UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Fort Lauderdale Division

BERNARD McDONALD, Plaintiff, v. CITY OF POMPANO BEACH, FLORIDA, a Florida municipal corporation, Defendant.	)	Case No. 20-cv-60297-RKA

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COUNT III OF THE VERIFIED AMENDED COMPLAINT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and S.D. Fla. Local Rule 56.1, Plaintiff Bernard McDonald, by and through undersigned counsel, files his Motion for Partial Summary Judgment as to Count III of the Verified Amended Complaint. In support of this motion, Plaintiff has simultaneously filed his Statement of Undisputed Material Facts. ECF 76.

I. FACTS AND PROCEDURAL HISTORY

In his original Complaint, Plaintiff alleged that the Street Solicitation Ordinance of the Pompano Beach City Code, §100.41, violated the First Amendment because it specifically singled out the solicitation of donations for differential treatment and was therefore a content-based restriction. ECF 1. In response to Plaintiff's lawsuit, the City passed amendments to §100.41 on June 23, 2020 which made the Street Solicitation Ordinance content neutral and removed a total of fifteen restrictions which were the target of Plaintiff's initial complaint. *See* Ordinance 20-60/Amendments to §100.41 (ECF 38-1).

At the same City Commission meeting, the City also amended §100.35, the Building or Obstruction on Public Streets, Sidewalks, and Right-of-Way Swale Areas Ordinance. *See* Ordinance 20-59/Amendments to §100.35 (ECF 38-2). The amendments to §100.35(C) restricted pedestrian activity on certain medians and along all three lane roadways, and made it unlawful for any person to:

> (1) For any period of time, sit or stand, in or on:
>
> (b) any median less than five feet where the adjacent roadway has three or more vehicular travel lanes in any one direction at the point of intersection (including travel lanes), except that pedestrians may use median strips only in the course of lawfully crossing from one side of the street to the other.
>
> (2) For any roadway that has three or more vehicular travel lanes in any one direction at the point of intersection (including turning lanes), to hand or seek to transmit by hand or receive by hand anything to any person who operates or occupies a motor vehicle of any kind, which vehicle is engaged in travel on or within any portion of the roadway, whether or not such vehicle is temporarily stopped in travel lanes or the road.[1]

Id.

Prior to the enactment of the amendments to §100.35, the City Attorney submitted to the City Commission only two items of evidence in support of the amendments. *See* Legistar Page (ECF 75-1). The first item was a one page data chart which listed the number of accidents at twenty-four intersections in Pompano Beach. *See* Occurrences Chart (DE 38-3). This data was used to identify the eight intersections where solicitation was restricted in the amended Street Solicitation ordinance, §100.41(B)(6). The second item was a one hundred and seventeen page report by the Florida Highway Safety and Motor Vehicles Department titled, "Traffic Crash Facts

[1] Violations of §100.35(C)(1) and (2) were punishable by a fine and/or a jail sentence up to sixty days. §100.35(C)(13)(a); Pompano Beach City Code, §10.99(A.).

Annual Report 2018" (FLHSMV Report).[2] *See* FLHSMV Report, ECF 75-2. Neither of these documents contain any data or facts about medians in the City of Pompano Beach.

On September 25, 2020, Plaintiff filed his Verified Amended Complaint which alleges in Count III a First Amendment challenge to §100.35(C)(1)(b) and (C)(2), DE 38), and on September 28, 2020, Plaintiff filed his Second Motion for a Preliminary Injunction. ECF 42. After a status conference held on October 2, 2020, ECF 43, the City responded to the preliminary injunction motion and stated that it would be repealing §100.35(C)(2) from the ordinance. ECF 52 at 4. On October 27, 2020, the City again amended §100.35 and deleted §100.35(C)(2) from the ordinance. *See* Ordinance 2021-05/Repeal of §100.35(C)(2). (ECF 75-3).

