No. 14-1421

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MICHAEL W. CUTTING; WELLS STALEY MAYS; ALISON E. PRIOR
Plaintiffs-Appellees,

v.

CITY OF PORTLAND, MAINE
Defendant-Appellant.

On Appeal from United States District Court
For the District of Maine
No. 2:13-cv-00359-GZS

BRIEF OF PLAINTIFFS-APPELLEES MICHAEL W. CUTTING, WELLS STALEY-MAYS, AND ALISON E. PRIOR

Zachary Heiden (No. 99242)
ACLU of Maine Foundation
121 Middle Street, Suite 301
Portland, ME 04101
(207) 774-544
zheiden@aclumaine.org

Kevin P. Martin (No. 89611)
Joshua M. Daniels (No. 1161059)
Timothy Bazzle (No. 1163618)
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109
(617) 570-1000
kmartin@goodwinprocter.com
jdaniels@goodwinprocter.com
tbazzle@goodwinprocter.com

Brian T. Burgess (No. 1163701)
GOODWIN PROCTER LLP
901 New York Avenue, NW
Washington, DC 20001
(202) 346-4000
bburgess@goodwinprocter.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND ORDINANCES

Federal

State

Portland

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to Fed. R. App. P. 34(a) and Local Rule 34.0(a), Plaintiffs-Appellees Michael W. Cutting, Wells Staley-Mays, and Alison E. Prior ("Plaintiffs") respectfully request oral argument in this appeal, which involves important questions concerning the scope of protection available under the First and Fourteenth Amendments of the U.S. Constitution. Oral argument will assist the Court in addressing the issues raised in this appeal.

STATEMENT OF JURISDICTION

The U.S. District Court for the District of Maine had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343 because this action arises under the Constitution and laws of the United States. The District Court had supplemental jurisdiction under 28 U.S.C. § 1367 over Plaintiffs' state-law claims arising under the Maine Civil Rights Act, ME. REV. STAT., tit. 5, § 4682, and the Maine Constitution.

On February 12, 2014, the District Court entered a final judgment and permanently enjoined the Defendant City of Portland, Maine (the "City") from enforcing the City ordinance at issue here, PORTLAND CITY CODE § 25-17(b) (the "Ordinance"). Following an extension, the City timely noticed its appeal on April 14, 2014. This Court has jurisdiction to review the District Court's final judgment under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court correctly held that the Ordinance is an impermissible content-based restriction on speech, based on the City's authoritative interpretation of the Ordinance to exempt the installation of political campaign signs on medians but not other types of signs or speech.

2. Whether, even if intermediate scrutiny applies, the District Court's judgment striking down the Ordinance under the First Amendment should be

affirmed because the City failed to sustain its burden at trial of showing that the Ordinance is narrowly tailored to a significant government interest and leaves open adequate alternative channels of communication.

STATEMENT OF THE CASE

I. The City's Residents Have Long Used Portland's Medians For A Wide Range Of Expressive Activities.

The City of Portland is the largest city in Maine, with approximately 66,000 residents, about 500 of whom are homeless. App. 16, Tr. 7:10-14. For years, the City's politicians, political activists, homeless, and other residents have used the City's medians to communicate with passersby, primarily motorists. App. 272-73; App. 47, Tr. 131:12-132:18. For example, the American Civil Liberties Union of Maine took to the median located on Franklin Street in 2007, to commemorate the anniversary of the Supreme Court's decision in *Roe v. Wade*:

App. 186; App. 53, Tr. 153:14-154:6. Likewise, students at the nearby University of Southern Maine frequently have used the median located at the intersection of

Forest Avenue and Preble Street to advertise car washes, rummage sales, and other fundraisers. App. 274; App. 53-54, Tr. 156:23-157:6. It is common for candidates for state and local electoral office to install campaign signs on the City's medians, in the hope of persuading voters driving by them, as shown here on the Franklin Street median:

App. 180, 273. Historically, it also has been "very common" to see individuals using the City's medians as a venue for panhandling. App. 17, 52 & 64, Tr. 10:19-11:3, 152:12-16 & 197:4-5.

That the City's medians are a popular venue for free speech should come as no surprise. Many of the City's medians are ideally suited for such activities owing to their physical characteristics. For example, the median on Franklin Street runs for several blocks and is as wide as 50 feet in many places:

App. 178, 274. Others medians are elevated significantly off the ground, which enhances both the visibility and the safety of the individual standing on it:

App. 184. And some medians, such as "Boothby Square," lie in between roads that see only low-speed traffic, either because of usage patterns or because of the characteristics of the roads themselves (*e.g.*, paved with cobblestones):

App. 181.

Plaintiffs here are no exception to the tradition of using Portland's medians for expressive conduct. Michael Cutting holds signs on the City's medians to express his political views on the issues of the day, as he has done "with some frequency" for the last "10, 15 years." App. 39, Tr. 97:18-22, 99:23-24. He does so because he "feel[s] a citizen has an obligation to act responsibly and to participate," and his goal is "to raise awareness to the general public about th[e] issues." App. 39, Tr. 98:4-12. He does so *on medians* because they provide "better visibility and [e]ffect" for his political messages. App. 39, Tr. 100:5-18.

Mr. Cutting's "favorit[e]" medians for demonstrating are those on the corner of Marginal Way and Franklin Street, in the areas around Congress and Monument Square, and on Forest Avenue close to the I-295 ramps. App. 39-40, Tr. 100:19-101:2. Several individuals have joined him at these locations to hold signs and express opposition to various governmental actions. App. 252. Mr. Cutting has never felt at greater risk while standing on a median than while standing on a sidewalk. App. 40, Tr. 101:23-102:15. He also has never seen anyone injured on a median while holding a sign. App. 40, Tr. 104:21-24.

Wells Staley-Mays is an activist affiliated with three different political groups: Peace Action Maine, Veterans for Peace and Pax Christi Maine. App. 258. Members of all three groups have regularly stood on medians with political signs. App. 258. Mr. Staley-Mays has engaged in a range of political activities during his seventeen years in Portland, including holding political signs. App. 44, Tr. 117:6-118:7. His signs are about two- to three-feet-wide and criticize American involvement in overseas wars. App. 257. Mr. Staley-Mays has held signs all across Portland, not only on medians, but also in City parks and squares. App. 44, Tr. 118:20-24. Based on his experience in all of these venues, Mr. Staley-Mays believes that medians provide greater visibility for his message, because he can display his signs to "traffic coming from at least two and maybe four different directions." App. 44, Tr. 119:3-8.

Alison Prior is among those who use the City's medians for panhandling, asking motorists for help in paying for basic living expenses and "mak[ing] ends meet." App. 46-47, Tr. 125:9-129:24. Ms. Prior began panhandling in December 2012, when she stood on one of the medians on Veterans' Bridge. App. 46, Tr. 125:11-21. She continued there for a few weeks, three to four days each week, until she found a job. App. 46, Tr. 126:5-20. Ms. Prior resumed panhandling in March 2013 after losing her home and her job. App. 46, Tr. 126:19-21. She stood on medians "[a]lmost every day," for three to four hours each day, from March 2013 to July 2013. App. 46, Tr. 128:15-22. When she panhandles, Ms. Prior holds a sign saying, "Homeless, hungry and sober, please help," and collects between $20 to $25 per day, which she uses to buy food, toiletries and basic necessities. App. 46-47, Tr. 128:14-129:5. She prefers to use the median at the intersection of Marginal Way and Preble Street because she has built up some recognition with "regulars," who give her money whenever they drive by. App. 46, Tr. 126:22-127:6.

Ms. Prior's practice when panhandling is to stand facing the traffic near the stop line where cars stop at red lights. App. 46, Tr. 128:7-10. While doing so, she remains completely on the median and collects money from drivers. App. 47, Tr. 129:18-21. If a driver in a middle lane reaches out to give her money, she will press the crosswalk signal button and walk safely to collect the donation while the

light is red. App. 49-50, Tr. 140:25-141:4. Ms. Prior interacts with drivers only if they engage her first. App. 47, Tr. 129:6-11. She has seen others panhandling on medians "all the time," and has observed them to interact with drivers in the same manner. App. 47, Tr. 129:22-130:1. Ms. Prior has never felt unsafe while standing on a median panhandling and has never seen an accident she thought was caused by a panhandler. App. 47, Tr. 130:2-131:9.

II. The City Enacted The Ordinance In 2013, Prohibiting Anyone From Engaging In Speech Or Assembly On The City's Medians.

The Ordinance at issue here provides that "[n]o person shall stand, sit, stay, drive or park on a median . . . except that pedestrians may use median strips only in the course of crossing from one side of the street to the other." PORTLAND CITY CODE § 25-17(b) (Def.'s Addendum at 1). The Ordinance defines a "median" or "median strip" to mean "a paved or planted are[a] of public right-of-way, dividing a street or highway into lanes according to the direction of travel." PORTLAND CITY CODE § 25-118 (Def.'s Addendum at 3). By its terms, the Ordinance applies to every median across the City, regardless of its size, location, surrounding traffic patterns, or history of use as a forum for protected speech. App. 29, Tr. 58:14-16. Consequently, the Ordinance covers not only narrow medians,[1] but also expansive

[1] During the City Council's session to consider whether to enact the Ordinance, the City's medians were twice described as being "in many cases . . . an 8" perch between [] rush hour traffic." App. 135-36. There was no evidence at trial that the City has any medians that are so narrow. App. 22-23, Tr. 29:11-33:16.

ones such as the nearly 50-foot-wide Franklin Street median. App. 29, Tr. 58:14-16; App. 180. It covers not just medians located in high-speed traffic areas, but also those in low-speed traffic areas, like the cobblestoned Boothby Square. App. Tr. 60, 181:5-182:7.

On its face, the Ordinance bans any individual from being present on the median for any purpose except to cross the street. Def.'s Addendum at 1. That broad scope is reflected in both the Ordinance's language and in a legal memorandum prepared by Neighborhood Prosecutor Trish McAllister for the Corporation Counsel before the Ordinance's enactment, which stated that the Ordinance "prevents *any person* from engaging in *any conceivable activity* in the median." App. 118 (second emphasis added).

