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

August 28, 2018

Via Email

Wendy Morthland
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RE: Decatur City Code Chapter 73, Section 20 "Unlawful Solicitation"

Dear Ms. Morthland,

We write with respect to Chapter 73, Section 20 of the Decatur City Code "Unlawful Solicitation" (the "Ordinance"), which prohibits panhandling in a number of manners and locations. These provisions violate the First Amendment to the United States Constitution and Article I, Section 4 of the Illinois Constitution. Since the landmark *Reed v. Gilbert* case in 2015, every panhandling ordinance challenged in federal court – at 25 of 25 to date – including several with features similar to the one in Decatur ("the City"), 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*, 144 F. Supp. 3d 218 (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 At least 31 additional cities have repealed their panhandling ordinances when informed of the likely infringement on First Amendment rights. Just last week, the Central District of Illinois invalidated a prohibition on "panhandling while at any time before, during, or after the solicitation knowingly approaching within five feet of the solicited person or intentionally touching the solicited person without the solicited person's consent." *Norton v. City of Springfield*, 15-3276, 2018 WL 3964800 (C.D. Ill. Aug. 17, 2018). The City's ordinance not only violates 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 Ordinance and instead consider more constructive alternatives or risk potential litigation.

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). As discussed below, the Ordinance is well outside the scope of permissible government regulation.

The Ordinance 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."). The Ordinance defines "solicit" as "request for immediate donation of money of other thing of value from another person," and then places other restrictions on locations and activities that should not be combined with solicitation. Decatur, Ill., Chapter 73 § 20. The Ordinance is content-based because it restricts the content of a person's speech—asking for money. It is not neutral because other types of speech, such as political campaigning, catcalling, evangelizing, or asking for signatures are not restricted by the Ordinance.

As a result, the Ordinance is 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). The Ordinance cannot survive strict scrutiny because neither does it serve any compelling state interest, nor is it narrowly tailored.

First, the Ordinance serves 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.").

Second, even if the City could identify a compelling state interest, there is no evidence to demonstrate that the Ordinance is "narrowly tailored" to such an interest. It is evident that the Ordinance is not "narrowly tailored" because it outlaws activities that are already banned by other criminal laws. *See e.g. Thayer* at 236. Much of the conduct prohibited by the Ordinance is already prohibited by laws against assault, battery, and obstruction of pedestrian traffic. The only reason to have a special rule against panhandling while committing these offenses is to target homeless people.

The location restrictions in the Ordinance, which outlaw solicitation in public transportation and near financial institutions and ATMs, are also unconstitutional. Unsurprisingly, every court to consider a regulation that, like the Ordinance, 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) (ordinance with buffer zone around ATMs struck down).

For these reasons, among others, the Ordinance cannot pass constitutional muster. Further, it is 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 Decatur's Unlawful Solicitation Ordinance 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.

We can all agree that we would like to see a Decatur 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. The City should place an immediate moratorium on enforcement and then proceed with a rapid repeal to avoid potential litigation, and then develop approaches that will lead to the best outcomes for all the residents of Decatur, housed and unhoused alike.

We look forward to your response on or before September 28, 2018.

Sincerely,

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