

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

GLYNN DILBECK and SHANE COOK

PLAINTIFFS

V.

CASE NO. 5:17-CV-5116

**HAYES MINOR, In his Official Capacity as
Chief of the Rogers, Arkansas Police Department**

DEFENDANT

MEMORANDUM OPINION AND ORDER

The parties agree that all claims in this case may be resolved by the Court on summary judgment. Defendant Hayes Minor filed his Motion for Summary Judgment (Doc. 60), Brief in Support (Doc. 61), and Statement of Facts (Doc. 62) on February 1, 2018. Shortly thereafter, on February 6, 2018, Plaintiffs Glynn Dilbeck and Shane Cook filed their Cross-Motion for Summary Judgment (Doc. 63), Brief in Support (Doc. 64), and Statement of Facts (Doc. 65). The Court has also considered the following documents: (1) Minor's Response in Opposition to Dilbeck's and Cook's Motion (Doc. 68); (2) Minor's Response to Statement of Facts (Doc. 69); (3) Dilbeck's and Cook's Response in Opposition to Minor's Motion and Reply (Doc. 71); (4) Dilbeck's and Cook's Response to Statement of Facts (Doc. 72); and (5) Minor's Reply (Doc. 73). For the reasons explained herein, Minor's Motion for Summary Judgment is **DENIED**, and Dilbeck's and Cook's Cross-Motion for Summary Judgment is **GRANTED**.

I. BACKGROUND

The central dispute in this case is whether an ordinance passed by the City of Rogers, Arkansas, on December 12, 2017, is constitutional. Section 52-139 of the Rogers Code of Ordinances, which is attached as Exhibit "A" to Ordinance 17-82 (Doc.

57-1, p. 3), explains in detail the sorts of activities that would be prohibited if the ordinance at issue (“the Ordinance”) were enforced by the City of Rogers (“the City”).¹

The Ordinance can broadly be described as a traffic-related regulation that targets the activities of pedestrians on the City’s roadways. However, the December 2017 version of the Ordinance was not the City’s first attempt to target such behavior. The earliest version of the Ordinance was passed on February 20, 2017, and titled “Sec. 38-24—Solicitation from persons driving motor vehicles prohibited.” (Doc. 5-3). It provided in section (a): “The practice of soliciting money or contributions from motor vehicles by pedestrians without a permit issued by the city is hereby prohibited within the city limits.” *Id.* The Ordinance therefore targeted the specific act of solicitation. Plaintiffs, who describe themselves as panhandlers or beggars, see Doc. 57, p. 3, challenged the February version of the Ordinance by bringing a lawsuit in this Court on June 27, 2017, arguing that the Ordinance violated their First Amendment right to engage in solicitation speech. Mr. Dilbeck claims that after the Ordinance passed, he was warned and harassed by the City’s police for panhandling; and Mr. Cook claims he applied for a permit to panhandle in order to be exempted from the Ordinance’s criminal penalties, but his application was denied.

¹ Shortly after the Court held a preliminary injunction hearing on September 26, 2017, the City voluntarily agreed to stay any enforcement of the Ordinance until after the Court issued its decision on the merits. See Text-Only Order of October 6, 2017. The City’s argument that Plaintiffs now lack standing to raise an as-applied challenge, since they have yet not suffered any ill effects of enforcement due to the City’s stay, see Doc. 68, p. 2, is not well taken. The Court credits Plaintiffs’ un rebutted assertion that their solicitation speech was chilled as a result of the City’s past enforcement of earlier versions of the Ordinance. There is no valid reason to assume that Plaintiffs’ speech would not be similarly chilled if the current version of the Ordinance were enacted and enforced by police.

The filing of the lawsuit apparently prompted the City to take a closer look at the February Ordinance, and on July 25, 2017, the Rogers City Council decided to repeal it. See Doc. 21-2, p. 4. That same day, the City adopted Section 52-139 of the Code of Ordinances, entitled "Approaching an occupied vehicle—Prohibited." *Id.* at 5. New Ordinance 52-139 tactfully eliminated any reference to "soliciting money." The revised text of the Ordinance reads as follows:

52-139. Approaching an occupied vehicle—Prohibited.

(a) Except as provided in subdivision (b) of this section, a person shall not approach the occupied vehicle of another person if the vehicle is in operation and on a public street.

(b) A person may approach the occupied vehicle of another if the person is:

(1) Authorized to perform roadwork, perform utility work, or direct traffic at the location and acting within the scope of his or her authority;

(2) Law enforcement acting in his or her capacity as law enforcement;

(3) Emergency personnel acting in his or her capacity as emergency personnel;

(4) A pedestrian acting consistently with Arkansas Code § 27-51-1203 and § 27-51-1204; or

(5) Using the roadway for pedestrian transportation purposes when no sidewalk or trail is available.

(c) A violation of this section shall be punishable as provided for in Section 1-5 of the Code of Ordinances, City of Rogers, Arkansas.

Id.