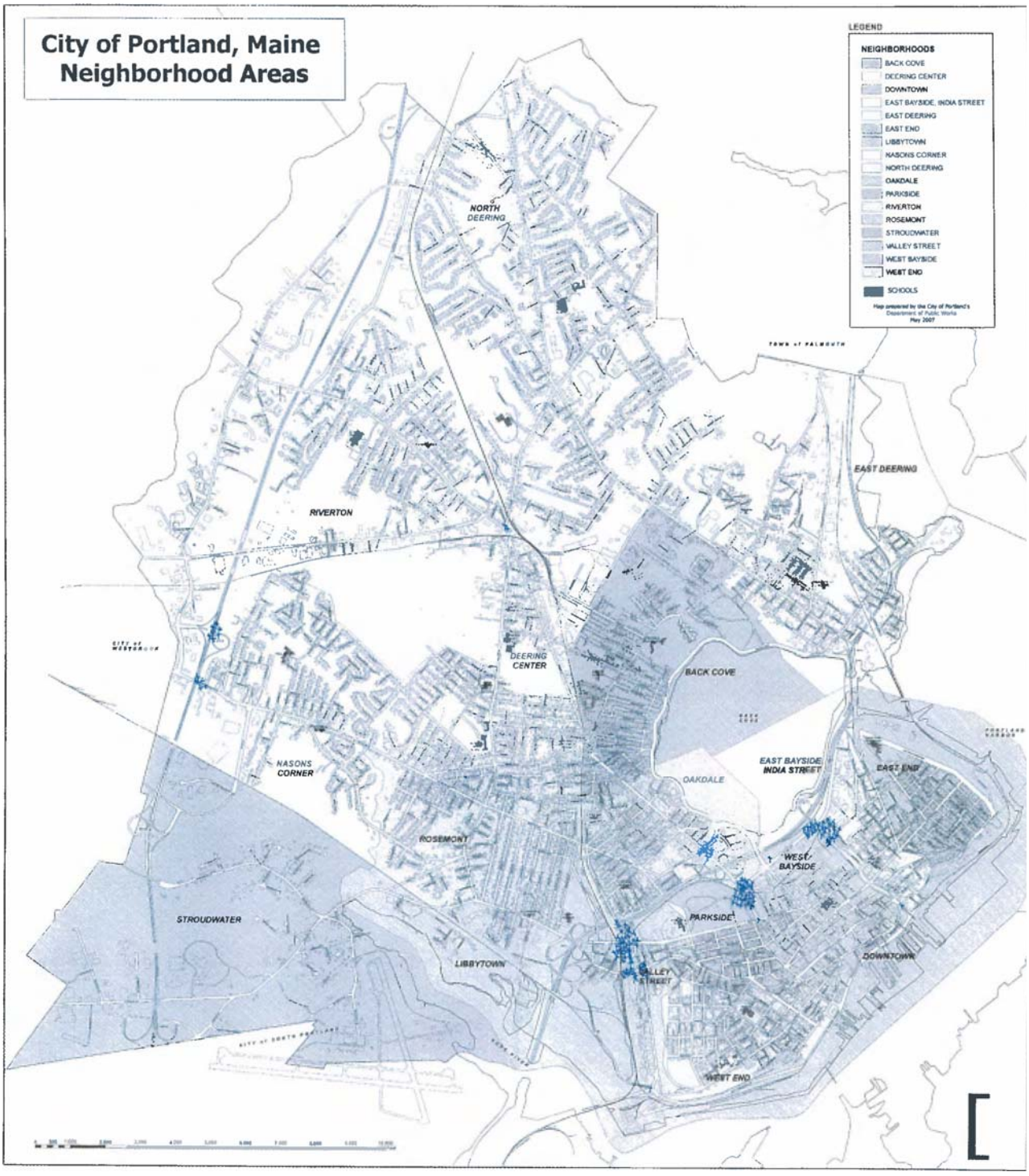
The City tried to pass such a law once before. In June 2012, City Police Chief Michael Sauschuck urged the City Council to pass identical legislation. App. 17, Tr. 11:4-11. The Council rejected that proposal, however, because at least some councilors believed that existing laws could address whatever public-safety concerns might exist on medians. App. 61, Tr. 188:7-14.

In 2013, Chief Sauschuck and City Councilor Ed Suslovic spearheaded a renewed effort to enact the same legislation. The impetus behind their effort was an increase in complaints about panhandling. App. 16, Tr. 8:13-18. In particular, there were complaints that panhandling was a "sty on [the] [C]ity," and an

"expanding" "problem" that was "getting out of control." App. 302, 304. Residents expressed concern that "the high-visibility and increasing aggressiveness of our homeless population" was driving away "old-guard" families. App. 317. City officials were told that that residents were "fed up with beggars" around the City, and that they should address the issue without being "intimidated by ACLU threats" or "pay[ing] heed to so called 'homeless advocates' who whine about the plight of these panhandlers." App. 315; App. 317 ("Please be strident and unafraid of legal action when thinking through the issue . . . . Please feel confident that you have the support of citizens here, even as the NAACP makes its threats."). No complaints were received about the activities of political demonstrators or of others (besides panhandlers) engaged in speech-related activities on City medians. App. 21, Tr. 27:11-23.

Councilor Suslovic reintroduced the Ordinance in June 2013. App. 121-22. The Council considered the Ordinance at its July 15, 2013 meeting, after hearing a presentation by Chief Sauschuck in support of the Ordinance. App. 128; App. 131-39. Chief Sauschuck's presentation included an analysis of "calls for service" received by the City police about panhandlers during a five-month period from January to May, in both 2012 and 2013. App. 131-56. Geographically, the incidents described in the calls for service were clustered in one of a few popular locations within the City, most of them near each other in southeast (downtown)

Portland or near the interstate in western Portland, as illustrated by the following map:



App. 176; App. 24, Tr. 37:6-39:15.

Nearly all of the incidents reported in the calls for service fell into three categories: (1) visibly intoxicated panhandlers stumbling into traffic or at risk of doing so; (2) panhandlers entering the roadway and blocking traffic; and (3) panhandlers yelling, starting fights, or acting in an otherwise belligerent manner toward motorists, pedestrians or other panhandlers. App. 18-23, Tr. 16:25-28:11 & 35:22-36:15; App. 133-34, 140-56.[2] With the exception of being intoxicated on a median, much of the conduct described in the calls violates other City and state laws apart from the Ordinance. App. 26-28, Tr. 47:3-49:3, 52:4-54:17; App. 111-12. These include, for example, obstruction of public ways, ME. REV. STAT., tit. 17-A, § 505; disorderly conduct, *id.* § 501-A; and assault, § 207. Pls.' Addendum at 1-4. Additionally, another City ordinance bans "abusive solicitation," PORTLAND CITY CODE § 17-2, defined as "blocking or impeding the passage of the person solicited," or "abusing the person solicited with words which are offensive and inherently likely to provoke an immediate violent reaction." Pls.' Addendum at 5-6. Many of the incidents reported in the calls for service could violate that prohibition as well. App. 27, Tr. 52:4-9.

[2] Some incidents appear not to have occurred on medians, but on sidewalks and in parking lots, and for others it is unclear where they occurred. App. 25, Tr. 41:4-9; App. 147-49 ("panhandling in the middle of this intsex … [refusing to leave] from the middle of the road"; "[caller] is on foot and male followed him up the [street] yelling at him"); App. 153 ("3 males and 1 female, are panhandling in parking lot and [refusing to leave]").

Chief Sauschuck compared the number of panhandling-related calls received by the police from January to May 2013 to the number of such calls received during the same period in 2012. App. 174. From January to May 2013, the police received 212 panhandling-related calls, of which 124 related to a panhandler on a median. *Id.* During the same period in 2012, the police had received 169 such calls, of which 101 related to a panhandler on the median. *Id.* Thus, the total number of panhandling-related calls (whether involving medians or not) received during those months increased by 25% year-over-year, while the number of such calls related to medians had increased by a smaller amount—about 23%. *Id.* Portland, in other words, experienced a general increase in complaints about panhandlers, not specifically about panhandlers on medians. The increase in the number of calls about panhandling on medians translated to about one or two additional incidents per week, City-wide, during the period analyzed. App. 24-25 & 37, Tr. 40:9-41:3 & 89:2-21.

During the City Council session in which the Ordinance was debated, the decision whether to approve the Ordinance was treated as a binary choice between enacting the Ordinance, as drafted and proposed, or doing nothing. App. 63, Tr. 194:19-195:7. The Council did not discuss any legislative alternatives to the Ordinance, such as laws that would prohibit standing on a median while intoxicated, or that would enhance penalties for violating existing laws while

standing on a median. App. 65, Tr. 201:4-203:4. Nor did the Council consider whether the Ordinance should apply only to certain medians based on their width or on the volume and speed of traffic surrounding them. App. 60 & 66, Tr. 181:24-182:7 & 206:2-10. And the Council did not discuss whether the City could effectively address any problems by reallocating police resources to particular medians of concern—a strategy that the police have employed to address aggressive panhandling on City sidewalks. App. 25, Tr. 41:24-43:8; App. 177, 188.

Following Chief Sauschuck's presentation, the City Council voted to adopt the Ordinance. App. 128, 139. It became effective on August 15, 2013. App. 188. Between that date and when Plaintiffs filed this action on September 24, 2013, the Ordinance was enforced against five different individuals, all of whom City police observed panhandling on City medians. App. 189-97. Based on police reports, it does not appear that any of these individuals was intoxicated at the time, nor that any was found to have violated any law aside from the Ordinance. App. 30-32, Tr. 64:10-71:8. City police issued these individuals "criminal trespass orders" for "ALL CITY MEDIANS," consistent with guidance that Chief Sauschuck provided to City police officers on August 14, 2013 regarding the Ordinance's enforcement. App. 188-97.

III. Plaintiffs Challenged The Ordinance.

The enactment of the Ordinance impeded Plaintiffs' ability to engage in speech protected under the First Amendment and Article I, § 4, of the Maine Constitution. Both Messrs. Cutting and Staley-Mays discontinued using the City's medians for political demonstrating. While Mr. Staley-Mays had planned to stand on City medians to protest the United States' then-potential intervention in Syria, he abandoned that plan due to the Ordinance. App. 44, Tr. 118:16-120:22. After the Ordinance became effective, Mr. Cutting inquired at City Hall about whether it would be enforced against him if he continued holding issue advocacy signs on the City's medians. App. 41, Tr. 106:22-107:10. A City employee advised that he "could certainly be expected to be arrested if [he] were to do that." App. 41, Tr. 107:11-18. With that warning, Mr. Cutting ceased standing on medians holding his signs for fear of "incur[ring] the penalties of arrest or fines." App. 41, Tr. 106:6-15.

The impact of the Ordinance on Ms. Prior was particularly severe. App. 48, Tr. 135:2-24 After the Ordinance went into effect, she ceased panhandling on the City's medians. She tried to do so on City sidewalks instead, but "literally did not make a penny." App. 48, Tr. 134:16-19. The reason was that, when the Ordinance closed off the medians for panhandling, it increased "competition for the 2 or 3 non-median spots that anybody can make money at where they can be visibly seen

by drivers." App. 48, Tr. 133:6-14. This meant that Ms. Prior "either [had] to wait [her] turn in Portland, which often never comes or go elsewhere which costs money to go." App. 48, Tr. 133:12-14. Ms. Prior chose the latter option, traveling at least three times per week by bus to Biddeford, where panhandling on medians remained legal. Her bus fare round-trip was $10, and travel time could be as long as two hours, but even so, panhandling on Biddeford's medians allowed Ms. Prior to "at least cover my travel expenses there and then be able to cover . . . some basic expenses here." App. 48, Tr. 135:5-24.

Plaintiffs filed this action in the U.S. District Court for the District of Maine. Their complaint challenged the Ordinance, both on its face and (on a pre-enforcement basis) as applied to Plaintiffs, as an unconstitutional infringement of their First Amendment rights and analogous state constitutional rights. App. 6; Dist. Ct. Dkt., ECF#1. They sought both declaratory and injunctive relief under federal and state civil-rights laws. *Id.*

IV. The District Court Proceedings.

A. Pretrial Briefing.

Along with their complaint, Plaintiffs filed a motion for a preliminary injunction. App. 6-7; Dist. Ct. Dkt., ECF#s 1-8. Plaintiffs argued that the Ordinance failed narrow tailoring review because (*inter alia*) it "effectively mutes *all* speech within [medians]." App. 6; Dist. Ct. Dkt., ECF# 3, at 10. As one

example of the Ordinance's lack of narrow tailoring, Plaintiffs noted that it "would, on its face, prohibit someone from entering the [City's] medians . . . to express political protest or campaign for elective office." App. 6; Dist. Ct. Dkt., ECF# 3, at 14.

