

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

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

Plaintiffs,

v.

CITY OF PORTLAND,

Defendant.

Civil Action No. _____

COMPLAINT

INJUNCTIVE RELIEF REQUESTED

Plaintiffs Michael W. Cutting, Wells Staley-Mays, and Alison E. Prior (collectively, “Plaintiffs”), by and through their attorneys, hereby allege as follows:

INTRODUCTION

1. This is a freedom of expression case brought under the Federal Civil Rights Act, 42 U.S.C. § 1983; the Maine Civil Rights Act, 5 M.R.S. § 4682; the First and Fourteenth Amendments to the United States Constitution; and Article I § 4 of the Maine Constitution for declaratory and injunctive relief against the City of Portland (the “City”), arising out of the City’s recent adoption of Portland City Code Ch. 25, Art. II, § 25-17(b) (the “ordinance”). The City Council approved the ordinance in July 2013 as part of an attempt to reduce “panhandling”—the solicitation of donations by the homeless—within Portland, and purportedly to address concerns about the safety of panhandlers who solicit money while standing in medians and that of vehicle occupants. Although framed as an effort to protect public safety, the ordinance prohibits a significant amount of peaceful, non-threatening, and non-aggressive speech from taking place on long-used traditional public fora, and hence is overly broad.

2. The ordinance prohibits standing, sitting, staying, driving, and parking in medians, with an exception for pedestrians who are using the median as they cross from one side of the street to the other. A separate section defines a median as *any* “paved or planted area of public right-of-way, dividing a street or highway into lanes according to the direction of travel.” The ordinance was initially rejected by the City Council in July 2012, but, in response to increased complaints about panhandling and its alleged detrimental effects on the City’s image and economic interests, it was brought up again for a vote in July 2013, when it was approved by a vote of 6 to 0. The ordinance went into effect in August 2013.

3. Plaintiffs are individuals who regularly solicit donations and engage in political

and other protected speech in areas defined as “medians” under the ordinance. In adopting the ordinance, the City has significantly restricted Plaintiffs’ constitutionally protected speech, in violation of the First and Fourteenth Amendments to the United States Constitution and Article I of the Maine Constitution.

4. Rather than narrowly tailoring the ordinance to the stated goal of protecting public safety, the City has instead chosen to proscribe a wide range of expression that traditionally has occurred on medians without implicating any safety concerns. Under the ordinance, individuals, like Plaintiffs Michael Cutting and Wells Staley-Mays, who wish to share their political opinions with others, are prohibited from campaigning on medians that have traditionally been used for just this type of political speech. Those who depend on assistance from strangers for basic necessities like food and shelter, like Plaintiff Alison Prior, now risk arrest if they stand peacefully and quietly on a median with a sign that says, “Please Help.” Politicians and their supporters are prohibited from standing on medians holding election signs, or even from entering the medians to post election signs. Nonprofit organizations are now prohibited from standing in medians to ask passersby for donations at any time, and college students cannot use medians to advertise fundraising events.

5. In addition, the ordinance is unconstitutionally overbroad because it prohibits engaging in communicative activities on medians regardless of the medians’ size and other features that in many cases render them eminently suitable—and, indeed, seemingly designed—for just such activity.

6. For example, as written, the ordinance forbids standing on the median that extends between the two directions of traffic on Franklin Street from Marginal Way to Middle Street in Portland. This median is approximately fifty feet wide, planted with grass and trees,

and has traditionally been used for a variety of communicative activities:



7. Likewise, the ordinance on its face makes it illegal to remain on the median at Fore Street and Silver Street in Portland, including for the purpose of engaging in speech, despite the fact that this median contains a park bench, grass, and decorative plants:



8. Indeed, the ordinance is so overbroad that, on its face, it would prohibit someone from entering the medians on Congress Street immediately in front of the Portland City Hall, which are bounded on either side by cross walks, are more than a car's width across (providing ample room to stand safely), and are ideally positioned to protest city government activity:



9. Plaintiffs seek a judgment under 42 U.S.C. § 1983, 28 U.S.C. § 2201, and 5 M.R.S. §§ 4682-4683, that the ordinance, Portland City Code § 25-17(b), is an unconstitutional violation of Plaintiffs' rights to freedom of speech under the First and Fourteenth Amendments to the United States Constitution and Article I of the Maine Constitution. Plaintiffs also seek preliminary and permanent injunctive relief in the form of an order enjoining the City from applying or enforcing this ordinance.

