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January 6, 2020

Mayor Bill Cunningham
Dunbar City Council
210 12th. Street
Dunbar, WV 25064
Sent via U.S. Mail

Re: Proposed Panhandling Ordinance

Dear Mayor Cunningham and Dunbar City Council members:

I am writing to you regarding the ordinance that Dunbar is currently considering to require a permit for panhandling. Laws restricting in this manner panhandling, begging, or solicitation are not only unconstitutional—the criminalization of poverty is bad public policy. I understand that the ordinance is to be introduced at tonight's city council meeting. The American Civil Liberties Union of West Virginia seeks to protect the rights and civil liberties of all West Virginians, and I request that you consider our organization's concerns, outlined in this letter, before moving forward with this unconstitutional proposed ordinance.

I. Blanket Restrictions on Solicitation Violate the First Amendment.

Peaceful solicitation is protected by the First Amendment. The United States Supreme Court has recognized that "charitable 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." *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980); *see also*, *e.g.*, *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 553 (4th Cir. 2013) ("The Supreme Court has held that the solicitation of 'charitable contributions' is protected speech.") (quoting *Riley v. Nat'l Fed'n of the Blind of N.C.*, 487 U.S. 781, 789 (1988); *Kelly v. City of Parkersburg*, 978 F. Supp. 2d 624, 627 (S.D. W. Va. 2013) ("Charitable solicitation by individuals is protected by the First Amendment.").

The Supreme Court has long held that, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

> To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."

Id. at 95-96 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)). The government thus "may not select which issues are worth discussing or debating in public facilities." *Mosley*, 408 U.S. at 96.

A. Content-Based Restrictions in Traditional Public Fora are Presumptively Unconstitutional.

The United States Court of Appeals for the Fourth Circuit has noted that "[t]here is no question that panhandling and solicitation of charitable contributions are protected speech." *Reynolds v. Middleton*, 779 F.3d 222, 225 (4th Cir. 2015); *see also Clatterbuck*, 708 F.3d at 553 (holding that "begging is communicative activity within the protection of the First Amendment").

When a city restricts speech near busy streets, it "regulates a quintessential public forum over which the First Amendment's shield is strongest." *Clatterbuck*, 708 F.3d at 555. "In public places which by long tradition or governmental fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed." *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45 (1983). "[P]laces such as parks, streets, and sidewalks fall into the category of public property traditional held open to the public for expressive activity." *Clatterbuck*, 708 F.3d at 555 (internal quotation marks omitted). Because public streets and sidewalks are traditional public fora, the government may only "impose reasonable content-neutral time, place, and manner restrictions that are narrowly tailored to serve a significant government interest and leave open ample alternative channels of communication." *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Laws restricting begging, panhandling, or solicitation are not content-neutral. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). In *Clatterbuck*, the Fourth Circuit found that the anti-solicitation ordinance at issue was content based because:

> The Ordinance plainly distinguishes between types of solicitations on its face. Whether the Ordinance is violated turns solely on the nature or content of the solicitor's speech: it prohibits solicitations that request immediate donations of things of value, while allowing other types of solicitations, such as those that request future donations, or those that request things which may have no "value"—a signature or a kind word, perhaps.

708 F.3d at 556.

On their face, most ordinances restricting panhandling or begging are content-based, because they "appl[y] or [do] not appl[y] as a result of content, that is, the topic discussed or the idea or message expressed." *Cent. Radio Co. v. City of Norfolk*, 811 F.3d 625, 633 (4th Cir. 2016). Additionally, a nondiscriminatory motive does not mean that a law is content-neutral. The Supreme Court has "long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment." *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 592 (1983). "Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." *Reed*, 135 S. Ct. at 2229.