The City answered and also opposed Plaintiffs' motion. App. 5; Dist. Ct. Dkt., ECF#s 13-14. As relevant here, the City responded to Plaintiffs' political campaign example by arguing that "Portland's City Code still allows the placement of political signs in medians just as it always has." App. 5; Dist. Ct. Dkt., ECF# 14, at 6. In support, the City cited an Affidavit from its Director of Public Services, Michael Bobinsky. App. 5; Dist. Ct. Dkt., ECF# 14, at 6. Director Bobinsky averred that "City regulations allow the placement of political signs upon public grounds pursuant to 23 M.R.S. 1913-A," and that the Ordinance's "prohibition against standing or staying in medians . . . does not conflict with this exemption." App. 243 ¶ 11. "Thus," the City argued, the Ordinance "has not 'effectively muted all speech within medians,' as Plaintiffs contend." App. 5; Dist. Ct. Dkt., ECF# 14, at 6.

The District Court (John H. Rich III, U.S. Magistrate Judge) conducted two status conferences. App. 4-5; Dist. Ct. Dkt., ECF# 20 at 1. With the parties' agreement, the District Court decided to hold a combined hearing on Plaintiffs'

motion for a preliminary injunction and the merits of Plaintiffs' claims. App. 4; Dist. Ct. Dkt., ECF# 20 at 1-2.

B. The District Court Trial.

The District Court (George Z. Singal, U.S. District Judge) held a one-day bench trial, at which eight witnesses testified and documentary evidence was received. App. 3, 15. Four of these witnesses—including Chief Sauschuck, Councilor Suslovic, and Director Bobinsky—testified for the City. App. 15.

Among other subjects, Chief Sauschuck testified regarding the City's concern for the safety of individuals standing on medians. He testified that the City's medians are "an inherent[ly] dangerous location," because a person standing there may be struck by a car that accidentally runs onto the median. App. 56, Tr. 165:17-166:10. Chief Sauschuck conceded, however, that the City could identify only three accidents involving a person standing on a median during the five-year period from 2008-2013.[3] The first involved a bicyclist who was hit by an unlicensed driver while waiting on a median to cross the street in August 2012.

[3] There were reports of four car crashes over a four-year period involving medians, but none involved pedestrians. App. 200-08. Two of these were caused by impaired drivers, App. 200-01 & 208, one of whom "fell asleep or passed out behind the wheel" while running over a median at 1:10 A.M., App. 200, a time when it is unlikely that anyone would be present on a median. App. 57, 171:11-172:4. Similarly, there was evidence that certain traffic signs on medians had been knocked down, presumably by cars. App. 69, Tr. 218:22-219:12. There was no evidence concerning the time of day when the signs were knocked down, or whether anyone was present on the median at the time. App. 71, Tr. 226:4-19.

App. 29, Tr. 59:20-60:25; App. 157-71.[4] Chief Sauschuck acknowledged that the Ordinance would not have prevented this accident because the bicyclist's use of the median was lawful even under the Ordinance. App. 29, Tr. 60:5-25. The second example involved a person who slipped and fell in front of a police cruiser while standing on a median during a blizzard in February 2013. App. 30, Tr. 62:23-63:5; App. 173. The third involved a minor two-car collision apparently caused by a driver who carelessly tried to change lanes after giving money to a solicitor on the median. App. 30, Tr. 61:11-62:19; App. 172.[5] There was no evidence of any accidents caused by the presence of individuals on the median holding political signs, handing items to drivers, or receiving donations from drivers. App. 30, Tr. 63:22-64:9.

Chief Sauschuck also testified about the scope of the Ordinance and the City's intended enforcement of it. With two exceptions, Chief Sauschuck agreed that the Ordinance's geographic and prohibitive scope is as broad as Plaintiffs have described, *supra* at 8-10. The first exception was Chief Sauschuck's disagreement that the Ordinance would apply to Boothby Square, *see* App. 181, on the ground that this location is not a median, but rather a public square. App. 34 & 59, Tr.

[4] This incident was the only example at trial of any individual having ever been struck by a car while standing on a City median.

[5] Chief Sauschuck acknowledged that this incident did not appear to be an example of a panhandler causing an accident by stepping out into a travel lane. App. 30, Tr. 62:13-15.

77:22-78:7 & 178:18-25. Chief Sauschuck conceded, however, that Boothby Square literally "match[es] the [Ordinance's] definition of a median strip," and that the Ordinance contains no express language exempting City squares. App. 38 & 59, Tr. 93:2-15 & 179:1-25; App. 115-16.

The second exception was that, consistent with Director Bobinsky's Affidavit, Chief Sauschuck testified that the Ordinance does not prohibit a person from standing on a median to plant electoral-campaign signs. He acknowledged that, "by a strict reading," the language of the Ordinance would seem to prohibit a campaign worker from "standing in the median to hammer in a sign that says vote for Joe Smith." App. 28-29, Tr. 56:23-57:6. But, he also testified, "[t]hat's certainly not the intent behind the ordinance," and that the police would not enforce it in those circumstances. App. 29 & 34, 57:4-5 & 77:12-21. When asked "[w]hat other conduct in the median won't be the subject of enforcement under the median strip ordinance," he responded that he could not provide "any exact examples . . . at this point." App. 37, Tr. 91:3-22.

Councilor Suslovic testified also that the Ordinance does not apply to the act of being on the median to install a campaign sign. App. 67, Tr. 211:21-212:13. He added that, in his view, that exemption makes sense because it is analogous to someone "paus[ing] on a median strip while crossing the street," based on his personal experience that "putting up campaign signs," typically . . . [doesn't] take

very long," only "ten seconds" per sign. App. 67, Tr. 212:9-15.[6] Councilor Suslovic testified that this time-based rationale for exempting campaign signs was never discussed by the City Council, which never considered how the Ordinance might affect one's ability to place campaign signs on medians. App. 66, Tr. 206:19-23.

Director Bobinsky testified next, and much of his testimony concerned the City's position regarding the purposes of median strips and how they should be used. Director Bobinsky testified that the City views its medians purely as "traffic control device[s]." App. 68, Tr. 215:18. He acknowledged, however, that at least some medians are safe to stand on, because they qualify as "basically an island refuge" from vehicular traffic. App. 71, Tr. 226:20-227:20. Further to that point, when asked whether "those areas become any less safe the longer one stands there," Director Bobinsky generally agreed that they did not, except for special circumstances like deteriorating weather conditions. App. 71, Tr. 227:5-15.

Director Bobinsky also testified regarding the campaign-sign issue. In response to the District Court's questions, he reaffirmed his pretrial averments that the Ordinance exempts planting campaign signs consistent with ME. REV. STAT.,

[6] As the record reflects, it is common for campaigns to plant multiple signs along the same median. *See* App. 180 (showing multiple campaign signs placed along median on Franklin Street).

tit. 23, § 1913-A. Def.'s Addendum at 4; App. 72, Tr. 229:8-16; App. 243 ¶ 11.[7] Director Bobinsky further explained that the statute operates as "an overlay on the city law," and so "allow[s] the placement of political signs on public grounds" including medians, notwithstanding that the City Ordinance says otherwise. App. 72, Tr. 229:8-230:25. Regarding the application of that exemption in practice, the District Court asked:

> THE COURT: How do we, by the way, know whether a sign is a political sign or not; we would have to read it?
>
> A. I would submit that we would have to read it, I suppose.

App. 72, Tr. 232:20-24.

Following the close of evidence, the District Court heard closing arguments, during which it questioned counsel. Much of the colloquy with the City's counsel focused on the City's interpretation of the Ordinance. During closing arguments, the District Court pointedly raised concerns that the City's interpretation of the Ordinance was not content-neutral because it would exempt someone installing a campaign sign on the median, but not someone installing a sign that said, "feed the homeless." App. 80, Tr. 262:17-264:20. The City's counsel did not dispute the District Court's understanding of the City's interpretation, other than to obliquely

[7] Director Bobinsky also clarified that his use of the term "political sign" in his Affidavit, App. 243 ¶ 11, was meant to refer only to electoral-campaign signs. App. 72, 229:17-230:11.

assert a few minutes later, "We don't care what the sign says." App. 81, Tr. 266:12-13.

C. Post-Trial Briefing

The District Court directed the parties to submit post-trial briefing. App. 2-3, 334-453. In its initial post-trial brief, the City reiterated that it interprets the Ordinance as "not [being] meant to apply to someone who is [on the median] temporarily to place a *political sign*." App. 355 (emphasis added). The City did not suggest that it interpreted the Ordinance also to permit the installation of other types of signs or for individuals to engage in other forms of non-political speech. It was not until the City's reply—its final submission to the District Court—that it suggested that signs other than campaign signs might be exempt. App. 421-22 ("In this case, the City's interpretation of its own Ordinance is that someone temporarily transiting a median to place a sign is not engaged in a prohibited activity.").

D. The District Court's Decision.

The District Court issued a judgment on February 12, 2014 permanently enjoining enforcement of the Ordinance, and holding that the law is invalid under the First Amendment to the U.S. Constitution and under the analogous provisions of the Maine Constitution. App. 219-41. The District Court began its opinion by "paus[ing] to frame [Plaintiffs'] challenge." App. 227. Because Plaintiffs

mounted a facial attack, the District Court "train[ed] its lens on the text of the Ordinance." App. 228.[8] In doing so, however, the District Court noted that it was required to "consider the [City of Portland's] authoritative constructions of the [O]rdinance, including its own implementation and interpretation of it, in order to understand the Ordinance's reach." App. 229 (citation omitted). Based on the entire trial record, including the testimony of Chief Sauschuck, Councilor Suslovic and Director Bobinsky, the District Court found the City's official interpretation of its Ordinance to be as follows: "the Ordinance does not allow any individual to sit, stand or stay on a median, except that an individual may transit a median to place or remove a campaign sign." App. 230; *see also* App. 223-24.[9]

The District Court then proceeded to examine the Ordinance's constitutionality in light of the City's interpretation. It first determined that "the medians in the City of Portland are traditional public fora," because "the evidence shows that the City's medians have routinely been the site of protected speech, including political protests, election campaigns by politicians, and solicitations by

---

[8] The District Court did not address Plaintiffs' as-applied challenges.

[9] In a footnote, the District Court acknowledged that the City had tried to "dro[p] the requirement that the sign be a 'campaign' sign from its Interpretation." App. 231 n.5. But it rejected the City's "post-hearing proffer of an altered interpretation allowing for placement of any sign" as "unpersuasive," because "[i]n all of the prior versions of the City's interpretation, the City consistently stated that only campaign signs were exempt from the Ordinance." *Id.* The District Court held that the City's attempted revision, which came only "[i]n its final filing," was "too little, too late." *Id.*

individuals for charity." App. 233; *see also* App. 221. Turning to the appropriate level of scrutiny, the District Court held that the Ordinance was content-based because, under the City's interpretation, "the Ordinance permits only the placement of campaign signs" on the median, "while all other messages, including Plaintiffs' signs with political messages or panhandlers with their signs, are disallowed." App. 236. It also noted Director Bobinsky's testimony that the City's interpretation requires one to read a sign before determining whether it may be placed on a median. *Id.*

The District Court did not end its analysis there, but also "look[ed] to the government's justification for the regulation." App. 237. It noted that the City's asserted justification for the Ordinance is "safety," but observed that the City's concern "is not unique to signs with the approved subject matter of 'campaign signs,'" for as a matter of "logic and common sense," it is no less safe to place other types of signs on the median than it is to place a campaign sign. App. 237-38. Accordingly, the District Court held that "on its face, the Ordinance, as officially interpreted, is a content-based restriction on free speech." App. 238. Moreover, because content-based restrictions are presumptively unconstitutional, and "because the Ordinance is not absolutely necessary to serve the state's asserted interest in public safety," the District Court held that the Ordinance failed strict

scrutiny, even assuming that the City's public safety justification is a compelling state interest. App. 238-39.

