IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ALTON WAGGONER, LAFAYETTE "TERI" HEISHMAN, HANNAH LEBOVITS, KAWANA SCOTT, Plaintiffs,	§	
v.	§	CASE NO. 3:22-cv-02776-E
THE CITY OF DALLAS, TEXAS, EDGARDO GARCIA, in his Official Capacity, And DAVID PUGHES, in his Official Capacity, Defendants.	§	

THE CITY DEFENDANTS' BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCITON

Respectfully submitted,

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ATTORNEYS FOR THE CITY DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was submitted to the Clerk of Court for electronic filing using the CM/ECF System on February 27, 2023. The Clerk of Court will transmit a Notice of Electronic Filing to all parties registered under the CM/ECF System to receive service electronically.

/s/ *Ana Marie Jordan*
Ann "Ana" Marie Jordan

Defendants the City of Dallas, and, in their official capacities, Dallas Chief of Police Edgardo Garcia and Dallas City Marshal David Pughes (together "the City Defendants") hereby file this their opposition to Plaintiffs' Motion for Preliminary Injunction (ECF No. 11) ("Pl. Motion"). In support the City Defendants would show:

INTRODUCTION

Plaintiffs seek a preliminary injunction prohibiting the City Defendants from enforcing the City of Dallas's duly enacted "Motor Vehicles and Traffic" Ordinance that prohibits a person from:

> stand[ing] or walk[ing] on *a median that measures six feet or less*, in areas where *no median exists* for roadways designated as divided roadways, or in an area designated as a *clear zone*.

Dallas, Tex., Code § 28-61.1(a) (emphasis added); *see* City App'x at DX 1 (copy of published ordinance no. 32333). The ordinance defines a "median" as "the intervening space, physical barrier, or clearly indicated dividing section between the two *roadways* of opposing traffic on a public divided roadway. *Id.* at § 28-61.1(b)(2). The ordinance further defines a "clear zone" as:

> the unobstructed, traversable area provided beyond the edge of the through travelled way for the recovery of errant vehicles. On a curbed street, the clear zone is the area four feet from the face of the curb. On an uncurbed street, the clear zone is 10 feet from the edge of the travel lane. A clear zone includes shoulders, bicycle lanes, and auxiliary lanes, except auxiliary lanes that function like through lanes. However, a clear zone does not include areas adjacent to the back of the curb where a paved sidewalk exists.

Id. at § 28-61.1(b)(1).

With respect to medians, apart from the ordinance's application to only medians measuring six feet or less in width, the ordinance further limits its application to medians located within certain roadways by defining "roadways" as "streets classified in the city's thoroughfare plan as major/principal or minor arterials, frontage roads or parkways along controlled access freeways

and tollways, non-controlled access state roadway facilities and associated intersections with city's major or minor arterials." *Id.* at § 28-61.1(b)(4); *see also* City App'x, DX 4 at 154-159(City of Dallas Street Design Manual describing major and minor arterial roadways).

This ordinance is a traffic safety measure that developed in large part because of the "Vision Zero" commitment entered by the Dallas City Council via resolution on December 11, 2019. *See* City App'x DX 2 ¶¶4-11 (Aff. by G. Khankarli); *see also id*. at DX 5, 6 (copies of Vision Zero 2019 Presentation and Resolution). Vision Zero is an internationally recognized strategy aimed at eliminating traffic fatalities and severe injuries relating to automobile users, pedestrians, and bicyclists. *Id.* DX 5 at slide 3. It is "[b]ased on the belief that no loss of life is acceptable and that all traffic fatalities and severe injuries are preventable." *Id.* Implementation of this strategy requires the City assume "pedestrians, bicyclists, motorists, truckers, bus operators and other multimodal forms of movement are not always engaged in perfect behavior." *Id.*, DX 2¶6; *see also* DX 5 at slide 5.

The council resolution adopted in 2019 established a benchmark by 2030 of zero traffic fatalities and a 50% reduction in severe traffic injuries. City App'x at DX 2¶4, DX 6 at 320 §1. The resolution directed the City Manager to develop a "Vision Zero Action Plan" and a "Vision Zero Task Force;" and directed key City departments, which eventually included the Department of Transportation, to participate in the development of Vision Zero Action Plan as well as in the Plan's implementation and evaluation. City App'x at DX 6 §§ 2-4; *see also id.* at DX 2¶4 and P's App'x at Ex. Q at 174 (listing project team and task force members).