THE PARTIES

10. Plaintiff Michael W. Cutting is a resident of Portland.

11. Plaintiff Wells Staley-Mays is a resident of Portland.

12. Plaintiff Alison E. Prior is a resident of Portland.

13. The Defendant City of Portland (the “City”) is a municipal corporation incorporated under the laws of Maine.

JURISDICTION AND VENUE

14. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, and 1988, as this action arises under the Constitution and laws of the United States, including 42 U.S.C. § 1983. The Court also has jurisdiction to grant declaratory relief pursuant to 28 U.S.C. § 2201. The Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367.

15. This Court has personal jurisdiction over the City because it is a resident of Maine.

16. Venue in this district is proper under 28 U.S.C. § 1391(b)(1) and (2) because the City is located within this district, and a substantial part of the events or omissions giving rise to the claim occurred within this district.

FACTS

The Challenged Ordinance

17. In June 2012, following an increase in the homeless population in Portland, City Councilor Ed Suslovic requested that the City Code be amended to address the purported public safety issue of people loitering in medians. He requested that the Corporate Counsel for the City draft an amendment to address the issue in time for the June meeting of the City Council committee he leads: the Public Safety, Health and Human Services Committee.

18. At the June 21, 2012 meeting of that Committee, Mr. Suslovic “indicated a

concern for panhandlers etc. who work on median strips in traffic,” and “discussed a few of the intersections where he sees panhandling occurring and subjects walking into traffic etc.” The Committee voted 3 to 0 to add language to chapter 25 of the City Code that would include the sentence, “Police have the ability to move someone from the median strip.”

19. At the July 16, 2012 meeting of the full City Council, the proposed amendment to section 25-17 was read. At the Council meeting, several individuals and representatives of organizations spoke against the amendment and it failed by a vote of 3 to 6.

20. Homelessness continued to increase over the subsequent months. Some residents expressed concern about how panhandling would impact Portland’s aesthetic appearance, complaining to the City Council about its vote to “allow[] [p]anhandlers at our intersections.” In response to one complainant, Mayor Michael Brennan referred to the July 2012 amendment and said that the “proposal may be revisited, but there is not any immediate plan to do so.” He also reassured the complainant that the Chief of Police was “making an effort to enforce current laws in order to address some of the issues you mentioned.”

21. Another citizen complained that “these folks that hang out with their cardboard signs . . . make many people uncomfortable and we see it day after day . . . It’s a sty on your city.” The Chief of Police responded that his “hands [we]re tied,” and that the “Police Department attempted to get enacted a new ordinance [in 2012] to deal with the median strip portion of this growing problem but it was voted down by the city council.”

22. In June 7, 2013, the Neighborhood Prosecutor prepared a two-and-a-half-page memorandum addressing the legality of a new proposed ordinance amendment that would ban all people from being in any median strip at any time for any reason other than crossing the street. The memorandum acknowledged that “panhandling is protected by the First Amendment” but

stated that “Portland would have a very strong argument that this ordinance amendment is still valid.”

23. On June 11, 2013, the Public Safety, Health and Human Services Committee re-considered the new proposed amendment. The Neighborhood Prosecutor explained that panhandling was protected by the First Amendment, “ran down the definitions,” and stated that she “believe[d] an ordinance such as this would pass.”

24. The City Council considered the proposal on July 15, 2013. The amendment passed by a vote of 6 to 0, and went into effect on August 15, 2013.

25. Section 25-17(b) now provides:

No person shall stand, sit, stay, drive or park on a median as defined in Section 25-118, except that pedestrians may use median strips only in the course of crossing from one side of the street to the other.

26. Section 25-118 defines “Median strip” as:

[A] paved or planted area of public right-of-way, dividing a street or highway into lanes according to the direction of travel.