Because most anti-begging ordinances are content-based, they are subject to strict scrutiny. "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Reed*, 135 S. Ct. at 2228 (internal quotation marks omitted). Strict scrutiny "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* at 2231 (internal citation omitted). The burden is on the government to prove that a content-based restriction "furthers a compelling government interest and is narrowly tailored to that end." *Id.*

> With respect to narrow tailoring, we require the government to prove that no less restrictive alternative would serve its purpose. A regulation is unconstitutionally overinclusive if it unnecessarily circumscribes protected expression, and is fatally underinclusive if it leaves appreciable damage to the government's interest unprohibited.

Cent. Radio, 811 F.3d at 633 (internal quotation marks and citations omitted). It is unlikely that any proposed ordinances restricting panhandling could pass this exacting test.

B. Even Content-Neutral Restrictions are Generally Unconstitutional for Lack of Narrow Tailoring.

Even when an ordinance is content-neutral and subject to intermediate scrutiny, the government must still present evidence to demonstrate that it is narrowly tailored and leaves open ample alternative channels of communication. *See Reynolds*, 779 F.3d at 227-29. "Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward*, 491 U.S. at 799.

Since the Supreme Court's decision in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014), the Fourth Circuit has held that intermediate scrutiny requires "the government to present actual evidence supporting its assertion that a speech restriction does not burden substantially more speech than necessary; argument unsupported by the evidence will not suffice to carry the government's burden." *Reynolds*, 779 F.3d at 229. "Except in those rare circumstances in which each activity within the proscription's scope is an appropriately targeted evil, a complete ban [on speech] is the very antithesis of a narrowly tailored law." *Hassay v. Mayor & City Council of Ocean City*, 955 F. Supp. 2d 505, 524-25 (D. Md. 2013) (internal quotation marks omitted). "[A] content-neutral restriction on speech in a traditional public forum is facially unconstitutional if it does not survive the narrow tailoring inquiry, even though that ordinance might seem to have a number of legitimate applications." *Cutting v. City of Portland*, 802 F.3d 79, 87-88 (1st Cir. 2015) (citing *McCullen*, 134 S. Ct. 2518).

"In addition to furthering a significant governmental interest, a narrowly tailored regulation 'must not burden substantially more speech than is necessary to further the government's legitimate interest.'" *Id.* at 230 (quoting *McCullen*, 134 S. Ct. at 2535). In *Reynolds*, the court found that the ordinance at issue was not narrowly tailored. First, the court noted that the ordinance applied "to all County roads, regardless of location or traffic volume, and include[d] all medians, even wide medians and those beside traffic lights and stop signs." *Id.* at 231. The ordinance therefore prohibited "all roadside leafletting and solicitation, even where those activities would not be dangerous." *Id.* "Given the absence of a county-wide problem," the court found that "the county-wide sweep" of the ordinance burdened more speech than was necessary. *Id.*

Second, the court noted that "the burden of narrow tailoring requires the County to prove that it actually tried other methods to address the problem." *Id.* Because there was "no evidence that the County ever tried to improve safety by prosecuting any roadway solicitors who actually obstructed traffic, or that it ever even considered prohibiting roadway solicitations only at those locations where it could not be done safely," the court in *Reynolds* held that the county could not "carry its burden of demonstrating that the [ordinance was] narrowly tailored." 779 F.3d at 232. Other courts have held similarly. *See*, *e.g.*, *Cutting*, 802 F.3d at 88-89 (striking down ban on expressive conduct on city medians for lack of narrow tailoring); *Hassay*, 955 F. Supp. 2d at 526-27 (striking down noise ordinance for lack of narrow tailoring).