For the first time, with the passage of the July 2017 version of the Ordinance, the City adopted the “approach” language that now appears in the Ordinance’s current incarnation. The Ordinance criminalized a person’s “approach” to an “occupied vehicle of another person if the vehicle is in operation and on a public street.” *Id.* It also carved out certain exceptions for pedestrians who were properly using marked or unmarked crosswalks, or roadways that had no sidewalks or trails available. *Id.* Other exceptions were made for law enforcement and emergency personnel working in or along the roadway. *Id.*

Despite the amendments made to the Ordinance in July of 2017, Plaintiffs filed an amended complaint on August 3, 2017, arguing that the revised Ordinance still failed “all relevant tests applied by the United States Supreme Court and other federal and state courts” and imposed “a content-based restriction on freedom of speech” (Doc. 21, p. 3). Plaintiffs also noted that others similarly situated faced “this same government persecution for their protected speech” due to “the threat of citation, arrest, prosecution, conviction and penalties” *Id.* at 1. The City responded to the amended complaint by filing a motion for judgment on the pleadings on August 23, 2017, and on September 26, 2017, the Court held a hearing on that motion and on the Plaintiffs’ motion for preliminary injunction.²

On October 6, 2017, the Court entered a Text-Only Order finding as moot the Plaintiffs’ motion for preliminary injunction in light of the City’s agreement not to enforce

² Originally this case also challenged the constitutionality of a similar panhandling/solicitation ordinance passed by the City of Fort Smith, Arkansas. But the Court granted the City of Fort Smith’s motion to sever, and the Fort Smith claims were stricken from this case and filed in a separate case in the Fort Smith Division.

the Ordinance pending a decision from the Court on the merits of Plaintiffs' complaint.³ About two months later, on December 12, 2017, the City repealed the July version of the Ordinance and replaced it with the current version (Doc. 57-1). In response, Plaintiffs filed their Fifth Amended Complaint (Doc. 57) on January 2, 2018, claiming that even the latest amendments to the Ordinance violated their First Amendment rights by chilling their ability to engage in solicitation speech in the public streets and roadways of Rogers. After the City answered the Fifth Amended Complaint, see Doc. 59, the parties filed cross-motions for summary judgment in quick succession, the City's Motion being filed on February 1, 2018, and the Plaintiffs' Motion being filed on February 6, 2018.

The most current version of the Ordinance passed on December 12, 2017, (Doc. 57-1). This is the version of the Ordinance that the Court will focus on in this Opinion. The revised Ordinance reads as follows:

52-139. Approaching an occupied vehicle – Prohibited.

(a) Except as provided in subdivision (b) of this section, a person shall not approach the occupied vehicle of another person if the vehicle is in operation and on a public street in a manner that could:

- (1) Cause injury to any person;
- (2) Cause property damage; or
- (3) Impede or obstruct the flow of traffic.

(b) A person may approach the occupied vehicle of another if the person is:

³ The City's motion for judgment on the pleadings was also deemed moot. See Text-Only Order of October 16, 2017.

- (1) Authorized to perform roadwork, perform utility work, or direct traffic at the location and acting within the scope of his or her authority;
 - (2) Law enforcement acting in his or her capacity as law enforcement;
 - (3) Emergency personnel acting in his or her capacity as emergency personnel; or
 - (4) A pedestrian acting consistently with Arkansas Code § 27-51-1203 and § 27-51-1204.
- (c) Every pedestrian entering a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway.
- (d) Any pedestrian entering a roadway at a point where a pedestrian tunnel or overhead pedestrian crossing has been provided shall yield the right-of-way to all vehicles upon the roadway.
- (e) Between adjacent intersections at which traffic control signals, signs, or other devices are in operation, pedestrians shall not enter a roadway at any place except in a marked crosswalk.
- (f) As used in this section, "in operation" means moving or having the engine on or engaged, and not lawfully parked.
- (g) A violation of this section is punishable as provided for in Section 1-5 of the Code of Ordinances, City of Rogers, Arkansas.

(Doc. 57-1).

As is readily apparent, the current version of the Ordinance is the most detailed one to date. It criminalizes the act of "approach[ing] the occupied vehicle of another person if the vehicle is in operation and on a public street," provided that doing so "could . . . [c]ause injury to any person . . . [c]ause property damage . . . or [i]mpede or

obstruct the flow of traffic.” *Id.* Therefore, not every “approach” would be subject to criminal sanctions under the Ordinance, since only those approaches that “could” lead to certain future consequences would garner criminal penalties.

Turning to the causes of action listed in the Fifth Amended Complaint, the Court observes that Plaintiffs have lodged two separate challenges to the constitutionality of the Ordinance. Plaintiffs’ First Amendment challenge is characterized as both a facial one and an as-applied one, as Plaintiffs contend the Ordinance on its face presents a content-based restriction on protected speech in a traditional public forum and/or imposes a content-based restriction as applied to the individual Plaintiffs. They believe the Ordinance should be subjected to a strict-scrutiny analysis, but they argue in the alternative that if the Court applied a lesser standard of scrutiny, the Ordinance would still fail to pass constitutional muster.

