UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KELSEY NICOLE MCCAULEY, a.k.a. KELSEY BOHN, Plaintiff, – Versus – CITY OF NEW ORLEANS, et al. Defendants.	NUMBER: 12-cv-2334 JUDGE: MAGISTRATE JUDGE:

MEMORANDUM IN SUPPORT OF TRO/PRELIMINARY INJUNCTION

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Introduction

Plaintiff Kelsey McCauley is a member of Raven Ministries, a religious congregation that regularly preaches the Gospel on Bourbon Street in the French Quarter. She and her fellow worshipers recently were told by the New Orleans Police Department that their message was no longer welcome on Bourbon, under §54-419(c)(4) of the City's "aggressive solicitation" ordinance, and that if they appeared and preached again, they would be arrested.

Bourbon Street is a traditional public forum – the area in which public speech is afforded the highest possible First Amendment protection. And §54-419(c)(4) is a viewpoint-discriminatory, content-based restriction on speech – the most oppressive measure a government can bring to bear on the First Amendment. The latter can almost never be imposed in the former.

So, McCauley brings this request for an immediate temporary restraining order restoring her right to preach on Bourbon Street. This Court has granted such orders in the past under similar circumstances, s*ee Howell v. City of New Orleans*, 844 F.Supp. 292, 294 (E.D. La. 1994) (acknowledging that Jackson Square is a traditional public forum and granting a TRO against content-based restrictions of First Amendment activity there), and it should not hesitate to do so again.

Facts

Every Friday and Saturday night, Pastor Troy Bohn and various members of his congregation, known collectively as Raven Ministries, assemble on the 500 Block of Bourbon Street to preach the Gospel. They gather in the middle of the thoroughfare, which is closed to cars, to convey a message of peace and compassion.

They ask passersby if they are familiar with the life and teachings of Jesus Christ, invite listeners to share in Christ's message, and evangelize to persons who may seek spiritual redemption. They typically display a large cross emblazoned with the words "Raven Street Church," and they usually hold signs or wear t-shirts that read "I Love Jesus," "Ask Me How Jesus Changed My Life," or similar messages. While they sometimes have spirited debate with listeners who chose to engage them, they do so peacefully. They do not preach hate or intolerance, they do not condemn those with whom they disagree, they do not use obscene language or images, and they do not physically pursue, harass or touch passersby. *They do not solicit donations of any kind*[1]. They make every effort to comply with applicable ordinances and the demands of police, and prior to the events that gave rise to this action, no member of Raven Ministries had ever been penalized or cited for his or her French Quarter preaching activities.

Plaintiff Kelsey Nicole McCauley is a member of Raven Ministries. Once a homeless teenager living on the streets of New Orleans, McCauley joined Pastor Troy's congregation last November after hearing one of its ministers speak in the Quarter. Troy and his wife also welcomed McCauley into their home, and McCauley, now 21, lives with them as family, having turned her life around with the help of her faith. She regularly accompanies Troy and the rest of his ministry to their

[1] The ordinance at issue here defines solicitation as "any plea made in person where: (a) A person by vocal appeal requests an immediate donation of money or other item from another person; or (b) A person verbally offers or actively provides an item or service of little or no value to another in exchange for a donation, under circumstances where a reasonable person would understand that the transaction is in substance a donation. However, solicitation shall not include the act of passively standing, sitting, or engaging in a performance of art with a sign or other indication that a donation is being sought, without any vocal request other than in response to an inquiry by another person. §54-419(b)(1).

Bourbon Street assemblies, where she speaks passionately about her spiritual awakening and religious convictions.

