BRYAN W. PEASE (SB# 239139)
1901 First Ave., Suite 219
San Diego, CA 92101
ph: (619) 723-0369
fax: (619) 923-1001
email: bryanpease@gmail.com

RACHEL E. SCOMA (SB# 274760)
4246 Wightman St.
San Diego, CA 92105
Telephone.: (760) 271-0579
email: rachel@canvassforacause.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Eugene Davidovich an individual, Davina Lynch, an individual, and John Kenney, an individual, Plaintiffs, v. CITY OF SAN DIEGO, Defendant.	Case No. **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER**

I. Introduction

SDMC section 54.0110 is void for vagueness in that it does not define a criminal offense with sufficient certainty so that ordinary people can understand what conduct is prohibited, and it encourages arbitrary and discriminatory enforcement. The ordinance fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty

interests and fails to give fair notice of what acts will be punished so that First Amendment rights are chilled.

Section 54.0110 is also overbroad because it has a chilling effect on free expression in that individuals are often not permitted to even place protest signs down next to where they are standing. The ordinance also sweeps unnecessarily broadly and thereby invades areas of protected freedoms.

Unless restrained by an order of this Court, Plaintiffs will continue to suffer irreparable harm in that their First Amendment freedoms will continue to be violated. The balance of hardships tips decisively in Plaintiffs' favor, in that there is no harm to Defendant in being required to respect Plaintiffs' First Amendment rights.

II. Argument

A. SDMC section 54.0110 is void for vagueness

The void-for-vagueness doctrine requires that a criminal statute define the criminal offense with sufficient certainty so that ordinary people can understand what conduct is prohibited, and in a manner that does not encourage arbitrary and discriminatory enforcement. (*See Free Speech Coalition v. Reno* (9th Cir. 1999) 198 F.3d 1083, 1095; *Nunez v. City of San Diego (9th Cir. 1997) 114 F.3d 935, 940*; *People v. Ewing* (1999) 76 Cal. App. 4th 199; *People v. Custodio* (1999) 73 Cal. App. 4th 807, 811.)

An enactment may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. (*City of Chicago v. Morales* (1999) 527 U.S. 41, 78; *Kolender v. Lawson* (1983) 461 U.S. 352, 358). A statute imposing criminal liability may be declared invalid in its entirety if piecemeal adjudication of the legality of the statute would entail the vague or uncertain future application of the statute. (*People v. Custodio* (1999) 73 Cal. App. 4th 807, 811). In analyzing whether a statute is sufficiently definite to pass constitutional muster, courts look not only at the language of the statute, but also to legislative history and California decisions construing the statute. (*People v. Custodio* (1999) 73 Cal. App. 4th 807, 811).

The doctrine affects statutes limiting free expression: If the statute fails to give fair notice of what acts will be punished so that First Amendment rights are chilled, an accused's rights under due process and freedom of speech are violated. (*See Kolender v. Lawson* (1983) 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 ; Connally v. General Constr. Co. (1926) 269 U.S. 385, 391; *People ex rel. Gallo v. Acuna* (1997) 14 Cal. 4th 1090, 1115; *Manning v. Municipal Court* (1982) 132 Cal. App. 3d 825, 829). A claim of void for vagueness will succeed when the litigant demonstrates that the law is vague as to the litigant or impermissibly vague in all of its applications. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal. 4th 1090, 1115, *citing Hoffman Estates v. Flipside, Hoffman Estates* (1982) 455 U.S. 489, 497-498; *Parker v. Levy* (1974) 417 U.S. 733, 755-757; *see also City of Chicago v. Morales* (1999) 527 U.S. 41, 78 (ordinance prohibiting loitering in public place by two or more people, one of whom is member of criminal street gang, unconstitutionally vague); *Nunez v. City of San Diego* (9th Cir. 1997) 114 F.3d 935, 940 (in facial vagueness challenge, ordinance need not be vague in all applications if it reaches substantial amount of constitutionally protected conduct)).