The Plaintiffs

27. Plaintiff Michael W. Cutting has been a resident of Portland since 1991. For the past fifteen years, he has stood on medians in the City holding large signs that protest various governmental actions and American military action abroad. He strategically chooses to stand in particular median locations at particular times in order to reach the largest audience. He has tried standing on sidewalks to convey his message but must move constantly to avoid oncoming pedestrians, and his sign can be read by far fewer people.

28. Mr. Cutting does not stand in the street and has never been endangered by standing on medians. He appeared at the June 17, 2013 City Council meeting to oppose the

ordinance and to explain that it would hamper his ability to exercise his free speech rights.

29. In August 2013, a few days after the ordinance went into effect, Mr. Cutting went to City Hall. He went to ask the Mayor what would happen if he held a sign on the median protesting the sentencing of Private Bradley (now Chelsea) Manning for his role in WikiLeaks. A City Hall receptionist told Mr. Cutting that a \$100 civil fine would be imposed if Mr. Cutting chose to protest on a City median. Since the ordinance was passed, Mr. Cutting has stopped standing on any median in Portland because he fears a fine or arrest:



30. Plaintiff Wells Staley-Mays has lived in Portland for the past 17 years. He has held large political protest signs at various locations across Portland during that time, including in medians, that bear messages critical of U.S. military involvement abroad. Mr. Staley-Mays has found that standing on medians with signs is the best means of conveying his political views to the widest audience. On a median, Mr. Staley-Wells can put his message in large letters on both sides of his signs, allowing him to get the attention of vehicle occupants traveling in both directions. Mr. Staley-Mays also has stood on city squares and sidewalks with his signs, but he

has found that when standing in those areas he cannot reach as many people with his message as when he stands on a median:



31. During all his years standing on medians with political signs, Mr. Staley-Mays has never been hit by a car, never interfered with traffic, and never felt his safety threatened. Mr. Staley-Mays is currently organizing protests against possible U.S. military action in Syria. He is concerned, however, that the new ordinance will restrict this protest and deter others from participating in the protest.

32. Plaintiff Alison E. Prior is 29 years old and has been a resident of Portland for six years. She has been homeless since January 2013 and during that time has lived at the Preble Street shelter and with friends. Ms. Prior was most recently employed at a convenience market but lost her job in February 2013.

33. Ms. Prior solicited passersby for money from a median during the Christmas season of 2012, stopped for a short while, then began again after losing her job. She relies on the

money she receives from panhandling to pay for food and other necessities. In approximately March of 2013 Ms. Prior began panhandling more regularly, from twice a week to every day. Prior to passage of the ordinance, she generally stood on the median on the north side of the intersection of Marginal Way and Preble Street in Portland, holding a cardboard sign that said, “Homeless, hungry, and sober . . . Please help”:



34. Ms. Prior usually panhandles from 1 p.m. to 6 p.m., during which time she receives between ten and twenty-five dollars. When she panhandles, Ms. Prior does not speak to vehicle occupants or otherwise interact with them unless they initiate by holding out money for her. On rare occasions before the ordinance went into effect, Ms. Prior would attempt to panhandle from the sidewalk side of the street. She made significantly less money doing so and thus preferred the Marginal Way median. Since the ordinance came into effect, Ms. Prior has not panhandled on a median in Portland because she fears legal consequences.

35. Mr. Cutting, Mr. Staley-Mays, and Ms. Prior have always felt safe engaging in their protected speech activities on Portland medians. They have never seen or heard of anyone getting hurt while engaging in protected speech activities on medians or causing any traffic accidents of any kind.

The Use Of Medians In Portland For Speech Activities

36. In addition to the conduct by plaintiffs described above, street medians in Portland have, for many years, been used by numerous residents for a variety of communicative activities, including political speech, panhandling, solicitation of donations to non-profits, and standing with or posting election signs.

37. Portland residents have used medians to show support for civil rights issues. For example, in 2007, members of the American Civil Liberties Union stood on a median on Franklin Street near Marginal Way to commemorate the anniversary of *Roe v. Wade*.