On Friday, September 14, 2012, Pastor Troy and several members of his congregation were at their usual spot on the 500 Block of Bourbon Street, when they were arrested by the New Orleans Police Department for violating §54-419(c)(4) of the City's "aggressive solicitation" ordinance. That part reads:

> §54-419(c)(4) - No person, *in any public or private place*, *shall use offensive, obscene or abusive language*, or grab, follow or engage in conduct which reasonably tends to arouse alarm or anger in others, or walk, stand, sit, lie, or place an object in such a manner as to block passage by another person or a vehicle, or to require another person or a driver of a vehicle to take evasive action to avoid physical contact. A person shall be guilty of obstructive interference if, in a public place, he intentionally obstructs pedestrian or vehicular traffic. *It shall be prohibited for any person or group of persons to loiter or congregate on Bourbon Street for the purpose of disseminating any social, political or religious message between the hours of sunset and sunrise*."

(Emphasis added.)

NOPD officers ushered Troy, McCauley and the rest of the congregation off the street, arrested Troy and a few others, and told those not arrested not to come back. Troy and the other arrestees were taken to the police station. McCauley, who had not been arrested, nonetheless accompanied Troy. Once at the station, Troy and a few others were cited, but McCauley was sent home with a warning and has no pending charge. All were released a few hours later with the admonition that if they appeared again, they again would be arrested.

McCauley deeply wants to return to Bourbon Street to continue speaking to the public about her faith – indeed, she feels that her spiritual commitment and religious calling compel her to go out again this coming weekend, as she has nearly

every weekend for almost a year – but she saw her family and friends arrested and taken away in handcuffs, and has been expressly told by police that she will suffer the same treatment if she returned. Eager to vindicate her First Amendment rights and those of her family and congregation, she brings this application.

Legal Argument

Preliminary relief is appropriate when a petitioner demonstrates "(1) a substantial likelihood of success on the merits, (2) a substantial threat of irreparable injury if the injunction is not issued, (3) that the threatened injury if the injunction is denied outweighs any harm that will result if the injunction is granted, and (4) that the grant of an injunction will not disserve the public interest." *Speaks v. Kruse*, 445 F.3d 396, 399-400 (5th Cir. 2006). "When analyzing the degree of 'success on the merits' that a movant must demonstrate to justify injunctive relief, the Fifth Circuit employs a sliding scale involving the balancing the hardships associated with the issuance or denial of a preliminary injunction with the degree of likelihood of success on the merits." *McWaters v. Federal Emergency Mgmt. Agency*, 408 F. Supp. 2d 221, 228 (E.D. La. 2006). "Moreover, when the other factors weigh in favor of an injunction, a showing of some likelihood of success on the merits will justify temporary injunctive relief." *Id*. As set forth below, McCauley easily meets the relevant standard.

I. McCauley is likely to succeed on the merits of her claims.

§54-419(c)(4) is nothing more than a heavyhanded attempt by the City of New Orleans to selectively regulate the cultural, political and religious tone on Bourbon Street. It is first and foremost a content-based, viewpoint-discriminatory

measure that stifles religious speech and assembly in a traditional public forum. Moreover, even if the ordinance were content neutral – and it plainly is not – it still would be an improper time, place or manner restriction on otherwise protected First Amendment activities. The ordinance is both unlawfully vague and overbroad, facially and as-applied. Each of these points independently undermines subsection (c)(4) of the ordinance[2], and each is addressed in turn.

A. §54-419(c)(4) is a content-based, viewpoint discriminatory restriction of speech in a traditional public forum.

§54-419(c)(4) prohibits one or more individuals from loitering or congregating on Bourbon Street, between the hours of sunset and sunrise, to disseminate a "social, political or religious" message. Only "social, political or religious" messages are prohibited; messages without "social, political or religious" character are allowed. As set forth below, Bourbon Street is a quintessential public forum and §54-419(c)(4) is a classic unconstitutional content-based, and viewpoint discriminatory, restriction on speech.

i. Bourbon Street is a traditional public forum, in which content-based regulations are subject to strict scrutiny.