SUMMARY OF THE ARGUMENT

I. The District Court properly recognized that, as the Supreme Court has instructed, it must consider the government's official interpretation of a law that is offered to defend the law from a facial challenge under the First Amendment, and that it must follow that interpretation even if the government's interpretation introduces additional or different constitutional weaknesses. The City's interpretation did exactly that. In attempting to cabin the Ordinance's reach to defend it from Plaintiffs' narrow-tailoring challenge, the City interpreted the Ordinance to contain a campaign-signs exemption that it supported through the testimony and declarations of numerous City witnesses. But that exemption traded one constitutional problem for another one: its application requires police officers and other officials to examine the content of the sign to be installed on the median, rendering the Ordinance necessarily content-based. The City does not dispute that the Ordinance is content-based if it includes the campaign-signs exemption, which the District Court found to be part of the City's official interpretation. Nor does the City maintain that the Ordinance can survive strict scrutiny. Accordingly, the Ordinance must fall under the First Amendment.

Contrary to the City's contentions, the District Court did not err in crediting

the consistent testimony of the City's witnesses and the statements of its counsel, both before and during the trial, in order to determine how the City interprets its ordinance. The City did try to repudiate its interpretation after the close of evidence, when it apparently recognized the constitutional defects of its approach. But, as the District Court held, that was too late. The District Court committed no error or abuse of discretion in rejecting the City's belated attempt to revise its position in response to the Court's concerns.

II. Even if the Ordinance were held to be content-neutral, the trial record still requires that it be struck down, especially in light of the Supreme Court's most recent decision applying intermediate scrutiny. *See McCullen v. Coakley*, 134 S. Ct. 2518 (2014). The City's Ordinance goes further than most other cities and States have gone in curbing speech to address issues with panhandling, strongly signaling that the City's approach is not narrowly tailored. Indeed more often than not, cases considering similar laws have turned on whether the law covered medians.

The trial evidence validates these concerns. It confirms that the City, in response to a limited problem involving bad behavior on a few of its medians less than once per day, decided to shutter that traditional public forum entirely. In doing so, it gave only slight consideration to existing laws of general application, which appear to address the vast majority of the misconduct on which the City

relies to justify the Ordinance. The City gave no thought at all to narrower legislative alternatives, or to options like reallocating police resources to the few "problem" spots that had been identified. Further, Plaintiffs' unrebutted trial evidence established that the Ordinance fails to leave open adequate alternative channels, because contrary to the City's suggestion, public parks, squares, and sidewalks are not as effective for the expressive conduct in which Plaintiffs and others engage. Because the City cannot meet its burden of establishing that the Ordinance is narrowly tailored and leaves open adequate alternative channels of communication, the Ordinance cannot survive even as a content-neutral speech regulation.

ARGUMENT

I. Standard Of Review.

In evaluating the District Court's judgment, which followed a full bench trial on the merits, legal conclusions are reviewed de novo, while findings of fact are reviewed only for the existence of "clear error." *Rosario-Urdaz v. Velazco* 433 F.3d 174, 177 (1st Cir. 2006); Fed. R. Civ. P. 52(a). Determinations of "mixed" issues of fact and law are reviewed "along a degree-of-deference continuum": "the more fact-dominated it is, the more likely that deferential, clear-error review will obtain," and vice versa. *Servicios Comerciales Andinos, S.A. v. Gen. Elec. Del*

Caribe, Inc., 145 F.3d 463, 469 (1st Cir. 1998) (citations and internal quotation marks omitted).[10]

In reviewing the District Court's findings, this Court "give[s] due regard to the trial court's opportunity to judge the witnesses' credibility," and will set aside a finding as clearly erroneous only "if review of the entire record leads to a definite and firm conviction that an error has been made." *Torres-Lazarini v. United States*, 523 F.3d 69, 72 (1st Cir. 2008). The District Court does not commit "clear error" where it merely favors one of two competing inferences, each of which the evidence could plausibly support. *Id.*

II. The District Court Did Not Err By Determining That The City's Interpretation Of Its Own Ordinance Renders The Law An Impermissible Content-Based Restriction On Free Speech.

The First Amendment to the U.S. Constitution forbids laws "abridging the freedom of speech . . . or the right of the people peaceably to assemble." U.S. Const. amend. I. Under First Amendment jurisprudence, courts evaluate such restrictions differently depending on where and how they operate. Judicial scrutiny is greatest for laws that restrict speech and assembly in "traditional public fora," which "occupy a 'special position in terms of First Amendment protection' because of their historic role as sites for discussion and debate." *McCullen*, 134 S.

[10] *See also Mars Steel Corp. v. Cont'l Bank N.A.*, 880 F.2d 928, 933-34 (7th Cir. 1989) ("Fact-intensive disputes, those whose resolution is unlikely to establish rules of future conduct, are reviewed under a deferential standard because the role of appellate courts in establishing and articulating rules of law is not at stake.").

Ct. at 2529 (quoting *United States v. Grace*, 461 U.S. 171, 180 (1983)). Indeed, the Supreme Court has recognized that the government's ability to restrict speech in such a forum is "very limited." *Id.* at 2529. The District Court below concluded that "[t]he medians in the City of Portland are properly classified as traditional public fora." App. 225. The City does not challenge that determination.

Instead, the City challenges only the level of scrutiny that the District Court applied to the Ordinance. City Br. 2. In traditional public fora, laws that restrict speech based on its content draw strict scrutiny, which requires the government to prove that its regulation is the least restrictive means of promoting a compelling governmental interest. *See Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989). Content-neutral laws draw somewhat less demanding review, albeit review that still "sharply circumscribe[s]" the government's power. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). Such laws are permissible only if "they are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information." *McCullen*, 134 S. Ct. at 2529 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Based on its determination of how the City interprets the Ordinance, the District Court held that the Ordinance is content-based and struck it down. App. 234-39. That decision was not error.

A. The District Court Correctly Held That It Was Bound By The City's Authoritative Interpretation Of The Ordinance.

Looking solely at the Ordinance's language, and ignoring any added interpretive gloss from the City, the Ordinance appears facially content-neutral. Def.'s Addendum at 1. But as the Supreme Court has instructed, federal courts "*must* consider the [local government's] authoritative constructions of [an] ordinance," including when "evaluating [a] facial challenge" to it. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (emphasis added). That interpretation "includ[es] [the local government's] own implementation and interpretation of [the ordinance]." *Id.*

The District Court recognized this and properly discerned the content of the City's authoritative interpretation of its own Ordinance. *See Forsyth County*, 505 U.S. at 131. In doing so, the District Court considered the representations the City's counsel made before, during, and after trial, as well as the testimony and averments of the City's witnesses, all of whom are City officials. Relying on Director Bobinsky's Affidavit, the City took the position before trial that despite the Ordinance's text, the Ordinance does not prohibit standing on a median for the purpose of planting political campaign signs. App. 5; Dist. Ct. Dkt., ECF# 14, at 6; App. 243 ¶ 11. Every City witness who addressed the subject gave testimony consistent with that interpretation. Director Bobinsky reaffirmed his pretrial Affidavit, explaining that the source of the campaign-sign exception lies in ME.

REV. STAT., tit. 23, § 1913-A(1)(H), which acts as an "overlay" on the City's Ordinance. App. 72, Tr. 229:8-230:25. Both Chief Sauschuck and Councilor Suslovic agreed that the Ordinance does not prohibit planting campaign signs on medians. App. 28-29 & 34, 56:23-57:6 & 77:12-21; App. 67, Tr. 211:19-212:20. The City's initial post-trial memorandum reiterated this position. App. 355.

As importantly, the City's presentation to the District Court made no suggestion, until the City's final submission, that its interpretation allowed for non-electioneering speech on a median. Indeed, the evidence suggested the opposite. When given the opportunity to provide other examples, besides planting campaign signs, of conduct that would be exempt because of the Ordinance's intent, Chief Sauschuck identified no other speech. App. 37, Tr. 91:3-22. Similarly, when told by the District Court that it understood the City's interpretation to allow standing on a median to plant a campaign sign, but not to plant a sign saying "feed the homeless," the City's counsel did not dispute that understanding. App. 80-81, Tr. 262:17-264:20 & 266:12-13.

In sum, the District Court did not clearly err in discerning the content of the City's interpretation, and its determination of that issue is supported by more than substantial evidence, *viz.* the testimony of the City's own witnesses.

B. The City's Interpretation Makes The Ordinance Impermissibly Content-Based.

The plain effect of the Ordinance's prohibition is to restrict speech and assembly on the City's medians. *See McCullen*, 134 S. Ct. at 2529 ("[E]ven though the Act says nothing about speech on its face, there is no doubt . . . that it restricts access to traditional public fora and is therefore subject to First Amendment scrutiny."). And under the City's interpretation, there also is no question that some types of speakers are subjected to the Ordinance's prohibition while others are not, all depending entirely on what a particular speaker intends to say while on the median. Such a regulation is classically content-based.

As the Supreme Court just recently reiterated, and as the District Court also noted in this case (App. 80, Tr. 263:10-17), a telltale sign of content-based speech regulations is that they "requir[e] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen*, 134 S. Ct. at 2531 (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)). Stated differently, a law restricting speech is content-based if "[w]hether [a person] violate[s] the [law] 'depends' . . . 'on what [the person] say[s],'" not "simply on where [the person] say[s] it." *Id.* (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010)). The record is clear that the City's interpretation of the Ordinance renders it content-based under this test. Indeed, Director Bobinsky readily conceded that the only way one could determine

whether a person's sign was exempt would be to examine its content: "*we would have to read it*." App. 72, Tr. 232:20-24 (emphasis added).

Here, a person "standing at the very spot where [Plaintiffs] stood" on the City's medians who installed campaign signs "would not [be] subjected to liability" under the City's interpretation. *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011). But Plaintiffs and others wishing to stand on the median with other signs *would* be "exposed" to liability. A law that operates in such a manner is content-based, as the Supreme Court has said more than once. *See id.*; *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) ("Under the city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack.") The City does not dispute that if the Ordinance is content-based, it is subject to strict scrutiny.

It also is irrelevant whether the City possesses some "animus toward the ideas contained" in the signs that its interpretation fails to exempt. *Discovery Network*, 507 U.S. at 429. "[D]iscriminatory . . . treatment is [not] suspect under the First Amendment only when the legislature intends to suppress certain ideas." *Id.* (quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991)). And while the City has advanced a content-neutral safety justification for the Ordinance, that rationale still must be invoked consistently to be credited. Yet it is not. As the District Court observed, there is

no reason to suppose that one who plants a campaign sign on a median is any more safe from vehicular traffic than one who is on the median with a sign bearing a different message. App. 237-38. The City offers no "justification for its selective ban on" certain speech on City medians. *Discovery Network*, 507 U.S. at 430.

The City has never maintained that the Ordinance can survive strict scrutiny, nor does it do so now. Accordingly, the Ordinance must fail under the First Amendment, and the District Court was right to hold so. App. 238-41.

C. The City's Arguments For Reversal Are Meritless.

The City urges numerous grounds for reversal, all of which are meritless. The City contends first that the District Court erred by giving any consideration to how the City interprets the Ordinance. "Because this is a facial challenge," the City claims, "the District Court . . . was obliged to rely on the language of the Ordinance itself," but instead it "fail[ed] to construe the Ordinance as it is actually written" by taking into account the City's interpretation. City Br. 17. But as *Forsyth County* teaches, federal courts "*must* consider" local governments' interpretations of their own laws, including when "*evaluating [a] facial challenge*." 505 U.S. at 131 (emphasis added). Additionally, because the Plaintiffs have also challenged the law as applied to them, the City's enforcement policy is clearly relevant on that score. *See McGuire v. Reilly*, 386 F.3d 45, 64-65 (1st Cir. 2004).

