

August 28, 2018

SENT VIA EMAIL AND REGULAR MAIL

Steven E. Mackenzie
City Manager
6 N Main St
Barre, VT 05641

RE: Barre's Aggressive Panhandling Ordinance, Sec. 11-10(c)

Dear Mr. Mackenzie:

We write with respect to Barre's "Aggressive Panhandling" Ordinance Sec. 11-10(c) (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 Barre ("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 At least 31 additional cities, including Vermont's own City of Burlington, have repealed their panhandling ordinances when informed of the likely infringement on First Amendment rights.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, as Chief Bombardier told us in April of 2018, the Barre City Police have not logged a single incident of panhandling or begging since before January 1, 2017. Because the Ordinance is unconstitutional and unnecessary, we call on the City to immediately repeal it, end any enforcement practices related to it, and instead consider more constructive alternatives.

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 “soliciting” defined as “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” in a variety of circumstances. Each inclusion of the word “solicit” distinguishes it from other types of speech that are not banned by the Ordinance. For instance, while the Ordinance bans soliciting money within fifteen feet of a public toilet, entrance of a building, or a pay telephone, there is no such ban on asking for petition signatures in those same locations.

As a result, a court will likely hold the Ordinance is a “content-based” restriction on speech that is presumptively unconstitutional, unless the City 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 content-based speech 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 certain types 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 evidenced enforcement of it are not narrowly tailored to serve it. *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. Such acts are not a public safety concern. As a result, the Ordinance and its current 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.”).

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 individual’s . . . 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 and current enforcement policy cannot pass constitutional muster.

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 Barre’s ordinance can be costly to enforce and will exacerbate problems associated with homelessness and poverty. And, notably, while public records show a small amount of enforcement in prior years, Barre’s Chief of Police recently informed us that the city’s police have not had occasion to enforce the Ordinance from January 1,

2017 to April of 2018. Clearly, panhandling does not present the scourge that the Ordinance drafters envisioned.

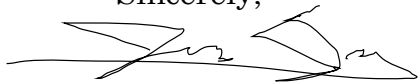
Thankfully, alternatives to such ordinances are available. Numerous communities have created alternatives that are more effective, and leave all involved—homeless and non-homeless residents, businesses, city agencies, and elected officials—happier in the long run. See National Law Center on Homelessness 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 can do this too. 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 Barre 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 Barre, 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 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,



Jay Diaz
Staff Attorney, ACLU of Vermont

Eric S. Tars
Senior Attorney, National Law Center on Homelessness & Poverty