C. There are Alternatives to Anti-Begging Laws.

Where aggression or intimidation accompany solicitation, existing criminal offenses are sufficient to give rise to criminal liability. For example, harassment is prohibited by West Virginia Code § 61-2-9a, assault and battery are prohibited by West Virginia Code § 61-2-9, and extortion is prohibited by West Virginia Code § 61-2-13. With regard to traffic safety concerns, laws already exist making it illegal to stand or park at an intersection except when in compliance with the law, jaywalk, disobey traffic signals, or walk along a roadway when sidewalks are provided. *See* W. Va. Code § 17C-13-3; W. Va. Code § 17C-10-3; W. Va. Code § 17C-10-1; W. Va. Code § 17C-10-6. These alternatives may be enforced to stop troubling behavior. They also tend to show that laws prohibiting panhandling are not narrowly tailored. *See*, *e.g.*, *Kelly*, 978 F. Supp. 2d at 631 (finding the city had "other statutes at its disposal to ensure public safety at intersections" and explicitly noting W. Va. Code § 17C-13-3 and W. Va. Code § 61-2-9a).

Additionally, as the Supreme Court of Massachusetts noted,

> There is no basis whatsoever in the record to support the assumption that those who peacefully beg are likely to commit crimes. It cannot be seriously contended that because a person is without employment and without funds he constitutes a moral pestilence. Poverty and immorality are not synonymous. Further, the government cannot make communicative activity criminal solely on the ground that the person engaging in the activity might commit a future crime.

Benefit v. City of Cambridge, 424 Mass. 918, 925-926 (1997) (internal quotation omitted).

II. Criminalizing Panhandling and Homelessness is Bad Policy.

Poverty, homelessness, and drug addiction are all serious problems in West Virginia, and many people who panhandle do so because of economic need, mental illness, or to feed an addiction However, criminalizing panhandling does not cure poverty or provide resources for individuals with addiction or mental health problems. Measures such as the proposed ordinance merely move the needy out of sight and are not feasible long-term solutions for dealing with poverty. The criminalization of panhandling is aimed only at the visual ramifications for others and does nothing to address the root causes or aid those who are suffering. It also further exacerbates the challenges beggars already face on a daily basis.

Criminalizing begging or homelessness is also bad fiscal policy. "Criminalization is the most expensive and least effective way of addressing homelessness." Nat'l Law Center on Homelessness & Poverty, *No Safe Place: The Criminalization of Homelessness in U.S. Cities* 9 (2014), https://www.nlchp.org/documents/No_Safe_Place; *see also*, *e.g.*, Donald Saelinger, *Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 Geo. J. on Poverty L. & Pol'y 545, 557-564 (2006) (analyzing the economic costs of criminalizing homeless).

> Criminalization measures do nothing to address the underlying causes of homelessness and, instead, only worsen the problem. Misusing police power to arrest homeless people is only a temporary intervention, as most people are arrested and incarcerated for short periods of time. Ultimately, arrested homeless people return to their communities, still with nowhere to live and now laden with financial obligations, such as court fees, that they cannot pay. Moreover, criminal convictions—even for minor crimes—can create barriers to obtaining critical public benefits, employment, or housing, thus making homelessness more difficult to escape.

Id. The money that Dunbar would use to enforce restrictions on panhandling could be more effectively spent offering services to impoverished people, the homeless, and people suffering from addiction.

Finally, homeless people and panhandlers are already a stigmatized group who are at a risk of becoming victims of crimes. From 1999 to 2013, the National Coalition for the Homeless found 1,437 reported acts of violence committed against homeless individuals. Nat'l Coalition for the Homeless, *Vulnerable to Hate: A Survey of Hate Crimes & Violence Committed Against Homeless People in 2013* 4 (June 2014), http://nationalhomeless.org/wp-content/uploads/2014/06/Hate-Crimes-2013-FINAL.pdf. At least 375 victims lost their lives as a result of those attacks. *Id.* These numbers likely represent only a small fraction of crimes committed against homeless people, as most go unreported. *See id.* Criminalizing panhandling only increases public stigma towards this already-marginalized group of people.

III. Conclusion

I hope this letter informs you of the dangers with the panhandling ordinance Dunbar is considering. Please do not hesitate to contact me if I could be of additional assistance in your consideration of this issue. I can be reached via email at lstark@acluwv.org.

Sincerely,

Loree Stark
Legal Director, ACLU-WV