The City places weight on the parties' seeming agreement in pretrial briefing—before the City's other witnesses confirmed Director Bobinsky's interpretation of the Ordinance—that the Ordinance is content-neutral, City Br. 16. That argument fails for two reasons. First, once the evidence was in, Plaintiffs repeatedly argued that if the City is bound by its witnesses' interpretation of the Ordinance, then the Ordinance is content-based. App. 76-77, Tr. 246:15-249:16; App. 383-84, 399-400, 443-44. Second, the content-based versus content-neutral issue is a question of law, and "[p]arties may not stipulate to the legal conclusions to be reached by the court." *T.I. Fed. Credit Union v. DelBonis*, 72 F.3d 921, 928 (1st Cir. 1995) (quoting *Saviano v. Comm'r of Internal Revenue*, 765 F.2d 643, 645 (7th Cir. 1985)). As this Court has recognized, "[c]ourts . . . 'are not bound to accept as controlling, stipulations as to questions of law.'" *Id.* (quoting *Estate of Sanford v. Commissioner*, 308 U.S. 39, 51 (1939)).

Changing tack, the City contends that "[e]ven if the parties' agreement . . . was not dispositive, this Court's determination in *Thayer v. City of Worcester*, 755 F. 3d 60 (1st Cir. 2014),] should be." City Br. 16. But the defendant in that case advanced no official interpretation of its "Pedestrian Safety" ordinance. The decision in *Thayer* therefore had no occasion to address, and did not address, the issue now before the Court.

Alternatively, the City contends that the District Court erred not in considering the City's interpretation of the Ordinance at all, but in purportedly considering the City's interpretation to *invalidate* the Ordinance, rather than to *save* it. City Br. 17-22. That contention also fails.

To begin, the City is wrong to suggest that a federal court may consider an official interpretation of a local ordinance only if it would succeed in saving the law. The Supreme Court's decision in *Forsyth County* proves as much. There, the Supreme Court considered an ordinance that on its face gave broad discretion to local officials to determine the amount of a fee charged for using public grounds for expressive activities—discretion which, the plaintiffs claimed, enabled official censorship of disfavored groups. 505 U.S. at 126-27, 129-30. The county proffered an official interpretation, presumably intended to defend the law by limiting its reach. *Id.* at 131.

But rather than saving the law, the county's interpretation made it even more suspect because it gave even more discretion to the county than the ordinance's text suggested.[11] On its face, the law's text implied that county officials must in all cases assess a fee. But the county read the law to authorize charging certain

[11] As here, the county's interpretation of its ordinance created a content-neutrality problem: "*As construed by the county*, the ordinance often requires that the fee be based on the content of the speech." *Forsyth County*, 505 U.S. 133-34 (emphasis added).

groups nothing at all, while doing nothing to limit the amount that might be charged to other groups. *Id.* at 131-33 & nn.9, 11. Applying the county's interpretation, the Supreme Court struck down the ordinance, on its face, under the First Amendment. *Id.* at 132-33. The District Court committed no error by doing likewise in this case. *See also Grace*, 461 U.S. at 176, 182 (accepting the Government's statutory interpretation, which "brings some certainty to the reach of the statute and hence avoids what might be other challenges to its validity," but which ultimately led the Court to conclude that the statute was not narrowly tailored); *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1042-43, 1052 (9th Cir. 2006) (holding that while a city's proffered limiting construction of its ordinance rendered it narrowly tailored in one respect, it also created a different and fatal narrow-tailoring problem).[12]

Moreover, the City's contention that the District Court improperly used its interpretation to invalidate the Ordinance rather than to save it is unsupported. The interpretation which the District Court relied on below in fact *was* put forward as a limiting construction, by the City itself, to defend the Ordinance from Plaintiffs'

[12] The City cites two cases from this Court to argue that its interpretation cannot render the Ordinance more constitutionally infirm. City Br. 20-21 (citing *McCullen v. Coakley*, 571 F.3d 167, 178 (1st Cir. 2009), and *McGuire*, 386 F.3d at 58 & n.4). As just discussed, controlling Supreme Court authority demonstrates that this categorical proposition is untrue. *See Forsyth County*, 505 U.S. at 131-33; *Grace*, 461 U.S. at 176, 182.

overbreadth challenge. Both the purpose and effect of Director Bobinsky's Affidavit, and of the interpretation of the Ordinance it proffered, was to limit the Ordinance's prohibitive scope, compared with what an ordinary reader would understand by relying solely on the text. Presumably, the City believed that its limiting construction was necessary to defeat Plaintiffs' narrow tailoring argument. Ultimately, though, the City's interpretation created further First Amendment difficulties by rendering the Ordinance content-based. The District Court acted correctly in recognizing that fact and ruling accordingly. *See Forsyth County*, 505 U.S. at 131-33; *Grace*, 461 U.S. at 176, 182; *Santa Monica*, 450 F.3d at 1042-43.[13]

Left with little else, the City maintains that "the District Court's characterization of the City's 'interpretation' in this case is clearly erroneous," and that "to the extent it was appropriate for the District Court to consider the City's purported interpretation of its own facially neutral ordinance, the Court got that

[13] Because the interpretation was offered to save the Ordinance, *Hoye v. City of Oakland*, 653 F.3d 835 (9th Cir. 2011), is inapposite. City Br. 20-22. That "courts may consider . . . executive practice . . . only to *save* a statute, not to condemn an otherwise valid one for being content based," 653 F.3d at 848, does not mean that they must shut their eyes to the additional constitutional problems those interpretations create. *Hoye* also recognizes that the validity of the ordinance might well rise or fall with that of its interpretive gloss where the two are inseparable. *See id.* at 848 n.10. The City's Ordinance cannot be understood separate from the City's interpretation, and so Plaintiffs' facial challenge may be understood to be directed at both. *See id.* at 855-56.

interpretation entirely wrong." City Br. 22-27.[14] To the contrary, the District Court's determination of the City's interpretation of the Ordinance was not erroneous, let alone "clearly erroneous." City Br. 22.

The District Court's determination on this point is owed considerable deference, as that Court alone observed the witnesses' testimony and counsel's representations with respect to how the City interprets its Ordinance. *See, e.g.*, *Torres-Lazarini*, 523 F.3d at 72; *Servicios Comerciales*, 145 F.3d at 469; Fed. R. Civ. P. 52(a)(6) ("[T]he reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility."). There is ample record support for the District Court's finding (App. 223-24) that the City's interpretation of the Ordinance permits standing on a median for the purpose of installing campaign signs, but not other expressive conduct. *See supra* at 20-23. Where the record contains substantial evidence to support the District Court's determination, this

[14] The City argues as well that the interpretation put forward by the City's witnesses "does not constitute an 'authoritative' or 'official' interpretation by the City." City Br. 28. But authoritative interpretations do not require "formal" proof, City Br. 28-29, and the testimony of the City's witnesses and the representations of its counsel suffice for that purpose. *See, e.g.*, *Forsyth County*, 505 U.S. at 131-33 (discerning interpretation from testimony of county's witnesses and from counsel's representations at argument). Additionally, it is difficult to imagine what purpose the City's submissions could have served, if not to represent its official and authoritative statement as to how it interprets its own law. Indeed, that is exactly what the District Court thought: Director Bobinsky "was chosen by the city to give an authoritative view of the statute's interpretation in its affidavit. They could have said you don't know anything, we're not going to put it in there, but they did so I assume he has more authority than I thought." App. 80, Tr. 261:6-11.

Court does not disturb it. *See, e.g.*, *Torres-Lazarini*, 523 F.3d at 72-73; *Servicios Comerciales*, 145 F.3d at 475.

To the extent the City complains that the District Court erred by refusing to accept its post-hearing revision of its interpretation, that argument also lacks merit. It was no abuse of discretion for the District Court to reject the City's revised interpretation, which the City offered only after realizing that the one it had theretofore advanced caused new problems. Indeed, this Court has itself rejected attempts by government lawyers to clarify previously proffered legal interpretations that came only at oral argument, using the same words as the District Court below: "too little, too late." *R.I. Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 35 n.5 (1st Cir. 1999); App. 231 n.5. And in other contexts, courts recognize that even if they ordinarily must defer to officials' interpretations of their own rules, no deference is owed to an interpretation that "is nothing more than a 'convenient litigating position,' . . . or a '*post hoc* rationalizatio[n].'" *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (citations omitted). The District Court was on firm ground in rejecting the City's belated attempt to revise its interpretation, and in deciding instead to credit the one the City advanced consistently before and throughout trial.

III. Alternatively, The Court Should Affirm Because Even If The Ordinance Is Content-Neutral, The City Failed To Carry Its Burden Of Proof.

This Court "may affirm on any basis apparent in the record," even if different from the ground on which the District Court based its judgment. *Debnam v. FedEx Home Delivery*, 766 F.3d 93, 96 (1st Cir. 2014). While the City's brief urges this Court to reverse the District Court for applying strict scrutiny, it fails to make any argument based on the trial record that the Ordinance survives intermediate scrutiny. And for good reason: even if the District Court erred in holding that the Ordinance is content-based (which it did not), the record plainly shows that the City cannot defend the Ordinance's validity even as a content-neutral time, place and manner restriction. *See McCullen*, 134 S. Ct. at 2537-40; *Casey v. City of Newport, R.I.*, 308 F.3d 106, 111 (1st Cir. 2002) (placing burden on the city to defend its law's constitutionality under intermediate First Amendment scrutiny). That is especially apparent when the record is viewed, as it must be, in light of the Supreme Court's most recent decision applying that standard of review. *See McCullen*, 134 S. Ct. at 2534-40.

A. The Supreme Court's Decision In *McCullen* Dooms The Ordinance Even Under Intermediate Scrutiny.

Applying the same mode of analysis to the Ordinance here that the Supreme Court did just recently to the fixed-buffer-zone law at issue in *McCullen* leaves no doubt the Ordinance cannot survive intermediate scrutiny. As was true in

McCullen, 134 S. Ct. at 2537, it is worth noting "[a]t the outset" that the Ordinance is "truly exceptional" in its breadth, compared to similar laws. With the exception of the Worcester, Massachusetts, "Pedestrian Safety" ordinance at issue in *Thayer*, 755 F.3d at 65 (which is still being challenged in trial-court litigation and in a petition for certiorari before the Supreme Court), Plaintiffs are aware of no government that has gone as far as the City has, by closing off all of its medians to all forms of expressive activity.