38. Political candidates and their supporters regularly use medians to promote their campaigns, both by standing with and posting election signs. For example, as depicted below, Ethan Strimling, who served as a state senator from 2002 to 2009, posted campaign signs on the Franklin Street median.



39. All of this activity has virtually ceased since section 25-17(b) came into effect.

The Ordinance Is An Unconstitutional Restriction On Speech

40. The United States Supreme Court “has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and [is] not lightly used.” *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939) (footnote omitted). “It has become axiomatic that ‘[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.’” *United States v. Robel*, 389 U.S. 258, 265 (1967) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

41. “In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which ‘have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.’” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496,

515 (1939). “In these quintessential public forums, the government may not prohibit all communicative activity.” *Id.*

42. While the state may enforce content-neutral regulations on the use of traditional public fora, such regulations must be “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” *Id.*

43. To satisfy the narrow tailoring requirement, “the Government . . . bears the burden of showing that the remedy it has adopted does not ‘burden substantially more speech than is necessary to further the government’s legitimate interests.’” *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). Restrictions “not only must . . . serve a ‘sufficiently strong’ or ‘significant governmental interest,’ they must significantly serve that interest.” *John Donnelly & Sons v. Campbell*, 639 F.2d 6, 8 (1st Cir. 1980), *aff’d*, 453 U.S. 916 (1981).

44. Alternative channels that “involve more cost and less autonomy” to speakers, that “are less likely to reach persons not deliberately seeking” the protected speech, and that “may be less effective media for communicating the message,” do not constitute ample alternative channels for protected speech. *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 93 (1977).

45. Moreover, “when statutes regulate or proscribe speech and when ‘no readily apparent construction suggests itself as a vehicle for rehabilitating the statutes in a single prosecution,’ . . . the transcendent value to all society of constitutionally protected expression is deemed to justify allowing ‘attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn

with the requisite narrow specificity.” *Gooding v. Wilson*, 405 U.S. 518, 520-21 (1972) (internal citations omitted).

46. The overbreadth doctrine “is predicated on the sensitive nature of protected expression.” *New York v. Ferber*, 458 U.S. 747, 768 (1982). The doctrine “is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.” *Gooding*, 405 U.S. at 521.

47. Here, the City’s newly adopted ordinance is, on its face, overly broad and unconstitutionally infringes Plaintiffs’ rights to exercise freedom of speech and expression in traditional public fora by restricting a substantial volume of constitutionally protected speech without adequate justification.

48. For example, the ordinance prohibits all activity on medians, regardless of their size, other than brief use to pass from one side of the street to the other. Such a broad spatial restriction on political speech, panhandling, solicitation of donations, electioneering, and all other protected forms of speech is not necessary to address whatever legitimate concerns may exist about traffic safety.

49. Likewise, by depriving individuals of the use of medians to engage in protected speech, Section 25-17(b) forces individuals to take their speech to sidewalks and city squares, which are demonstrably less effective channels for communicating protected speech. Sidewalks are not available on all streets, and even where they exist, they may not be as visible to street traffic as medians.

50. Thus, individuals, including residents such as Plaintiffs Michael W. Cutting and Wells Staley-Mays, can no longer stand on the corner of Franklin Street and Marginal Way or

Forest Avenue and Marginal Way, as they have for years, holding signs that contain core First Amendment Speech.

51. Candidates for election cannot enter the median to place a sign promoting their candidacy, as they have for years.

52. Plaintiffs are prohibited under the ordinance from holding political signs while standing in any Portland median, placing political signs in any Portland median, or panhandling in any Portland median, even though each of these activities is peaceful and non-intrusive, and does not threaten the safety of any individual or the public peace.

53. Residents such as Plaintiff Alison E. Prior can no longer stand on the median, holding a sign asking for help from motorists stopped at a traffic light in a non-aggressive, non-risky manner.

54. Because the ordinance restricts a substantial amount of constitutionally protected speech without sufficient justification, it cannot survive review under the First and Fourteenth Amendments to the United States Constitution and Article I of the Maine State Constitution.

CLAIMS FOR RELIEF

Count I **Violation of 42 U.S.C. § 1983**

55. Plaintiffs hereby re-allege Paragraphs 1 through 54 as though fully set forth herein.

56. 42 U.S.C. § 1983 provides that “[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or

other proper proceeding for redress.”