There are three classifications of fora. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Doe v. Santa Fe Independent School Dist.*, 168 F.3d 806, 819 (5th Cir. 1999). The first category, the traditional public forum, consists of places like public streets and parks, "which by long tradition or by

[2] Plaintiff challenges only Part (c)(4) of §54-419.

government fiat have been devoted to assembly and debate." *Service Employees, Local 5 v. City of Houston*, 595 F.3d 588, 595 (5th Cir. 2010), *quoting Perry* at 45. In traditional public fora, "government entities are strictly limited in their ability to regulate private speech...." *Service Employees*, *supra*, *quoting Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009). For the government to enforce a content-based exclusion in a traditional public forum, the exclusion must survive strict scrutiny; that is, the government must show that its regulation is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* This is an almost insurmountable obstacle, as it has long been the case that content-based restrictions on speech in public fora are presumptively invalid. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992); *Rangra v. Brown*, 566 F.3d 515 (5th Cir. 2009).

In keeping with that standard, the federal courts of this State have not hesitated to strike down content-based restrictions in traditional public fora. *See*, *e.g.*, *Howell*, *supra*, 844 F.Supp. at 294 (acknowledging that Jackson Square is a traditional public forum and granting a TRO against content-based restrictions of First Amendment activity there); *Acorn v. City of New Orleans*, 606 F.Supp. 16, 23 (E.D. La. 1984) (striking down a New Orleans anti-solicitation ordinance because solicitations were made in the street, a traditional public forum).

Almost every night of the week, Bourbon Street attracts not only hundreds of revelers and partygoers, but also preachers and protesters both itinerant and local. It sees numerous cultural and music festivals throughout the year, including French Quarter Fest, the Krewe de Vieux Parade, and Southern Decadence – the

festival a few weeks ago at which several other religious speakers not related to this matter were arrested – and of course, every Mardi Gras, it becomes the focal point of one of the largest celebrations in the United States. There can be no doubt that Bourbon Street is a traditional public forum. *Howell*, *supra*, 844 F.Supp. at 294; *Trebert v. City of New Orleans,* 2005 WL 273253 (E.D. La. 2005) ("Jackson Square in the French Quarter is a quintessential public forum"); *International Action Center v. City of New York,* 522 F.Supp.2d 679 (S.D.N.Y. 2007) ("Manhattan's Fifth Avenue, as all public roadways, is a traditional public forum for the expression of First Amendment rights.") (*citing Shuttlesworth v. Birmingham*, 394 U.S. 147, 152 (1969)). Because Bourbon Street is undoubtedly a traditional public forum, any content-based regulation of speech there is subject to strict scrutiny.

ii. §54-419(c)(4) is content-based and viewpoint-discriminatory.

§54-419(c)(4) is not content-neutral, as it bars speech and assembly for the purpose of spreading *social, political or religious messages* while allowing speech and assembly for other purposes. Indeed, because only messages of a social, political or religious perspective are restricted, the section imposes a particularly egregious viewpoint restriction. Such restrictions are subject to strict scrutiny, and this one cannot survive.

Viewpoint discrimination is "discrimination because of the speaker's specific motivating ideology, opinion, or perspective." *Rosenberger v. Rector & Visitors Univ. Va*, 515 U.S. 819, 829 (1995). It is "presumed impermissible when directed against speech otherwise within the forum's limitations." *Id*. Moreover, it is not limited to

exclusion of one specific message in favor of another; it can also be found where the government opens a forum to all viewpoints except those from a certain perspective. *See Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 393-394 (1993). In *Lamb's Chapel*, the Supreme Court addressed a public school policy permitting the use of after-school facilities for all purposes except religious ones. *Id.* at 387. A local church had challenged the policy after the school denied its request to show a film that presented a religious perspective on child-rearing. *Id.* at 388-389. The school had not rejected the church's film in favor of other films on the same subject; it simply rejected the film because it was religious and its policy prohibited the use of school facilities for religious purposes. *Id.* at 389.

