ACLU
Iowa
505 Fifth Avenue, Suite 808
Des Moines, IA 50309-2317
www.aclu-ia.org

April 5, 2022

Delivered via email to City Council members at the following addresses:

council.info@davenportiowa.com, kyle.gripp@davenportiowa.com, rick.dunn@davenportiowa.com, maria.dickmann@davenportiowa.com, marion.meginnis@davenportiowa.com, , ben.jobgen@davenportiowa.com, judith.lee@davenportiowa.com, robby.ortiz@davenportiowa.com, derek.cornette@davenportiowa.com, jj.condon@davenportiowa.com; tim.kelly@davenportiowa.com

CC: Davenport City Attorney's Office
Tom.Warner@davenportiowa.com

RE: Davenport Municipal Code Aggressive Panhandling Ordinance, § 9.08.080, and Prohibited Activity in Roadways Ordinance, § 9.08.050

Dear Councilpersons:

I am writing on behalf of the ACLU of Iowa regarding Davenport's Municipal Ordinances § 9.08.050 and § 9.08.050, regarding aggressive panhandling and prohibited activity in roadways (the "Ordinances"). DAVENPORT, IOWA, MUN. CODE. § 9.08.080 (2006), https://ecode360.com/35576829; DAVENPORT, IOWA, MUN. CODE. § 9.08.050 (2004), https://ecode360.com/35576819. Since the 2015 landmark decision of *Reed v. Town of Gilbert*, courts around the country have repeatedly found that panhandling ordinances—including some "aggressive panhandling" ordinances with features similar to the ones in Davenport ("the City")—violate the First Amendment. *See Reed v. Town of Gilbert, Ariz.,* 576 U.S. 155 (2015); *Rodgers v. Bryant,* 942 F.3d 451, 453 (8th Cir. 2019); *see e.g., Norton v. City of Springfield, Ill.* 806 F.3d 411 (7th Cir. 2015); *Thayer v. City of Worcester,* 755 F.3d 60 (1st Cir. 2014), *vacated,* 576 U.S. 1048 (2015), *declaring ordinance unconstitutional on remand*, 144 F.Supp.3d 218 (Mass. Dist. Ct., 2015); *McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1067-70 (10th Cir. 2020), *cert. denied* 141 S.Ct. 1738 (2021). By 2019, courts had struck down more than 70 anti-panhandling ordinances. *Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities*, NAT'L LAW CTR. ON HOMELESSNESS AND POVERTY 80 (2019), https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf (hereinafter

"*Housing Not Handcuffs"*.) And this number continues to rise, with many cities ceasing enforcement or repealing their ordinances.

Cities across Iowa have already repealed their unconstitutional panhandling/solicitation ordinances. For example, following notification letters from the ACLU of Iowa, the cities of Des Moines and Council Bluffs, repealed their ordinances in 2018; Grimes partially repealed its ordinance at that time. *Des Moines City Council repeals city's panhandling ordinances,* Des Moines Register (Oct. 8, 2018), https://www.desmoinesregister.com/story/news/2018/10/08/des-moines-city-council-votes-repeal-panhandling-ordinance-poverty-aclu-iowa-grimes-council-bluffs/1568657002/; *Bluffs council votes to repeal panhandling ordinance*, World Herald News Service, (Sept. 27, 2008), https://omaha.com/eedition/sunrise/articles/bluffs-council-votes-to-repeal-panhandling-ordinance/article_702ed5b2-9660-55ce-a44e-e4cdeba05f8c.html. More recently, the city of Grimes has now also fully repealed a similar panhandling/solicitation ordinance. (See Ex. 1).

Like the ordinances in these other Iowa cities, Dubuque's Ordinance is not only a facially content-based restriction on free speech protected by the First Amendment to the United States Constitution and the Iowa Constitution, but it is also harmful and ineffective public policy. Numerous examples of better alternatives now exist which the City could draw on. We are asking the City to promptly repeal the Ordinance and instead consider more constructive alternatives. Enforcement of the Ordinance risks potential litigation. Importantly, when it comes to "aggressive panhandling" the City can instead regulate the criminal behavior it is concerned about. It need not, as this Ordinance does, restrict the content of the speech that may accompany that behavior an element of the offense.