On June 8, 2022, the Vision Zero Action Plan "the Plan" was adopted by resolution No. 22-0865. City App'x at DX 1, P's App'x at Ex. Q (copy of the Plan). The Plan contained a pledge signed by the City Council promising "that safety of the people on public roads is a top priority

and [the City Council] will work to eliminate traffic deaths and severe injuries cause by preventable crashes." *See* City App'x DX 2¶5; P's App'x, Ex. Q at 175. Since then, the City has taken a proactive approach of prevention using data developed by the Plan team, including a high injury network (HIN) of roadways and crash data to identify locations and conditions that create a high risk of injury. *See* City App'x DX 2¶6-9. After analyzing the data, the city departments are tasked with developing and continuing to evaluate countermeasures to assist with prevention. The challenged ordinance is an example of such a counter measure. *Id.* at ¶¶11-12, 14.3. In order to address a perceived increase of pedestrian presence in or near roadways where pedestrians should not be present, the City Council in consultation with the City's Department of Transportation, adopted the challenged ordinance. *Id.* at ¶¶11-12; *see also* photos attached to G. Khankarli's affidavit (depicting safety concerns).

Finally, when enacting the challenged ordinance on October 26, 2022, the City Council relied on information gathered and submitted by the Dallas Department of Transportation to proactively prevent pedestrian and motorist fatalities on the City's arterial roadways. *See* City App'x, DX 1 at 9; *see also id*. DX 2. That information included in part: (1) the studies referenced in the Vision Zero Resolution and Plan referring to the high rate of City of Dallas' pedestrian fatalities, *see* City App'x DX 5, 6; P's App'x Ex. Q; (2) the recommendations by the U.S Department of Transportation, American Association of State Highway Transportation, National Association of City Transportation, and Section 4.3.5 of the City of Dallas Street Design Manual that a minimum width of six feet is required for a median to constitute a pedestrian refuge; (3) that items on a median should be located to provide at least three feet of clearance from the outermost edge of structure to back of curb; (4) the Texas Department of Transportation's recommendation that an area of four feet from the face of the curb be free from obstructions to provide a way for

recovery of errant vehicles and (5) the City of Dallas' Thoroughfare Plan. *See* City App'x DX 1at 9; *see also id.* at DX 3, 4, 9.

The ordinance therefore on its face only applies to *conduct* (standing or walking) in areas located within clearly defined roadways where the City has determined walking and standing pose a high risk of serious injury or death to pedestrians and/or motorists. The affected areas are identified as (1) medians measuring six feet or less in width; (2) defined roadways where no medians exist; and (3) defined clear zones such as shoulders and bike lanes located in defined roadways. Despite this narrowly tailored regulation of *conduct* in areas adjacent to *some* roadways, Plaintiffs seek declarative and injunctive relief claiming this ordinance violates the First Amendment on its face and as applied by incorrectly characterizing the ordinance as a "sweeping" and "broad" prohibition of "*all* speech" on "the majority of medians across the city." *See* Complaint for Declarative Relief at ¶98, 110; Motion for Preliminary Injunction at p. 5.

However, instead of pointing to evidence substantiating their allegations, Plaintiffs inappropriately rely on information related to the City's attempts to address homelessness which is a separate and distinct challenge with which the City is also grappling. While public safety and homelessness sometimes overlap, the relevant information in this case - as instructed by clearly established Supreme Court precedent - is the text of the challenged ordinance as enacted, the legislative record on which the City Council relied to justify the challenged ordinance when it was enacted, and the criteria on which enforcement of the ordinance depends, which all clearly establish the ordinance addresses public safety, not homelessness or protected speech.

Accordingly, Plaintiffs' request for preliminary injunction should be denied for five reasons: (1) the challenged ordinance on its face does not regulate speech, only conduct; (2) the affected medians are not public forums intended for communicative activity because their sole

public purpose is to regulate traffic; (3) to the extent plaintiffs can show the ordinance *as applied* to them incidentally impacts their protected speech, the ordinance is content-neutral (and subject to intermediate scrutiny) because it applies to anyone standing or walking in the prohibited areas without regard to a violator's message, if any; (4) the restriction prohibiting standing and walking in the prohibited areas is reasonable and narrowly tailored because it restricts prolonged access by pedestrians to areas that are inherently dangerous and where motorists would not expect to encounter pedestrians for any or prolonged durations; and (5) the restriction leaves available substantial alternative public locations throughout the City of Dallas that are not inherently dangerous and in which plaintiffs are free to solicit donations, help individuals experiencing homelessness, and advocate for political issues. These locations include publicly accessible sidewalks, parks and medians that are wider than six feet.