The Supreme Court struck down the policy unanimously, noting that "the film involved here no doubt dealt with a subject otherwise permissible under [school policy], and its exhibition was denied solely because the film dealt with the subject from a religious standpoint." *Id.* at 394. The Court then reiterated the simpler, broader principle: "The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" *Id.*, *quoting City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

Here, §54-419(c)(4) imposes a similar restriction: All viewpoints may be shared on Bourbon Street, except social, political or religious ones. Thus, religious preaching and lively political speech are banned, but public parade of scantily-clad dancers and bawdy Krewe de Vieux floats, which often poke fun at religion and politics, are permitted. Under the plain language of §54-419(c)(4), it might be perfectly okay for any "person or group of persons to loiter or congregate" on

Bourbon Street between the hours of sunset and sunrise for the purpose of disseminating news about "Huge Ass Beers" and inexpensive crawfish platters, but if that same person or group of persons were to preach the Gospel or collectively shout "Vote Jindal!", they would risk six months' imprisonment. In short, the qualification that only "social, political or religious" speech is banned turns Bourbon Street into a constitutional morass through which no person should be required to tread.

This paradoxical result – that religious and political speech are banned while speech about supersized beer is permitted – makes §54-419(c)(4) particularly egregious. As the Supreme Court observed in *New York Times Co. v. Sullivan*, the First Amendment "'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people' " 376 U.S. 254, 269 (1964) (*quoting Roth v. United States*, 354 U.S. 476 (1957)); *see also R.A.V. v. St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in judgment) ("Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech" in which "[c]ore political speech occupies the highest, most protected position"); *Citizens United v. Federal Election Comm'n*, 558 U.S. 50 (2010) ("If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech"). The Supreme Court has likewise long held that religious speech is at the core of First Amendment protections:

> Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be

> Hamlet without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing ... or even acts of worship....

Capital Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995).[3]

In sum, §54-419(c)(4) is a viewpoint discriminatory, content based restriction on speech that targets the "core" speech most vital under the First Amendment. It is therefore unconstitutional and unenforceable.

iii. Even if §54-419(c)(4) is viewpoint neutral, it is still content-based, subject to strict scrutiny and presumptively invalid.

a. §54-419(c)(4) is a content-based restriction because it bans "social, political or religious" messages.

Even if it is viewpoint neutral, because §54-419(c)(4) prohibits "social, political or religious" speech, it is still subject to strict scrutiny and is presumptively invalid as a content-based restriction. *Service Employees*, *supra* at 595; *R.A.V.*, *supra* at 382. The ordinance cannot survive such review.

The City may argue that its anti-begging law is not content-based because it allegedly serves purposes other than suppressing disfavored speech. *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 811 (2000) (restriction neutral if it is "justified without reference to the content of the regulated speech"); *Ward v. Rock*

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[3] In addition, the Supreme Court has consistently acknowledged the value of leafleting as a means of conveying religious ideas. *See, e.g., Watchtower Bible & Tract Soc'y of N.Y. v. Vill. of Stratton*, 536 U.S. 150, 161-62 (2002). Indeed, the Supreme Court stated seventy years ago that:

> The hand distribution of religious tracts is an age-old form of missionary evangelism-as old as the history of printing presses. It has been a potent force in various religious movements down through the years ... This form of religious activity occupies the same high estate under the First Amendment as do worship in the churches and preaching from the pulpits.

Murdock v. Penn., 319 U.S. 105, 108-109 (1943).

Against Racism, 491 U.S. 781, 791 (1989). However, the mere possibility of a content-neutral justification does not mean a law is content-neutral. Rather, the Supreme Court has set forth a simple test: If, in enforcing the law, one "must necessarily examine the content of the message that is conveyed," the regulation is content-based. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992); *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (Kennedy, J., concurring) (stating that the statute "describes speech by content," therefore "it is content based").[4] Here, because it criminalizes "social, political or religious" speech, §54-419(c)(4) cannot be enforced without reference to content, and therefore, it is a presumptively invalid, content-based restriction on speech.

b. §54-419(c)(4) is content-based because it bans "offensive" speech.