Curiously, Plaintiffs present their First Amendment challenge over the course of three separate Counts. Count I is styled as a facial and as-applied challenge to the Ordinance, based on the proposition that the Ordinance is content-based and should be subject to strict scrutiny. Count II is a First Amendment challenge based on the notion that the City was motivated by negative animus towards beggars when drafting and passing the Ordinance. Count III presents an analytical alternative to Count I, based on the proposition that even if the Ordinance were deemed content-neutral under First Amendment standards, it would still not survive intermediate scrutiny due to a lack of narrow tailoring. The Court has determined that the most logical approach to evaluating Plaintiffs’ First Amendment challenge is to combine Counts I-III into a single

claim and apply the appropriate level of scrutiny, while at the same time addressing Plaintiffs' substantive arguments.

Count IV is Plaintiffs' second constitutional challenge to the Ordinance, which arises under the Fourteenth Amendment. This challenge is based on the proposition that the Ordinance should be declared void for vagueness under due process standards, "in that it criminalizes protected speech without fair notice as to what contemplated conduct is forbidden and thus does not furnish a sufficiently ascertainable standard of guilt." (Doc. 57, p. 6). With regard to this claim, Plaintiffs contend that certain portions of the Ordinance are so vague that a person of ordinary intelligence would not understand what sorts of acts could subject him to criminal penalties, and that the Ordinance is drafted in such a way that it is likely to result in arbitrary and discriminatory enforcement.

As relief, Plaintiffs request a permanent injunction barring the City from enforcing the Ordinance, a declaratory judgment that the Ordinance is unconstitutional, and an award of their costs and attorney's fees.

In response to the Fifth Amended Complaint, Hayes Minor, the Chief of the Rogers Police Department, argues on behalf of the City that the Ordinance in its current form is both facially valid and also valid as applied to Plaintiffs. The City believes the Ordinance comports with due process standards and is not void for vagueness. In the City's view, the Ordinance is content-neutral on its face because it does not purport to regulate speech at all and can be justified without reference to the content of any speech—including solicitation speech. Further, the City contends that the Ordinance is

supported by a compelling governmental interest, namely, the City's need to promote pedestrian and vehicular safety and to avoid pedestrian-related accidents. The City's position is that the Ordinance is sufficiently narrowly tailored, in that it permits protected speech—including panhandling—to take place in many other locations throughout the City. Finally, as to the Fourteenth Amendment challenge, the City simply disagrees that the Ordinance is vague and argues that all relevant terms have either been explicitly defined or are easily defined according to common usage.

II. LEGAL STANDARD

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). When, as here, cross-motions for summary judgment are filed, each motion should be reviewed in its own right, with each side “entitled to the benefit of all inferences favorable to them which might reasonably be drawn from the record.” *Wermager v. Cormorant Twp. Bd.*, 716 F.2d 1211, 1214 (8th Cir. 1983); *see also Canada v. Union Elec. Co.*, 135 F.3d 1211, 1212-13 (8th Cir. 1998). The moving party bears the burden of proving the absence of any material factual disputes. Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). If the moving party meets this burden, then the non-moving party must “come forward with ‘specific facts showing that there is a genuine issue for trial.’” *Matsushita*, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(c)); *Nat’l Bank of Commerce of El Dorado, Ark. v. Dow Chem. Co.*, 165 F.3d 602, 607 (8th Cir. 1999). These specific facts must be “such that a reasonable jury could return a

verdict for the nonmoving party.” *Allison v. Flexway Trucking, Inc.*, 28 F.3d 64, 66 (8th Cir. 1994) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

III. DISCUSSION

A. First Amendment Challenge

Plaintiffs’ First Amendment challenge to the Ordinance stems from their panhandling activities in the City. They argue that the Ordinance unfairly targets, chills, and potentially eliminates all solicitation speech in the roadways of the City of Rogers by virtue of the Ordinance’s criminal penalties. The parties agree that according to established precedent, solicitation speech requesting alms, gifts, or charity is afforded strong protection under the First Amendment. See *Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 632 (1980) (“[C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment.”); *Gresham v. Peterson*, 225 F.3d 899, 904 (7th Cir. 2000) (“While some communities might wish for all solicitors, beggars and advocates of various causes be vanished from the streets, the First Amendment guarantees their right to be there, deliver their pitch and ask for support.”); *Speet v. Schuette*, 726 F.3d 867, 878 (6th Cir. 2013) (“[W]e hold that begging, or the soliciting of alms, is a form of solicitation that the First Amendment protects.”).

The parties also agree that public streets and sidewalks occupy a “special position in terms of First Amendment protection.” *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (quotation and citation omitted). Accordingly, “the government’s

ability to restrict speech in such locations is very limited.” *Id.* Here, the activities potentially criminalized by the Ordinance would be prohibited on every public street in Rogers, without limitation or qualification.