CITY'S OBJECTIONS TO PLAINTIFFS' EVIDENCE

A. Plaintiffs' evidence is irrelevant to the issues in this case.

Pursuant to Rules 401, 402 and 403 of the Federal Rules of Evidence, the City hereby objects to the admission or consideration of Plaintiffs' Exhibits C, E, F, G, H, and I as irrelevant to the legal or factual questions at issue in this case. These exhibits contain the following information:

> Pls' Ex. C: City Council Briefing "An Overview of Panhandling, Solicitation, and Available Strategies," dated February 3, 2021 [ECF 11-1 at 11-32].
>
> Pls' Ex. E: Gov't Performance & Financial Management Committee Briefing, "Update - Office of Homeless Solutions Panhandling Diversion," dated April 25, 2022 [ECF 11-1- at 53-66].
>
> Pls' Ex. F: Gov't Performance & Financial Management Committee Briefing, "Update - Office of Homeless Solutions Panhandling Diversion," dated May 20, 2022 [ECF 11-1 at 68-78].
>
> Pls' Ex. G: Public Safety Committee Briefing, Memo, dated October 7, 2022 [ECF 11-1 at

80-82].

Pls' Ex. H: "Panhandling Deflection Program Update" undated [ECF 11-1 at 84-98].

Pls' Ex. I: Gov't Performance and Financial Management Committee Briefing, "Office of Homeless Solutions Update: Panhandling Deflection Program," dated October 21, and 24, 2022 [ECF 11-1 at 100-107]

These exhibits concern the Dallas City Council's ongoing efforts to understand and address the complicated issue of homelessness within the city's boundaries, not with the enactment of the challenged ordinance. While these exhibits demonstrate the City was *aware* that enforcement of the challenged ordinance will likely impact homeless persons who are soliciting in regulated areas, such awareness, as a matter of law, does not affect the First Amendment analysis. *See, e.g., McCullen v. Coakley*, 573 U.S. 464, 479 (2014) ("a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics"); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.")

Likewise, to the extent these exhibits are being offered to show that the City Council's *intent or motive* behind the challenged ordinance is *different* from the intent and motive gleaned from the face and text of the ordinance, such evidence is wholly irrelevant to the Court's inquiry of whether the ordinance *on its face or by its application* violates the Free Speech Clause. *See United States v. O'Brien*, 391 U.S. 367, 383 (1968) ("it is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive"); *Grossbaum v. Indianapolis–Marion Cnty. Bldg. Auth.*, 100 F.3d 1287, 1293 (7th Cir. 1996) (holding that the First Amendment only "forbids Congress and . . . the States from making laws abridging the freedom of speech—a far different proposition than prohibiting

the *intent* to abridge such freedom"). Indeed, as Justice Antonin Scalia once observed, in the context of interpreting an "unambiguous and unequivocal statute," "[w]e are governed by laws, not by the intentions of legislators." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in judgment).

Finally, to the extent that these exhibits are being offered to demonstrate the City Council is attempting to "criminally punish[] poor people," as alleged by Plaintiffs, *see* Pl. Motion at 5, these exhibits are far from probative of that fact. Despite Plaintiffs' emotional and hyperbolic rhetoric, these exhibits demonstrate quite the opposite. Indeed, by seeking to understand and address homelessness, the City is attempting, within legal bounds, to help, not punish, persons who are experiencing homelessness or are poor and in need of services. These exhibits demonstrate only that the City, like many municipalities across the country, is experimenting with ways to solve the underlying issues that lead to and *perpetuate* homelessness, including panhandling. Accordingly, these exhibits are not probative of any wrongdoing, or of any legal or factual issue relevant to this case and should be excluded as irrelevant.

B. Plaintiffs' declarations are conclusory, self-serving, and misleading.

The City further objects to Plaintiffs' Exhibits J, K, L, M, N, and O which contain the sworn declarations of Yafeuh Balogun, Kawana Scott, Steven Monacelli, Hannah Lebovits, Alton Waggoner, and Lafayette "Teri" Heishman, on the ground that these declarations are conclusory, self-serving, and misleading. These declarations broadly reference "medians" and "street corners" where the declarants purportedly routinely engage in free speech but fail to specify where these "medians" or "street corners" are physically located. Such generality is misleading because the challenged ordinance applies only to a narrow kind of median that measure six feet or less and to other areas located within clearly defined arterial roadways. Because none of the declarations

clearly identify any specific median or area that they claim they want to use for assembly and debate and which is rendered unavailable by the ordinance, the City cannot address their allegations that the ordinance will impact their speech or that the ordinance is ineffective as a public safety or traffic control measure.

For example, Mr. Balogun states that he has engaged in protests "on sidewalks and street corners" (ECF 11-1 at 109 ¶3), but fails to specify where these sidewalks and street corners are located or how close to the roadway he stood when he protested. Thus, the City is unable to respond to whether and to what extent these sidewalks and street corners are covered by the ordinance. Mr. Balogun also states that he has used "medians, including narrow medians," (ECF 11-1 at 111 ¶11) to share his protest message, but likewise fails to specify that the medians he has utilized in the past were six feet or less in width, or whether they are located on arterial roadways. Medians wider than six feet are not covered by the ordinance, nor are "narrow medians" that are not located on arterial roadways. Consequently, Mr. Balogun does not establish his speech is impacted by the ordinance.