§54-419(c)(4) is an impermissible content-based regulation also because it bans "offensive" speech. Indeed, on banning offensive speech purely because it's offensive, Justice Brennan made one thing quite clear: "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). And even if the ordinance may plausibly be read to restrict only that offensive speech that "reasonably tends

[4] The courts of appeal have hewn closely to this line. See, e.g., *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 794 (9th Cir. 2006) (ordinance limiting begging had the content-neutral purpose of protecting merchants, but nonetheless was an invalid content-based restriction because it required examination of message to determine if ordinance applied); *Berger v. Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009) (rule barring active but permitting passive solicitation was content-based because it prohibited requests for donations); *Desert Outdoor Adver., Inc. v. City of Moreno Valley*, 103 F.3d 814, 820 (9th Cir. 1996), *cert. denied*, 522 U.S. 912 (1997) (throwing out as content-based a municipal ordinance that limited commercial signs solely to official notices, notices posted by public officers, warning or directional information, and boundary or municipal markers).

to arouse alarm or anger in others," neither "alarm" nor "anger" justify banning offensive speech. Rather, the standard is the familiar language of *Brandenburg*: Speech may be banned only where it both incites "imminent lawless action" and is "likely" to produce such action. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Short of such incitement, the City's ban on "offensive" speech cannot survive strict scrutiny.

iv. §54-419(c)(4) cannot survive strict scrutiny.

Whether it is viewpoint discriminatory or simply content-based, §54-419(c)(4)'s ban on speech in a traditional public forum must be both necessary to serve a compelling government interest and narrowly drawn to achieve it. *Service Employees*, *supra*, 595 F.3d at 595. It is neither.

a. The City has no compelling interest.

First, there is no compelling reason for the City to limit political or religious speech in a traditional public forum in such a heavyhanded manner. Indeed, the City concedes as much with its tolerance of the widely diverse viewpoints and expressions already permitted in the Quarter. Bourbon Street for more than 100 years has been the staging point for all manner of passionate, dramatic, controversial and shocking acts of public expression, and the City not only accepts but encourages it, *because throughout history, those things have been what draw many people, partygoers and preachers alike, into the Quarter*. Indeed, public assembly and speech, and the public dialogue between different viewpoints, cultures and lifestyles on Bourbon Street, are undeniably part of what makes the

Quarter unique and special. The City cannot offer a compelling reason for limiting the content of that dialogue.

The City has, on the other hand, offered a meager justification for the aggressive solicitation ordinance as a whole, stating that, "This section is intended to protect citizens from the disruption, fear and intimidation accompanying certain kinds of solicitation, *and not to limit constitutionally protected activity*." §54-419(a)(4). But that justification, by its plain language, only applies to solicitation, and does not rise to the level of a compelling interest. *See*, *generally*, *City of Indianapolis v. Edmond*, 531 U.S. 32, 44 (2000) (Generalized interests in preventing and curtailing ordinary crime are not compelling governmental interests). Moreover, the City admits *in that very statement of legislative purpose* that it has no interest in regulating constitutionally protected activity.

b. §54-419(c)(4) is not narrowly tailored.

Second, the even if the City had a compelling interest in limiting the content of religious and political expression on Bourbon Street, §54-419(c)(4) is not narrowly tailored to do so. A narrowly tailored restriction is the "least restrictive alternative necessary to forward a compelling government interest," *John Doe No. 1 v. Reed*, 130 S.Ct. 2811, 2839 (2010), and §54-419(c)(4) cannot possibly meet that standard. It bans *all* public assembly and discussion of social, religious and political matters, *any*where on Bourbon Street, at *any* volume, between *any* number of people, at *any* hour between sunset and sunrise. Such a heavyhanded approach has been rejected by the courts of the Fifth Circuit in the past, at even less-rigorous levels of scrutiny. *See*, *e.g.*, *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981) (throwing out a *content-*