The First Amendment protects requests for charity in a public place. *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."). 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). As discussed below, the Ordinances are well outside the scope of permissible government regulation.

Aggressive Panhandling Ordinance

The Aggressive Panhandling Ordinance is an impermissible content-based restriction.

Davenport Municipal Code Ordinance Section 9.08.080 ("The Aggressive Panhandling Ordinance") is an impermissible content-based restriction. The Ordinance overtly distinguishes between types of speech based on "subject matter . . . function or purpose." *Reed,* 576 U.S. at 163; *see e.g., 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."). In 2019, the Eighth Circuit Court of Appeals affirmed the grant of a preliminary injunction to plaintiffs "challeng[ing] an Arkansas anti-loitering law that bans begging in a manner that is harassing, causing alarm, or impedes traffic." *Rodgers v. Bryant,* 942 F.3d 451, 453 (8th Cir. 2019). The Eighth Circuit determined that the law was a content-based restriction because "it applie[d] only to those asking for charity or gifts," and thus "its application depend[ed] on the 'communicative content' of the speech." *Id*. at 456 (quoting *Reed*, 576 U.S. at 163).

Likewise, Davenport's Aggressive Panhandling Ordinance regulates a particular form of speech—"any request for or solicitation of an immediate donation of money." § 9.08.080(B)(1). As a result, a court will very likely determine that this Ordinance is a "content-based" restriction on speech that is presumptively unconstitutional. *See Reed,* 576 U.S. at 163.

Courts use the most stringent standard—strict scrutiny—to review such restrictions. *Id*. (holding that content-based laws may only survive strict scrutiny if "the government proves that they are narrowly tailored to serve a compelling interest."). The Ordinance cannot survive strict scrutiny because there is no evidence to demonstrate it is narrowly tailored to the interests it is purported to serve. Theoretical discussion is not enough: "the burden of proving narrow tailoring requires the [municipality] to prove that it actually *tries* other methods to address the problem." *Reynolds v. Middleton*, 770 F.3d 222, 231 (4th Cir. 2015). The City may not "[take] a sledgehammer to a problem that can and should be solved with a scalpel." *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276, 1294 (D. Colo. 2015) (holding ordinance restricting time, place, and manner of panhandling was unconstitutional).

The stated purposes of the Aggressive Panhandling Ordinance are (1) "to ensure unimpeded pedestrian traffic flow," and (2) "to otherwise foster a safe and harassment-free climate in public places." § 9.08.080(A). Assuming that the purposes would be considered compelling, the Ordinance could not pass intermediate scrutiny, let alone strict, because it is only supported "by mere speculation or conjecture," and "burden[s] substantially more speech than necessary." *Edenfield v. Fane,* 507 U.S. 761, 770 (1993); *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). Similar to the ordinance struck down in *Thayer v. City of Worcester*, the Aggressive Panhandling Ordinance only targets the listed conduct connected with requests for immediate donations. 144 F.Supp.3d 218, 228-29 (D. Mass. 2015). The *Thayer* court pointed out that the ordinance prevented solicitors from blocking certain entrances and exits, but did not, for example, prevent a person from "engag[ing] in political advocacy" in those locations. *Id.* at 227. Similarly, Davenport's Aggressive Panhandling Ordinance prevents panhandlers from soliciting at locations such as bus stops or outdoor dining, but does not prevent other types of speech in such places. § 9.08.080. This focus suggests Davenport speculated that those experiencing poverty and homelessness were more likely to be aggressive. Such prejudice indicates the true purpose of the Ordinance is to limit begging.