The declarations by all four plaintiffs suffer from similar deficiencies. While generally referencing "medians less than six feet and within clear zones" none of the plaintiffs identify the physical location of a specific median or area in which they routinely gather to express themselves. *See* Scott Decl. [P's App'x, Ex. K at 114 ¶4] (generally referencing "medians less than six feet and within clear zones."); Lebovits Decl. [*id.* Ex. M at 128-29 ¶¶3,4,7] (generally referencing "medians and street corners"); Waggoner Decl. [*id.* Ex. N at 135-36 ¶¶3, 5] (generally referencing "medians and street corners near traffic lights" and that he stands "within four feet of the street" and utilizes "medians of less than six feet" to panhandle); Heishman Decl. [*id.* Ex. O at 139-40 ¶¶3,5,8] (generally referencing "medians and street corners near traffic lights," and claiming he "often

stands within four feet of the street and use[s] medians of less than six feet panhandle," even though he uses "a wheelchair to get around."). Once again the ordinance does not prohibit standing or walking on *all* medians or street corners, nor does it prohibit standing or walking on narrow medians that are not located in arterial roadways.

Mr. Monacelli's affidavit suffers from similar deficiencies. Mr. Monacelli states that over the course of two years beginning in the Spring of 2020 (during the pandemic), he has observed protests conducted in the City of Dallas. P's App'x, Ex. L at 118 ¶2. Mr. Monacelli attached four photographs to his affidavit which purport to depict the use of medians as places where people assemble and debate. In the first photograph, Mr. Monacelli is depicted standing with two men on a median measuring less than six feet. *Id.* at 119 ¶5a, 123. He claims "occupying the median was critical to safely and accurately covering the demonstration occurring." *Id.* at 119 ¶5a. However, the protestors are not depicted, and common sense would dictate that the median in that photo is simply too narrow to be compatible with traditional general assembly and debate. *Id*. at 123.

The second photo depicts protesters standing behind a row of Covid signs. *Id.* at 124. However, this conduct would not be barred by the ordinance if the signs are within a sufficient distance from the roadway or if the roadway is not arterial roadway. The third photo depicts protesters sitting close to the edge of a roadway. *Id.* at 125. While the ordinance would prohibit pedestrians standing or walking within close proximity to an active arterial roadway, the median depicted in this photo would be excluded from the ordinance's application because it is clearly larger than six feet in width. The fourth photograph depicts a man holding a sign dangerously close to what appears to be an active roadway after dark and other protestors standing on a sidewalk. *Id.* at 125. While the individuals standing and walking on the sidewalk would not run afoul of the ordinance, the man holding the sign close to the roadway would likely receive a citation if the

roadway is an arterial roadway because such conduct poses a danger to both himself and to a motorist, especially at night.

Moreover, Mr. Monacelli's declaration and photos fail to indicate whether the streets adjacent to the medians and areas depicted in a few of his photos were blocked off after protesters obtained a permit pursuant to Dallas City Code § 42A-5 (3), 42A-2 (22) (requiring special events permits for temporary outdoor gatherings with an expected total attendance greater than 100 and requiring closure of public street, lane, alley or sidewalk). If so, Mr. Monacelli's photos are misleading for the additional reason that the challenged ordinance would not bar pedestrian presence in these areas under circumstances in which a permit was obtained that would allow for cessation of normal traffic flow.

For these reasons the City objects to the Court's consideration of these exhibits.

ARGUMENT

I. A Preliminary Injunction is an Extraordinary and Drastic Remedy That is Unwarranted in this Case.

A "[p]reliminary injunction is an extraordinary remedy never awarded as of right." *Benisek v. Lamone*, 138 S. Ct. 1942, 1943–44 (2018) (internal quotations and citations omitted); *see also Enterprise Intern. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 472 (5th Cir.1985) ("the district court must remember that a preliminary injunction is an extraordinary and drastic remedy"); *White v. Carlucci*, 862 F.2d 1209, 1211 (5th Cir.1989) (A preliminary injunction is "not to be granted routinely, but only when the movant, by a clear showing, carries the burden of persuasion."). And the "purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held[.]" *Benisek* 138 S.Ct.at 1945 (citing *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)).

Here, Plaintiffs' delay in seeking such extraordinary relief weighs in favor of denying the

preliminary injunction. The ordinance at issue in this case has been in effect since it was published on October 29, 2022. City's App'x, DX 1 at 8. Plaintiffs filed suit on December 14, 2022 without requesting a temporary restraining order or preliminary injunction. Their request for preliminary injunction was not made until January 6, 2023, which suggests, no degree of harm necessitating such extraordinary relief exists. Consequently, the relative positions of the parties is maintained by the denial of a preliminary injunction.

