly tailored time, place, and manner restriction may not "burden substantially more speech than is necessary" to achieve the identified government interest, id. at 799, and must "target[ ] and eliminate[ ] no more than the exact source of the 'evil' it seeks to remedy. Frisby v. Schultz, 487 U.S. 474, 485 (1988). For the reasons discussed below, the Charitable Solicitation Ordinance cannot satisfy that standard and therefore must be enjoined in the context of individuals' speech.

As an initial matter, a regulation of speech will not be considered a valid time, place and manner restriction if that regulation is content-based, as opposed to content neutral. Id. Yet here, and as discussed above in Section II.B.1., New Brunswick is regulating speech throughout the city based solely on the content of the message: if an individual's words include a request for money or food without a permit, she is in violation of the Charitable Solicitation Permit Ordinance (and, indeed, the Anti-Begging Ordinance); if the content of the speech involves a message soliciting something without monetary value, no law has been broken.

Even assuming arguendo that the Charitable Solicitation Permit Ordinance were content neutral, it is nonetheless an invalid regulation of speech because it cannot be deemed narrowly

tailored to achieve a significant interest. As discussed in Section II.B.1, supra, with regard to the Anti-Begging Ordinance, any concerns associated with begging could be adequately addressed through existing criminal laws that prohibit problematic conduct, and do not prohibit speech. As the United States Supreme Court warned over eighty years ago, concerns about policing crime cannot justify unreasonable burdens on individual speech:

> [A] municipality cannot...require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be [communicated]; some persons may, while others may not, disseminate information....Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated...and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech....

Schneider v. New Jersey, 308 U.S. 147, 164 (1939) (invalidating law prohibiting door-to-door solicitation/canvassing without a permit); accord Village of Schaumberg, 444 U.S. at 639 (same, where law governs door-to-door and solicitations on the street by certain types of organizations; concerns about fraudulent solicitation can be addressed by enforcing fraud and trespass offenses without burdening speech through permit law); accord Cantwell, 310 U.S. at 306 (same, law requiring approval of solicitation for religious or charitable purposes; "Nothing we have said is intended...to imply that....persons may...commit frauds upon the public. Certainly penal laws are available to punish such conduct."); Berger 569 F.3d at 1043 (striking permit law based on clear alternative methods of regulating misconduct: "the City could simply enforce its existing rules against those who actually exhibit unwanted behavior") (quoting Frisby, 487 U.S. at 485).

Likewise, the Charitable Solicitation Permit Ordinance is not narrowly tailored to serve any safety-related interests since it penalizes peaceful speech – thus burdening speech that simply does not implicate any of the "evils" that a municipality might reasonably seek to quell. See Murdock v. Pennsylvania, 319 U.S. 105, 116 (1943) (solicitation licensing law invalid because it "is not directed to the problems which the police power of the state is free to deal....[Plaintiffs] are pursuing their solicitations peacefully and quietly....[T]he [ ] ordinance is not narrowly drawn to safeguard the people...against the evils of solicitations."); accord Cantwell, 310 U.S. at 309-310. As the Ninth Circuit concluded in striking a similar permit law aimed at street performers, any law that applies to everyone engaged in certain speech regardless of the manner conveyed impermissibly "burdens all [speakers] too root out the occasional bad apple. By doing so, [it] fails to 'target[ ] and eliminate[ ] no more than the exact source of the 'evil' it seeks to remedy." Berger, 569 F.3d at 1045.

As explained here, the Charitable Solicitation Ordinance cannot withstand the constitutional scrutiny of a reasonable time, place, and manner regulation. It is content based and, in the alternative, cannot be considered narrowly tailored to any significant government interest. The law must be enjoined as to all provisions requiring an individual obtain a permit before engaging in indisputably protected speech.

III. A Balance Of The Relative Hardships Overwhelmingly Tips In Plaintiffs' Favor.

In considering injunctive relief, courts balance the relative hardship to the parties. Crowe, 90 N.J. at 134. Such relief is more readily granted where doing so furthers the public interest, as opposed to when only private interests are involved. Yakus v. United States, 321 U.S. 414, 441 (1944) (citations omitted).

Here, the public interest heavily favors the issuance of injunctive relief because the harm faced by Mr. Fleming and others like him is severe, as discussed in above § I. The public interest unequivocally favors enforcement of basic constitutional rights. The challenged Ordinances not only ban protected speech, but they ban speech that conveys a message regarding a matter of public interest: i.e., that society's basic needs are not being met, such that the homeless must take to the streets to plead for assistance. Moreover, Mr. Fleming and others face not only loss of personal liberty (i.e., jail time), but also the ability to access the money and food assistance that helps them obtain their basic necessities. The public interest cannot tolerate such government bans on freedom of speech.

By contrast, New Brunswick faces no identifiable harm if enforcement of the Ordinances were enjoined. To the contrary, any actual problematic conduct can be addressed by enforcing existing criminal law and disorderly persons offenses.

The balance of the equities thus indisputably favors injunctive relief. See, e.g., Valle De Sol Inc., 709 F.3d at 828-829 (invalidating law prohibiting day laborer solicitation since the "equities tip in favor of the plaintiffs because they have a significant First Amendment and economic interest in engaging in solicitation speech and [the government] need not impede that speech in order to pursue its [ ] safety goals;" injunction is "in the public interest because the [law], if enforced, would infringe the First Amendment rights of many persons who are not parties this this lawsuit."); see also Garden State Equal. v. Dow, 433 N.J. Super. 347, 359-61, (Ch. Div. 2013) (detailing substantial harm that would befall plaintiffs and contrasting government's "incorporeal harm;" government's "attempt to portray potential harm as

outweighing the individuals' constitutional [ ] interests ... [is] patently preposterous.'") (internal quotations omitted).[5]

Given that the balance of the equities plainly preponderate in Plaintiffs' favor, this Court should grant temporary, preliminary and ultimately permanent injunctive relief barring enforcement of the Ordinances.

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[5] While Garden State Equal., 433 N.J. Super. at 355 addresses a motion to stay, the same Crowe standard applies to both stay applications and injunctive relief.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant temporary, preliminary and ultimately permanent injunctive relief barring enforcement of New Brunswick Municipal Ordinances §9.04.050(A)(6) (disorderly conduct to beg for or solicit food or money on any street or sidewalk within New Brunswick) and §5.32.020 and its related provisions (as to permit requirements governing individual speakers) because these laws violate the right to free speech embodied in the New Jersey Constitution, Article I, Paragraph 6. These Ordinances should be promptly declared invalid and their enforcement should be banned forever.

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By: _____
Gerard G. Brew
A Member of the Firm

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