On November 18, 2020, an evidentiary hearing was held on Plaintiff's Second Motion for a Preliminary Injunction. The City called Plaintiff Bernard McDonald as a witness and submitted three photos of the intersection where Plaintiff was arrested for a violation of the Solicitation Ordinance in August 2018.[3] ECF 66. The City presented no other witnesses or evidence.

At the conclusion of the hearing on the Second Motion for a Preliminary Injunction, the Court deferred ruling. ECF 72. The Court raised the possibility of continuing the hearing and consolidating it with an expedited trial on the merits pursuant Federal Rule of Civil Procedure 65(a)(2). *Id*. At a status conference the following day, the Parties subsequently consented to the

[2] In the entire FLHSMV Report, there is only a single data entry addressing medians. In a section titled "Environmental Factors and Injury Levels" assessing the thousands of traffic accidents statewide, the term "cross median" is listed with no resulting fatal, incapacitating, or non-incapacitating injuries. ECF 75-2 at 32, 34.

[3] The parties agreed that the photos of the intersection of Sample Road and Federal Highway that were introduced by the City at the hearing do not accurately depict how the intersection and the medians appear today.

proposed consolidation, ECF 69, and also waived their respective rights to a jury trial, thereby allowing for an expedited bench trial. ECF 72.

At that time, the Court raised the possibility of conducting discovery. Plaintiff contended that no additional discovery was needed and that the case could be decided on summary judgment, given that the City had failed to meet it burden to present "at least *some* pre-enactment evidence that the regulation would serve its asserted interests," pursuant to *Buehrle v. City of Key West,* 813 F.3d 973, 979 (11th Cir. 2015) (emphasis in original) (quotations/citations omitted). The Court allowed discovery and directed the parties to confer and submit a joint scheduling order. ECF 72. Nonetheless, Plaintiff believes that no further discovery is necessary to adjudicate the constitutionality of the pending ordinance. All relevant evidence is already in the record or was presented to the City Commission during the consideration of the ordinance; any evidence now gathered or created by the City would not be relevant or admissible since it was not considered by the Commission. Thus, this Court can rule on the constitutionality of the ordinance without any further discovery.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper when the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 258 (1986); *Welch v. Celotex Corp.*, 951 F.2d 1235, 1237 (11th Cir. 1992). The burden of showing the absence of any such genuine issue rests with the moving party. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. *Matsushita Electric Ind.*

Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine issue for trial." *Id.* at 587

III. LEGAL ARGUMENT

A. The Medians in §100.35(C)(1)(b) are Traditional Public Fora

While the Eleventh Circuit Court of Appeals has not addressed the issue, four federal circuits have held that a median dividing lanes of traffic is a traditional public forum. *See McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1063, 1067-1069 (10th Cir. 2020) (medians next to streets with a forty mile speed limit are public fora); *Reynolds v. Middleton*, 779 F.3d 222, 225 (4th Cir. 2015) ("there is no question that public streets and medians qualify as traditional public fora"); *Cutting v. City of Portland, Me.*, 802 F.3d 79, 82 (1st Cir. 2015) (median strips used for expressive purposes were public fora); *Satawa v. Macomb County Road Commission*, 689 F.3d 506, 520 (6th Cir. 2012) (median "in the middle of a busy eight-lane road, with a fifty mile-per-hour speed limit ... [o]n balance, ... [was] a traditional public forum").

Similarly, in *Martin v. City of Albuquerque*, 396 F.Supp.3d 1008, 1016, 1020, 1021 (D. N.M. 2019) the Court held that medians less than six feet in width were traditional public fora and noted that "in most First Amendment challenges to regulations covering streets, sidewalks, and even medians, courts have found them to be without question, and without particularized analysis, traditional public fora."

