ACLU Iowa

NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY

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

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Delivered via email to City Council members at the following addresses: BillGray@dmgov.org, joshmandelbaum@dmgov.org, ccoleman@dmgov.org, LindaW@dmgov.org, joegatto@dmgov.org, connieboesen@dmgov.org.

CC: Des Moines City Attorney's Office – Litigation
Des Moines City Hall
602 Robert D. Ray Dr.
Des Moines, IA 50309

RE: Des Moines Municipal Code Anti-Begging Ordinances, §§ 78-101, 78-102, 78-103, and 78-112

Dear Councilpersons:

We write with respect to the Des Moines Municipal Code Anti-Begging Ordinances, §§ 78-101, 78-102, 78-103, and 78-112 (the "Ordinance"). Since the landmark *Reed v. Gilbert* case in 2015, every panhandling ordinance which has been challenged in federal court—at 25 of 25 to date—including many with features similar to the one in Des Moines ("the City"), has been found constitutionally deficient. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015)*; 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*, 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. At least 31 additional cities have repealed their panhandling ordinances when informed of the likely infringement on First Amendment rights.

The City's ordinance not only almost certainly violates the constitutional right to free speech protected by the First Amendment to the United States Constitution and the Iowa Constitution, it is also bad policy, and numerous examples of better alternatives now exist which the City could draw on. We call on the City to immediately repeal the Ordinance and instead consider more constructive alternatives or risk potential litigation.

The First Amendment protects peaceful 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 Ordinance is well outside the scope of permissible government regulation.

The Ordinance is an impermissible content-based restriction.

The Ordinance overtly distinguishes between types of speech based on "subject matter … function or purpose." *See Reed,* 135 S.Ct. at 2227 (internal citations, quotations, and alterations omitted; *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."). The Ordinance bans based on its content (begging, or asking for help) without first obtaining a license (§78-102, 78-103) and bans all begging, without or without a license, between the hours of 9:00 pm and 8:00 am (§78-112). The Ordinance exempts from permitting requirements any solicitations for funds made by mail, telephone, among members or employees, by political candidates, and religious organizations. (§78-101). These exceptions indicate that the purpose of the Ordinance is to ban begging on the street by people experiencing poverty and homelessness.

As a result, a court will very likely determine that the Ordinance is a "content-based" restriction on speech that is presumptively unconstitutional. *See Reed* 125 S.Ct. at 2226–7 (2015); *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (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"); *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014). The Ordinance cannot survive strict scrutiny because neither does it serve any compelling state interest, nor is it narrowly tailored.

First, the Ordinance serves no compelling state interest. Distaste for a certain type of speech, or a certain type of speaker, is not even a *legitimate* state interest, let alone a *compelling* one. Shielding unwilling listeners from messages disfavored by the state is likewise not a permissible state interest. 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.").

Second, even if the City could identify a compelling state interest, there is no evidence to demonstrate that the Ordinance is "narrowly tailored" to such an interest. Theoretical discussion is not enough: "the burden of proving narrow tailoring requires the County to prove that it actually *tried* other methods to address the problem." *Reynolds v. Middleton*, 779 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 Ordinance's permitting scheme is likewise invalid.

In traditional public fora like public sidewalks, regulations on speech are subject to strict scrutiny and must be narrowly tailored to achieve a compelling government interest. *Frisby v. Schultz,* 487 U.S. 474, 481 (1988). A prior restraint is a government regulation which requires a speaker to acquire a permit or license before speaking. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (noting that an "ordinance requiring a permit and a fee before authorizing public speaking, parades, or assemblies in 'the archetype of a traditional public forum,' is a prior restraint on speech."). Prior restraints bear "a heavy presumption against [their] constitutional validity." *Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980). While cities may impose permitting requirements on those wishing to hold a march, parade, or rally in the form of valid time, place, and manner restrictions, *See Cox v. New Hampshire*, 312 U.S. 569, 574–576 (1941), such schemes must meet certain constitutional requirements. *Forsyth Co.*¸ 505 U.S. at 130. Any permit scheme controlling the time, place, and manner of speech must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication. *Forsyth Co.*, 505 U.S. at 130; *United States v. Grace,* 461 U.S. 171, 177 (1983).

Permit requirements targeting single individuals or small groups are unjustifiable. *See Douglas v. Brownell*, 88 F.3d 1511, 1514, 1523 (8th Cir. 1996) (striking a Clive, Iowa ordinance requiring groups of 3 or more demonstrators to obtain a permit in advance of a demonstration, finding a small group was not a significant safety risk); *see also Grossman v. City of Portland*, 33 F.3d 1200 (9th Cir. 1994) (noting that city ordinances that had participant requirements of at least 50 people "appear much more narrowly tailored"); *NAACP v. City of Richmond*, 743 F.2d 1346 (9th Cir. 1984); *Rosen v. Port of Portland*, 641 F.2d 1243, 1248 n.8 (9th Cir. 1981) (stating that "even a 24-hour notice requirement was not narrowly tailored for regulating small groups"). The Eighth Circuit agreed with the demonstrators, noting that for small groups, concerns regarding the disruption of use of the public sidewalks and streets are minimal.