The Court will begin its discussion by considering the appropriate level of scrutiny that should be applied when evaluating whether the Ordinance passes constitutional muster, or else imposes too great a burden on protected speech. According to the Supreme Court’s guidance in *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218, 2226-27 (2015), when a law is accused of restricting protected speech, the first inquiry is whether the law, on its face, appears to impose a “content-based” restriction on speech or a “content-neutral” restriction. “Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.” *Id.* at 2226. Accordingly, a law is content-based if it “draws distinctions based on the message a speaker conveys,” either by “defining regulated speech by particular subject matter,” or by “defining regulated speech by its function or purpose.” *Id.* at 2227. In some cases, laws that may appear content-neutral on their face may nonetheless be subject to the same strict level of scrutiny as content-based regulations if they are ones that “cannot be justified without reference to the content of the regulated speech or that were adopted by the government because of disagreement with the message the speech conveys.” *Id.* (internal quotation and citation omitted).

Here, the Court finds that the Ordinance does not impose any content-based restrictions on speech. The Ordinance criminalizes non-speech activity, namely, a pedestrian's "approach" to an occupied vehicle when the vehicle is "in operation and on a public street." (Doc. 57-1). The language of the Ordinance does not reference any form of speech, nor does it draw distinctions or impose punishment based on a speaker's particular message or viewpoint. In fact, *any pedestrian* who approaches an occupied vehicle in operation on a road in Rogers—regardless of the purpose for that approach—is potentially subject to the Ordinance's criminal penalties.

Because the Ordinance is not content-based and, indeed, does not regulate speech directly in any respect, the Court will next consider whether it imposes an incidental restriction on speech. Perhaps one of the only reasons why a pedestrian might approach a vehicle in traffic on a public street would be to engage the driver in some type of speech. Along those lines, the examples of the types of speech that could be implicated in such a scenario are virtually limitless. For instance, a pedestrian could approach a vehicle to ask for directions or for a ride, to solicit for an organized charity or for personal financial assistance (including receiving funds), to pass out political literature, to wish the driver "good morning," or to hurl insults at the driver for displaying a bumper sticker the pedestrian finds displeasing. Not all of these types of speech are entitled to constitutional protection, of course; but the fact that both protected and non-protected speech could incidentally be silenced, or at least chilled, by virtue of the threat of criminal penalties imposed by the Ordinance weighs in favor of a close examination of the Ordinance's incidental effect on speech.

The Supreme Court in *United States v. O'Brien*, 391 U.S. 367, 375 (1968), considered a statute that criminalized the act of destroying one's draft card, a law that "on its face deal[t] with conduct having no connection with speech." Observing that the act of burning a draft card could potentially involve symbolic speech and the communication of a political viewpoint or protest, the Court nonetheless upheld the law's constitutionality, observing that "a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Id.* at 377. The *O'Brien* Court's four-part "intermediate scrutiny" framework is applied when a regulation does not facially concern protected speech but appears to have an incidental, chilling effect on speech.

Turning to the plain language of the Ordinance, the Court finds that although it is facially neutral, it nonetheless incidentally burdens speech. The burden on speech is limited, however, to certain factual situations, as the Ordinance does not fully prohibit persons from engaging in any expressive activity in or along the public streets. For example, the Ordinance would not prohibit a speaker from holding up a sign while sitting or standing on a median strip or on a sidewalk in the middle of or along a public street. The Ordinance also would not prohibit a speaker from talking with drivers as they waited at an intersection or stop sign, or even from shouting messages to drivers on the roadway. What the Ordinance *would prohibit* is a pedestrian approaching a car

to speak with the driver, hand materials to the driver, or in the case of a panhandler, to receive alms from the driver. The Ordinance does not define what "approach" means, and the Court takes Plaintiffs' point that it could plausibly mean anything from leaning toward a car window with an extended hand, to taking a few steps toward a car window, to stepping off the curb and entering the street to get closer to a car in the middle of traffic. All such approaches could be subject to criminal penalties under the Ordinance if the arresting officer believed they could lead to injury, property damage, or the obstruction of the flow of traffic.

The Supreme Court has explained that

regulations that burden speech incidentally or control the time, place, and manner of expression are [not] invalid simply because there is some imaginable alternative that might be less burdensome on speech. Instead, an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.

United States v. Albertini, 472 U.S. 675, 688-89 (1985) (internal citations omitted).

Here, the City argues that the Ordinance is only a restriction on conduct and not on speech. However, the Court must consider, for the reasons set forth in the preceding discussion, whether the Ordinance meets the *O'Brien* test, due to its incidental effect on certain types of protected speech. First, passing a traffic ordinance is certainly within the power of the Rogers City Government. But with regard to the second part of the *O'Brien* test, there is little to no evidence to show that this particular Ordinance furthers an important or substantial government interest. The City relies on "a common-sense analysis" to establish that any person approaching a vehicle in

operation “could create harm to person or property or impede the flow of traffic.” (Doc. 61, p. 6-7). The City then cites to national highway statistical data that generally demonstrate “the continued increase in both pedestrian deaths and traffic fatalities” over the course of time. *Id.* at 7. The national data contain a demographic breakdown of pedestrians who were killed in traffic accidents, including the times of day and days of the week they were killed, the vehicle types and impact points, and whether alcohol was a factor in any of the deaths. The data are so general that it is impossible for the City to argue that the statistics conveyed by the data spurred the City to pass this Ordinance, which criminalizes only pedestrian behavior and not motorist behavior and makes no distinction as to locations, times, or circumstances where pedestrian behavior would be regulated.