Moreover, "[i]n order to obtain a preliminary injunction, a movant must demonstrate (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction does not issue; (3) that the threatened injury outweighs any harm that will result if the injunction is granted; and (4) that the grant of an injunction is in the public interest." *Moore v. Brown*, 868 F.3d 398, 402–03 (5th Cir. 2017). "[T]he movant must carry the burden of persuasion on each of the elements of the four-prong test." *Apple Barrel Prods., Inc. v. Beard*, 730 F.2d 384, 389 (5th Cir. 1984). "[T]he movant has a heavy burden of persuading the district court that all four elements are satisfied." *Enterprise,* 762 F.2d at 472. As demonstrated below, Plaintiffs cannot meet their heavy burden in this case.

II. Plaintiffs Cannot Demonstrate a Substantial Likelihood They Will Prevail.

A. The challenged ordinance on its face regulates conduct not speech and Plaintiffs do not allege or establish the challenged ordinance was applied to them.

Plaintiffs' First Amendment claim revolves around the incorrect assumption that the ordinance regulates speech. *See* Pl. Motion at 17 ("Section 28-61.1 prohibits Plaintiffs from engaging in protected First amendment activities. . ."). However, because neither the language on the face of the ordinance nor the ordinance's application depend on a particular viewpoint of a violator, which is what courts are required to consider, *see McCullen*, 573 U.S. at 479-80, the challenged ordinance does not regulate speech on its face. *See e.g. Evans v. Sandy City*, 944 F.3d

847, 853 (10th Cir. 2019) (recognizing that challenged ordinance restricting standing or sitting on narrow and unpaved medians, "is not a ban on panhandling or solicitation"). Rather, the challenged ordinance plainly regulates standing and walking, which is *conduct.* Because Plaintiffs cannot demonstrate the text of the ordinance makes any reference to *speech*, their facial challenge to the ordinance on First Amendment grounds fails as a matter of law.

And because Plaintiffs do not allege or show they have been cited under the ordinance or that they have been threatened with prosecution, their "as applied" challenge is theoretical and therefore lacking in an injury-in-fact sufficient to establish this Court even has jurisdiction over that claim. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). To meet the injury-in-fact standing element at the pleading stage, a plaintiff must allege facts establishing "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical[.]" *Id*. (cleaned up). The "injury in fact test requires more than an injury to a cognizable interest." *Id*. at 563. Rather, it "requires that the party seeking review be himself among the injured." *Id*. Moreover, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by [an allegation of] a continuing, present adverse effects." *Id*. at 564.

Although a plaintiff does not necessarily have to be arrested under a criminal statute or ordinance to challenge the constitutionality of that law, he or she must be able to establish "a credible threat of prosecution" under the law. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)."[P]ersons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." *Id.* (internal quotation marks and citation omitted). "When plaintiffs do not claim that they have ever been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible, they

do not allege a dispute susceptible to resolution by a federal court." *Id*. at 298-99 (internal quotations omitted).

Similarly, Plaintiffs are not entitled to bring a federal suit to secure an advisory determination about which hypothetical activities in unspecified locations may or may not be violations of the challenged ordinance. *See, e.g., Texas v. Travis County*, 272 F. Supp. 3d 973, 980 (W.D. Tex. 2017), aff'd, 910 F.3d 809 (5th Cir. 2018) (dismissing on standing grounds a declaratory action seeking "impermissible" advisory opinion regarding whether law was constitutional where the "alleged injury turns on the legal consequences of some act that may or may not occur"). For these reasons, Plaintiffs' facial and as applied challenges lack merit, standing and/or are not ripe.

B. The affected medians and other areas are not public forums.

Plaintiffs bear the burden of demonstrating that the medians and other areas affected by the challenged ordinance are public forums. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680-84 (1992). Not all public spaces are public forums. Rather such designation is reserved for "places which by long tradition or by government fiat have been devoted to assembly and debate." *Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983). While public streets, sidewalks, and parks are generally considered traditional public forums, *id*., "[t]he mere fact that government property can be used as a vehicle for communication does not mean that the Constitution requires such uses to be permitted." *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984). The government may reserve property that is not by tradition or designation a public forum "for its intended purposes. . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*, 460 U.S. at 46.