These courts have reasoned that "[o]bjectively, medians share fundamental characteristics with public streets, sidewalks, and parks, which are quintessential public fora." *McGraw*, 973 F.3d at 1067-68. The Court in *McGraw* recently explained this common sense conclusion, stating:

> We similarly decline to carve out a distinction between public streets—"the archetype of a traditional public forum," *Frisby v. Schultz*, 487 U.S. 474, 480-81 (1988) —and the medians that lie in the middle of and are surrounded by those streets. If the road that abuts a median on both sides is a public forum, the median itself also qualifies.

McGraw, 973 F.3d at 1068.

The public properties subject to the restriction in this case—medians along three lane roads that are greater than three feet but less than five feet along three lane roadways—are traditional public fora.

B. §100.35(C)(1)(b) Is Not Narrowly Tailored

1. General Principles of Narrow Tailoring

The government's power to restrict speech in "traditional public fora" such as public streets and sidewalks "is very limited." *McCullen v. Coakley*, 573 U.S. 464, 476-477 (2014). That is, the government must prove that the restrictions "are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). That does not mean that the government must adopt the "least restrictive or least intrusive means" possible. *McCullen*, 574 U.S. at 486. But it must do more than merely assert that its chosen means are more efficient than other alternatives. Instead, the government must "show[] that it seriously undertook to address the problem with less intrusive tools readily available to it." *Id*. at 486.

To be narrowly tailored, the ordinance must not "burden more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799. That is, the "government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Id*. To satisfy these requirements, the Supreme Court has

held that the government "must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *McCullen*, 573 U.S. at 495. After all, "[i]f the First Amendment means anything, it means that regulating speech must be a last—not first—resort." *Thompson v. Western States Medical Center*, 535 U.S. 357, 373 (2002). *See also McCullen*, 572 U.S. at 486 ("[B]y demanding a close fit between the ends and the means, the tailoring requirement prevents the government from too readily sacrificing speech for efficiency.").

2. Requirement of Pre-Enactment Evidence of Narrow Tailoring

Plaintiff respectfully submits that this case can be decided as a pure question of law and that no further evidence is necessary. The relevant, material factual record in this case is set. Following *Buehrle*, the City has to present any pre-enactment evidence that the median restriction in §100.35(C)(1)(b) is narrowly tailored and that the restriction would serve its asserted purpose. In its answer to the Amended Complaint, its response to Plaintiff's Second Motion for a Preliminary Injunction, and in its presentation at the evidentiary hearing, the City produced no relevant pre-enactment evidence. And, any evidence the City seeks to develop post-enactment during discovery is not relevant and material to the legal issue to be decided by the Court. *See Buehrle v. City of Key West*, 813 F.3d at 979 ("reasons [that] were given in the context of Mr. Buehrle's lawsuit, well after the enactment of the ordinance . . . cannot serve as *pre-enactment* evidence that the ordinance serves a significant governmental interest")(emphasis in original).

The City cannot produce any relevant pre-enactment evidence because there is none. It is undisputed that the only evidence the City Attorney presented to the City Commission, pre-

enactment, was a one page chart listing the number of accidents at certain intersections that was used to identify the eight intersections listed in a *different* ordinance, §100.41(B)(6), ECF 38-3, and a voluminous annual report from 2018 by the Florida Highway Safety and Motor Vehicles Department that assessed traffic accident data statewide. ECF 75-2. Neither of these documents contained any relevant data or facts about medians, let alone the medians in the City of Pompano Beach.

The Eleventh Circuit has required that to meet its burden that the median restriction is narrowly tailored, the City must rely on pre-enactment evidence. The Court cannot "simply take the City at its word that the Ordinance serves the aforementioned interests." *Buehrle*, 813 F.3d at 978-79. Rather, the City must show that it "rel[ied] on at least *some* pre-enactment evidence that the regulation would serve its asserted interests," and that its concerns rest on "more than merely speculative factual grounds." *Id*. at 979, 980 (emphasis in original; quotations/citations omitted). *See also Freenor v. Mayor & Alderman of City of Savannah*, No. CV414-247, __ F.Supp 3d __, 2019 WL 9936663, at *12 (S.D. Ga. May 20, 2019) (court found that "none of the evidence presented by the City was pre-enactment evidence that the ordinance serves a significant government interest" and struck down city's licensing scheme on First Amendment grounds).

