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March 24, 2021

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Eric S. Tars
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National Homelessness Law Center
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Sent via electronic mail to sbrett@aclukansas.org and ETars@nlchp.org

RE: City of Merriam, Kansas Ordinance Amending Chapter 68, Article II, Division 2; Prohibition on Pedestrians Standing, Sitting, Entering, or Staying upon Medians and Roadways at Certain Intersections (the "Ordinance")

Dear S. Brett and E. Tars:

My firm, McAnany, Van Cleave & Phillips, P.A., represents the City of Merriam, Kansas (the "City") and I act as City Attorney for the City. I am in receipt of your March 15, 2021 correspondence addressed to Mayor Ken Sissom and the City Council of Merriam regarding the above-referenced ordinance. While we appreciate your notice regarding potential avenues to enable the City to safely house its homeless population, we respectfully disagree with your position that the Ordinance is unconstitutional.

The Ordinance is a constitutional time, place, and manner regulation of the places within the City in which persons may engage in constitutionally protected speech. *See Evans v. Sandy City*, 944 F.3d 847 (10th Cir. 2019). In *Evans*, the Sandy City, Utah city council adopted an ordinance "making it illegal for any person 'to sit stand, in or on any unpaved median, or any median of less than 36 inches for any period of time.'" *Id.* at 851. The Tenth Circuit analyzed the Sandy City ordinance through the specific lens of whether an ordinance prohibiting the sitting or standing on specified medians violated the First Amendment. *Id.* at 852. While the *Evans* Court acknowledged the holdings of other Circuit Courts deeming panhandling protected speech under the First Amendment, the Court found that the subject ordinance was a valid time, place, and manner restriction, even under the stricter First Amendment standards for traditional public fora. *Id.* at 853. Similarly, the City's Ordinance is also a valid time, place, and manner restriction.

"It is well-settled 'that even in a public forum 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."'" *Id.* at 854 (citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) and *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288 (1984).). Thus, the constitutionality of the Ordinance depends on (1) whether the Ordinance is content neutral; (2) whether the Ordinance is narrowly tailored to serve a significant government interest; and (3) whether the Ordinance leaves ample alternative channels of communication. *See id.*

Content Neutrality

The Ordinance is content neutral. The Ordinance would not be content neutral if it drew content-based distinctions on its face. *See id.* at 854. Merriam's ordinance does not. Regulation of expressive activity "is content neutral so long as it is 'justified without reference to the content of the regulated speech,'" and "[t]he ***government's purpose*** is the ***controlling consideration***" when determining content neutrality. *Id.* A regulation unrelated to the content of expression is content neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* Nowhere in the Ordinance does the content of speech affect an individual's compliance with or violation of the Ordinance. Instead, any person who stands, sits, or otherwise goes upon the medians and roadways at the intersections identified in Section 1(d) of the Ordinance violates the Ordinance, regardless of the reason underlying their occupation of a median or roadway or their speech on or about such medians and roadways. Further, the express purpose of the Ordinance is "to promote and protect the public health, safety, and welfare of the citizens of the City of Merriam while leaving open ample alternative channels of communication throughout the City of Merriam." The express and sole purpose of the Ordinance—to promote public health, safety, and welfare—demonstrates the clear content neutrality of the Ordinance. Just like the ordinance at issue in *Evans*, the Ordinance is a content neutral regulation which satisfies Constitutional standards.

Narrowly Tailored to Serve a Significant Government Interest

The Ordinance is also narrowly tailored to serve a significant government interest. As stated in *Evans*, promoting public safety is a significant governmental interest. *Id.* at 856. To be narrowly tailored, however, "the Ordinance must not burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)) (internal quotations omitted). The Ordinance "need not be the least restrictive or least intrusive means of" ensuring public safety; rather, "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest, the [Ordinance] will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* Like the ordinance at issue in *Evans*, the Ordinance is limited to only "those medians [and roadways] where it is unsafe to sit or stand." The Ordinance specifically references the Merriam Police Chief's investigation into dangers presented by the presence of persons on medians and is narrowly tailored to subside such dangers at the intersections specifically identified in the course of the Police Chief's investigation. Like the ordinance in *Evans*, "the restriction on speech is directly tailored to the danger," and the City "is

not required to ignore the danger posed by" individuals standing and sitting on specifically identified medians and roadways because of the effect upon speech.

Ample Alternative Channels of Communication

In addition to being content neutral and narrowly tailored to serve a substantial government interest, the Ordinance leaves open ample alternative channels of communication. "While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate." *Id.* Like the ordinance at issue in *Evans*, the Ordinance indisputably leaves open many alternative channels for panhandlers to communicate or others exercising their speech rights. In fact, the Ordinance designates only nine (9) intersections at which individuals may not stand or sit on medians and roadways. This leaves open every other median, in addition to all other traditional public fora not identified in the Ordinance such as sidewalks adjacent to the right of way, within the boundaries of the City for individuals to exercise their speech rights.

In sum, the Ordinance is a Constitutionally valid time, place, and manner restriction that does not violate the First Amendment or interpreting jurisprudence. While the City certainly recognizes the honorable purposes and motivations of both the ACLU and the National Homelessness Law Center, the Constitutionality of the Ordinance is beyond dispute, and the City stands by its decision to enact the Ordinance in furtherance of its devotion to furthering the public health, safety, and welfare of its citizens.

Please feel free to contact me at rdenk@mvplaw.com or (913) 371-3838 with any comments or questions regarding the foregoing.

Sincerely,

Ryan B. Denk

Cc: Chris Engel, City Administrator
Darren McLaughlin, Chief of Police