In addition to the national data, the City also cites a number of news reports from across the country that involve pedestrian fatalities, apparently in an effort to convince the Court that these accident reports provide a *post hoc* justification for the City’s drafting and passage of the Ordinance. None of the pedestrians who perished in the news articles referenced by the City did so because they “approached” a vehicle in traffic. It is therefore quite difficult for the City to argue that these articles illustrate why the City’s Ordinance is necessary to prevent future pedestrian injury or death. For example, in a news article cited by the City from Marietta, Georgia, a pedestrian was fatally struck by a motorist whose car jumped the curb. See https://www.cbs46.com/news/woman-arrested-charged-in-fatal-crash-that-killed-marietta-man/article_4f6bbb59-b304-5f7a-a818-ae7cd2fcabd5.html (last visited Sept. 18,

2018). Another article cited by the City describes a motorist in San Antonio, Texas, who hit a pedestrian who was walking lawfully on the sidewalk. See <https://www.ksat.com/traffic/pedestrian-walking-on-sidewalk-hospitalized-after-being-hit-by-vehicle> (last visited Sept. 18, 2018). Yet another article from a newspaper in Germantown, Tennessee, explains how a “driver of an SUV lost control coming down the hill . . . and struck [a panhandler] as he was standing in the median.” <https://www.germantownpulse.net/single-post/2017/06/20/Panhandler-Killed-in-Middlebrook-Road-Crash> (last visited on Sept. 18, 2018).

Aside from failing to justify the particular prohibitions of the Ordinance through citations to national statistical data or data from other cities, it must be emphasized that *none of the data* cited by the City (1) describe accidents or damage to property that occurred in Rogers or (2) describe the traffic patterns and features (medians, sidewalks, etc.) of any of the public streets in Rogers that would justify a blanket prohibition on certain pedestrian activity on every street and at every hour of the day or night. In the end, the City has made no meaningful effort to justify the passage of the Ordinance based on a governmental interest or concern, and at least some justification is needed when the Ordinance has an incidental effect on certain types of protected speech.

Importantly, the Ordinance would do nothing to address the problem of motorists hopping curbs and injuring or killing pedestrians. The Ordinance would specifically allow pedestrians to remain in place and engage in speech in the streets or on sidewalks or medians along the street, provided that they did not “approach” vehicles in traffic. See the City’s Reply to Plaintiffs’ Motion for Summary Judgment, Doc. 73, p. 8

("Plaintiffs can stand on the sidewalk all day with a sign that says 'please give me money,' and that will not be illegal Nothing is stopping plaintiffs from asking for money . . . on the sidewalk, or even on the side of the road; they just cannot approach a vehicle in the road."). To the extent the City has identified a public safety problem concerning pedestrian fatalities in Rogers, there is no reason to believe that the Ordinance is targeted to address the source of the problem, as it fails to address driver behavior and focuses exclusively on pedestrian behavior.

All this brings the Court to the third part of the *O'Brien* test: whether the stated governmental interest in passing the law is related to the suppression of free expression. As previously discussed, the Ordinance focuses on certain pedestrian behavior, without any apparent justification, and fails to consider the safety of pedestrians stationed on or in the roadway who remain in place and make no "approach" to cars. Similarly, the Ordinance fails to consider the culpability of drivers who, through their inattention or otherwise, cause pedestrian deaths. To add to this lack of empirical support, the Court cannot turn a blind eye to the fact that the earliest version of the Ordinance targeted solicitation speech in particular, prohibiting "[t]he practice of soliciting money or contributions from motor vehicles by pedestrians without a permit issued by the city." (Doc. 5-3). One could reasonably extrapolate, as Plaintiffs have here, that even though the current version of the Ordinance (and its immediate predecessor) removed the reference to solicitation speech, the City's true intent in passing the Ordinance ever remained the same: to target and eliminate solicitation speech from the public roadways. The City vehemently denies this purpose and insists

that the Ordinance is exactly what it appears to be on the surface: a mere traffic regulation meant to save lives and protect both pedestrians and motorists. The Court is not convinced.

Once the City's nonspecific appeal to "public safety" is disregarded, it is evident that the City's true purpose in passing the Ordinance was to curtail panhandling in the City's streets, as demonstrated by the fact that there is zero support in the record for any other valid purpose to the Ordinance. Plaintiffs correctly point out that laws already exist that further, if not accomplish, the City's goal of promoting "pedestrian and vehicular safety." (Doc. 61, p. 12). Laws already exist to prevent jaywalking, obstructing traffic, impeding traffic, hitchhiking, and stopping a vehicle on specific places on a roadway. See Doc. 64, p. 19 n.4.