Certainly, no such law has survived a final judgment. More often than not, when laws regulating speech on medians have been challenged, courts have struck them down. *See, e.g.*, *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 941, 948-51 (9th Cir. 2011); *Watkins v. City of Arlington*, No. 4:14-cv-381, 2014 WL 3408040, at *6 (N.D. Tex. July 14, 2014); *Wilkinson v. Utah*, 860 F. Supp. 2d 1284, 1290 (D. Utah 2012); *Traditionalist Am. Knights of Ku Klux Klan v. City of Desloge*, 914 F. Supp. 2d 1041, 1047, 1050 (E.D. Mo. 2012); *News & Sun-Sentinel Co. v. Cox*, 702 F. Supp. 891, 901-02 (S.D. Fla. 1988); *ACORN v. City of New Orleans*, 606 F. Supp. 16, 21-22 (E.D. La. 1984).[15]

[15] *Thayer* discounted *Redondo Beach*, *News & Sun-Sentinel*, and *New Orleans* because the laws they considered "reached far wider" than the "Pedestrian Safety" ordinance there at issue. 755 F.3d at 75 n.8. But while the laws considered in *Redondo Beach*, 657 F.3d at 941, and *News & Sun-Sentinel*, 702 F. Supp. at 893, also applied to sidewalks, there is no suggestion in either of those cases that they would have been valid had they covered only the medians, as this Ordinance does. A complete ban on the use of one public forum is not narrowly tailored merely

Where courts upheld laws banning speech in roads, it often has been specifically because, unlike this Ordinance, *they did not apply to the median*. *See, e.g.*, *ACORN v. St. Louis County*, 930 F.2d 591, 594 (8th Cir. 1991); *Sun-Sentinel Co. v. City of Hollywood*, 274 F. Supp. 2d 1323, 1332 (S.D. Fla. 2003); *Dominguez v. State*, 902 S.W.2d 5, 8-9 & n.4 (Tex. Ct. App. 1995) (agreeing that a ban also covering medians would be "overbroad"). The fact that other governments, by and large, have elected not to go as far as the City has—and that their laws have often been invalidated when they have gone so far—"raise[s] concern that the [City] has too readily forgone options that could serve its interests just as well, without substantially burdening the kind of speech in which [Plaintiffs] wish to engage." *McCullen*, 134 S. Ct. at 2537.[16] Those concerns are only validated when one

---

because a different public forum remains open. *Cf. Grace*, 461 U.S. at 180-81. And the Ordinance here if anything *resembles* the one at issue in *New Orleans* in its excessiveness: just as that law applied to "neutral grounds" that were "one hundred feet or more across," and failed to take account traffic conditions in particular locations at particular times, 606 F. Supp. at 19 & n. 6, this Ordinance likewise covers expansive 50-foot-wide medians and makes no effort to take account of any median's surrounding traffic patterns. *See supra* at 9.

[16] A few decisions have upheld laws restricting expressive conduct in the median, but even those do not support this Ordinance's scope. In *Int'l Soc'y for Krishna Consciousness, Inc. v. City of Baton Rouge*, 876 F.2d 494, 498 (5th Cir. 1989), *Reynolds v. Middleton*, 2013 WL 5652493, *3-4 (E.D. Va. Oct. 15, 2013), appeal pending No. 13-2389 (4th Cir.), and *Denver Publ'g Co. v. City of Aurora*, 896 P.2d 306, 314 (Colo. 1995), for example, the decisions upholding the laws at issue were based on evidence of risks that are particular to solicitation from vehicles, and distinguished other forms of speech covered by Portland's Ordinance. Regardless whether such laws are valid under the First Amendment, and Plaintiffs do not

considers the lack of "fit between [the Ordinance's] ends and [its] means." *Id.* at 2534.

1. The Ordinance Is Not Narrowly Tailored.

"[T]he government may not prohibit all communicative activity" occurring in public fora such as the City's medians. *Perry Educ. Ass'n*, 460 U.S. at 45. Instead, to be narrowly tailored, a law must "targe[t] and eliminat[e] no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). A "complete ban," therefore, can be narrowly tailored "only if each activity within the proscription's scope is an appropriately targeted evil." *Id.*

That is simply not true of the Ordinance. As the evidence established at trial, *see supra* at 8-9, the Ordinance prohibits a wide range of peaceful, constitutionally protected expression from taking place in the traditional public forum of the City's medians—including firefighters collecting donations from passing motorists, and political demonstrators holding signs critical of the U.S. government or the City police. App. 28, Tr. 56:3-19. The City's only reply has been to invoke generic interests in pedestrian and traffic safety. City Br. 15. Even assuming these are significant governmental interests in the abstract, the First Amendment requires that laws restricting speech be tailored to risks that are "real,

---

concede that they are, this Ordinance reaches far more broadly than that. *See supra* at 8-10.

not merely conjectural." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994).[17]

The trial evidence as well as the legislative record both establish that the only "real" risk to which the Ordinance purportedly responds is the problem of certain individuals behaving badly on medians, specifically by blocking traffic, drunkenly stumbling into traffic, and harassing or threatening passersby. *See supra* at 12. Yet in response to this limited problem, the City opted to enact a broad solution: forbidding anyone to stand on its medians for any reason except crossing the street. Def.'s Addendum at 1. To justify that response as "narrowly tailored," the City "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*, 134 S. Ct. at 2540.

As in *McCullen*, the City cannot shoulder that burden on this record. It is not enough that the City gave some thought to the possibility of relying on existing

[17] Rather than invoking generic safety interests, the City must prove that there actually is a significant safety interest *in forbidding individuals to stand on medians*, and that the Ordinance "significantly serve[s]" that interest. *John Donnelly & Sons v. Campbell*, 639 F.2d 6, 8 (1st Cir. 1980). And to carry that burden it must rely on "objective evidence," not "mere facial assertions" or "common sense" alone. *Horina v. City of Granite City, Ill.*, 538 F.3d 624, 633-35 (7th Cir. 2008); *Weinberg v. City of Chi.*, 310 F.3d 1029, 1038-39 (7th Cir. 2002). On this record, particularly with its sparse evidentiary support for the claim that standing on medians per se is inherently dangerous, it is at best doubtful whether the Ordinance serves a significant governmental interest in safety. *See supra* at 18-19. Plaintiffs will assume that it does, however, solely for purposes of analysis.

laws to accomplish its objective; it must also "sho[w] that it seriously undertook to address the problem with less intrusive tools readily available to it" before eschewing them. *McCullen*, 134 S. Ct. at 2539; *see Casey*, 308 F.3d at 115-17. Here it has not: as Chief Sauschuck conceded, virtually all of the conduct that was the impetus behind the Ordinance already is illegal under state and City laws of general application that forbid, *e.g.*, obstruction of public ways, assault, disorderly conduct, and abusive solicitation. App. 20-21 & 26-28, Tr. 24:21-25:6, 47:3-24, & 51:2-54:17. The City's counsel reached essentially the same conclusion during the legislative process. App. 111-12. Given these alternatives, the City "ha[d] available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate." *McCullen*, 134 S. Ct. at 2539. It failed to make use of them.

The City's only explanation for doing so was that it viewed these alternatives as undesirably "reactive" rather than "proactive." App. 36, Tr. 85:20-86:12. But the comparative ease with which a blanket ban on speech in a traditional public forum may be enforced, vis-à-vis relying on laws that more precisely target the problem the government seeks to prevent, does not justify the former approach. "[T]he prime objective of the First Amendment is not efficiency." *McCullen*, 134 S. Ct. at 2540. That is in part why even content-neutral laws burdening speech must still be narrowly tailored:

> The government may attempt to suppress speech not only because it disagrees with the message being expressed, but also for mere convenience. Where certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency.'

Id. at 2534 (citation omitted). Time and again, therefore, the Supreme Court has warned that "[b]road prophylactic rules in the area of free expression are suspect," *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 637 (1980) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)), and that when the government is faced with conduct it wishes to curb, it must resist the temptation to curb protected expression for the sake of "mere convenience." *McCullen*, 134 S. Ct. at 2534; *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373 (2002) ("If the First Amendment means anything, it means that regulating speech must be a last—not first—resort."). The record in this case shows that the City succumbed to that temptation.

Even if the City could reasonably discount existing laws as being not up to the task, it failed even to consider any number of obvious legislative alternatives that would prohibit less speech than the one it actually chose. For example, to address the risks posed by the presence of intoxicated individuals on medians—which is not currently unlawful in Portland, App. 74, Tr. 239:11-15—the City could have passed laws that authorize police to remove publicly intoxicated

individuals from the median. *See, e.g.*, Pls.' Addendum at 7-8, MASS. GEN. LAWS ch. 111B, § 8; Pls.' Addendum at 9-10, N.H. REV. STAT. § 172-B:3.I. Or, in response to perceived shortcomings in the obstruction-of-public-ways laws, App. 111, the City could have authorized police to arrest a person who walks out from a median and obstructs traffic or traffic signs, without requiring an initial warning. The City also could have amended its abusive solicitation ordinance to enhance the penalties for misconduct occurring on median strips. It did not even consider these alternatives, App. 65, Tr. 201:4-203:4, let alone determine that they would fail to achieve its goals. *McCullen*, 134 S. Ct. at 2540; *Casey*, 308 F.3d at 115-17.[18]

Finally, even if the Court were to find that the City reasonably concluded that other, less intrusive laws would serve its purpose less effectively, "[the City] has another problem." *McCullen*, 134 S. Ct. at 2539. The trial evidence was undisputed that the incidents which spurred the Council to enact the Ordinance were geographically concentrated in only a few locations, many within close proximity to each other. *See supra at* 10-11. On top of that, the frequency of these incidents amounted to fewer than one per day. App. 37, Tr. 89:2-21; App. 174-77.

[18] Like the Court in *McCullen*, Plaintiffs do not suggest that any of these legislative alternatives would necessarily be constitutional, since their validity would depend on a number of case-specific factors that have not yet been factually developed. *McCullen*, 134 S. Ct. at 2538 n.8. Plaintiffs merely point out that the existence of these less intrusive alternatives forecloses any argument that the City's Ordinance is narrowly tailored.

"For a problem shown to arise only [a few times] a week [at a handful of locations]," banishing all speakers from every one of the City's medians "is hardly a narrowly tailored solution." *McCullen*, 134 S. Ct. at 2539. Yet the City never even considered addressing the problem by reallocating police resources to these "problem" locations, even though it had used the same strategy against the problem of abusive solicitation on sidewalks, by giving "strong special attention" to those areas that needed it most. App. 25, Tr. 41:24-42:14; App. 188.

The geographic concentration of the conduct which motivated the City to enact the Ordinance is also evidence of the Ordinance's geographic overinclusiveness. But it is not the only evidence. The Ordinance operates throughout the City, banishing all expressive activity from every median, irrespective of how wide it is, how heavily traveled the roads around it are, or how it is used. Pls.' Addendum at 1-2; App. 178-87. Even crediting the City's pedestrian-safety concerns as a general matter, the risk that one could be struck by vehicular traffic while holding a sign in, *e.g.*, the 50-foot-wide Franklin Street median is vanishingly remote. App. 178-80. Likewise, the danger to demonstrators who might choose to stand in protest on the elevated median located on Spring Street between High Street and Temple Street was never established at

trial. App. 184. Yet the Ordinance includes even these "island refuge[s]" within its ambit. App. 71, Tr. 226:20-227:20.[19]

In sum, even if the City could prove that restricting speech on some medians is necessary to serve public safety (and it has not), it has not even tried to justify its decision to eliminate all speech and assembly on every median without exception. The geographic overinclusiveness of the Ordinance alone warrants its invalidation. *See, e.g.*, *McCullen*, 134 S. Ct. at 2539; *Redondo Beach*, 657 F.3d at 949 (invalidating ordinance that restricted speech "citywide [on] all streets and sidewalks in the City," in the absence of evidence supporting the existence of a citywide problem).

