

January 11, 2019

VIA ELECTRONIC & CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Hon. John Moor
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Re: Asbury Park Ordinance No. 2018-36

Dear Mayor Moor:

Asking a neighbor for help should not be a crime, especially during this "Season of Giving." Yet Asbury Park Ordinance No. 2018-36, establishing a new section of Police Regulations entitled "Begging and Panhandling" (the "Ordinance"), makes it illegal for people to ask for help by imposing burdensome restrictions on when, where, and how this speech can take place. The Ordinance not only violates the New Jersey Civil Rights act and the free speech guarantees of the First Amendment to the United States Constitution and Article 1, Paragraph 6 of the New Jersey Constitution, but it is also bad policy. More compassionate and effective alternatives exist. On behalf of the ACLU of New Jersey and the New Jersey Coalition to End Homelessness, we call on Asbury Park to immediately repeal the Ordinance.¹

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Since *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), every panhandling ordinance challenged in federal court, including many with features similar to Asbury Park's Ordinance, has been found unconstitutional. See, e.g., *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015); *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014), *vacated*, 135 S. Ct. 2887 (2015), *declaring ordinance unconstitutional on remand*, 2015 WL 6872450, at *15 (D. Mass. Nov. 9, 2015)); *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276 (D. Colo. 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>. Also, a significant number of cities repealed their panhandling ordinances after city officials were informed that the ordinances likely

¹ Enforcing the ordinance subjects the city to liability for civil rights violations. As co-counsel with the ACLU of New Jersey, our Firm previously brought two constitutional challenges to New Brunswick municipal ordinances that prohibited panhandling. Both cases resulted in agreements to amend or repeal the challenged ordinances.

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violated the First Amendment.² The First Amendment protects peaceful requests for donations in public places. See, e.g., *United States v. Kokinda*, 110 S. Ct. 3115, 3119 (1990) (“Solicitation is a recognized form of speech protected by the First Amendment.”). The government’s authority to regulate such public speech is exceedingly restricted, “[c]onsistent with the traditionally open character of public streets and sidewalks....” *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (quotation omitted). Asbury Park’s Ordinance falls well outside the scope of permissible government regulation.

The Ordinance overtly distinguishes between types of speech based on “subject matter ... function or purpose.” *Reed*, 135 S. Ct. at 2227 (internal citations, quotations, and alterations omitted). Specifically, the Ordinance targets the use of “the spoken, written or printed word or bodily gestures, signs, or other means with the purpose of obtaining an immediate donation of money or other item of value or soliciting the sale of goods or services.” As a result, the Ordinance is a presumptively unconstitutional “content-based” restriction on speech. See *Reed*, 135 S. Ct. at 2232; *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009).

Courts use the most stringent standard – strict scrutiny – to review such restrictions. See, e.g., *Reed*, 135 S. Ct. at 2227 (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”); *Norton*, 806 F.3d at 412-13 (“Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification.”). The Ordinance cannot survive strict scrutiny because it serves no compelling state interest and is not narrowly tailored.

Although Asbury Park may have an interest in preventing assault or battery, New Jersey law already criminalizes those behaviors. See, e.g., *N.J. Stat. §§ 2C:12-1; 2C:33-2*. Asbury Park does not need a redundant law criminalizing them when they arise in the course of solicitation. One court succinctly addressed this concern as follows: “At times, threatening behavior may accompany panhandling, but the correct solution is not to outlaw panhandling. The focus must be on the threatening behavior.” *Browne*, 136 F. Supp. 3d at 1294.

Asbury Park’s Ordinance is over-inclusive and not focused on threatening behavior. The Ordinance defines “Aggressive Manner” as including the act of approaching or speaking to a person if that conduct is intended or is likely to cause a reasonable person to “suffer unreasonable inconvenience” or “annoyance.” In so doing, the Ordinance prohibits protected speech that poses no public safety threat. Preventing temporary feelings of annoyance or inconvenience is not a compelling public safety concern. As such, the Ordinance will not pass constitutional muster. See *id.* at 1276 (rejecting claims that ordinance served public safety as unsupported and

² For example, several cities in Colorado and Ohio (among other states) repealed laws restricting panhandling in public places. See, e.g., Joe Palazzolo, *As Panhandling Laws Are Overturned, Cities Change Policies*, Wall St. J., Aug. 8, 2017, available at <https://www.wsj.com/articles/as-panhandling-laws-are-overturned-cities-change-policies-1502204399?ns=prod/accounts-wsj>.