neutral anti-pamphleting ordinance at the Dallas-Fort Worth Airport because it was not narrowly tailored); *Beckerman v. City of Tupelo*, 664 F.2d 502, 507 (5th Cir. 1981) (undoing an ordinance authorizing the local police chief to deny a parade permit if he found that the parade would "probably cause injury to persons or property or provoke disorderly conduct or create a disturbance"); *Dallas Acorn v. Dallas County Hospital District*, 670 F.2d 629 (5th Cir. 1982) (striking down a public hospital's "no solicitation rule" because it was vague); *Acorn v. City of New Orleans*, *supra*, 606 F.Supp. at 23 (wiping out an ordinance that prohibited solicitation from pedestrians, even when streets were closed to vehicular traffic). In short, the Fifth Circuit and the Eastern District of Louisiana repeatedly have tossed less egregious ordinances for less compelling reasons. This Court would be in good company to strike down §54-419(c)(4).

B. In the alternative, §54-419(c)(4) is an impermissible time, place or manner restriction

Even in a traditional public forum, the government may regulate the time, place or manner of First Amendment activity. *Ward*, *supra*, 491 U.S. at 791. However, the *first rule* of time, place or manner restrictions is that they must be content-neutral. *Id.* at 796. They also must be "narrowly tailored to serve a significant governmental interest," and must "leave open ample alternative channels for communication of the information." *Id. See also Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654-55 (1981); *Sarre v. City of New Orleans*, No. 10-30025 (5th Cir. 2011).

As already discussed, *supra* at I.A.ii-iii, §54-419(c)(4) never leaves the starting gate of time, place or manner validity, as it is not content-neutral. At any rate, it trips over the second two requirements as well.

i. §54-419(c)(4) is not narrowly-tailored.

As briefed at I.A.iv.b above, the City cannot show that the aggressive solicitation ordinance is narrowly tailored, and the courts of the Fifth Circuit and the Eastern District of Louisiana repeatedly have cast aside content-neutral time, place or manner restrictions far narrower than §54-419(c)(4). This Court should do no different.

ii. §54-419(c)(4) does not leave ample alternative fora.

Likewise, the City cannot demonstrate that the aggressive solicitation ordinance leaves open "ample alternative fora," *Sarre*, *supra* at 9; *Ward* at 796, for Plaintiff's speech.

While an alternative forum does not have to be the speaker's first choice, *Sarre*, at 9, it is nonetheless inadequate if it "foreclose[s] a speaker's ability to reach one audience even if it allows the speaker to reach other groups." *Id.* (noting that just because "an artist can sell his product in other locations to other audiences does not mean those locations are adequate alternatives.").

Here, the aggressive solicitation ordinance shuts out all social, political and religious speech on Bourbon Street, written or spoken between sunset and sunrise. It also bans all "offensive" language, *public or private*. Such restrictions do not leave open "ample alternative channels for communication and must be eliminated.

C. §54-419(c)(4) is unconstitutionally vague.

As previously noted, the aggressive solicitation ordinance bans "social, political or religious messages" on Bourbon Street during certain hours, and bans "offensive" speech at all times, anywhere in the Quarter. However, it does not define "offensive" or "social," giving speakers little notice of what speech might be unlawful and leaving the field wide open for arbitrary and selective enforcement. It is thus unconstitutionally vague under the Fourteenth Amendment's guarantees of Due Process, and must be thrown out.

It is a basic principle of due process that "an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). To avoid vagueness, an ordinance must (1) be "clear enough to provide a person of ordinary intelligence notice of what conduct is prohibited," and (2) "provide standards for those who enforce its prohibitions." *Id.* Under the first prong, "mathematical certainty" is not required, *id.*, but where "…[p]eople of common intelligence must necessarily guess at the law's meaning and differ as to its application," it is unconstitutionally vague. *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 889 (2010). Likewise, where a statute "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden," it must be struck down. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

Under the second prong, the statute must provide law enforcement with a meaningful set of "explicit standards." *Grayned* at 108. If instead the law merely "encourages arbitrary and erratic arrests and convictions," *Papachristou* at 162, it

cannot stand. Moreover, where the statute places "unfettered discretion. . . in the hands of the [police]," *id.* at 168, or "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure," *id.* at 170, it violates the Fourteenth Amendment. As the Supreme Court has noted, a law is vague under the Fourteenth Amendment where it "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned* at 108-109.

