



NATIONAL LAW CENTER
ON HOMELESSNESS & POVERTY

August 28, 2018

VIA EMAIL AND REGULAR MAIL

Mayor, City Councilmembers, and City Attorney of Albany
c/o City Manager Peter Troedsson
333 Broadalbin St. SW
Albany, OR 97321
Email: peter.troedsson@cityofalbany.net

RE: Albany City Code 13.23.010 et seq. (Ord. 5885)

Dear Mayor, City Councilmembers, and City Attorney of Albany:

We write to urge Albany to immediately repeal its anti-panhandling ordinance, Albany City Code 13.23.010 et seq. (Ord. 5885) (the "Ordinance"). Anti-panhandling ordinances are deeply problematic, both as a matter of public policy and as a legal and constitutional matter. We have identified 61 anti-panhandling ordinances enacted by cities across the State of Oregon, and today we are reaching out to each of these cities as part of a national campaign to address this widespread problem.

Anti-Panhandling Ordinances Are Bad Public Policy

Harassing, ticketing and/or arresting people who ask for help in a time of need is inhumane and counterproductive. People who are experiencing poverty are forced to ask for help because they are simply trying to survive and have no other reasonable way to get the help they need. Those in our society who wish to offer a helping hand should be able to hear their call and answer it with kindness. Imposing legal restrictions on this simple act of humanity and connection harms our communities and the fragile safety net for people living in need.

Like many other ordinances that criminalize homelessness and poverty, anti-panhandling ordinances do not help cure poverty or any of the other challenges facing our communities. Instead, these laws only exacerbate problems associated with homelessness and poverty. Handing citations to people who are panhandling propels people into a downward cycle of criminality; unnecessary contact with the judicial and criminal justice systems is often traumatizing and increases a person's likelihood of continued criminal justice involvement; and criminal charges and records prevent people from obtaining employment, housing, and public benefits.

Anti-panhandling ordinances are also costly to enforce and divert resources from public policy that actually works to keep our communities safe and healthy. Non-punitive alternatives, like affordable and subsidized housing with wrap-around services, are much more effective, both in outcomes and as a fiscal matter.

When governments adopt a model of criminalization, they also expose themselves to liability on the taxpayer's dime. With no other options, individuals facing constitutional violations will be forced to assert their rights by bringing claims against cities that violate the law. Sure enough, like other states across the nation, Oregon cities have faced such lawsuits in our recent past.

Anti-Panhandling Ordinances Are Deeply Problematic as a Constitutional Matter

Since the landmark *Reed v. Gilbert* case in 2015, every panhandling ordinance challenged in federal court – at 25 of 25 to date – has been found constitutionally deficient. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015); *see, e.g. Norton v. City of Springfield, Ill.*, 806 F.3d 411 (7th Cir. 2015); *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014), *vacated*, 135 S. Ct. 2887 (2015), *declaring ordinance unconstitutional on remand*, 2015 WL 6872450, at *15 (D. Mass. Nov. 9, 2015)); *see also* National Law Center on Homelessness and Poverty, HOUSING NOT HANDCUFFS: A LITIGATION MANUAL (2017), <https://www.nlchp.org/documents/Housing-Not-Handcuffs-Litigation-Manual>.

Panhandling ordinances on the books in municipalities across the State of Oregon contain features similar to the ordinances that have been struck down by the courts. While the constitutionality of each of these ordinances is *at least* strongly suspect, the vast majority we have identified almost certainly violate the constitutional right to free speech protected by the First Amendment to the United States Constitution.

The First Amendment protects peaceful requests for charity in a public place. *See, e.g., United States v. Kokinda*, 497 U.S. 720, 725 (1990) (“Solicitation is a recognized form of speech protected by the First Amendment.”). The government’s authority to regulate such public speech is exceedingly restricted, “[c]onsistent with the traditionally open character of public streets and sidewalks....” *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (quotation omitted).

Anti-panhandling ordinances generally contain language that overtly distinguishes between types of speech based on “subject matter ... function or purpose.” *See Reed*, 135 S.Ct. at 2227 (internal citations, quotations, and alterations omitted; *See, e.g., Norton*, 806 F.3d at 412-13 (“Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification.”)).

As a result, courts are likely to hold that these ordinances are a “content-based” restriction on speech that is presumptively unconstitutional. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2232 (2015); *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009). Courts use the most stringent standard – strict scrutiny – to review such restrictions. *See, e.g., Reed*, 135 S. Ct. at 2227 (holding that content-based laws may only survive strict scrutiny if “the government proves that they are narrowly tailored to serve a compelling state interest”); *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014). These ordinances generally fail strict scrutiny because they do not serve any compelling state interest, nor are they narrowly tailored.

Distaste for a certain type of speech, or a certain type of speaker, is not even a *legitimate* state interest, let alone a *compelling* one. Shielding unwilling listeners from messages disfavored by the state is likewise not a permissible state interest. As the Supreme Court explained, the fact that a listener on a sidewalk cannot “turn the page, change the channel, or leave the Web site” to

avoid hearing an uncomfortable message is “a virtue, not a vice.” *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 (1992) (“The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.”).

Even if a City could identify a compelling state interest, there is generally no evidence that an ordinance is “narrowly tailored” to such an interest. Though “public safety” is an important state interest that is often asserted, these ordinances are generally not narrowly tailored to serve it. *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276 (D. Colo. 2015) (rejecting claims that the ordinance served public safety as unsupported and implausible); *Cutting v. City of Portland*, 802 F.3d 79 (1st Cir. 2015) (requiring evidence to substantiate claims of public safety).