The City is stuck with the fact that it did not consider any relevant pre-enactment evidence. This case can be decided as a matter of law and the Court should find that the median restriction in §100.35(C)(1)(b) is not narrowly tailored.

3. Application of Narrow Tailoring Principles to §100.35(C)(1)(b)

The City's median provision in §100.35(C)(1)(b) makes it a crime to merely sit or stand on any median that is greater than three feet but less than five feet wide next to a three lane road.

This restriction effectively bars a person from engaging in panhandling, solicitation or other protected speech—such as holding a sign or handing out a leaflet—on every such median. The measure arbitrarily prohibits protected expression on a broad swath of public space where people such as Plaintiff Bernard McDonald have historically exercised their right to free speech.

Here, the City has chosen the "easier route." *McCullen*, 573 U.S. at 495. Instead of enforcing existing laws that specifically address the safety problem of pedestrians being in the roadway, the City has enacted a ban on all expressive conduct on an entire class of public property: medians between three to five feet next to three lane roads. Remarkably, §100.35(C) itself currently contains other provisions which prohibit: a person from occupying a paved travel lane while traffic is flowing, §100.35(C)(2); a person from altering or impeding traffic, §100.35(C)(3); and, a person from remaining in the portion of a paved road upon commencement of traffic flow from a stopped position, §100.35(C)(4). Given that vital First Amendment interests are at stake, it is not enough for the City "simply to say that other approaches have not worked." *McCullen*, 573 US at 496. The City must prove that and, here, it has failed.

The pre-enactment evidence submitted with the ordinance does not show that a city-wide ban on such medians is narrowly tailored to address the problem of safety. Such an all-encompassing ban is not narrowly tailored and does not pass intermediate scrutiny. Courts have struck down sweeping bans of expressive conduct on medians because they were not narrowly tailored, since the ordinances did not take into account the individual characteristics of the medians and surrounding traffic conditions.

In *Cutting v. City of Portland, Maine*, 802 F.3d 79, 87-92 (1st Cir. 2015), the First Circuit held that a complete ban on standing on all medians in the city was not narrowly tailored because

it was geographically overinclusive. Evidence of some damaged medians and isolated reports of vehicles driving onto medians was not sufficient to show that the danger existed at all medians. The Court found that "given this record, the risk is simply not posed" in many of the locations and held that the ordinance failed the narrow tailoring test. *Id*. at 90. *See also Thayer v. City of Worcester*, 144 F.Supp.3d 218, 237 (D. Mass. 2015) (city ordinance banning a person from standing or sitting on median strip and walking upon a roadway was not narrowly tailored because it was not targeted at particularly dangerous locations and because "considerations such as pedestrian and vehicular traffic patterns were not given any weight.").

In *Martin v. City of Albuquerque*, 396 F.Supp.3d 1008, 1016 (D. N.M. 2019), the city passed an ordinance with a series of provisions designed to prohibit roadside solicitation, including one which made it unlawful to "access, use, occupy, congregate, or assemble" on "any portion of any median that is less than six feet in width." The Court found that the city's assertion of safety design principles did not explain "the city's decision to apply the median ban to all those medians," *id*. at 1034, and held that the median provision was not narrowly tailored because the city failed "to show why other measures with less speech-restrictive impacts would fail to achieve the goal of reducing pedestrian-vehicle conflicts in Albuquerque." *Id*. at 1035. Likewise, Pompano Beach cannot show that less restrictive measures would fail to achieve the goal of §100.35(C)(1)(b)'s similarly sweeping ban on sitting or standing on all medians which are less than five feet next to three lane roadways.