The Fifth Circuit has echoed the Supreme Court's admonition. "[R]egulations should not be vague. Because the First Amendment needs breathing space, government regulation must be drawn with some specificity. *Service Employees, Local 5*, *supra*, at 596. "Flexibility in a statute is permissible, but the statute must provide fair notice so that its prohibitions may be avoided by those who wish to do so." *Id.*, *citing Grayned* at 110-12. In the First Amendment context, the Fifth Circuit has made clear that "vagueness challenges usually must show that the law has a capacity to chill constitutionally protected conduct, especially conduct protected by the First Amendment." *Roark & Hardee LP v. City of Austin*, 522 F.3d 533, 546 (5th Cir. 2008) (internal citations omitted).

Here, the City has not defined certain critical terms of the ordinance. The meanings of "offensive" and "social," are left open to interpretation, giving speakers little notice of what speech might subject them to arrest, possible heavy fines and up to six months in jail. §54-419(d) ("Whoever violates the provisions of this section

shall be guilty of a misdemeanor and upon conviction shall be fined not more than $500.00, and/or imprisoned for not more than six months."). Moreover, the lack of specificity offers the NOPD wide and unfettered discretion in enforcement, and sets the stage for arbitrary and selective arrests. Finally, McCauley's expressive activities and those of her congregation already have been chilled by §54-419(c)(4), as both she and her family and friends were expressly told that they would be arrested if they returned to the Quarter, and they remain hesitant to do so for fear of such arrest.

D. §54-419(c)(4) is unconstitutionally overbroad.

§54-419(c)(4) is overbroad both substantially and as applied. Not only does it criminalize wide swaths of otherwise protected speech on Bourbon Street and throughout the Quarter, but McCauley herself has been cast off of Bourbon Street by the NOPD for lawful activity unrelated to the City's goal in enacting the ordinance.

When a law "prohibits a substantial amount of protected speech[,] not only in an absolute sense but also relative to the statute's plainly legitimate sweep," it violates the First Amendment. *United States v. Williams*, 535 U.S. 285, 292 (2008); *Hill v. City of Houston, Tex.*, 764 F.2d 1156, 1161 (5th Cir. 1985). "An overbroad statute is invalid on its face, not merely as applied, and cannot be enforced until it is either re-drafted or construed more narrowly by a properly authorized court." *Id.* To be sure, a declaration of overbreadth is "strong medicine" applied "sparingly and only as a last resort," *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973), and the overbreadth of the ordinance "must not only be real, but substantial as well," in

relation to its "plainly legitimate sweep." *Id.* at 615. But where a statute's deterrent effect on legitimate expression is indeed both "real and substantial," it must be invalidated. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975).

Here, §54-419(c)(4), as discussed at length, has no legitimate sweep, as there is no basis for the City to regulate the substance of speech on Bourbon Street in a viewpoint-discriminatory, content-based manner. Thus, the aggressive solicitation is overbroad in both (1) its complete prohibition of "social, political or religious" messages on Bourbon between sunset and sunrise, and (2) its ban on *all* "offensive" speech in public *or private* areas at *any* time, *any*where in the French Quarter.

Moreover, even if the boundaries of a "legitimate sweep" could be defined from the stated purpose of the ordinance: "to protect citizens from the disruption, fear and intimidation accompanying certain kinds of solicitation[5]," §54-419(a)(4), a restriction on *all* social, political or religious dissemination from sunrise to sunset on Bourbon Street, and all offensive speech anywhere in the Quarter is bound to restrict activities that have nothing to do with that goal.

