ACLU New Mexico

NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY

August 28, 2018

Via U.S. First-Class and electronic mail to:

Raye Miller, Mayor
City of Artesia
511 W. Texas Avenue
Artesia, NM 88210
mayor@artesianm.gov

RE: Artesia's "Solicitors and Peddlers" Ordinance

Dear Mayor Miller:

Your municipality is one of several New Mexican cities with a municipal code that makes it illegal, in one form or another, to panhandle. Artesia's law is titled "Solicitors and Peddlers". The sections relevant to panhandling are codified at Artesia Municipal Code §§ 4-2-1 through 4-2-2 ("Ordinance"). This Ordinance not only unfairly targets poor and homeless persons whose pleas for assistance are protected by the First Amendment, but it is also legally indefensible. We write to ask that the City of Artesia immediately initiate the steps necessary to repeal the ordinance and take it off the books. While the process of repeal is unfolding, law enforcement should be instructed not to enforce this ordinance.

In recent years, this nation and New Mexico have seen a marked uptick in enforcement of laws that effectively criminalize homelessness and extreme poverty, including many laws that prohibit individuals from peacefully asking passersby for help.[1] Not only do these ordinances violate the constitutional rights of impoverished people, but they are costly to enforce and serve to exacerbate problems associated with homelessness and poverty. Harassing, ticketing and/or arresting poor persons for asking for help is inhumane, counterproductive and, in most cases, illegal. That is why the ACLU has devoted resources in recent years to reviewing and challenging such ordinances here in New Mexico. Recently, we filed an action in federal court challenging the constitutionality of Albuquerque's anti-panhandling ordinance.[2] We urge the City of Artesia to seek alternatives to criminalizing homelessness. Numerous communities have opted for compassionate, needs-driven approaches to homelessness that are more effective, more humane and less costly.[3]

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[1] *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.

[2] *See* Albuquerque Journal, *City agrees not to enforce panhandling ordinance for now*, February 18, 2018, https://www.abqjournal.com/1133182/city-agrees-not-to-enforce-panhandling-ordinance.html.

[3] For example, recently, Philadelphia, Pennsylvania substantially 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,*

Solicitation of charity is protected by the First Amendment

It is well-settled that peacefully soliciting charity in a public place is protected by the First Amendment.[4] This constitutional protection applies not just to organized charities, but also to the humblest solitary beggar asking for spare change to get through the day. More than twenty years ago, the Second Circuit explained that begging or panhandling is communicative activity that the Constitution protects:

> Begging frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation. Even without particularized speech, however, the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance. We see little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed. The former are communicating the needs of others while the latter are communicating their personal needs. Both solicit the charity of others. The distinction is not a significant one for First Amendment purposes.[5]

In 2015, the ACLU of Colorado received a favorable ruling in its challenge to Grand Junction's panhandling ordinance. In that case, the federal district court similarly underscored the significance of panhandling's communicative function:

> This court believes that panhandling carries a message. Often, a request for money conveys conditions of poverty, homelessness, and unemployment, as well as a lack of access to medical care, reentry services for persons convicted of crimes, and mental health support. The City's attempt to regulate this message is an attempt to restrain the expression of conditions of poverty to other citizens.[6]

In the years since the *Loper* decision, numerous courts have held that regulations or outright prohibitions of solicitation violate the First Amendment.[7] Indeed, since the Supreme

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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."

[4] *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.").

[5] *Loper v. New York Town Police Department*, 999 F.2d 699, 700 (2d Cir. 1993).

[6] *Browne v. City of Grand Junction*, 2015 WL 3568313, at *5 (D. Colo. June 8, 2015).

[7] *See, e.g.*, *Speet v. Schuette*, 726 F.3d 867, 870 (6th Cir. 2013) (invalidating Michigan's anti-panhandling statute, which "bans an entire category of activity that the First Amendment protects"); *Clatterbuck v. City of Charlottesville*, 708 F.3d 549 (4th Cir. 2013) (subjecting regulation of solicitation to strict scrutiny); *ACLU of Idaho v. City of Boise*, 998 F. Supp. 2d 908 (D. Idaho 2014) (issuing preliminary injunction); *Kelly v. City of Parkersburg*, 978 F. Supp. 2d 624 (S.D. W Va. 2013) (issuing preliminary injunction); *Guy v. County of Hawaii*, 2014 WL 4700289 (D. Hawaii Sept. 19, 2014) (issuing temporary restraining order).