Also in *Martin*, the city's ordinance had another section which imposed a citywide ban on pedestrian presence within six feet of every entrance or exit to every freeway in the city. *Id*. at 1016. The Court held that this provision was also not narrowly tailored because the city failed to

"show that *all* pedestrian presence near *all* the ramps covered by the Ordinance is equally dangerous and must be completely prohibited in order to successfully minimize pedestrian-vehicle conflicts." *Id*. at 1033 (emphasis in original.). Pompano Beach's ban on sitting or standing on any median greater than three feet but less than five feet along all three lane roads is indistinguishable from the ban in *Martin*. The attempt to ensure safety by banning people from sitting or standing on such medians fails the narrow tailoring test, where the City's own supporting data fails to justify such a ban.

The City's deficiency is simple. Here, as in *Martin* and other cases, the City has no evidence to show that its solution to ensure traffic and pedestrian safety is accomplished by the ban of sitting or standing on all medians between three to five feet in width next to three lane roads.

C. §100.35(C)(1)(b) Does Not Provide Ample Alternative Channels of Communication.[4]

A reasonable time, place, and manner restriction on protected speech must "'leave open ample alternative channels for communication of information.'" *Evans v. Sandy City*, 944 F.3d 847, 860 (10th Cir. 2019) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). While the First Amendment does not require that all modes of communication be available at all times and in all places, a restriction on expression may be invalid if the remaining means of communication are inadequate. *Evans*, 944 F.3d at 860 (citing *City Council of Los Angeles v.*

[4] It is important to note that a court should only reach this prong if it finds that the challenged ordinance is narrowly tailored. If it is not, the ordinance fails intermediate scrutiny whether or not other channels of communication are available. *McCullen v. Coakley*, 573 U.S. 464, 496 n.9 (2014); *cf. Reynolds v. Middleton*, 779 F.3d 222, 232 n.5 (4th Cir. 2015) (noting that because it had found the ordinance at issue failed the narrow tailoring prong, it was not required to consider the ample alternative channels prong, but briefly addressed the issue anyway, since it was likely to arise on remand).

Taxpayers for Vincent, 466 U.S. 789, 812 (1984)). In examining the adequacy of alternative channels, courts look in part at the speaker's ability to reach his target audience. *Evans*, 944 F.3d at 860 (citing *Ward*, 491 U.S. at 802).

In *McCraw*, 973 F.3d at 1063-1065, the plaintiffs, who included panhandlers, political parties, and others, challenged an ordinance that outlawed pedestrian presence on medians in all streets with a speed limit of forty miles per hour or more. In conducting its ample alternative channels of communication analysis, the court found that the record did not support the lower court's conclusion that moving to a sidewalk was an ample alternative. *Id*. at 1079. The court noted that communications from the sidewalk would not be as visible to drivers as communications from medians, and plaintiffs would have to compete with storefront signage for attention. *Id.* The court also pointed out that for those soliciting funds, which was protected expression, roadsides and sidewalks did not provide safe and direct access to the driver, who was often the only occupant of a vehicle. *Id.* The court also observed that plaintiffs would be out of the sightline of drivers while on sidewalks, and would be much more visible from medians. *Id*. The court stated that approximately 400 medians were affected by the ordinance, and that slightly over 100 were unaffected by the ordinance, but noted that the unaffected medians could be significantly less effective for communicative purposes, since fewer vehicles were present. *Id*. "Just as in real estate, location matters in some constitutional questions." *Id*. For these reasons, the court found that the ordinance did not satisfy the ample alternative channels of communication requirement. *Id*. at 1080.

Here, §100.35(C)(1)(b)'s sweeping ban on sitting or standing on all medians of less greater than three feet but than five feet next to three lane roadways is just as restrictive as the ordinance

in *McCraw*. To the extent that the City contends that the Plaintiff and others can occupy medians on other roadways with fewer lanes, those locations would be less effective, since fewer vehicles would be present, as *McCraw* noted. As Plaintiff McDonald averred, the medians are a preferable position to solicit for donations because the solicitor can be seen by more motorists, and thus the opportunity to collect more money is greater. McDonald Declaration, ¶5 (ECF 57-1). In light of *McCraw*, the amendments to §100.35 fail to provide ample alternative channels of communication.