An important feature of public forums is unrestricted public access. Prior to the enactment of the Dallas ordinance, due to the inherent dangers of crossing a busy roadway at an unmarked crossing to get to a median, access to medians measuring less than six feet unconnected to crosswalks that are protected by a control signal dividing two roadways was, is, and will continue to be restricted by jaywalking laws. *See, e.*g., Tex. Transp. Code § 552.002 (prohibiting pedestrians from crossing a roadway unless a control signal displays "Walk" and permitting pedestrian to walk to a sidewalk or safety island only if pedestrian has partially crossed while the "Walk" signal is displayed). Moreover, the City's Street Design Manual and the Texas Department of Transportation Roadway Design Manual clearly indicate that medians less than six feet in width are not considered "pedestrian refuges" for the obvious reason that such medians are too small to protect a pedestrian in a busy roadway and are therefore simply incompatible with assembly and debate. *See* City's App'x DX 4 at 227, DX 9 at 419.

In addition, the public record in this case clearly demonstrates that the affected medians are designed to regulate vehicular traffic, divide and delineate traffic lanes, and prevent vehicles from crossing into oncoming traffic. City App'x DX 2. And the clear zones affected by the ordinance are not areas traditionally utilized as public forums because doing so is obviously dangerous to pedestrians, bicyclists, and motorists alike and is simply incompatible with engaging in assembly and debate. *See Id.* DX 2 (Affidavit by G. Khankarli and photos attached). Plaintiffs therefor cannot demonstrate that the four feet between an arterial roadway and a speaker are areas the Supreme Court has held by either tradition or designation to be *devoted* to public assembly and debate.

Nevertheless, Plaintiffs primarily argue that because the affected "medians and areas adjacent to streets" are *near r*oadways they are equivalent to streets and sidewalks. Pl. Motion at

17. However, mere proximity to streets and sidewalks does not in and of itself render all medians public forums dedicated to assembly and debate. Plaintiffs' reliance on *Warren v. Fairfax Cnty*, 196 F.3d 186 (4th Cir. 1999), *McCraw v. City of Oklahoma*, 973 F.3d 1057 (10th Cir. 2020) and similar cases is misplaced. In *Warren*, the plaintiff was prohibited from erecting a holiday display on an outdoor mall which measured at least 30 yards wide and approximately 200 yards long which "invit[ed] pedestrians to stroll . . . and explore" and was likened to a park. *Id.* at 194. In *McCraw* the ordinance at issue prohibited standing, sitting or staying on any portion of a median that measured less than thirty feet wide or located less than 200 feet from an intersection. *Id.* at 1062. When holding that the medians at issue there were public fora, the Court found that the record in that case demonstrated a long tradition of expressive activity occurring on Oklahoma City's medians that were impacted by the ordinance. *Id.* at 1069.

Here, however, while *some* medians may qualify as public fora in the City of Dallas, the medians *affected by the ordinance* are simply too small to have ever been long utilized as places devoted to assembly and debate due to their incompatibility for such use. Indeed, the Dallas ordinance does not prohibit anyone from standing or walking on a median wider than six feet, so long as the individual stands or walks at a safe distance from the vehicular traffic in arterial roadways. And the notion that clear zones, such as bicycle lanes and roadway shoulders, where vehicles and bicyclists are traveling at high speeds were ever utilized as places for traditional assembly and debate is a dubious proposition. Indeed, it is highly unlikely that any reasonable person would intentionally and routinely place themselves in an area so close to a roadway where they would risk injury for the purpose of conveying a message to passing motorists when that goal can be achieved from a safe distance.

Plaintiffs' insistence that these areas are devoted for such use highlights their true

complaint, which is not that they are being prevented from exercising speech, but rather, that they cannot *approach a vehicle to collect money*, which is conduct, not speech and distinct from carrying a sign or distributing literature. *See, e.g. United States v. Kokinda*, 497 U.S. 720, 733–34 (1990) (holding regulation prohibiting solicitation on public sidewalk in front of U.S. Post Office did not violate First Amendment in part because postal sidewalk was not a traditional public forum and finding restriction was reasonable in part because "[s]olicitation impedes the normal flow of traffic . . . and requires action by those who would respond: The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card."); *see also United States v. Belsky*, 799 F.2d 1485, 1489 (11th Cir. 1986) ("Soliciting funds is an inherently more intrusive and complicated activity than is distributing literature").

Therefore, even if Plaintiffs can demonstrate that *some* medians in the City of Dallas have traditionally been used as public fora, they have not and cannot demonstrate that the medians and areas *affected by the challenged ordinance* qualify as public fora as that term has been defined by the Supreme Court.

C. Even if the ordinance *as applied* implicates some protected speech in a public forum, the ordinance is a content-neutral, reasonable, time, place and manner restriction subject to intermediate scrutiny.