Court's landmark ruling in *Reed v. Gilbert* in 2015, every panhandling ordinance challenged in federal court –25 to date – has been found constitutionally deficient.[8] Further, at least 31 additional cities have repealed their panhandling ordinances when informed of the likely infringement on First Amendment rights. Here in New Mexico, the City of Gallup recently rescinded its panhandling law after being informed by the ACLU that the ordinance was likely unconstitutional.

Artesia's ordinance violates the First Amendment

The government's authority to regulate public speech is exceedingly restricted, "[c]onsistent with the traditionally open character of public streets and sidewalks....".[9] Artesia's Ordinance is well outside the scope of permissible government regulation as it overtly distinguishes between types of speech based on subject matter, function or purpose.[10] The Ordinance makes it unlawful for an individual to "stand or otherwise be present on a street or within a public right of way and actively solicit employment, business, or contributions from any person in a motor vehicle..." Artesia City Code § 4-2-2 (D). Other types of speech that happen on those same streets and public rights of way such as boycotting a business, communicating messages in favor or in opposition to a public policy or shouting support for a certain political candidate are not criminalized by the Ordinance. Such distinctions are unconstitutional, content-based restrictions on speech.

In analyzing content-based restrictions, courts use the most stringent standard – strict scrutiny – to review them. In order to meet strict scrutiny, a law must be narrowly tailored to serve a compelling state interest.[11] Artesia's Ordinance cannot survive strict scrutiny. First, it 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

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[8] *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) (anti-panhandling statute is content-based and subject to strict-scrutiny); *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276, 1287 (D. Colo. 2015) (same); *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014) (same), *vacated*, 135 S. Ct. 2887 (2015), *declaring ordinance unconstitutional on remand*, 144 F. Supp. 3d 218 (D. Mass. 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.

[9] *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014).

[10] *See Reed,* 135 S.Ct. at 2227; *Norton v. City of Springfield, Ill.*, 806 F.3d 411, 412 (7th Cir. 2015) ("Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification.").

[11] *See, e.g., Reed*, 135 S. Ct. at 2226 (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*, 134 S. Ct. at 2534.

vice."[12] 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 of the problem is not enough: "the burden of proving narrow tailoring requires the County to prove that it actually *tried* other methods to address the problem."[13] The City may not "[take] a sledgehammer to a problem that can and should be solved with a scalpel."[14]

In addition to being content-based, the Ordinance makes it unlawful for someone to panhandle in public spaces "without first securing a permit from the city…" Artesia City Code § 4-2-1 (A). The Ordinance further states that the city clerk or the *police department* shall "investigate the persons and/or organization applying for the permit" in order to determine whether a permit will be issued. *Id.* § 4-2-1 (C). Such a provision is considered a prior restraint under First Amendment law and is gravely problematic as it carries the risk of a government official censoring speech with which he or she disagrees. Prior restraints carry "a heavy presumption against [their] constitutional validity."[15] Allowing a police department official to make decisions about who can and cannot speak and what that speech can entail goes against the very fiber of the First Amendment and is a "dramatic departure from our national heritage and constitutional tradition."[16]

For the foregoing reasons, Artesia's Ordinance is extremely vulnerable to a constitutional challenge.

Required Action

We can all agree we would like to see an Artesia where homeless people are not forced to solicit assistance 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 achieve this goal.

Based on the foregoing, we ask the City of Artesia to take the following immediate actions:

1. **Stop enforcing Artesia Municipal Code §§ 4-2-1 through 4-2-2. This requires instructing any law enforcement officers charged with enforcing the law that §§ 4-2-1 through 4-2-2 is no longer to be enforced in any way, including by issuance of citations, warnings, or move-on orders.**

2. **Immediately initiate the steps necessary to repeal Artesia Municipal Code §§ 4-2-1 through 4-2-2.**

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[12] *McCullen*, 134 S. Ct. at 2529; *see also, 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.").
[13] *Reynolds v. Middleton*, 779 F.3d 222, 231 (4th Cir. 2015).

[14] *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276, 1294 (D. Colo. 2015).

[15] *Carroll v. Pres. Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968).

[16] *Watchtower Bible and Tract Soc'y of New York, Inc. v. Vill. Of Stratton*, 536 U.S. 150, 166 (2002).

3. **Dismiss any pending prosecutions under Artesia Municipal Code §§ 4-2-1 through 4-2-2.**

In the event the City of Artesia does not take steps to remedy its unconstitutional ordinance, the ACLU of New Mexico will consider all options to ensure that the law is no longer enforced. Please inform us by **September 11, 2018** with the steps the City of Artesia intends to take to address the issues detailed in this letter.

Sincerely,

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