The implications of the ban on private offensive speech alone are absurd. For example, if McCauley, afraid of arrest in the middle of the street, took her religious message inside a bar or restaurant and began speaking with customers in a way that someone found offensive, she could be fined and arrested. If one of those customers got into a heated debate with McCauley, he or she too might be penalized. And if, in that same restaurant, as McCauley and her loquacious new

[5] Extremely unlikely, as neither McCauley nor the rest of Raven Ministries solicits within the meaning of the ordinance.

friend were being dragged away in handcuffs, a group of patrons on the street outside began chanting in protest, they might face six months in jail. While unlikely, such a cascade of absurdities is within the realm of possibility under the language of the §54-419(c)(4). This Court should not permit the City to play so fast and loose with the First Amendment.

II. Without a TRO and preliminary injunction, McCauley will be irreparably harmed.

"Violation of constitutional rights constitutes irreparable injury as a matter of law." *Springtree Apartments, ALPIC v. Livingston Parish Council*, 207 F. Supp. 2d 507, 515 (M.D. La. 2001). As the Supreme Court has noted, "the loss of First Amendment freedoms, even for minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Deerfield Medical Ctr. v. City of Deerfield Beach*, 661 F.2d. 328 (5th Cir. 1981) ("we have already determined that the constitutional right of privacy is either threatened or is in fact being impaired and this conclusion mandates a finding of irreparable injury."); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2948.1 (2d Ed. 1995) ("When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). This reasoning essentially collapses the "likelihood of success on the merits" and "irreparable harm" prongs of the injunctive inquiry where constitutional rights are at stake. *Forum for Academic & Inst. Rights v. Rumsfeld*, 390 F.3d 219, 246 (3d Cir. 2004).

For every day that the aggressive solicitation ordinance has existed, McCauley has been irreparably harmed. For every day that it remains, that harm will continue. *This very weekend*, the City will run roughshod over McCauley's protected First and Fourteenth Amendment rights and those of her congregation.

III. The injury to McCauley's First and Fourteenth Amendment rights outweighs any harm an injunction may cause the City.

The City has no legitimate interest in enforcing a blatantly unconstitutional ordinance, particularly where such enforcement would harm the protected First and Fourteenth Amendment rights of its citizens. *American Civil Liberties Union v. Johnson*, 194 F.3d 1149 (10th Cir. 1999) (upholding the district court's issuance of a TRO and noting that "the threatened injury to Plaintiffs' constitutionally protected speech outweighs whatever damage the preliminary injunction may cause Defendants' inability to enforce what appears to be an unconstitutional statute") Here, while the City has an obligation to enact and enforce ordinances that benefit its residents, there are far less restrictive means by which the City can protect visitors to and preserve the character of Bourbon Street and the French Quarter. Therefore, any harm to the City under a temporary restraining order will be minimal. The City will, at most, have to tolerate some social, political or religious speech in the Quarter, and it will be required to consider more carefully the constitutionality of any ordinances it passes.

Conversely, the burden McCauley and the other members of Raven Ministries will suffer if the ordinance is not enjoined will be severe, as they will be

forced to risk arrest and prosecution if they continue to preach their religious beliefs on Bourbon Street.

IV. The public interest will be served by a TRO.

A temporary restraining order enjoining the Defendants from enforcing §(c)(4) of the ordinance will serve the public interest, as the public interest is always served by ensuring the government's compliance with the Constitution and civil rights laws. *See*, *e.g.*, *Valley v. Rapides Parish School Board*, 118 F.3d 1047, 1056 (5th Cir. 1997) (finding that public interest would be undermined if the unconstitutional actions of a school board were permitted to stand); *G&V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (holding that it is always in the public interest to prevent violation of constitutional rights); *Forum for Acad. & Inst. Rights v. Rumsfeld*, 390 F.3d 219, 246 (3d Cir. 2004) ("The public interest is best served by enjoining a statute that unconstitutionally impairs First Amendment rights.").

Conclusion

For the reasons set out above, this Court should issue a temporary restraining order and preliminary injunction prohibiting Defendants from continuing to enforce the §54-419(c)(4).

Respectfully submitted by:

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