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**MEMORANDUM**

TO: Honorable Mayor and Council Members

FROM: Law Office of Avi S. Rocklin, LLC <sup>AS</sup>

DATE: November 26, 2024

RE: Solicitation of Charity from Public Medians

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The question addressed in this Memorandum is whether persons may solicit charity from public medians. The short answer is that, unless there is a demonstrated and substantiated public health and safety concern and narrowly tailored regulations to protect such concern, peaceful solicitation of charity from public medians is a constitutionally protected free speech right.

The U.S. Supreme Court has held that peacefully soliciting charity in a public place is protected by the First Amendment. *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). The First Amendment protection applies not only to organized charities, but also to individuals begging for charity. “Like other charitable solicitation, begging is speech entitled to First Amendment protection.” *Smith v. City of Fort Lauderdale*, 177 F.3d 954, 956 (11<sup>th</sup> Cir. 1999); *see also Loper v. N.Y.C. Police Dep’t*, 999 F.2d 699, 704 (“Begging frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation. Even without particularized speech, however, the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance.”).

In addition, courts have consistently held that medians are public places. “Objectively, medians share fundamental characteristics with public streets, sidewalks, and parks, which are quintessential public fora.” *McGraw v. City of Oklahoma City*, 973 F.3d 1057, 1067-68 (10<sup>th</sup> Cir. 2020); *see also Reynolds v. Middleton*, 779 F.3d 222, 225 (4<sup>th</sup> Cir. 2015) (“There is ... no question that public streets and medians qualify as ‘traditional public forum[s]’”); *Cutting v. City of Portland*, 802 F.3d 79, 83 (1<sup>st</sup> Cir. 2015) (holding that Portland’s medians were traditional public fora “on the understanding that ... the people of Portland have used median strips for expressive purposes in much the same way that they have used parks and sidewalks”). The First Amendment protection afforded to solicitation in public places thus includes public medians.

Even in public forums, however, the government may impose reasonable restrictions on the “time, place, and manner” of protected speech “provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of information.” *Evans v. Sandy City*, 944 F.3d 854 (10<sup>th</sup> Cir. 2019). In other words, a municipality may adopt content neutral, narrowly tailored regulations prohibiting solicitation from public medians to protect against a demonstrated and

substantiated public health and safety concern.

In *McGraw*, the Tenth Circuit Court of Appeals, the federal court setting forth binding legal precedent with respect to Colorado law, addressed the precise question at issue here. In that case, the City of Oklahoma City adopted an ordinance prohibiting standing, sitting or staying in public medians. 973 F.3d. at 1062. When the district court declined to find that the ordinance was constitutional as a matter of law, the City amended the ordinance to prohibit pedestrian presence on medians with a speed limit of 40 or more, excluding government employees, people on the median to cross the street and persons performing legally authorized or emergency work. *Id.* at 1063. The City, however, was unable to demonstrate any public health and safety concern to justify the regulation. The Court stated as follows:

When we examine the evidence the City offers in support of the Revised Ordinance, we conclude that the City's evidence is insufficient to demonstrate that the City's "recited harms are real" or that the Revised Ordinance "will in fact alleviate these harms in a direct and material way." (Internal citation omitted.) Critically, this record *is devoid of evidence* that accidents involving vehicles and pedestrians on medians in Oklahoma City is an actual issue, as opposed to a hypothetical concern. There is neither evidence of any accident involving a pedestrian on a median, fatal or not, nor evidence that a pedestrian on a median caused an accident or distracted a driver enough to compromise the safety of the pedestrian or the driver.

*Id.* at 1071-72 (emphasis added). Without supporting evidence, the Court found that the ordinance was unconstitutional.

The City of Loveland ("Loveland") previously adopted an ordinance prohibiting panhandling and soliciting in medians. See Section 9.30.030.A.2. of the Loveland Municipal Code. Despite having adopted the regulation, Loveland staff advised Town staff that the Loveland Police Department does not enforce the provision given the constitutional concerns. Rather, Loveland conducted a Citywide Roadway Safety Study, and thereafter adopted Chapter 12.29 of the Loveland Municipal Code concerning "Pedestrian Access to Medians." Chapter 12.29 delineates the medians wherein public access is prohibited based on substantiated public safety concerns. Notably, public access to the medians on U.S. Highway 34 is not prohibited because, based on Town's staff's understanding, those medians are over 6 feet in width and do not meet the criteria for narrow and unsafe conditions.

In short then, based on current law and currently available information, it would not be constitutional for the Town to prohibit "peaceful" solicitation from public medians. "Aggressive" solicitation, however, could be regulated. More, if the Town wanted to promulgate regulations concerning solicitation from public medians based on public safety concerns, the Town would be advised to conduct a study similar to the study conducted by Loveland and determine the actual public health and safety concerns, if any, associated with such conduct from particular medians and then promulgate narrowly tailored regulations to remedy such concerns.