57. The First Amendment to the United States Constitution, as applicable to the States through the Fourteenth Amendment, prohibits the making of any law that “abridg[es] the freedom of speech.”

58. As described above, the ordinance, on its face, unconstitutionally infringes or imminently threatens to infringe Plaintiffs’ rights under the First and Fourteenth Amendments, including their rights to freedom of speech and expression.

59. The ordinance is the official policy of the defendant, in that it was duly adopted by the Portland City Council.

60. By acting and threatening to act under the color of state law to deprive Plaintiffs of rights guaranteed by the Constitution and laws of the United States, the City and its Police Department have violated and continue to violate 42 U.S.C. § 1983.

61. As a result, Plaintiffs are entitled to preliminary and permanent injunctive relief, a declaratory judgment, costs and attorneys’ fees, and such other relief as the Court deems just.

Count II
Violation of Maine Civil Rights Act, 5 M.R.S. § 4682

62. Plaintiffs hereby re-allege Paragraphs 1 through 54 as though fully set forth herein.

63. The Maine Civil Rights Act, 5 M.R.S. § 4682, provides that “[w]henver any person, whether or not acting under color of law, intentionally interferes or attempts to intentionally interfere by physical force or violence against a person, damage or destruction of property or trespass on property or by the threat of physical force or violence against a person, damage or destruction of property or trespass on property with the exercise or enjoyment by any other person of rights secured by the United States Constitution or the laws of the United States

or of rights secured by the Constitution of Maine or laws of the State or violates section 4684-B, the person whose exercise or enjoyment of these rights has been interfered with, or attempted to be interfered with, may institute and prosecute in that person's own name and on that person's own behalf a civil action for legal or equitable relief.”

64. The First Amendment to the United States Constitution, as applicable to the States through the Fourteenth Amendment, prohibits the making of any law that “abridg[es] the freedom of speech.”

65. Article I, sec. 4 of the Maine Constitution affirmatively grants that, “[e]very citizen may freely speak, write and publish sentiments on any subject, being responsible for the abuse of this liberty.

66. As described above, by enacting Section 25-17(b), the City and its Police Department are banning the Plaintiffs’ from exercising their right to stand, sit or stay on City medians to speak freely on any subject as secured by Article 1, sec. 4 of the Main Constitution, and the First and Fourteenth Amendments to the United States Constitution.

67. As a result, Plaintiffs are entitled under 5 M.R.S. §§ 4682-4683, to preliminary and permanent injunctive relief, a declaratory judgment, costs and attorneys’ fees, and such other relief as the Court deems just.

Count III
Declaratory Judgment

68. Plaintiffs hereby re-allege Paragraphs 1 through 54 as though fully set forth herein.

69. 28 U.S.C. § 2201(a) provides that “[i]n a case of actual controversy within its jurisdiction, . . . any court of the United States, upon the filing of an appropriate pleading, may

declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”

70. As described above, Plaintiffs allege that Section 25-17(b) violates the First and Fourteenth Amendments to the United States Constitution and Article I of the Maine State Constitution.

71. Upon information and belief, the City and its Police Department have enforced and plan to continue enforcing Section 25-17(b).

72. There is an actual controversy between the parties as to whether Section 25-17(b) violates the United States and Maine Constitutions.

73. Plaintiffs seek a declaration that Section 25-17(b) is unconstitutional and violates Plaintiffs’ rights to freedom of speech under the First and Fourteenth Amendments to the United States Constitution and Article I of the Maine State Constitution.

* * * * *

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request the following relief:

- a) A declaratory judgment holding that the challenged ordinance violates the United States Constitution, including the First and Fourteenth Amendments to the Constitution, and the Maine State Constitution, including Article I, on their face and as applied to Plaintiffs;
- b) A preliminary and permanent injunction prohibiting the City from enforcing the challenged ordinance;
- c) An award to Plaintiffs of costs and attorneys’ fees; and
- d) Any such other and further relief that this Court deems just and proper.

Respectfully submitted,

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