Even if Plaintiffs can somehow show that medians six feet or less in width and the other areas affected by the ordinance are public fora devoted to public assembly and debate, the ordinance passes constitutional muster because it is a content-neutral, reasonable, time, place, and manner restriction that serves a substantial governmental interest, and leaves open adequate alternative places for speech. *Ward,* 491 at 790. A public forum restriction need not be the least

restrictive alternative. *Id*. at 798. "[A] regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* at 791.

Here the ordinance reasonably restricts standing and walking on a median that measures six feet or less in an arterial roadway for the obvious reason that permitting such access is dangerous in part because those medians are not designed to accommodate such activity. The ordinance therefore serves a purpose unrelated to the content of expression. But, even if this ordinance was solely directed at solicitation in roadways, which it is not, it would not offend the First Amendment because such a restriction in this context would clearly fall within a reasonable time, place and manner restriction. The Supreme Court said so in in *Kokinda* when it acknowledged that solicitation is different from other types of speech because it can reasonably be expected to disrupt or interfere with the right of others to be left alone.

Indeed, the Court observed that "residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information. One need not ponder the contents of a leaflet or pamphlet in order mechanically to take it out of someone's hand, but one must listen, comprehend, decide, and act in order to respond to a solicitation. Solicitors can achieve their goal only by "stopping [passersby] momentarily or for longer periods as money is given or exchanged for literature" or other items." *Id*. at 734. In the context of the Dallas ordinance, not only can a person who is asking for money too close on a busy roadway disrupt passage, but such conduct can also lead to far more serious consequences than simply distracting from the business of a post office.

1. Plaintiffs' content-based arguments are unsupported by precedent.

Plaintiffs primarily argue that the level of scrutiny this Court must apply to the challenged ordinance is dictated by the individual legislators' *motives* behind the Ordinance. *See generally* Pl. Motion. However, this argument lacks controlling precedent and therefore fails. The mere fact that individual members of the Dallas City Council recognized that panhandlers' speech would be indirectly impacted by an ordinance that regulates conduct regardless of a speaker's message, is insufficient as a matter of law to transform a neutral regulation into a content-based restriction of speech. *See, e.g., McCullen*, 573 U.S. at 479 ("a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics"); *see also Ward*, 491 U.S. at 791 ("A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others."); *O'Brien*, 391 U.S. at 383 ("it is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.")

The Supreme Court's decision in *Hill v Colorado*, 530 U.S. 703 (2000) illustrates the point well. There, the Court explained that "the contention that a statute is 'viewpoint based' simply because its enactment was motivated by the conduct of the partisans on one side of a debate is without support." *Hill,* 530 U.S. at 724. Relying on *Frisby v. Schultz*, 487 U.S. 474 (1988), the Court explained that it had, in the past, recognized a picketing ordinance as constitutional that "was obviously enacted in response to the activities of antiabortion protesters who wanted to protest at the home of a particular doctor." *Id.* at 725. Indeed, the First Amendment only "forbids Congress and . . . the States from making laws abridging the freedom of speech—a far different proposition than prohibiting the *intent* to abridge such freedom." *Grossbaum*, 100 F.3d at 1293 (internal quotation marks omitted).

Because Plaintiffs points to no precedent supporting their argument that the intent of legislators is relevant to the First Amendment inquiry, their argument fails.

2. **The ordinance is content-neutral and therefore subject to intermediate scrutiny.**

Thus, instead of focusing on an individual legislators' motives and intent, Supreme Court precedent requires that this Court look to the actual *text* of the statute that was enacted by the governing body as a whole. In *Hill v. Colorado*, the Supreme Court held that a Colorado law was content-neutral even though it prohibited speakers from approaching within eight feet of persons entering an abortion facility. The Court determined the law was content-neutral in part because "it [was] not a 'regulation of speech.'" Rather, according to the Court, it was "a regulation of the places *where* some speech may occur." *Hill,* 530 U.S. at 719. In addition, after considering the statute's text and finding that the law's "restrictions apply equally to all demonstrators, regardless of viewpoint," and that "the statutory language makes no reference to the content of the speech," the Court concluded that the law's application did not depend on "disagreement with the message" conveyed by a speaker. *Id*. Finally, the Court observed that the government interests in protecting citizens' privacy and providing clear guidance to law enforcement were unrelated to the content of the speaker's message. *Id.*

Like the ordinance in *Hill,* the Dallas ordinance on its face does not regulate speech. Instead, to the extent an individual wants to engage in speech, the Dallas ordinance only indirectly impacts *where* that speech may occur by prohibiting standing or walking in narrowly defined areas that pose a high risk of injury or death to pedestrians and motorists. And, enforcement of the ordinance does not require consideration of any message being conveyed while standing or

walking on an affected median or area.[1] Finally, the government interest in protecting pedestrians and motorists from injury are unrelated to the content of any speaker's message. The Dallas ordinance applies equally to any person on the affected median regardless of the content of their speech, if any.

