



NATIONAL LAW CENTER
ON HOMELESSNESS & POVERTY

August 28, 2018

BY EMAIL TO: calumumba@city.jackson.ms.us

Chokwe Antar Lumumba
Mayor of Jackson
219 S. President Street
Jackson, MS 39205-001
Ph: 601-960-1111

RE: Jackson, MS – Code of Ordinances Sec. 94-1, *et seq.*

Dear Mayor Lumumba,

We write with respect to Jackson’s Code of Ordinances Section 94-1, *et seq.* on solicitation (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 Jackson (“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 At least 31 additional cities have repealed their panhandling ordinances when informed of the likely infringement on First Amendment rights.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. We call on the City to immediately repeal the Ordinance 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 makes it unlawful to “commercially solicit’ . . . on a street, sidewalk, or public place, without a permit.” Jackson Code Sec. 94-2(a). “Commercial solicitation” includes panhandling. *Id.* The

Ordinance prohibits commercial solicitation (i) in certain locations including within 15 feet of a public toilet, ATM and bus stop and within the Central Business District, (ii) at nighttime, (iii) in an aggressive, false or misleading manner, and (iv) by a minor at the behest of an adult. Jackson Code Sec. 94-2(b)-(f). “Commercial solicitation” does not include “passively standing or sitting with a sign or other indication that one is seeking donations without addressing the request to any specific person.” *Id.* at 94-2(a). Even if at/in an appropriate time, manner or place, before commercially soliciting, a person must obtain a registration issued by the chief of police. *Id.* at 94-2(h).

As a result, a court will likely hold 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. 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).

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).

The Ordinance imposes “manner” restrictions on commercial solicitation by allowing “passive” solicitation but prohibiting “aggressive solicitation,” which includes blocking someone’s path, following or walking alongside a person, and using profane or abusive language. Jackson Code Sec. 94-2(a) and (d). 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.”).

The Ordinance also places “time” restrictions on panhandling. It prohibits panhandling “after sunset and before sunrise.” Jackson Code 94-2(c). Here, there is no evidence suggesting that the Ordinance’s time-based restriction on requests for charitable donations hews closely to a compelling interest. Courts regularly strike down such restrictions. *See, e.g., Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 580 (6th Cir. 2012) (striking down 6 pm curfew for door-to-door solicitation); *see also Thayer*, 144 F. Supp. 3d 218, 233-34, 237-38 (collecting cases and striking down as unconstitutional an ordinance prohibiting panhandling after dark because, despite “legitimate concerns regarding aggressive panhandlers and public safety[,]” it was “not the least restrictive means available to protect the public and therefore, does not satisfy strict scrutiny”).

Furthermore, the Ordinance’s licensing requirements for panhandlers, Jackson Code Sec. 94-2(h), cannot survive constitutional challenge because they are not narrowly tailored to advance a compelling governmental interest. Indeed, a similar licensing scheme was struck down as facially unconstitutional in Slidell, LA. *See Blich v. City of Slidell*, 260 F. Supp. 3d 656, 671 (E.D. La. 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 Jackson Code Sec. 94-1, *et seq.* 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 do understand that Jackson may have allowed such unconstitutional ordinances to stay on the books but may have no intention of enforcing them. Even if that is the case, it is important to remove this archaic law from the municipal code. Leaving the law on the books raises the very real possibility that, at some point in the future, the Ordinance will be enforced, leading to the infringement of constitutional rights

We can all agree that we would like to see a Jackson 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 litigation risk, and then develop approaches that will lead to the best outcomes for all the residents of Jackson, housed and unhoused alike. In addition, if there are any pending prosecutions under the Ordinance, dismiss them.

We look forward to your response on or before **September 11, 2018**.

Sincerely,



Joshua Tom

Legal Director, ACLU of Mississippi



Eric S. Tars

Senior Attorney, National Law Center on Homelessness & Poverty