2. The Ordinance Does Not Leave Open Adequate Alternative Channels Of Communication.

The record below also shows that the City failed to establish that the Ordinance's City-wide ban on all speech in medians leaves "realisti[c]" opportunities for effective communication open to Plaintiffs and others like them. *Linmark Assocs. v. Twp. of Willingboro*, 431 U.S. 85, 93 (1977). "[A]n alternative is not adequate if it 'foreclose[s] a speaker's ability to reach one audience even if it allows the speaker to reach other groups.'" *Weinberg*, 310 F.3d at 1041 (citation

[19] The City provided no evidence that collecting money from vehicles is riskier from the median than from the sidewalk. App. 58-59, 176:24-177:7. Yet the City has banned only the former, so there is not even a "close fit between ends and means" in that respect. *McCullen*, 134 S. Ct. at 2534. "[P]oor fit" suggests that the law is not narrowly tailored. *Id.* at 2532.

omitted). By closing off all medians from protected speech, the Ordinance displaces individuals entirely from a public forum and forces them to take their speech elsewhere, *e.g.*, parks, sidewalks and city squares.

The trial evidence showed that these alternatives do not allow political demonstrators to reach as many people as medians do, and that they are inadequate to reach at least one key audience: drivers. As Messrs. Cutting and Staley-Mays testified, sidewalks are typically less visible to street traffic than medians are due to parked cars, pedestrian traffic, and other obstacles, while City squares and parks likewise offer less visibility to street traffic. App. 40, 43, 48, & 53, Tr. 101:8-22, 113:12-114:19, 134:20-135:1, & 155:3-9. The City's principal response was to suggest other ways for speakers to spread their message to the public, such as by going door-to-door, leafletting, sending letters, or congregating on private property. App. 42 & 45, 112:13-23 & 122:13-123:2. But these alternatives "are far from satisfactory" because they would almost certainly involve "more cost" and would likely prove "less effective media for communicating the message" to "persons not deliberately seeking" it out. *Linmark Assocs.*, 431 U.S. at 93; *see also City of Ladue v. Gilleo*, 512 U.S. 43, 57 (1994) (prohibited speech "may have no practical substitute," particularly "for persons of modest means," where the alternatives are more expensive and time-consuming).

The evidence also was uncontested that the Ordinance leaves ineffective alternatives to medians for soliciting charitable contributions.[20] Ms. Prior testified that the number of non-median locations available in the City for panhandling is extremely limited, and that those locations are often hotly contested by the City's many homeless residents. App. 48-49, Tr. 133:6-134:19 & 138:11-13. While there are unclaimed locations not covered by the Ordinance, they are demonstrably ineffective fora for those hoping to persuade passersby to give money, as Ms. Prior's experience showed: while was able to collect $20 to $25 on a typical day from medians, she collected almost nothing when she tried soliciting from sidewalks. App. App. 46-49, Tr. 128:25-129:2, 134:16-19, & 137:5-10.

Ms. Prior's inability to raise *any* money from the City's sidewalks establishes that venue's unsuitability for successfully reaching an audience with a message of charity. *See Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) ("The right of free speech is guaranteed every citizen that he may reach the minds of willing listeners and to do so there must be opportunity to win their attention."). The City offered no evidence that there are adequate alternative venues that are effective for soliciting charitable contributions and able to physically accommodate all those

[20] The City does not dispute that requesting charity through begging or panhandling is protected First Amendment speech. City Br. 12. *See also Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 553 (4th Cir. 2013).

wishing to solicit. It thus failed to demonstrate that the Ordinance leaves open adequate alternative channels of communication.

B. *Thayer* Does Not Control Here.

The City contends that the Court should uphold its Ordinance on intermediate scrutiny merely because the Court affirmed in part the refusal to preliminarily enjoin a similar ordinance in *Thayer*. City Br. 29. That argument fails for several reasons.

First, *Thayer* did not come to this Court on a full trial record, and this Court stressed that it was only deciding plaintiffs' entitlement to preliminary injunctive relief, not the merits of the case. 755 F.3d at 78. Here, the full trial record demonstrates that Portland's Ordinance cannot survive intermediate scrutiny, for the reasons given above.

Second, *Thayer* explicitly did *not* consider whether that "Pedestrian Safety" ordinance satisfied intermediate scrutiny. Instead, it held that it need not even reach the issue because, on a facial challenge, the plaintiffs had not satisfied an initial burden of making a prima facie showing of "substantial" overbreadth. *See Thayer*, 755 F.3d at 71-73. Plaintiffs here mount both a facial challenge and an as-applied challenge to the Ordinance, and so the City necessarily bears the burden of proof at least with respect to the latter. *See* App. 6, Dist. Ct. Dkt., ECF#1; *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 183 (1999). With

respect to their facial challenge, based on the full trial record created in the District Court, Plaintiffs have made at least a "prima facie" showing that the Ordinance lacks narrow tailoring, with the protected speech it prohibits greatly outstripping the law's constitutionally legitimate applications (if any exist). *See supra* at 45-51.

Third, *Thayer*'s imposition of a threshold overbreadth burden on plaintiffs asserting that a law is not narrowly tailored was incorrect under the Supreme Court's First Amendment cases, including the Supreme Court's subsequent decision in *McCullen*. The Supreme Court has long made the government carry the burden of showing that laws burdening speech are narrowly tailored, even on a facial challenge. *See, e.g.*, *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 816-17 (2000) (collecting cases). *McCullen* is consistent with these precedents. *See* 134 S. Ct. at 2540 ("*[T]he government must demonstrate* that alternative measures that burden substantially less speech would fail to achieve the government's interests." (emphasis added)). *Thayer* is not. Indeed, *McCullen* itself proves that: there the Supreme Court struck down the statute at issue on its face because it was not narrowly tailored. For that reason, the Supreme Court said, it was unnecessary even to "consider petitioner's *overbreadth* challenge." *Id.* at 2540 n.9 (emphasis added).

CONCLUSION

For all the foregoing reasons, the judgment of the District Court should be affirmed.

Dated: November 3, 2014

Respectfully submitted,

MICHAEL W. CUTTING, WELLS STALEY-MAYS, and ALISON E. PRIOR

By their attorneys,

/s/ Kevin P. Martin
Kevin P. Martin (No. 89611)
Joshua M. Daniels (No. 1161059)
Timothy Bazzle (No. 1163618)
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109
(617) 570-1000
kmartin@goodwinprocter.com
jdaniels@goodwinprocter.com
tbazzle@goodwinprocter.com

Brian T. Burgess (No. 1163701)
GOODWIN PROCTER LLP
901 New York Avenue, NW
Washington, DC 20001
(202) 346-4000
bburgess@goodwinprocter.com

Zachary Heiden (No. 99242)
ACLU of Maine Foundation
121 Middle Street, Suite 301
Portland, ME 04101
(207) 774-544
zheiden@aclumaine.org

No. 14-1421

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MICHAEL W. CUTTING; WELLS STALEY MAYS; ALISON E. PRIOR
Plaintiffs-Appellees,

v.

CITY OF PORTLAND, MAINE
Defendant-Appellant.

On Appeal from United States District Court
For the District of Maine
No. 2:13-cv-00359-GZS

CERTIFICATE OF COMPLIANCE

The undersigned, Kevin P. Martin, counsel for Plaintiffs-Appellees, hereby certifies pursuant to Fed. R. App. P. 32(a)(7)(C) that the Brief for Plaintiffs-Appellants complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). According to the word count function of Microsoft Word, the word-processing system used to prepare the brief, the brief contains 12,963 words.

/s/ Kevin P. Martin
Kevin P. Martin
GOODWIN PROCTER LLP
Exchange Place
Boston, MA 02109
(617) 570-1000

Dated: November 4, 2014

No. 14-1421

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MICHAEL W. CUTTING; WELLS STALEY MAYS; ALISON E. PRIOR
Plaintiffs-Appellees,

v.

CITY OF PORTLAND, MAINE
Defendant-Appellant.

On Appeal from United States District Court
For the District of Maine
No. 2:13-cv-00359-GZS

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(b)-(c), 30(a)(3), and 31(b), I hereby certify that on November 4, 2014, a true and correct copy of the foregoing was served on the following counsel of record in this appeal via CM/ECF:

Jennifer L. Thompson, Esq.
City of Portland
Office of Corporation Counsel
389 Congress Street
Portland, ME 04101
(207) 874-8480
jlt@portlandmaine.gov

/s/ Kevin P. Martin
Kevin P. Martin, Esq.

TABLE OF CONTENTS

PLAINTIFFS' ADDENDUM

Maine Revised Statutes

Title 17-A: MAINE CRIMINAL CODE

Chapter 21: OFFENSES AGAINST PUBLIC ORDER

§505. OBSTRUCTING PUBLIC WAYS

1. A person is guilty of obstructing public ways if he unreasonably obstructs the free passage of foot or vehicular traffic on any public way, and refuses to cease or remove the obstruction upon a lawful order to do so given him by a law enforcement officer.

[1975, c. 499, §1 (NEW) .]

2. As used in this section, "public way" means any public highway or sidewalk, private way laid out under authority of statute, way dedicated to public use, way upon which the public has a right of access or has access as invitees or licensees, or way under the control of park commissioners or a body having like powers.

[1975, c. 499, §1 (NEW) .]

3. Obstructing public ways is a Class E crime.

[1975, c. 499, §1 (NEW) .]

SECTION HISTORY
1975, c. 499, §1 (NEW).

Maine Revised Statutes

Title 17-A: MAINE CRIMINAL CODE

Chapter 21: OFFENSES AGAINST PUBLIC ORDER

§501-A. DISORDERLY CONDUCT

1. A person is guilty of disorderly conduct if:

A. In a public place, the person intentionally or recklessly causes annoyance to others by intentionally:

(1) Making loud and unreasonable noises;

(2) Activating a device, or exposing a substance, that releases noxious and offensive odors; or

(3) Engaging in fighting, without being licensed or privileged to do so; [2007, c. 144, §3 (NEW).]

B. In a public or private place, the person knowingly accosts, insults, taunts or challenges any person with offensive, derisive or annoying words, or by gestures or other physical conduct, that would in fact have a direct tendency to cause a violent response by an ordinary person in the situation of the person so accosted, insulted, taunted or challenged; [2007, c. 144, §3 (NEW).]

C. In a private place, the person makes loud and unreasonable noise that can be heard by another person, who may be a law enforcement officer, as unreasonable noise in a public place or in another private place, after having been ordered by a law enforcement officer to cease the noise; or [2007, c. 144, §3 (NEW).]

D. In a private or public place on or near property where a funeral, burial or memorial service is being held, the person knowingly accosts, insults, taunts or challenges any person in mourning and in attendance at the funeral, burial or memorial service with unwanted, obtrusive communications by way of offensive, derisive or annoying words, or by gestures or other physical conduct, that would in fact have a direct tendency to cause a violent response by an ordinary person in mourning and in attendance at a funeral, burial or memorial service. [2007, c. 144, §3 (NEW).]

[2007, c. 144, §3 (NEW) .]

2. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Public place" means a place to which the public at large or a substantial group has access, including but not limited to:

(1) Public ways as defined in section 505;

(2) Schools and government-owned custodial facilities; and

(3) The lobbies, hallways, lavatories, toilets and basement portions of apartment houses, hotels, public buildings and transportation terminals. [2007, c. 144, §3 (NEW).]

B. "Private place" means any place that is not a public place. [2007, c. 144, §3 (NEW).]

[2007, c. 144, §3 (NEW) .]

3. Disorderly conduct is a Class E crime.

[2007, c. 144, §3 (NEW) .]

SECTION HISTORY
2007, c. 144, §3 (NEW).

Maine Revised Statutes

Title 17-A: MAINE CRIMINAL CODE

Chapter 9: OFFENSES AGAINST THE PERSON

§207. ASSAULT

1. A person is guilty of assault if:

A. The person intentionally, knowingly or recklessly causes bodily injury or offensive physical contact to another person. Violation of this paragraph is a Class D crime; or [2001, c. 383, §10 (NEW); 2001, c. 383, §156 (AFF).]