Besides appearing to be based on mere speculation, the Davenport Aggressive Panhandling Ordinance is underinclusive because it targets only solicitations for immediate donations of money. In *Rodgers,* the Eighth Circuit held that because the law regulated only charitable solicitations accompanied with certain actions, and not "political or commercial" solicitations similarly expressed, the law was underinclusive and therefore not narrowly tailored. 942 F.3d at 457. The Eighth Circuit held that the plaintiffs were likely to prevail in their First Amendment claims because the government offered no explanation why it "single[d] out charitable solicitation," when the actions regulated are "equally dangerous," no matter the content of the speech. *Id*. Because Davenport makes a similar content-based distinction in its Aggressive Panhandling Ordinance, and again, this focus suggests prejudice against people experiencing homelessness and poverty rather than a concern for public safety. Like the government in *Rodgers,* Davenport cannot justify the content-based distinction targeting solicitations for immediate donations of money.

The Ordinance includes a ban on speech that does not threaten public safety and does not create a captive audience.

Davenport's Aggressive Panhandling Ordinance is also overinclusive in that it regulates speech that does not pose a threat to public safety. On remand from the U.S. Supreme Court to make a decision in accordance with *Reed,* the *Thayer* court examined the aggressive panhandling ordinances in *McLaughlin v. City of Lowell* and *Browne v. City of Grand Junction*. 140 F.Supp.3d 177 (D. Mass. 2015); 136 F.Supp.3d 1276 (D. Colo. 2015). Both *McLaughlin* and *Browne* dealt with "almost identical" aggressive panhandling ordinances to the one at issue in *Thayer*, and the courts in both cases struck down the ordinances for not being the "least restrictive means." *Thayer*, 144 F.Supp.3d at 235-36. Using the reasoning from *McLaughlin* and *Browne*, the *Thayer* court also struck down the Worcester ordinance. *Id.* at 237.

Similar to the ordinances in *McLaughlin, Thayer, and Browne,* Davenport's Aggressive Panhandling Ordinance targets "coercive panhandling techniques," such as "continuing to solicit . . . a person after that person has refused." 140 F.Supp.3d at 183; § 9.08.080. This would include a panhandler merely "seek[ing] to explain [why] the [money] is needed" after being rejected, or calmly following a person for a short time at a reasonable distance and in a nonthreatening manner to "convey a longer message." *McLaughlin*, 140 F. Supp.3d at 193. Neither situation actually threatens public safety, but the Ordinance forbids such actions and thereby limits "explanations of the nature of poverty[, which] sit at the heart of what makes panhandling protective expressive conduct in the first place." *Id*.

The Aggressive Panhandling Ordinance also bans solicitations "in a situation in which it is obvious to a reasonably prudent person that the person being solicited would not feel free to immediately walk away." § 9.08.080(3)(g). Normally when confronted with speech that "offends [his] esthetic, if not [his] political and moral, sensibilities," the unwilling listener has "the burden . . . to 'avoid further bombardment of (his) sensibilities simply by averting (his) eyes.'" *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 210-11 (1975) (quoting *Cohen v. California,* 403 U.S. 15, 21 (1971)). Under the captive audience doctrine, the U.S. Supreme Court has "sparingly" allowed regulation of protected speech where "the degree of captivity makes it impractical for the unwilling [listener] to avoid exposure." *Snyder v. Phelps*, 562 U.S. 443, 459 (2011); *Erznoznik,* 422 U.S. at 209. The plurality in *Lehman v. City of Shaker Heights* explained that "'[t]he streetcar audience is a captive audience [because i]t is there as a matter of necessity, not of choice.'" 418 U.S. 298, 302 (1974) (quoting *Public Utilities Comm'n v. Pollak,* 343 U.S. 451, 468 (1952) (Douglas, J., dissenting)). In his concurrence, Justice Douglas used the example that a person at a restaurant is not sufficiently captive because she may "get up and leave" if she "hears disquieting or unpleasant programs in [such a] public place[]."

