



NATIONAL LAW CENTER
ON HOMELESSNESS & POVERTY

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August 28, 2018

SENT VIA ELECTRONIC MAIL: tjirsa@estes.org

Mayor Todd Jirsa
Town of Estes Park
P.O. Box 1200
Estes Park, CO 80517

Re: Estes Park's Panhandling Ordinance

Dear Mayor Jirsa:

Your municipality is one of dozens in Colorado with a municipal code that criminalizes panhandling under circumstances that pose no threat to public safety. Specifically, Section 9.08.090(b)(5) of Estes Park's municipal code criminalizes panhandling on public transportation. This provision unfairly target poor and homeless persons whose pleas for assistance are protected by the First Amendment, and is legally indefensible. We write to ask that Estes Park immediately initiate the steps necessary to repeal this provision. While the process of repeal is unfolding, law enforcement should be instructed not to enforce this provision.

In recent years, this nation and Colorado 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 anti-begging 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 considerable resources in

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>.

recent years to reviewing and sometimes initiating court challenges to such ordinances here in Colorado.²

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. *See, e.g., Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980) (“[C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests – communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes – that are within the protection of the First Amendment.”). As the Second Circuit explained more than twenty years ago, 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:

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

² Following are examples of ACLU actions aimed at challenging laws that criminalize peaceful solicitation of charity:

- In 2013, Colorado Springs repealed an ordinance establishing a “Downtown No Solicitation Zone” after the ACLU obtained a preliminary injunction. As part of the settlement in that case, Colorado Springs paid the ACLU \$110,000 in attorneys’ fees.
- In early 2015, the ACLU filed a class action lawsuit challenging Fort Collins’s enforcement of its panhandling ordinance. After legal briefing on the ACLU’s motion for a preliminary injunction, Fort Collins repealed all of the challenged provisions. As part of the subsequent settlement, Fort Collins paid the ACLU \$82,500 in attorney’s fees.
- Later in 2015, a federal judge ruled in an ACLU case that Grand Junction’s panhandling ordinance violated the First Amendment. *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276 (D. Colo. 2015). Grand Junction repealed the ordinance and paid the ACLU \$330,000 in attorneys’ fees.
- In October 2015, in response to a letter from the ACLU, Colorado Springs dismissed hundreds of panhandling charges against individuals who had been cited for peacefully soliciting charity with a sign.
- In 2016, in response to letters from the ACLU, 34 jurisdictions across Colorado agreed to repeal local ordinances that prohibited “loitering . . . for the purpose of begging.”

of others. The distinction is not a significant one for First Amendment purposes.

Loper v. New York Town Police Department, 999 F.2d 699, 700 (2d Cir. 1993). In the years since the *Loper* decision, numerous courts have held that regulations or outright prohibitions of panhandling violate the First Amendment.³ Indeed, since the landmark *Reed v. Gilbert* Supreme Court case in 2015,⁴ there has been a flood of First Amendment challenges to panhandling ordinances around the country. Every panhandling ordinance challenged in federal court since *Reed* – 25 to date – has been found constitutionally deficient, including the City of Grand Junction’s ordinance challenged by the ACLU.⁵

Estes Park’s ordinance violates the First Amendment.

Section 9.08.090(b)(5) bans solicitation speech on public transport that is courteous, polite, nonthreatening, nonaggressive, does not pose a risk to public safety, and is squarely protected by the First Amendment. This provision does not narrowly focus on dangerous, threatening or unduly coercive behaviors. Instead, the ordinance prohibits, on all public transport, even passively, silently, and nonintrusively sitting with a sign that asks for charity, as well as gentle verbal pleas for assistance. This provision could not survive a legal challenge.

The language of Estes Park’s panhandling ordinance is familiar to the ACLU. In 2014, the ACLU filed a lawsuit in federal court challenging provisions of Grand Junction’s panhandling ordinance, including a provision prohibiting solicitation on public buses.⁶ After the court granted summary judgment against the City, the

³ See, e.g., *Speet v. Schuette*, 726 F.3d 867, 870 (6th Cir. 2013) (invalidating Michigan’s anti-begging 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).

⁴ In *Reed*, the Supreme Court clarified that “a speech regulation targeted at specific subject matter [e.g. requests for donations] is content based even if it does not discriminate among viewpoints within that subject matter,” and is thus subject to strict scrutiny. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2230-31 (2015).

⁵ 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*, 144 F. Supp. 3d 218 (D. Mass. 2015) (same); 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>.

⁶ In the lawsuit, the ACLU did not challenge the portions of Grand Junction’s ordinance that target threatening, coercive or menacing behavior that actually interferes with the rights of others. The unchallenged portions of Grand Junction’s ordinance are nearly identical to Estes Park’s Sec. 9.08.090(b)(1)-(4) and are not the subject of this letter.

City repealed the challenged provisions and paid substantial attorneys' fees. As in *Loper*, the Colorado federal district court 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.

Browne v. City of Grand Junction, 2015 U.S. Dist. Lexis 73834, **12-13 (D. Colo. June 8, 2015). Applying *Reed*, the court went on to find that the panhandling restrictions were content-based and, thus, subject to strict scrutiny. *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276, 1288-90 (D. Colo. 2015). None of the challenged provisions survived the court's scrutiny. We are confident that the problematic provision of Estes Park's municipal code, which is nearly identical to one of the provisions found unconstitutional in the *Browne* case, would face a similar fate if challenged in court.

In the wake of *Browne* and *Reed*, several Colorado municipalities repealed provisions of their panhandling ordinances similar to the Estes Park provisions criticized in this letter. Indeed, we are aware of only a handful of jurisdictions that – like Estes Park – have allowed these provisions to stay on the books. While we know that some jurisdictions are actively enforcing their outdated anti-begging ordinances, we understand that others may have no intention of enforcing this ordinance but have nevertheless allowed it to stay on the books. Your municipality may be one such jurisdiction. Even if that is the case, it is important to remove this law from the municipal code. Leaving the law on the books raises the very real possibility that, at some point in the future, an energetic law enforcement officer will review the entirety of the municipal code and begin enforcing the ordinance.

Required Action

Based on the foregoing, we ask Estes Park to take the following immediate actions:

- 1. Stop enforcing Section 9.08.090(b)(5). This requires instructing any law enforcement officers charged with enforcing the municipal code that this provision is not to be enforced in any way, including by issuance of citations, warnings, or move-on orders.**
- 2. Immediately initiate the steps necessary to repeal Section 9.08.090(b)(5).**

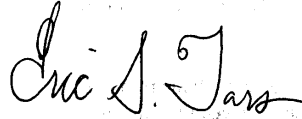
3. If there are any pending prosecutions under Section 9.08.090(b)(5), dismiss them.

Please provide a written response to this letter by **September 4, 2018**.

Sincerely,



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