A statute prohibiting individuals from wandering "without apparent business" and refusing to identify themselves to police was void for vagueness because it failed to sufficiently describe the guilty conduct and vested excessive discretion in the police to decide guilt. (*Kolender v. Lawson* (1983) 461 U.S. 352). A juvenile curfew ordinance that makes it unlawful for any minor to "loiter, idle, wander, stroll or play in or upon the public streets, highways, roads, alleys, parks, playgrounds, wharves, docks, or other public grounds, public places and public buildings, places of amusement and entertainment, vacant lots or other unsupervised places, between the hours of ten o'clock P.M. and daylight immediately following" except in four specific situations, is also unconstitutionally void for vagueness and allows the police excessive discretion to decide whether to stop and arrest juveniles after curfew hours. (*Nunez v. City of San Diego* (9th Cir. 1997) 114 F.3d 935, 940-944).

An ordinance forbidding loitering in any public place by two or more persons, one of whom is a member of a criminal street gang, is also impermissibly vague. Although the

ordinance does not prohibit speech, the freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. (*City of Chicago v. Morales* (1999) 527 U.S. 41, 78).

In the present case, SDMC section 54.0110 is void for vagueness in that it does not define a criminal offense with sufficient certainty so that ordinary people can understand what conduct is prohibited, and it encourages arbitrary and discriminatory enforcement. The ordinance fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests and fails to give fair notice of what acts will be punished so that First Amendment rights are chilled.

B. Section 54.0110 is overbroad

A statute that prohibits protected speech along with unprotected speech so that it has a chilling effect on free expression is facially invalid. (*See People v. Hsu* (2000) 82 Cal. App. 4th 976 (statute restricting speech as invalid in any respect is invalid in all respects); *People v. Tisbert* (1992) 11 Cal. App. 4th Supp. 1; *see also Kash Enterprises, Inc. v. City of Los Angeles* (1977) 19 Cal. 3d 294, 303.) A governmental purpose to control or prevent activities constitutionally subject to state regulation cannot be achieved by means that sweep unnecessarily broadly and thereby invade areas of protected freedoms. (*In re Englebrecht* (1998) 67 Cal. App. 4th 486, 497, quoting *Williams v. Garcetti* (1993) 5 Cal. 4th 561, 577.)

The First Amendment doctrine of overbreadth is an exception to the normal rule regarding the standards for facial challenges. Under the overbreadth doctrine, a law may be invalidated if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep. (*United States v. Stevens* (2010) ___ U.S. ___, 130 S. Ct. 1577, 1587; *Washington State Grange v. Washington State Republican Party* (2008) 552 U.S. 442, 449 n.6.) Showing that a law punishes a substantial amount of protected free speech, judged in relation to the law's legitimate sweep, suffices to invalidate all enforcement of the law until a limiting construction or partial invalidation narrows it to remove the seeming threat or

deterrence to constitutionally protected expression. (*Virginia v. Hicks* (2003) 539 U.S. 113, 123.)

In one case, the court ordered dismissal of a misdemeanor complaint against a defendant who had set up a table in a county courthouse to collect signatures for a ballot initiative and to collect donations. The defendant was charged with violating a county ordinance that broadly banned all solicitation on county property. The court held that the ordinance was unconstitutionally overbroad since it did not attempt to exempt acts of solicitation protected by the First Amendment. (*People v. Tisbert* (1992) 11 Cal. App. 4th Supp. 1, 6.)

In another case, the Court held that a statute prohibiting fortunetelling for profit was unconstitutionally overbroad and invalid "in its essence." The Court held that the ordinance could not be saved without rewriting it and that such a revision would be an abuse of the Court's power. (*Spiritual Psychic Science Church v. City of Azusa* (1985) 39 Cal. 3d 501, 520.)

A city ordinance prohibiting use of portable tables for distribution of literature was a limitation on expressive activity protected by the Constitution to the extent tables facilitated dissemination of First Amendment speech. (*American Civil Liberties Union of Nevada v. City of Las Vegas* (9th Cir. 2006) 466 F.3d 784, 791-799).

In the present case, SDMC section 54.0110 prohibits not only the placement of First Amendment protected literature tables, but *any* other object on any city property. Section 54.0110 is overbroad because it has a chilling effect on free expression in that individuals are often not permitted to even place protest signs down next to where they are standing. The ordinance also sweeps unnecessarily broadly and thereby invades areas of protected freedoms.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request a temporary restraining order enjoining the City of San Diego and its agents and employees from enforcing SDMC section 54.0110.

Dated: November 16, 2011

By: /s/ Bryan W. Pease

Bryan W. Pease
Attorney for Plaintiffs