The discussion is well served at this point by turning to a few highly relevant comparison cases that help to illustrate why the City's Ordinance violates the First Amendment. The first case is *Traditionalist American Knights of the Ku Klux Klan v. City of Desloge*, 775 F.3d 969 (8th Cir. 2014). In that case, the Court of Appeals for the Eighth Circuit found that a content-neutral traffic regulation that had an incidental effect on speech was nonetheless constitutional. The ordinance in question prohibited pedestrians from "stand[ing] in or enter[ing] upon a Roadway for the purpose of distributing anything to the occupant of any vehicle." *Id.* at 972. Importantly, the ordinance permitted pedestrians to solicit or distribute information to drivers who were in traffic, as long as the pedestrians remained on the sidewalk and did not step into the roadway. *Id.* The "roadway" was specifically defined in the ordinance as "the entire

road, from one curb or pavement edge to another, including parking lanes.” *Id.* In stark contrast to the case at bar, the city of Desloge commissioned a professionally licensed traffic and transportation engineer “to prepare a report identifying and evaluating any safety issues raised by pedestrian distributions or solicitations on public roadways” in the city. *Id.* at 973. The expert took photographs of and visited Desloge’s roads to analyze traffic patterns and make specific observations. After doing so, he recommended that pedestrians be prohibited from stepping into the roadways to solicit or distribute to drivers. *Id.* at 974.

The *Desloge* Court credited the expert’s on-the-ground observations and extensive reporting of the potential hazards of pedestrians stepping into the roadway when considering whether the ordinance furthered a substantial governmental interest that was unrelated to the suppression of free expression. The city’s stated governmental interest in passing the ordinance was therefore quite narrow. The city aimed to stop “pedestrians step[ping] into the roadway to distribute materials to a vehicle occupant.” *Id.* at 978.

In *Desloge*, a group of Ku Klux Klan members sought to step into the city’s streets to distribute leaflets that expressed their views on gun rights. *Id.* at 974. Though the Court acknowledged that leafletting is considered speech that is ordinarily protected by the First Amendment, the city’s decision to ban pedestrians from entering the roadway to engage in such speech was well justified by the evidence, even though the ban covered all city streets at all times of day. *Id.* The Court therefore vacated the district court’s injunction against enforcement of the ordinance, finding that the

ordinance did not create an undue and unjustified burden on speech, in view of the city's demonstrated safety concerns and the fact that pedestrians in Desloge still remained free to solicit and/or distribute on Desloge's roadways, including "to drivers who stop at the edge of a road" or to drivers who pull up next to pedestrians who are "stand[ing] on a sidewalk to distribute." *Id.*

In the factually similar case of *Watkins v. City of Arlington*, 123 F. Supp. 3d 856, 861 (N.D. Tex. 2015), a Texas district court reviewed the constitutionality of a city's traffic ordinance and found it to be lawful even though it prohibited some pedestrians from soliciting, selling, or distributing material to the occupants of motor vehicles in traffic. One of the main reasons why the law was upheld was because it did not entirely ban solicitation speech in the roadways of the city. Arlington carved out an exception to its ordinance that permitted pedestrians to solicit, sell, or distribute materials to drivers in traffic as long as the pedestrians "remain[ed] on the surrounding sidewalks and unpaved shoulders, and not in or on the roadway itself, including the medians and islands." *Id.* By contrast, the City of Rogers' Ordinance creates no exceptions for panhandlers who remain on the sidewalk or shoulder of the road while accepting alms, since any "approach" to a car in traffic—even one made from a sidewalk, without stepping into the roadway itself—could potentially subject the panhandler to criminal penalties.

Another important difference between the ordinance in *Watkins* and the Ordinance in the case at bar is that the city of Arlington's ordinance only applied to intersections controlled by traffic signals, see *id.* at 869—in contrast to the City's

Ordinance, which applies to every Rogers street, without exception. In the end, the city of Arlington's ordinance passed constitutional scrutiny because it was narrowly tailored to prohibited certain speech activities "in or on the roadway itself" and at intersections controlled by traffic signals, but otherwise did not impose unwarranted burdens on speech in the roadway.

The final comparison case the Court considers is *Petrello v. City of Manchester*, a district court opinion from the District of New Hampshire. 2017 WL 3972477 (D.N.H. Sept. 7, 2017). In that case, a city's police department issued a policy calling on officers to enforce a state statute that prohibited disorderly conduct. Officers were directed to charge panhandlers with disorderly conduct when the officers determined the panhandlers were obstructing vehicular traffic on public streets, "even when the panhandlers d[id] not step into the road." *Id.* at *6. The court found that the police department's policy, which was attributable to the city, was perhaps content based; however, the court did not need to go so far as to resolve that question because the policy could not even survive scrutiny as a content-neutral regulation. See *id.* at *11.

