ACLU Vermont

NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY

August 28, 2018

SENT VIA EMAIL AND REGULAR MAIL

William J. Fraser
City Manager
39 Main St.
Montpelier, VT 05602

RE: Montpelier's Begging Ordinance Sec. 11-708

Dear Mr. Fraser:

We write with respect to Montpelier's "Begging" Ordinance Sec. 11-708 (the "Ordinance"). Since the landmark *Reed v. Gilbert* case in 2015, every panhandling or begging ordinance challenged in federal court – at 25 of 25 to date – including many with features similar to the ones in Montpelier ("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*, 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 At least 31 additional cities, including Vermont's own City of Burlington, have repealed their panhandling ordinances when informed of the likely infringement on First Amendment rights.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 City'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 City could draw on. And, a review of Montpelier Police Department records shows that the Ordinance is rarely enforced. Because the Ordinance is unconstitutional and unnecessary, we call on the City 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); s*ee, 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 any person from begging or soliciting "the gift of money or any other thing, or exhibit[ing] himself for the purpose of inciting pity, in or on a street or public place . . . ." The Ordinance is short and overly broad. It bans an entire category of speech in any and all public places "without the permission of the chief of police." Requiring such permission is a form of impermissible prior restraint, unacceptable under longstanding First Amendment doctrine.

Because the City has made this overly broad subject matter-based distinction for "begging," the Ordinance is a "content-based" restriction on speech—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 certain types 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 and any evidenced enforcement of it are 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). The City's ordinance bans all kind of speech and expressions that cannot be deemed a risk to public safety. Even written and unspoken requests for charity are banned under the Ordinance. Although the Montpelier Police Department may have a more limited enforcement policy than suggested by the Ordinance, public records show that, just this year, individuals are still being admonished and "moved along" for verbally asking others for charity. Such requests are not a valid public safety concern. As a result, the Ordinance and such enforcement 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."). For these reasons, among others, the Ordinance and its enforcement cannot pass constitutional muster.

Even more specific ordinances that ban requests for charity within an identified geographic area or through a certain manner have been found unconstitutional. *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)

Further, the anti-panhandling ordinance is simply unnecessary bad policy. Harassing individuals and chilling their requests for help in a time of need is inhumane and counterproductive. Unlawful anti-panhandling ordinances such as Montpelier's ordinance can be costly to enforce and only exacerbate problems associated with homelessness and poverty. Moreover, Montpelier's Police

Department has only had a few occasions to admonish panhandlers from January 1, 2017 to April of 2018. Clearly, panhandling is not a major issue in Montpelier.

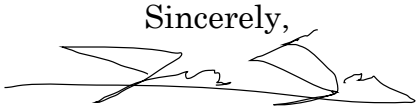
Thankfully, alternatives to such ordinances are available. Numerous communities have created alternatives that are more effective, and leave all involved—homeless and non-homeless residents, businesses, city agencies, and elected officials—happier in the long run. *See* National Law Center on Homelessness 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 "aggressive panhandling" ordinance because of concerns about its constitutionality and lack of enforcement.

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