B. The person has attained at least 18 years of age and intentionally, knowingly or recklessly causes bodily injury to another person who is less than 6 years of age. Violation of this paragraph is a Class C crime. [2001, c. 383, §10 (NEW); 2001, c. 383, §156 (AFF).]

[2001, c. 383, §156 (AFF); 2001, c. 383, §10 (RPR) .]

2.

[2001, c. 383, §156 (AFF); 2001, c. 383, §10 (RP) .]

3. For a violation under subsection 1, the court shall impose a sentencing alternative that involves a fine of not less than $300, which may not be suspended.

[2005, c. 12, Pt. JJ, §1 (NEW) .]

SECTION HISTORY
1975, c. 499, §1 (NEW). 1985, c. 495, §4 (AMD). 2001, c. 383, §156 (AFF). 2001, c. 383, §10 (RPR). 2005, c. 12, §JJ1 (AMD).

---

other public places, Ch. 25.

Sec. 17-2. Prohibition against abusive solicitation.

(a) *Purpose.* It is the intent of this chapter to impose reasonable manner of limitations on solicitation, as defined herein, in order to protect the safety of the general public against abusive solicitation while respecting the constitutional right of free speech.

(b) *Definitions.* The following words or phrases as used in this chapter shall have the following meanings:

(1) "Solicitation" means any request made in person seeking an immediate donation of money or other item of value. A person shall not be deemed to be in the act of solicitation when he or she passively displays a sign or gives any other indication that he or she is seeking donations without addressing his or her solicitation to any specific person, other than in response to an inquiry by that person.

(2) "Donation" means a gift of money or other item of value and shall also include the purchase of an item for an amount far exceeding its value under circumstances where a reasonable person would understand that the purchase is in substance a gift.

(3) "Abusive solicitation" means to do one or more of the following while engaging in solicitation or immediately thereafter:

a. Blocking or impeding the passage of the person solicited;

b. Following the person solicited by proceeding behind, ahead or alongside of him or her after the person solicited declines to make a donation;

c. Threatening the person solicited with physical harm by word or gesture;

d. Abusing the person solicited with words which are offensive and inherently likely to provoke an immediate violent reaction;

e. Touching the solicited person without the solicited person's consent.

(c) *Penalties.* Any person who engages in abusive solicitation as defined herein shall be guilty of a violation of this article and, upon conviction, shall be punished by a fine of not less than twenty-five dollars ($25.00) nor more than one hundred fifty dollars ($150.00) for each offense. The city may also seek and the court may order injunctive relief designed to prevent any further violations of this article.
(Ord. No. 151-97, § 1, 12-1-97)

***Editor's note--**Ord. No. 151-97, § 1, adopted Dec. 1, 1997, repealed § 17-2, panhandling, and enacted new provisions as herein set out. Formerly, such section derived from § 703.1A of the 1968 Code; Ord. No. 408-71, adopted Aug. 16, 1971; Ord. No. 76-75, § 1, adopted Jan. 20, 1975; and Ord. No. 60-97, adopted Aug. 18, 1997.

Sec. 17-3. Handbills.

(a) No person shall throw, cast or cause or permit to be thrown or cast any handbill, circular, card, booklet, placard, paper, or any other object constituting litter, in or upon any street, way or public place; provided, however, it shall not be unlawful for any person to hand out or distribute handbills, or any other thing which is otherwise permitted by law, in any public place to any person willing to accept such handbill or other thing.

(b) No person shall place or attach any handbill, circular, card, booklet or placard on any automobile or other conveyance located in any public street or way, which is unoccupied at the time of such placement or, if occupied, without the consent of the occupant. No person shall place or attach any other object on any automobile or other conveyance located in any public street or way, which is unoccupied at the time of such placement or, if occupied, without the consent of the occupant, if such object could reasonably be expected to constitute litter if removed.

This paragraph does not apply to public service notices distributed by the city or a department of the city. Such notices shall be placed on the driver's side of the windshield or vehicle.

(c) No person shall post or otherwise attach any handbill, circular or paper sign to or upon any sidewalk, crosswalk, curb, curbstone, street lamppost, hydrant, tree, shrub, tree stake or guard, trash receptacle, railroad trestle, utility pole or wire appurtenance, or any light pole, public bridge, drinking fountain,

Print

PART I ADMINISTRATION OF THE GOVERNMENT

TITLE XVI PUBLIC HEALTH

CHAPTER 111B ALCOHOLISM

Section 8 Incapacitated persons; assistance to facility or protective custody

Section 8. Any person who is incapacitated may be assisted by a police officer with or without his consent to his residence, to a facility or to a police station. To determine for purposes of this chapter only, whether or not such person is intoxicated, the police officer may request the person to submit to reasonable tests of coordination, coherency of speech, and breath.

Any person assisted by a police officer to a police station shall have the right, and be informed in writing of said right, to request and be administered a breathalyzer test. Any person who is administered a breathalyzer test shall be presumed intoxicated if evidence from said test indicates that the percentage of alcohol in his blood is ten one hundredths or more and shall be placed in protective custody at a police station or transferred to a facility. Any person who is administered a breathalyzer test, under this section, shall be presumed not to be intoxicated if evidence from said test indicates that the percentage of alcohol in his blood is five one hundredths or less and shall be released from custody forthwith. If any person who is administered a breathalyzer test, under this section, and evidence from said test indicates that the percentage of alcohol in his blood is more than five one hundredths and is less than ten one hundredths there shall be no presumption made based solely on the breathalyzer test. In such instance a reasonable test of coordination or speech coherency must be administered to determine if said person is intoxicated. Only when such test of coordination or speech coherency indicates said person is intoxicated shall he be placed in protective custody at a police station or transferred to a facility.

Any person presumed intoxicated and to be held in protective custody at a police station shall, immediately after such presumption, have the right and be informed of said right to make one phone call at his own expense and on his own behalf. Any person assisted by a police officer to a facility under this section shall have the right to make one phone call at his own expense on his own behalf and shall be informed forthwith upon arriving at the facility of said right. The parent or guardian of any person, under the age of eighteen, to be held in protective custody at a police station shall be notified forthwith upon his arrival at said station or as soon as possible thereafter.

If any incapacitated person is assisted to a police station, the officer in charge or his designee shall notify forthwith the nearest facility that the person is being held in protective custody. If suitable treatment services are available at a facility, the department shall thereupon arrange for the transportation of the person to the facility in accordance with the provisions of section seven.

No person assisted to a police station pursuant to this section shall be held in protective custody against his will; provided, however, that if suitable treatment at a facility is not available, an incapacitated person may be held in protective custody at a police station until he is no longer incapacitated or for a period of not longer than twelve hours, whichever is shorter.

A police officer acting in accordance with the provisions of this section may use such force as is reasonably necessary to carry out his authorized responsibilities. If the police officer reasonably believes that his safety or the safety of other persons present so requires, he may search such person and his immediate surroundings, but only to the extent necessary to discover and seize any dangerous weapons which may on that occasion be used against the officer or other person present; provided, however, that if such person is held in protective custody at a police station all valuables and all articles which may pose a danger to such person or to others may be taken from him for safekeeping and if so taken shall be inventoried.

A person assisted to a facility or held in protective custody by the police pursuant to the provisions of this section, shall not be considered to have been arrested or to have been charged with any crime. An entry of custody shall be made indicating the date, time, place of custody, the name of the assisting officer, the name of the officer in charge, whether the person held in custody exercised his right to make a phone call, whether the person held in custody exercised his right to take a breathalyzer test, and the results of the breathalyzer test if taken, which entry shall not be treated for any purposes, as an arrest or criminal record.

TITLE XII
PUBLIC SAFETY AND WELFARE

CHAPTER 172-B
ALCOHOLISM AND ALCOHOL ABUSE

Section 172-B:3

172-B:3 Treatment and Services. –

I. When a peace officer encounters a person who, in the judgment of the officer, is intoxicated as defined in RSA 172-B:1, X, the officer may take such person into protective custody and shall take whichever of the following actions is, in the judgment of the officer, the most appropriate to ensure the safety and welfare of the public, the individual, or both:

(a) Assist the person, if he consents, to his home, an approved alcohol treatment program, or some other appropriate location; or

(b) Release the person to some other person assuming responsibility for the intoxicated person; or

(c) Lodge the person in a local jail or county correctional facility for said person's protection, for up to 24 hours or until the keeper of said jail or facility judges the person to be no longer intoxicated.

II. When a peace officer encounters a person who, in the judgment of the officer, is incapacitated as defined in RSA 172-B:1, IX, the officer may take such person into protective custody and shall take whichever of the following actions is, in the judgment of the officer, the most appropriate to ensure the safety and welfare of the public, the individual, or both:

(a) Transport the person to an approved alcohol treatment program with detoxification capabilities or to the emergency room of a licensed general hospital for treatment, except that if a designated alcohol counselor exists in the vicinity and is available, the person may be released to the counselor at any location mutually agreeable between the officer and the counselor. The period of protective custody shall end when the person is released to a designated alcohol counselor, a clinical staff person of an approved alcohol treatment program with detoxification capabilities, or a professional medical staff person at a licensed general hospital emergency room. The person may be released to his own devices if at any time the officer judges him to be no longer incapacitated. Protective custody shall in no event exceed 24 hours.

(b) Lodge the person in protective custody in a local jail or county correctional facility for up to 24 hours, or until judged by the keeper of the facility to be no longer incapacitated, or until a designated alcohol counselor has arranged transportation for the person to an approved alcohol treatment program with detoxification capabilities or to the emergency room of a licensed general hospital.

III. No person shall be lodged in a local jail or county correctional facility under paragraph II unless the person in charge of the facility, immediately upon lodging said person in protective custody, contacts a designated alcohol counselor, a clinical staff person of an approved alcohol treatment program with detoxification capabilities or a professional medical staff person at a licensed general hospital emergency room to determine whether said person is indeed incapacitated. If, and only if none of the foregoing are available, such a medical or clinical determination shall be made by a registered nurse or registered emergency medical technician on the staff of the detention facility.

IV. No local jail or county correctional facility shall refuse to admit an intoxicated or incapacitated person in protective custody whose admission is requested by a peace officer, in compliance with the conditions of this section.

V. Notwithstanding any other provisions of law, whenever a person under 18 years of age who is judged by a peace officer to be intoxicated or incapacitated and who has not been charged with a crime is taken into protective custody, if no needed treatment is available, his parent or guardian shall be immediately notified and such person may be held at a police station or a local jail or a county correctional facility in a room or ward separate from any adult or any person charged with juvenile delinquency until the arrival of his parent or guardian. If such person has no parent or guardian in the area, arrangements shall be made to house him according to the provisions of RSA 169-D:17.

VI. If an incapacitated person in protective custody is lodged in a local jail or county correctional facility his family or next of kin shall be notified as promptly as possible. If the person requests that there be no notification, his request shall be respected.

VII. A taking into protective custody under this section is not an arrest, however nothing in this section shall be construed so as to prevent an officer or jailer from obtaining proper identification from a person taken into protective custody or from conducting a search of such person to reduce the likelihood of injury to the officer or jailer, the person taken into protective custody, or others. No unnecessary or unreasonable force or means of restraint may be used in

detaining any person taken into protective custody.

VIII. Peace officers or persons responsible for supervision in a local jail or designated alcohol counselors who act under the authority of this section are acting in the course of their official duty and are not criminally or civilly liable therefor, unless for gross negligence or willful or wanton injury.

Source. 1979, 378:2. 1988, 89:20. 1989, 285:10, eff. July 28, 1989.