While the captive audience doctrine may in theory support a ban in very specific circumstances, the Davenport Ordinance sweeps too broadly in including locations without regard to public safety. *See Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 447 U.S. 530, 541-42 (1980) ("[T]he First Amendment does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid objectional speech."). The Ordinance lists a bus stop as an example of such a situation, but just because a solicited person "find[s] it difficult to leave," does not mean the solicitation is "demonstrably more dangerous." *McLaughlin,* 140 F. Supp.3d at 195. 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." *McCullen v. Coakley,* 134 S. Ct. 2518, 2529 (2014); *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.").

In holding the Worcester ordinance failed strict scrutiny, the *Thayer* court agreed with the analysis of *McLaughlin* that the ordinances were duplicative of state assault laws already sufficiently targeted the behavior. *Id.* at 236. The *McLaughlin* court cited *R.A.V. v. City of St. Paul* to find the Lowell ordinance subjected panhandlers to "increased liability" for "engag[ing] in particular expressive acts," even though Lowell had not "demonstrate[d] that public safety require[d] harsher punishments for panhandlers." 140 F.Supp.3d at 193 ("*R.A.V.* instructs that where a law prohibits behavior on the basis of expressive content—even if the underlying behavior may be prohibited constitutionally or already is prohibited—the decision to create an *additional* content-based prohibition must satisfy strict scrutiny."). Davenport's Aggressive Panhandling Ordinance prohibits a panhandler from "touching . . . the solicited person," and also from panhandling in a way "that would cause a reasonably prudent person to feel threatened or fearful." § 9.08.080(3). Like in *Thayer* and *McLaughlin,* existing laws already prohibit this behavior, but do so without regard to protected speech. *See* IOWA CODE § 708.1 (2020); DAVENPORT, IOWA, MUN. CODE. § 9.20.060, https://ecode360.com/35576924. After Alderman Bill Lynn drafted the Aggressive Panhandling Ordinance, Davenport Police Captain Dave Struckman commented, "It can get very annoying when the panhandlers try to talk a person into giving them money." Deidre Cox Baker, *Pushy Panhandlers Could Face New Rules,* QUAD-CITY TIMES, Apr. 1, 2006, at A4. Despite complaints that panhandlers can be "annoying," that does not pass the constitutional scrutiny applied to content-based restrictions, because it does not further the City's legitimate interests to subject people experiencing poverty and homelessness to harsher punishments for assault based on the content of their speech.

Prohibited Activity in Roadways Ordinance

The Prohibited Activity in Roadways Ordinance makes it "unlawful for a pedestrian to sit, stand, or move within or upon a roadway . . . or a median between two roadways" while engaging in certain speech and conduct, including "soliciting, peddling, selling, advertising, donating, or distributing any product, property, or service." § 9.08.050; *see generally* § 9.10.010 ("S[oliciting i]s requesting by phone or other electronic means, by mail, or in person, a donation of money, property or services."). The Ordinance mentions protecting "the safety or welfare" of drivers and avoiding the "imped[iment of] the free flow of vehicular traffic on the roadway." § 9.08.050. The U.S. Supreme Court recently denied cert of the U.S. Court of Appeals for the Tenth Circuit's holding against Oklahoma City's ordinance regarding standing or sitting on certain medians. *McCraw*, 973 F.3d at 1057. Not only does Davenport's Prohibited Activity in Roadways Ordinance restrict protected speech in a traditional public forum like the ordinance held unconstitutional in *McCraw,* but it also goes further by discriminating based on the content of the protected speech. Because it focuses on the "topic discussed or the idea or message expressed," the Ordinance is a content-based regulation subject to strict scrutiny. *Reed*, 576 U.S. at 155. The Ordinance cannot survive strict scrutiny because it is based on mere speculation, and it is not narrowly tailored to the interests it is alleged to serve.

The Ordinances are harmful and ineffective public policies.

The Ordinance is also ineffective and harmful public 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 Davenport's Ordinances are costly to enforce and only exacerbate problems associated with homelessness and poverty. Rather than criminalizing the behavior in the Prohibited Activity in Roadways Ordinance, Davenport can modify restrictions and infrastructure to optimize pedestrian and traffic safety while avoiding being as prejudicial to those in poverty or as limiting to protected speech. *See Urban Street Design Guide*, NAT;' ASS'N OF CITY TRANSP. OFFICIALS, https://nacto.org/publication/urban-street-design-guide/street-design-elements/ (last visited April 1, 2022); *20 Proven Countermeasures that Offer Significant and Measurable Impacts to Improving Safety*, U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN, https://safety.fhwa.dot.gov/provencountermeasures/fhwasa18029/ (last modified Dec. 17, 2019).

