AMERICAN CIVIL LIBERTIES UNION
Colorado

NATIONAL LAW CENTER
ON HOMELESSNESS & POVERTY

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August 28, 2018

SENT VIA ELECTRONIC MAIL: larsonp@cityofouray.com

Pamela Larson, Mayor
City of Ouray
P.O. Box 468
Ouray, CO 81427

Re: City of Ouray Loitering Ordinance

Dear Mayor Larson:

Your municipality is one of several in Colorado with a municipal code that broadly criminalizes begging. Ouray Municipal Code § 10-2 (L). The 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 Ouray 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 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 recent years to reviewing and sometimes challenging such ordinances here in Colorado.[2]

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

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

- 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, the City repealed one of its panhandling ordinances and revised the other to leave in place only those provisions to which the ACLU does not object.
- In 2016, in response to letters from the ACLU, 34 jurisdictions across Colorado agreed to repeal local ordinances identical to Ouray's that prohibited "loitering . . . for the purpose of begging."

Loper v. New York Town Police Department, 999 F.2d 699, 700 (2d Cir. 1993).[3]

In 2015, during the litigation of the ACLU's successful challenge to Grand Junction's panhandling ordinance, the federal district court in Colorado 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.

Browne v. City of Grand Junction, 2015 U.S. Dist. Lexis 73834, **12-13 (D. Colo. June 8, 2015).

In the years since the *Loper* decision, numerous courts have held that regulations or outright prohibitions of panhandling violate the First Amendment.[4] Indeed, since the landmark *Reed v. Gilbert* Supreme Court case in 2015,[5] 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.[6]

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[3] Notably, the New York City ordinance at issue in the *Loper* decision was very similar to the ordinance at issue in this letter. The ordinance provided that a person commits a crime when he "[l]oiters, remains or wanders about in a public place for the purpose of begging." *Loper*, 999 F.2d at 701. The court held that the ordinance violated the First Amendment. *Id*. at 706.

[4] *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).

[5] 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).

[6] *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), *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.

Ouray's ordinance violates the First Amendment.

The Ouray ordinance prohibiting begging is far broader than many of the anti-panhandling regulations that courts have struck down in recent years. It prohibits passively, silently, and nonintrusively sitting with a sign that asks for charity, and it applies everywhere in the municipality. The ordinance could not survive a legal challenge.

We have learned of several jurisdictions that are actively enforcing outdated anti-begging ordinances – whether by means of citations, warnings, or move-on orders. We understand, however, that some municpalities 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 archaic 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 Ouray to take the following immediate actions:

1. **Stop enforcing Sec. 10-2 (L). This requires instructing any law enforcement officers charged with enforcing the municipal code that Sec. 10-2 (L) 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 Sec. 10-2 (L).**

3. **If there are any pending prosecutions under Sec. 10-2 (L), dismiss them.**

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

Sincerely,

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