Theoretical discussion is not enough: “the burden of proving narrow tailoring requires [a municipality] to prove that it actually *tried* other methods to address the problem.” *Reynolds v. Middleton*, 779 F.3d 222, 231 (4th Cir. 2015). Cities may not “[take] a sledgehammer to a problem that can and should be solved with a scalpel.” *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276, 1294 (D. Colo. 2015) (holding ordinance restricting time, place, and manner of panhandling was unconstitutional).

Some jurisdictions have attempted to remedy the constitutional issues facing their anti-panhandling ordinances by limiting them to time place and manner restrictions. Time and time again, however, courts have struck these restrictions down as well.

Courts regularly strike down time-based restrictions. *See, e.g., Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 580 (6th Cir. 2012) (striking down 6 pm curfew for door-to-door solicitation). Similarly, every court to consider a regulation that bans requests for charity within an identified geographic area has stricken the regulation. *See, e.g., Norton v. City of Springfield*, 806 F.3d 411, 413 (7th Cir. 2015); *Cutting v. City of Portland, Maine*, 802 F.3d 79 (1st Cir. 2015); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011) (en banc); *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 237 (D. Mass. 2015) (“[M]unicipalities must go back to the drafting board and craft solutions which recognize an individuals... rights under the First Amendment...); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 189 (D. Mass. 2015); *Browne v. City of Grand Junction, Colorado*, 2015 WL 5728755, at *13 (D. Colo. Sept. 30, 2015).

Courts also have not hesitated to strike regulations that regulate the manner in which a person can ask for a charitable donation, even where the regulation was supposedly justified by a state interest in public safety. And for good reason: restricting people’s behavior on account of their speech is almost always too over-reaching to be narrowly tailored to any compelling governmental interest. *See, e.g., Clatterbuck v. City of Charlottesville*, 92 F. Supp. 3d 478 (W.D. Va. 2015); *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 233 (D. Mass. 2015) (striking down provisions against blocking path and following a person after they gave a negative response); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 189 (D. Mass. 2015); *Browne v. City of Grand Junction, Colorado*, 2015 WL 5728755, at *12-13 (D. Colo. Sept. 30, 2015) (“[T]he Court does not believe[] that a repeated request for money or other thing of value necessarily threatens public safety.”).]

Beyond this federal jurisprudence, the Oregon Constitution has also been utilized to successfully challenge anti-panhandling ordinances in Oregon. For example, ACLU of Oregon successfully challenged the City of Medford's ordinance restricting the solicitation of donations (Medford Municipal Code, § 5.258) (*Volkart v. City of Medford*). The court found it violated Article I, section 8 and granted summary judgment in our favor. Prior to that, at our urging, the Ashland City Council repealed its Municipal Code § 10.68.050 which provided that "no one shall solicit affairs or beg or publically solicit subscriptions in any part of the parks" after its police department in a general order noted that "panhandling and loitering are not crimes [but are] constitutionally protected activities." As you can see, there is a long line of case law finding prohibitions against solicitation in a traditional public forum a violation of the free speech guarantees of the Oregon and United States Constitutions.

Alternatives to Anti-Panhandling Ordinances Exist

Numerous communities have created alternatives that are more effective, and leave all involved—homeless and non-homeless residents, businesses, city agencies, and elected officials—happier in the long run. *See* National Law Center on Homelessness and Poverty, HOUSING NOT HANDCUFFS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES (2016), <https://www.nlchp.org/documents/Housing-Not-Handcuffs>.

For example, Philadelphia, PA recently greatly reduced the number of homeless persons asking for change in a downtown subway station by donating an abandoned section of the station to a service provider for use as a day shelter. *See* Nina Feldman, *Expanded Hub of Hope homeless center opening under Suburban Station*, WHYY (Jan. 30, 2018) <https://whyy.org/articles/expanded-hub-hope-homeless-center-opening-suburban-station/>. In opening the Center, Philadelphia Mayor Jim Kenny emphasized "We are not going to arrest people for being homeless," stressing that the new space "gives our homeless outreach workers and the police a place to actually bring people instead of just scooting them along." These programs are how cities actually solve the problem of homelessness, rather than merely addressing its symptoms.

Albany's Anti-Panhandling Ordinance Should be Repealed

We can all agree that we would like to live in a city where homeless people are not forced to beg on the streets. But whether examined from a legal, policy, fiscal, or moral standpoint, criminalizing any aspect of panhandling is not the best way to get to this goal. That is why we are urging you to:

1. Place an immediate moratorium on any enforcement of your anti-panhandling ordinance. This requires instructing any law enforcement officers charged with enforcing the city code that the anti-panhandling ordinance should not be enforced in any way, including by issuance of citations, warnings, or move-on orders;
2. Proceed with a rapid repeal of the anti-panhandling ordinance to avoid potential legal issues;
3. If there are any pending prosecutions or citations under the anti-panhandling ordinance, dismiss them; and

4. Develop new approaches that will lead to the best outcomes for all of your residents, housed and unhoused alike.

In addition, if your jurisdiction is not currently enforcing its anti-panhandling, and you simply have a constitutionally suspect that remains on the books, we urge you to remove this archaic law from your city code. Leaving the law on the books raises the very real possibility that, at some point in the future, an energetic law enforcement officer will review the entirety of the municipal code and begin enforcing the ordinance.

We look forward to your prompt response.

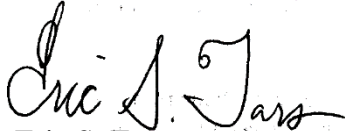
Sincerely,



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