In *Petrello*, a panhandler was standing in a grassy area between a road and a sidewalk, with her back to a traffic light, holding a sign that said "Veteran." *Id.* at *4. A police officer observed several motorists stop at the red light near Petrello and hand her certain items. Petrello never stepped into the roadway to receive any of these items. *Id.* "Then, while the traffic light was green, a Cadillac driving northbound on Maple Street came to a complete stop and handed something to Petrello." *Id.* Petrello took the item without stepping into the road, but the entire transaction prevented the car

behind the Cadillac from making it through the green light before the light turned red. The officer on the scene cited Petrello for obstructing vehicular traffic.

The *Petrello* court observed that “where a panhandler, like Petrello, remains on the grass and never steps into the road, it is difficult to understand how charging that person with obstructing traffic serves the City’s interest in promoting traffic safety.” *Id.* at *11. Even though, arguably, the driver was the cause of the traffic obstruction, Petrello was blamed. The court determined that the police department’s panhandling policy was not narrowly tailored because it imposed criminal penalties based on a third party’s reaction to speech. Further, the policy “operate[d] as a de facto ban on panhandling (by those like Petrello who do not step into the road) and thereby chill[ed] substantially more speech than necessary to serve the City’s interests.” *Id.* at *12.

The court concluded:

The City has other available measures to address its legitimate interests in promoting public safety and preventing traffic obstructions. For instance, the City could limit enforcement to panhandlers who step into the road and obstruct traffic. Or, the City could enforce the statute against motorists who stop in the road at a green light, thereby causing a traffic obstruction Either approach to enforcement would serve the City’s interests and would not sweep so broadly as to capture the passive panhandler.

Id.

Turning back to the instant case, the City of Rogers has presented no evidence that it undertook even a cursory examination of its streets in order to gauge the dangers potentially posed when pedestrians “approach” cars in traffic. The Ordinance does not simply ban pedestrians from stepping into the roadway (as the *Desloge* ordinance did); instead, the City’s Ordinance is far broader. It bans a pedestrian from approaching a

vehicle entirely, even if the pedestrian remains on the sidewalk, shoulder of the road, or median strip. Many forms of constitutionally protected speech, including solicitation speech and leafletting, simply cannot be performed without the speaker approaching the person solicited, either to distribute materials or collect alms. See, e.g., *Gresham v. Peterson*, 225 F.3d 899, 904 (7th Cir. 2000) (“Beggars at times may communicate important political or social messages in their appeals for money, explaining their conditions related to veteran status, homelessness, unemployment and disability, to name a few. Like the organized charities, their messages cannot always be easily separated from their need for money.”). The effect of the Ordinance is to ban such speech from the acknowledged public forum of the public streets—throughout the entire City of Rogers and for no principled or articulable reason the Court can find for doing so.

It must be acknowledged that panhandling is often perceived as a nuisance, and the presence of panhandlers on a city’s streets reminds its residents that poverty lurks in their midst, and that not all can afford a meal, a place to live, or gas for their cars. Certainly there is merit to the City’s argument that panhandlers and motorists alike may be in greater danger of being involved in accidents and suffering injuries due to the fact that engaging in speech activities in the public roads may be distracting—and, in fact, *is meant to be* distracting. But the way the City has chosen to address its panhandling “problem” is totally unsupported by any research; does not address the source of any identified traffic safety concerns; and fails to justify the imposition of a sweeping and unprincipled ban on activities that incidentally burden speech.

The Court therefore finds that the Ordinance, if enacted, would cut a wide and destructive swath through the First Amendment rights of not only panhandlers, but also leafleteers, political activists, and many others who choose to engage in protected speech on the streets of Rogers. The Ordinance would curtail, if not eliminate, such speech on *all* City streets, from the busiest of intersections to the quietest of cul-de-sacs, at all times of the day and night. “While it may be easier to stop stationary panhandlers than motorists, the City may not use convenience or efficiency as a proxy for the narrow tailoring test.” *Petrello*, 2017 WL 3972477, at *12. For these reasons, the incidental restriction on Plaintiffs’ and others’ First Amendment freedoms is greater than is essential to the furtherance of any stated government interest supporting the enactment of the Ordinance. The Ordinance violates the First Amendment to the Constitution and will be declared unconstitutional on that basis.

B. Fourteenth Amendment Challenge

With respect to Plaintiffs’ Fourteenth Amendment challenge, the Court finds the Ordinance to be impermissibly vague and, thus, violative of due process. The Ordinance does not simply regulate the behavior of those who would step out into traffic. Instead, it broadly criminalizes a pedestrian’s “approach” to a vehicle that is in traffic but not parked, without regard to the pedestrian’s location in relation to the street or to the vehicle. The Ordinance fails to define what an “approach” is and therefore fails to give pedestrians fair notice of exactly what behavior is prohibited and would be subject to sanctions. Finally, the way that the Ordinance has been drafted would tend to lead to arbitrary enforcement.

