



NATIONAL LAW CENTER
ON HOMELESSNESS & POVERTY

August 28, 2018

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

Ken Miyagishima, Mayor
City of Las Cruces
P.O. Box 20000
Las Cruces, NM 88004
KMiyagishima@las-cruces.org

RE: Las Cruces' "Prohibited Solicitations" Ordinance

Dear Mayor Miyagishima:

Your municipality is one of several New Mexican cities with a municipal code that makes it illegal, in one form or another, to panhandle. Las Cruces' law is titled "Prohibited Solicitations" and is codified at Las Cruces Municipal Code §§ 21-61 through 21-65 ("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 Las Cruces 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 Las Cruces 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

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

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 U.S. Dist. Lexis 132226 (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.

Las Cruces' 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 Las Cruces' 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 "any person to solicit money or other things of value..." in virtually all public areas of the city. See LCMC, § 21-62. This includes parks, plazas, sidewalks, streets, public transportation vehicles, bus stations, bus stops; near banks, check cashing facilities and automated teller machines; and on medians and on entrances to and exits from highways. Other types of speech such as the holding of signs to boycott a business, communicate messages or support a certain political candidate are not targeted 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 Las Cruces' 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

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.

channel, or leave the Web site” to avoid hearing an uncomfortable message is “a virtue, not a 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

Section 21-63 (a) of the Ordinance cites safety as a reason for the prohibition against panhandling on city streets and highways in Las Cruces. While public safety is an important state interest, the Ordinance is not narrowly tailored to serve it.¹⁵ The law prohibits panhandling on all streets, medians and highway entrances and exits, without regard to size, traffic volume or history of accidents. Despite the Ordinance’s purported concern for public safety, it does not prohibit individuals from standing on a median or freeway entrance/exit ramp to engage in other sorts of speech such as sharing political messages, advertising for a business or simply engaging in conversation with an occupant of a vehicle. The Ordinance’s prohibitions on other locations where panhandling can occur such as in public transportation vehicles, bus stations, bus stops, and near automated teller machines, banks and check cashing businesses is similarly problematic as every court to consider a regulation that bans requests for charity within an identified geographic area has stricken the regulation.¹⁶ The Ordinance cannot be said to further public safety.

For the foregoing reasons, Las Cruces’ Ordinance is extremely vulnerable to a constitutional challenge.

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 *See e.g. 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).

¹⁶ *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” 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).

Required Action

We can all agree would like to see a Las Cruces 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 Las Cruces to take the following immediate actions:

- 1. Stop enforcing Las Cruces Municipal Code §§ 21-61 through 21-65. This requires instructing any law enforcement officers charged with enforcing the code that it 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 Las Cruces Municipal Code §§ 21-61 through 21-65.**
- 3. Dismiss any pending prosecutions under Las Cruces Municipal Code §§ 21-61 through 21-65.**

In the event the City of Las Cruces 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 Las Cruces intends to take to address the issues detailed in this letter.

Sincerely,



María Martínez Sánchez
Staff Attorney
ACLU of New Mexico



Eric S. Tars

Senior Attorney
National Law Center on Homelessness & Poverty