ACLU Vermont

NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY

August 28, 2018

SENT VIA EMAIL AND REGULAR MAIL

Selectboard
Town of Rutland
C/O Bill Sweet, Administrative Assistant to the Selectboard
181 Business Route 4
Center Rutland, VT 05736

RE: Town of Rutland Aggressive Panhandling Ordinance

Dear Rutland Town Selectboard:

We write with respect to Rutland Town's Aggressive Panhandling (the "Ordinance"). Since the landmark *Reed v. Gilbert* case in 2015, every panhandling ordinance challenged in federal court – at 25 of 25 to date – including many with features similar to the ones in Rutland Town ("the Town"), 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. At least 31 additional cities, including Vermont's own City of Burlington, have repealed their panhandling ordinances when informed of the likely infringement on First Amendment rights. The Town's ordinance not only almost certainly 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 Town could draw on. We call on the Town to immediately repeal the Ordinance, end any enforcement practices related to it, 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 explicitly bans "asking for money or objects of value in a public place . . . using the spoken, written or printed word, bodily gestures, signs or other means with the purpose of obtaining an immediate donation of money or other thing of value . . . ." from people in a variety of circumstances. Each inclusion of the word solicit overly distinguishes soliciting from other types of speech that are not banned by the Ordinance. For instance, while the ordinance bans asking for money within fifteen feet of a public toilet, there is no such ban on asking for petition signatures.

As a result, a court will likely hold the Ordinance is a "content-based" restriction on speech that is presumptively unconstitutional, unless the Town can show it is narrowly tailored to satisfy a compelling justification. *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 it neither serves a 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. 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 Ordinance is not narrowly tailored to serve that interest. *See 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). For example, the Ordinance bans the act of silently holding one's hand out for an offering while on a public sidewalk within fifteen feet of a building entrance. Such an act cannot be deemed a risk to public safety. Many similar acts of spoken, written, and unspoken requests for charity are banned under the Ordinance. As a result, the Ordinance cannot be plausibly said to further public safety.

Courts 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.").

Also, 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); *Cross v. City of Sarasota*, No. 15-CV-02364 (M.D. Fla. June 21, 2017). 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 Rutland Town's Aggressive Panhandling Ordinance can be 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

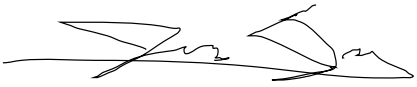
HANDCUFFS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES (2016), https://www.nlchp.org/documents/Housing-Not-Handcuffs.

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/. Creatively, cities and towns can actually solve the problem of homelessness, rather than merely addressing its symptoms through criminalization or "move alongs." Vermont cities and towns can repeal anti-panhandling ordinances and take similar positive steps. Laudably, Burlington recently repealed its nearly identical "aggressive panhandling" ordinance because of concerns about its constitutionality and lack of enforcement.

We can all agree that we would like to see a Rutland where homeless and poor 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 Town 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 Rutland Town, housed and unhoused alike. In the event the Town does not repeal this unconstitutional law, we will seek out impacted individuals to represent in legal action, at which time we will seek interim injunctive relief and attorney's fees as authorized by 42 U.S.C. § 1988.

Please do not hesitate to contact ACLU-VT Staff Attorney, Jay Diaz, with questions or thoughts at (802) 223-6304. We look forward to your response on or before **September 30, 2018**.

Sincerely,



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