Like the ordinance in *Douglas*, the Des Moines Anti-Begging Ordinance would not survive a court's inevitable application of strict scrutiny. Applying the permit requirements to such small numbers of persons (or here, a single individual) is not necessary to protect any compelling government interests. *Douglas*, 88 F.3d at 1524. Further, the Ordinance is not narrowly tailored because it "restricts a substantial amount of speech" that does not interfere with the city's potential legitimate interests. *See id.* at 1524. Thus, in addition to the impermissible content-based regulation of speech, wholly prohibiting speakers without a license from engaging in protected speech in traditional public fora, such as sidewalks, cannot pass constitutional muster.

The Ordinance's time restriction is invalid.

The Ordinance prohibits begging between 9:00 pm and 8:00 am (§78-112). Here, there is no evidence suggesting that the Ordinance's time-based restriction on requests for charitable donations hews closely to a compelling interest. Courts regularly strike down such restrictions. *See, e.g., Ohio Citizen Action v. City of Englewood*, 671 F.3d 564 (6th Cir. 2012) (striking down 6:00 pm curfew for door-to-door solicitation); *Browne v. City of Grand Junction*, 136 F.Supp. 3d 1276 (D. Colo. 2015) (striking prohibition on solicitation between the hours falling 30 minutes after sunset or 30 minutes after sunrise). In *Browne*, the court found that "[t]here is no indication

that panhandling at night—no matter the location in Grand Junction—is inherently dangerous or threatening to the public. Therefore, Grand Junction has not shown that a blanket prohibition on panhandling at night is necessary to advance public safety." *Id.* at 1292–3. *See also Thayer v. Worcester, MA*, 144 F. Supp. 3d 218 (D. Mass 2015) ("[T]he entirety of Ordinance 9-16 fails because it is not the least restrictive means available to protect the public....").

The Ordinance is harmful and ineffective public policy.

While the Ordinance cannot pass constitutional muster, it also is simply 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 the Des Moines Ordinance are costly to enforce and only exacerbate problems associated with homelessness and poverty. Numerous communities have created alternatives that are more effective, and leave all involved—homeless and non-homeless residents, businesses, city agencies, and elected officials—happier in the long run. *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.

For example, Philadelphia, PA recently 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* 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 Kenny emphasized "We are not going to arrest people for being homeless," stressing 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 are how cities actually solve the problem of homelessness, rather than merely attempting to suppress evidence of it.

We can all agree that we would like to see a Des Moines where homeless people are not forced to beg on the streets. But whether examined from a legal, policy, fiscal, or moral standpoint, criminalizing any aspect of panhandling is not the best way to achieve this goal. The City should place an immediate moratorium on enforcement and then proceed with a rapid repeal to avoid potential litigation. The City can then develop approaches that will lead to the best outcomes for all the residents of Des Moines, housed and unhoused alike.

As you know, successful claims brought under the First Amendment to enjoin the Des Moines Anti-Begging Ordinance will entitle the prevailing plaintiff to attorney's fees and costs, as authorized by 42 U.S.C. § 1988.

Through the ACLU's investigation, we have had conversations with people who are homeless in Des Moines, who have informed us of Des Moines police officers actively enforcing its unconstitutional anti-begging ordinance through citations, warnings, and "move-on" orders, all of which violate the free speech right to ask for help.

Des Moines should repeal the Ordinance.

Based on the foregoing, we ask Des Moines to take the following immediate actions:

1. Stop enforcing the Des Moines Municipal Code Anti-Begging Ordinances, §§ 78-101, 78-102, 78-103, and 78-112. This requires instructing any law enforcement officers charged with enforcing the municipal code that the Anti-Begging Ordinances are no longer to be enforced in any way, including by issuance of citations, warnings, or "move-on" orders.

2. Immediately initiate the steps necessary to repeal §§ 78-101, 78-102, 78-103, and 78-112.

3. If there are any pending prosecutions under §§ 78-101, 78-102, 78-103, and/or 78-112, dismiss them.

Thank you for your attention to this important matter. We look forward to your response on or before **September 14, 2018**.

Sincerely,

/s/Philip Brown
Philip Brown
Legal Fellow
ACLU of Iowa Foundation
Tel: 515-207-0759
Email: phil.brown@aclu-ia.org

/s/Rita Bettis Austen
Rita Bettis Austen
Legal Director
ACLU of Iowa Foundation

Eric S. Tars
Senior Attorney
National Law Center on Homelessness & Poverty