ACLU Illinois | CHICAGO COALITION FOR THE HOMELESS | NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY

July 17, 2019

VIA U.S. MAIL & EMAIL

Todd Fleming
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100 S Lincoln Av
O'Fallon, IL 62269
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RE: City of O'Fallon Ordinances 74.07 and 111.09 on Solicitation and Panhandling

Dear Mr. Fleming:

We write with respect to City of O'Fallon Ordinances 74.07 and 111.09 (collectively, the "Ordinances"), which prohibit panhandling in a number of manners and locations. Since the landmark *Reed v. Gilbert* case in 2015, every panhandling ordinance challenged in federal court – at least 25 of 25 to date – including many with features similar to the ones in O'Fallon ("the City"), has been found constitutionally deficient or resulted in the repeal of that ordinance. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015)*; see, e.g. Norton v. City of Springfield*, 324 F. Supp. 3d 994, 1002 (C.D. Ill. 2018); *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. At least 31 additional cities – including eight municipalities in Illinois in the past year alone – have repealed their panhandling ordinances when informed of the likely infringement on First Amendment rights. The City's ordinances not only almost certainly violate the constitutional right to free speech protected by the First Amendment to the United States Constitution, it is also bad policy, and numerous examples of better alternatives now exist which the City could draw on. We call on the City to immediately repeal the Ordinances and instead consider more constructive alternatives or risk potential litigation.

The First Amendment protects peaceful requests for funds 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). As discussed below, the Ordinances are well outside the scope of permissible government regulation

The Ordinances overtly distinguish between types of speech based on "subject matter … function or purpose." *See Reed*, 135 S.Ct. at 2227 (internal citations, quotations, and alterations omitted); *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."); *Blitch v. City of Slidell*, 260 F. Supp. 3d 656, 667 (2017) (holding unconstitutional a panhandling ordinance because it was facially content-discriminatory and "burden[ed] speech and/or conduct by its subject matter and

by its purpose"); *Homeless Helping Homeless, Inc. v. City of Tampa*, 2016 WL 4162882 at *4-*5 (M.D. Fla. Aug. 5, 2016) (same). The Ordinances define panhandling as an in-person solicitation in a public place for "an immediate donation of money, goods or any other form of gratuity", except for requests that involve "passively standing or sitting with a sign or other indication that one is seeking donations." Section 111.02. The Ordinances prohibit panhandling in locations including bus stops, on public transportation, in sidewalk cafes, during times after sunset and before sunrise, and in a group of two or more persons. Section 111.09. The Ordinances also prohibit individuals from soliciting contributions while standing on median strips or in roadways. Section 74.07. The Ordinances are content-based because they restrict the content of a person's speech – asking for money. They are not neutral because other types of speech, such as political campaigning, catcalling, evangelizing, or asking for signatures are not restricted.

As a result, the Ordinances impose "content-based" restrictions on speech that are 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). The Ordinances cannot survive strict scrutiny because neither do they serve any compelling state interest, nor are they narrowly tailored.

First, the Ordinances serve no compelling state interest. 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."); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 189 (holding that a city's interest in promoting tourism and business was not sufficiently compelling to justify a content-based prohibition on solicitation); *Homeless Helping Homeless, Inc. v. City of Tampa*, 2016 WL 4162882 at *4-*5 (M.D. Fla. Aug. 5, 2016) (striking down a solicitation ban on the grounds that the city's interest in promoting tourism and economic activity its downtown area and historic district was not sufficiently compelling to survive strict scrutiny).

Second, even if the City could identify a compelling state interest, there is no evidence to demonstrate that the Ordinances are "narrowly tailored" to such an interest. Theoretical discussion is not enough: "the burden of proving narrow tailoring requires the County to prove that it actually *tried* other methods to address the problem." *Reynolds v. Middleton*, 779 F.3d 222, 231 (4th Cir. 2015). The City 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).

Though "public safety" is an important state interest, the Ordinances are not narrowly tailored to serve it. *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276, 1294 (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). For example, the City can protect pedestrian safety with other regulations, such as those prohibiting pedestrians from crossing the roadway at any point other than a crosswalk (Section 74.03). As a result, the Ordinance cannot be said to further public safety.

The location restrictions in the Ordinances, which outlaw panhandling at locations including intersections, median strips, bus stops, and sidewalk cafes, are also unconstitutional. Unsurprisingly, every court to consider a regulation that, like the Ordinances, bans requests for money 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) (holding unconstitutional an ordinance prohibiting all expressive activity on median strips); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011) (en banc) (striking down an ordinance that prohibited, among other things, solicitation of contributions on streets and highways); *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 [sic] . . . rights under the First Amendment . . . ."); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 189 (D. Mass. 2015) (striking down an ordinance that banned vocal panhandling in a city's downtown area, as well as within twenty feet of a bank, ATM, check-cashing business, transit stop, public restroom, pay telephone, theater, outdoor seating area, and associated parking areas); *Browne v. City of Grand Junction, Colorado*, 2015 WL 5728755, at *13 (D. Colo. Sept. 30, 2015).

The Ordinances also restrict the manner in which people can ask for an in-person donation, including by prohibiting panhandling in a group of two or more persons. Courts have not hesitated to strike regulations that regulate the manner in which a person can ask for a 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.").]

For these reasons, among others, the Ordinances cannot pass constitutional muster. Further, they are simply not good policy. Harassing, ticketing and/or arresting people who ask for help in a time of need is inhumane and counterproductive. Unlawful anti-panhandling ordinances such as these are costly to enforce and only exacerbate problems associated with homelessness and poverty. 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.

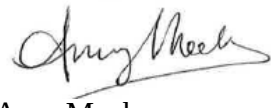
For example, Philadelphia, PA recently greatly reduced the number of homeless persons asking for change in a downtown subway station by donating an abandoned section of the station

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.

Please respond by August 19, 2019 with your assurances that the O'Fallon police will immediately stop enforcing the Ordinances, that any pending charges under the Ordinances, or resulting from arrests under the Ordinances, will be dismissed, and that the Village Board will swiftly repeal the Ordinances. If the Village does not comply, the ACLU of Illinois and the Chicago Coalition for the Homeless will be forced to consider legal options to protect the rights of panhandlers in O'Fallon.

Should you wish to discuss this further, please do not hesitate to contact Amy Meek at (312) 201-9740, ext. 341 or ameek@aclu-il.org. Thank you for your attention to this matter.

Sincerely,



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