According to the Supreme Court in *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972):

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.

(cleaned up and citations omitted).

Although the Court does not “expect mathematical certainty from our language,” *id.* at 111, the term “approach” as it is used in the Ordinance is subject to such a broad range of meanings that a person of ordinary intelligence could not clearly understand what would constitute prohibited behavior. The City argues that “approach” means “to come near.” However, it is unclear whether a panhandler whose feet remained in place in the roadway, but who leaned into an open car window—or simply extended a hand toward an open car window—to accept a donation, thereby “approached” the car. In other words, it is unclear to the Court, in reading the Ordinance, whether an “approach” would necessarily involve taking a step or two. Similarly, it is unclear whether a panhandler standing motionless on a median strip, holding a sign requesting

help, would impermissibly “approach” a car if he simply took money that a driver waved in his direction from her car window.

The Ordinance conditions the criminality of a pedestrian’s “approach” on whether a third party, presumably a police officer, would classify the approach as potentially dangerous. Only those approaches that could potentially cause injury, cause property damage, or impede or obstruct the flow of traffic would be subject to criminal penalties. Since this Ordinance incidentally burdens speech, the Court harbors concerns about whether the lack of explicit enforcement standards in the text of the Ordinance would lead to discriminatory enforcement. Panhandlers or other speakers who may be conveying unpopular messages may be unfairly targeted by law enforcement, whereas those hailing a cab, asking for directions, or requesting donations for established charities, such as the Red Cross or the local Fireman’s Fund, may not be targeted—despite the fact that all pedestrians in these examples might be “approaching” motorists in much the same way and potentially obstructing the flow of traffic.

“[I]f arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.” *Id.* at 108. This is especially the case when a law incidentally burdens speech. In *Stahl v. City of St. Louis*, 687 F.3d 1038 (8th Cir. 2012), a man standing on an overpass in between two interstate highways held signs conveying an unpopular opinion, namely, that the terrorist attacks on New York City on September 11, 2001, were “an inside job.” *Id.* at 1039. The picketer, named Stahl, was arrested by law enforcement after citizens complained that

his signs were offensive. *Id.* The authority to arrest Stahl came from an ordinance very like the one in the case at bar, which prohibited conduct that had the consequence of impeding vehicular traffic. *Id.* at 1038. Though the arresting officer testified that the controversial messages on Stahl's signs played no part in the arrest, the Court ultimately found that the traffic ordinance in question "offend[ed] the Due Process Clause because it fail[ed] to provide fair notice of what is forbidden." *Id.* at 1041.

The Court of Appeals ruled that the ordinance in *Stahl* was vague, not because the language of the ordinance was susceptible to multiple meanings, but because the enforcement mechanism was dependent on the likelihood that certain acts would disrupt traffic. The Court observed that "[t]hough there are certainly times when a speaker knows or should know that certain speech or activities likely will cause a traffic problem, in many situations such an effect is difficult or impossible to predict." *Id.* The Court was also concerned that "[t]he fact that a person only violates the ordinance if his or her action evokes a particular response from a third party is especially problematic because of the ordinance's resulting chilling effect on core First Amendment speech." *Id.* Indeed, this Court's concerns about the enforcement of the Ordinance in the case at bar are much the same as the Eighth Circuit's concerns in *Stahl*.

"Speech is an activity particularly susceptible to being chilled, and regulations that do not provide citizens with fair notice of what constitutes a violation disproportionately hurt those who espouse unpopular or controversial beliefs." *Id.* Since the Ordinance in the case at bar incidentally burdens constitutionally protected

speech, the unpopularity or "nuisance value" of that speech could be a factor triggering discriminatory enforcement. That, coupled with the vagueness of multiple key terms in the Ordinance itself, renders the law unconstitutional on Fourteenth Amendment grounds.

IV. CONCLUSION

IT IS THEREFORE ORDERED that Defendant Hayes Minor's Motion for Summary Judgment (Doc. 60) is **DENIED**, and Plaintiffs Glynn Dilbeck's and Shane Cook's Cross-Motion for Summary Judgment (Doc. 63) is **GRANTED**.

IT IS FURTHER ORDERED that Ordinance 52-139 is **DECLARED UNCONSTITUTIONAL** under the First and Fourteenth Amendments to the United States Constitution.

IT IS FURTHER ORDERED that the City of Rogers, Arkansas is **PERMANENTLY ENJOINED** from enforcing Ordinance 52-139, passed on December 12, 2017.

IT IS FURTHER ORDERED that Plaintiffs submit a brief and itemized bill in support of their request for an award of attorney's fees and costs, pursuant to 42 U.S.C. § 1988, by no later than **October 9, 2018**. Defendant may file a response by no later than two weeks after Plaintiffs' brief is filed. Judgment will enter following the Court's decision on the issue of fees and costs.

IT IS SO ORDERED on this 24th day of September, 2018.


TIMOTHY L. BROOKS
UNITED STATES DISTRICT JUDGE