Numerous communities have created alternatives that are more effective and leave all involved—homeless and non-homeless residents, businesses, city agencies, and elected officials—better positioned in the long run. *See generally, Housing Not Handcuffs*.

For example, Philadelphia, PA greatly 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* Melissa Romero, *Suburban Station to Open Permanent Service Hub for the Homeless,* CURBED PHILA., (Oct. 16, 2017), https://philly.curbed.com/2017/10/16/16481552/suburban-station-hub-of-hope-homeless-services; *See also* 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/. In opening the Center, Philadelphia Mayor Jim Kenney emphasized: "We are not going to arrest people for being homeless." *Expanded Hub of Hope*. Programs like Project HOME's Hub of Hope are how cities actually solve the problem of homelessness, rather than merely attempting to suppress evidence of it.

The optimal outcome for all is a Davenport where homeless people are not forced to beg on the streets. But whether examined from a legal, policy, fiscal, or moral standpoint, criminalizing panhandling is not the best way to achieve this goal. Enforcing outdated anti-begging ordinances—whether by means of citations, warnings, or "move-on" orders—unconstitutionally interferes with the speaker's protected free speech rights. The City must place an immediate moratorium on enforcement of the Ordinances and then proceed with a rapid repeal. The City can then develop approaches that will lead to the best outcomes for all the residents of Davenport, housed and unhoused alike. And in the meantime, police may continue to enforce speech-neutral criminal laws to promote and protect public safety.

As you know, successful claims under the First Amendment to enjoin the Davenport Aggressive Panhandling Ordinance and Prohibited Activity in Roadways Ordinance will entitle the prevailing plaintiff to attorney's fees and costs, as authorized by 42 U.S.C. § 1988.

We have learned that some municipalities may have allowed unconstitutional panhandling/solicitation ordinances to stay on the books with no intention of enforcing them. Even if that is the case, it is important to remove the unconstitutional ordinance from the municipal code

in order to protect residents from constitutional violations, and to protect the city and its officers from liability.

Grimes provides a cautionary tale: after the ACLU learned that county officers were enforcing the City's remaining unconstitutional panhandling/solicitation ordinance despite the city's determination not to do so, we contacted legal counsel for the city, which, to its great credit, agreed to repeal the panhandling ordinance to avoid future violations. (See Ex. 1). Had the city not taken the step to repeal the ordinance, it risked officers again enforcing it without realizing it had been determined to be unconstitutional.

Davenport should not take this risk.

Davenport should repeal the Ordinances.

Based on the foregoing, we ask Davenport to take the following actions:

1. Stop enforcing the Davenport Municipal Code Prohibited Activity in Roadways Ordinance, § 9.08.050, and Aggressive Panhandling Ordinance, § 9.08.080. This requires instructing any law enforcement officers charged with enforcing the municipal code that the Ordinances are no longer to be enforced in any way, including by issuance of citations or warnings, or by telling panhandlers to move along.

2. Immediately initiate steps necessary to repeal §§ 9.08.050 and 9.08.080.

3. If there are any pending prosecutions under §§ 9.08.050 and/or 9.08.080, dismiss those charges.

Thank you for your attention to this important matter. I ask that you inform me within 14 days of the date of this letter that you agree to undertake all three actions.

Please contact me with any questions about this matter by phone or email at shefali.aurora@aclu-ia.org.

Sincerely,

/s/ Shefali Aurora
Shefali Aurora
Staff Attorney

ACLU of Iowa Foundation, Inc.
505 Fifth Ave., Ste. 808
Des Moines, IA 50309-2317
Telephone: (515) 207-0567
Fax: (515) 243-8506