Thus, because the challenged Dallas ordinance on its face unambiguously and unequivocally regulates conduct and makes no reference to speech, it is content-neutral as a matter of law. *McCullen*, 573 U.S. 479-80 (finding regulation content neutral because the "Act does not draw content-based distinctions on its face" and even though the regulation's application has an "inevitable effect" of restricting some speech more than other speech, it was content-neutral because it served "purposes unrelated to the content of expression") (*citing Ward*, 490 U.S. at 791 and *Renton v. Playtime Theatres, Inc*., 475 U.S. 41, 48 (1986)).

D. **The ordinance serves compelling and significant governmental interests and leaves substantial alternative channels of communication.**

Public safety and traffic control and mobility are compelling and significant governmental interests**.** The ordinance on its face furthers these interests by avoiding disruptions in traffic flow and reducing the risk of traffic fatalities and injuries and is therefore a reasonable time, place and manner regulation. *See Kokinda*, 497 U.S. at 733 (agreeing that restricting access of postal premises for solicitation was reasonable because solicitation is inherently disruptive and "impedes the normal flow of traffic.") (citing *Heffron v. Int'l Society for Krishna Consciousness*, *Inc*., 452 U.S. 640, 653 (1981)). And by its application, in accordance with Vision Zero, the ordinance proactively prevents pedestrian fatalities in medians and shoulders adjacent to arterial roadways;

[1] Plaintiffs make much of the fact that the City Marshall is also empowered to enforce the ordinance. However, that fact does not render enforcement dependent on a speaker's message. Rather, due to the council's recognition that this ordinance would likely impact panhandlers, the Marshall's involvement after a violation has occurred permits the City to help, not punish, violators of the ordinance who are experiencing substance abuse issues or homelessness by offering them services in lieu of fines or jail time.

preserves the purpose of the medians affected by the ordinance, which is to regulate traffic flow; prevents pedestrians from entering frontage roads or state-owned roadways where pedestrian access is uncontrolled by walls, fencing, or other barriers; ensures bicycle lanes and shoulders are clear of pedestrian traffic; and ensures a safe distance between an arterial roadway and pedestrians, which all keeps the traffic on arterial roadways moving. *See* City App'x, DX 2 at ¶11.

Moreover, the ordinance leaves open numerous alternative areas where members of the public may engage in speech (including panhandling) such as sidewalks, public parks, medians wider than six feet, and in streets (provided the proper permits are obtained). For these reasons, Plaintiffs fail to meet their heavy burden to show they are substantially likely to prevail.

III. Plaintiffs Cannot Show Irreparable Harm.

Plaintiffs argue they will suffer irreparable harm because they face "the impossible choice of giving up the protected activity they depend on to survive" or "life-altering consequences simply from speaking with and in some cases, offering help to people on the street" and that they are "unable to use medians in her protest work" and are restricted from the "galvaniz[ing] support for causes." Pl's Motion at 32-33. However, as explained above, the ordinance does not prohibit this activity. It only requires that plaintiffs engage in this activity at a safe distance from an arterial roadway and on medians that measure wider than six feet.

IV. The Balance of Equities Tips in the City's Favor and Denying the Preliminary Injunction Serves the Public Interest.

Plaintiffs argue that any "potential injury to the City from an injunction will be minimal." Pl. Motion at 33. However, any time a governmental entity is enjoined by a court from effectuating the laws enacted by representatives of its people, the governmental entity suffers a form of irreparable injury. *See Veasey v. Abbott*, 870 F.3d 387, 391 (5th Cir. 2017) (citing *Maryland v. King*, 567 U.S. 1301 (2012); *Walters v. Nat'l Ass'n of Radiation Survivors*, 468 U.S. 1323, 1324

(1984)). Here, the City's justification for passing the ordinance was to ensure public safety, ensure traffic control and mobility, and further its Vision Zero goal of zero traffic fatalities and a 50% reduction in severe injuries. Granting the preliminary injunction would prevent the City from achieving these goals and would prevent the City from engaging in the most important function of government—keeping its residents safe. Thus, the City's actual harm flowing from the grant of the preliminary injunction clearly outweighs any speculative harm Plaintiffs might suffer.

Finally, Plaintiffs rely on their incorrect assumption that the ordinance bars solicitation. It does not. As demonstrated above, the ordinance is a reasonable, narrowly tailored time, place and a manner restriction that proactively protects pedestrians, bicyclists and motorists from harm and keeps the arterial roadways moving in a safe manner free from distraction and disruption. Accordingly, enjoining it only disserves these public interests.

PRAYER

For these reasons, the City respectfully asks this Court to deny Plaintiffs' Motion for Preliminary Injunction.