For all these reasons, §100.35(C)(1)(b) cannot withstand intermediate scrutiny because it is not narrowly tailored and burdens substantially more speech than is necessary to achieve the City's interest in safety.

Finally, pursuant to the overbreadth doctrine, because §100.35(C)(1)(b)'s "very existence may cause others not before the court to refrain from constitutionally protected speech or expression[,]'" Plaintiff seeks a declaration that it is facially unconstitutional and unenforceable against anyone. *Hill v. Colorado*, 530 U.S. 703, 731-32 (2000) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973)).

D. §100.35(C)(2) Failed Intermediate Scrutiny and Violated Plaintiff's First Amendment Rights

In Count III of the Verified Amended Complaint, Plaintiff also alleged that §100.35(C)(2) violated his rights under the First Amendment. The prohibition in §100.35(C)(2), which barred people from seeking "to hand or seek to transmit by hand or receive by hand anything to any person who operates or occupies a motor vehicle[,]" is virtually identical to the language the City used in §100.41(A) to define what it means to lawfully "solicit." The amendment in §100.35(C)(2), however, makes the same lawful conduct defined in §100.41(A) criminal if done on "any roadway

that has three or more lanes in any one direction (including turning lanes)." Thus, under this provision, solicitation is prohibited on *every* three lane roadway in the City.

At the status conference held on October 2, 2020, ECF 43, the Court expressed great skepticism as to the constitutionality of §100.35(C)(2). On October 27, 2020, the City repealed the provision. *See* Ordinance 2021-05/Repeal of §100.35(C)(2), (ECF 75-3). Plaintiff is seeking damages for the chilling effect of this ordinance for the several months it was in effect.

Because Plaintiff is seeking damages as to §100.35(C)(2), the repeal of the provision does not moot his claim that the law was unconstitutional. *See Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 8 (1978) (case was not moot where party had claim for damages); *Reich v. Occupational Safety and Health Review Commission*, 102 F.3d 1200, 1202 (11th Cir. 1997) (mooting of injunctive relief does not moot request for monetary relief).

Plaintiff moves the Court to enter an order declaring that §100.35(C)(2) was an unconstitutional restriction of speech in violation of the First Amendment, both on its face and as applied to Plaintiff. In support thereof, Plaintiff adopts the argument he previously presented in Plaintiff's Second Motion for Preliminary Injunction and incorporates it herein. *See* ECF 42 at 8.

CONCLUSION

Based on the above argument and authorities, Plaintiff Bernard McDonald respectfully requests that this Court enter an Order granting his Motion for Partial Summary Judgment as to Count III of the Verified Amended Complaint.

Respectfully submitted,

Dante P. Trevisani
Florida Bar No. 72912
E-mail: *dtrevisani@floridajusticeinstitute.org*
Ray Taseff

Florida Bar No. 352500
E-mail: *rtaseff@floridajusticeinstitute.org*
Florida Justice Institute, Inc.
100 S.E. 2nd Street
3750 Miami Tower
Miami, Florida 33131-2309
305-358-2081
305-358-0910 (Fax)

By: *s/Ray Taseff*
Ray Taseff

Mara Shlackman
Florida Bar No. 988618
Email: mara@shlackmanlaw.com
Law Offices of Mara Shlackman, P.L
757 SE 17th Street, PMB 309
Fort Lauderdale, Florida 33316
954-523-1131
954-206-0593 (Fax)

F.J. McLawrence
Florida Bar No. 624527
Email: info@mclawrencelaw.com
The McLawrence Law Firm
633 S. Federal Highway; Ste. 200-B
Fort Lauderdale, Florida 33301
954-318-1376
954-616-0566

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed today, December 14, 2020, the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all persons registered to receive electronic notifications for this case, including all opposing counsel.

By: *s/Ray Taseff*
Ray Taseff