



NATIONAL LAW CENTER  
ON HOMELESSNESS & POVERTY

August 28, 2018

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

Javier Sanchez, Mayor  
City of Española  
405 N. Paseo de Oñate  
Española, NM 87532  
javiersanchez@espanolanm.gov

**RE: Española's "Safety in Public Places" Ordinance**

Dear Mayor Sanchez:

Your municipality is one of several New Mexican cities with a municipal code that makes it illegal, in one form or another, to panhandle. Española's law is titled "Safety in Public Places" and is codified at Code of the City of Española, §§ 272-1 through 272-5 ("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 Española 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.<sup>1</sup> 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.<sup>2</sup> We urge the City of Española 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.<sup>3</sup>

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<sup>1</sup> 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>.

<sup>2</sup> 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>.

<sup>3</sup> 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*, WHYY (Jan. 30, 2018), <https://whyy.org/articles/expanded-hub-hope-homeless-center-opening-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.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup>

In the years since the *Loper* decision, numerous courts have held that regulations or outright prohibitions of solicitation violate the First Amendment.<sup>7</sup> Indeed, since the Supreme 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.<sup>8</sup> Further, at least 31

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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."

<sup>4</sup> 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.").

<sup>5</sup> *Loper v. New York Town Police Department*, 999 F.2d 699, 700 (2d Cir. 1993).

<sup>6</sup> *Browne v. City of Grand Junction*, 2015 WL 3568313, at \*5 (D. Colo. June 8, 2015) (*Browne I*).

<sup>7</sup> 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).

<sup>8</sup> 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 II*, 136 F. Supp. 3d

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.

### *Española'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...."<sup>9</sup> Española'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.<sup>10</sup> The Ordinance prohibits myriad types of panhandling while explicitly distinguishing other types of speech as lawful. *See* the definition of "Panhandling" under § 272-3. ("Panhandling shall not include street performances, buskers or licensed door-to-door solicitations.") Further, additional types of speech such as the holding of signs to boycott a business, communicate messages, or support a certain political candidate are similarly unaffected 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.<sup>11</sup> Española's Ordinance cannot survive strict scrutiny as it does not serve a compelling state interest.

Section 272-2 (A) of the Ordinance cites quality of life, economic vitality and public safety as justifications for the law. With respect to quality of life and economic vitality, our Supreme Court has pointedly stated that 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."<sup>12</sup>

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at 1287; *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>.

<sup>9</sup> *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014).

<sup>10</sup> *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.").

<sup>11</sup> *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 v. Coakley*, 134 S. Ct. 2518, 2534 (2014).

<sup>12</sup> *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014); *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.").

With respect to public safety, while it is an important state interest, the Ordinance is not narrowly tailored to serve it.<sup>13</sup> The City may not “[take] a sledgehammer to a problem that can and should be solved with a scalpel.”<sup>14</sup> Española’s law prohibits panhandling in a variety of locations, some of which include in public transportation vehicles and facilities, near bus stops, on sidewalks near cafés, and on any street if it entails interaction with an occupant of a vehicle. *See* § 272-4. However, despite the Ordinance’s purported concern for public safety, it does not prohibit individuals from standing in those exact same locations 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. Unsurprisingly, every court to consider a regulation that bans requests for charity within an identified geographic area has struck down the regulation.<sup>15</sup> 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.”<sup>16</sup> The Ordinance cannot be said to further public safety.

The Ordinance’s restrictions on time and manner regarding panhandling are similarly problematic. With respect to time, the Ordinance limits speech constituting panhandling to daytime hours, *see* § 272-4 (A), yet provides no similar time limitations for other forms of speech. 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.<sup>17</sup> Finally, the Ordinance’s provisions targeting the manner in which an individual may panhandle are also impermissible. The Ordinance prohibits individuals from approaching individuals who are standing in line, asking a person more than once for a donation or panhandling in a group of two or more people. *See* § 272-3. Courts have not hesitated to strike regulations that regulate the way 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.<sup>18</sup>

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<sup>13</sup> *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).

<sup>14</sup> *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276, 1294 (D. Colo. 2015) (*Browne II*).

<sup>15</sup> *See, e.g., Norton v. City of Springfield*, 806 F.3d 411 (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 I*, 2015 WL 5728755, at \*13.

<sup>16</sup> *Reynolds v. Middleton*, 779 F.3d 222, 231 (4th Cir. 2015).

<sup>17</sup> *See, e.g., Browne II*, 136 F. Supp. 3d at 1292-93 (D. Colo. 2015) (finding that city did not show that a blanket prohibition on panhandling at night was necessary to advance public safety); *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 580 (6th Cir. 2012) (striking down 6 P.M. curfew for door-to-door solicitation).

<sup>18</sup> *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 (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 II*, 136 F. Supp. at 1293 (“[T]he Court does not believe[] that a repeated request for money or other thing of value necessarily threatens public safety.”).

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

***Required Action***

We can all agree would like to see an Española 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 Española to take the following immediate actions:


- 1. Stop enforcing Española's Safety in Public Places Ordinance. This requires instructing any law enforcement officers charged with enforcing the Ordinance 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 Española's Safety in Public Places Ordinance.**
- 3. Dismiss any pending prosecutions under Española's Safety in Public Places Ordinance.**

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

Sincerely,



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