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implausible); *Cutting v. City of Portland*, 802 F.3d 79 (1st Cir. 2015) (requiring evidence to substantiate claims of public safety).

Indeed, codifying distaste for a certain type of speech or a certain type of speaker is not a *legitimate* state interest, let alone a *compelling* one. Laws or ordinances aimed at shielding unwilling listeners from disfavored messages are likewise unconstitutional. As the Supreme Court explained, 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.” *McCullen*, 134 S. Ct. at 2529; *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2545 (1992) (“The government may not regulate use based on hostility – or favoritism – towards the underlying message expressed.”). Reports that a City Councilman considers panhandlers “embarrassing” for the City further exemplify the impermissible state interest involved here. See *Asbury Park Says Aggressive Panhandling is Embarrassing, So the City Banned It*, https://www.nj.com/monmouth/index.ssf/2018/10/asbury_park_bans_aggressive_panhandling.html.

Even if the City could identify a compelling state interest, it could not show that the Ordinance is “narrowly tailored” to such an interest. Asbury Park may not “[take] a sledgehammer to a problem that can and should be solved with a scalpel.” *Browne*, 136 F. Supp. 3d at 1294. In its purported attempt to regulate aggressive behavior, the Ordinance sweeps vast swaths of protected speech within its purview.

Consistent with the foregoing principles, every court to consider a regulation that, like the Ordinance, banned requests for charity within an identified geographic area has stricken the regulation. See, e.g., *Norton*, 806 F.3d at 413; *Cutting*, 802 F.3d at 79; *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011) (en banc); *Thayer*, 144 F. Supp. 3d at 237 (“[M]unicipalities must go back to the drafting board and craft solutions which recognize an individuals ... rights under the First Amendment...); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 189 (D. Mass. 2015); *Browne*, 136 F. Supp. 3d 1276. For example, the City of Grand Junction’s ordinance, like Asbury Park’s Ordinance, banned solicitation within a certain distance from an ATM, on or near public streets, from patrons on restaurant patios, and from people who were waiting in line to enter a building or event. The court found the city “has not shown – and the Court does not believe – that the panhandling of an individual in the areas identified ... without more, constitutes a threat to public safety.” *Browne*, 136 F. Supp. 3d at 1294.

Additionally, courts have not hesitated to strike laws that regulate the manner in which a person can ask for a charitable donation, even where the regulation was supposedly justified by a state interest in public safety. Indeed, restricting people’s behavior on account of their speech is almost never narrowly tailored to any compelling governmental interest. See, e.g., *Clatterbuck v. City of Charlottesville*, 92 F. Supp. 3d 478 (W.D. Va. 2015). For example, a federal court struck down provisions against blocking the path of and following a person after he/she has declined a request for charity. *Thayer*, 144 F. Supp. 3d at 233. Similarly, Asbury Park’s Ordinance defines “Aggressive Manner” to include “intentionally blocking or

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interfering” with the free passage of a pedestrian or vehicle; like the rest of the Ordinance, that provision infringes on protected expression and cannot be upheld.

Further, the Ordinance is not good policy. Harassing, ticketing, and/or arresting people who ask for help in a time of need is inhumane and counterproductive. Unlawful anti-panhandling ordinances such as Asbury Park’s are costly to enforce and only exacerbate problems associated with homelessness and poverty. Numerous communities have created alternatives that better serve all involved – homeless and non-homeless residents, businesses, city agencies, and elected officials alike. 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>.

Recently, for example, Philadelphia donated a section of a downtown subway station to a service provider for use as a day shelter. This move has significantly reduced the number of homeless people who need to seek assistance from commuters. 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/>. Upon opening the shelter, Philadelphia Mayor Jim Kenny emphasized, “We are not going to arrest people for being homeless” and that the new space “gives our homeless outreach workers and the police a place to actually bring people instead of just scooting them along.” These programs can make progress toward ameliorating homelessness, rather than merely papering over its symptoms. The New Jersey Coalition to End Homelessness stands ready to work with Asbury Park to develop alternatives to the Ordinance that would more effectively advance the community’s shared goals.

Whether examined from a legal, policy, fiscal, or moral standpoint, criminalizing any aspect of panhandling is the wrong way to approach a problem. The unconstitutional Ordinance exposes Asbury Park to legal liability. Asbury Park should place an immediate moratorium on the Ordinance’s enforcement and then proceed with a rapid repeal to avoid potential litigation. .

We look forward to your response on or before January 28, 2019.

Sincerely yours,



Nicholas M. Insua

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