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NOTES

THE CONSTITUTIONALITY OF PANHANDLING ORDINANCES:
MAKING “CENTS” OUT OF *REED* v. *TOWN OF GILBERT*

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NOTES

THE CONSTITUTIONALITY OF PANHANDLING ORDINANCES: MAKING “CENTS” OUT OF *REED* v. *TOWN OF GILBERT*

*Megan Smith**

I. INTRODUCTION

In the past twenty-five years, cities have increasingly implemented “status” ordinances that aim to reduce the visibility of homelessness.¹ Such laws make it illegal to sleep, sit or store personal belongings in public areas.² Other more facially neutral laws³—laws prohibiting open containers, loitering or disorderly conduct—have been disproportionately enforced against people who are homeless or living in poverty.⁴ Many cities have adopted a new approach to reduce the visibility of homelessness by creating legislation that makes it unlawful for any person on the street to panhandle.⁵ Panhandling is broadly defined as asking another person for money or items of value.⁶ In 2014, more than three out of every four cities in the United States

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¹ *A Dream Denied: The Criminalization of Homelessness in U.S. Cities*, NAT’L COAL. FOR THE HOMELESS (Jan. 2006), <http://www.nationalhomeless.org/publications/crimreport/trends.html>.

² NAT’L COAL. FOR THE HOMELESS, *supra* note 1.

³ A “facially neutral” law is one that, as written, does not explicitly discriminate against a particular group.

⁴ NAT’L COAL. FOR THE HOMELESS, *supra* note 1.

⁵ See discussion *infra* Part D. See also NAT’L COAL. FOR THE HOMELESS, *supra* note 1 for a chart on cities that prohibit begging and aggressive panhandling.

⁶ WEBSTER’S DICTIONARY, <http://www.merriam-webster.com/dictionary/panhandle> (last visited May 6, 2017).

had an ordinance prohibiting panhandling in certain public areas.⁷ Local business owners and associations interested in promoting safety and local tourism often support these efforts, while opponents of such laws argue that these restrictions serve to further criminalize homelessness and create additional barriers for people trying to move out of poverty.⁸

This Note aims to examine the constitutionality of such panhandling ordinances in light of the recent United States Supreme Court decision in *Reed v. Town of Gilbert*.⁹ Part II of this Note offers judicial background on panhandling as a form of charitable solicitation protected by the First Amendment's freedom of speech clause and reviews the level of judicial scrutiny applicable to freedom of speech claims. Part III discusses the disagreement among federal circuits as to whether panhandling restrictions are content-based and the support *McCullen v. Coakley*¹⁰ offers to those challenging panhandling restrictions. Part IV analyzes the Supreme Court's decision in *Reed v. Town of Gilbert* and speculates as to the effect this decision will have on aggressive panhandling laws in the future.

II. PANHANDLING AS CHARITABLE SOLICITATION AND LEVELS OF JUDICIAL SCRUTINY IN FREEDOM OF SPEECH CLAIMS

A. Charitable Solicitations: A Protected Form of Speech

The First Amendment of the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech."¹¹ Freedom of speech is essential to the preservation of a free society in which government is based upon the consent of informed citizens and is dedicated to protecting the rights of all individuals.¹² While the Supreme Court has yet

⁷ *No Safe Place: The Criminalization of Homelessness in U.S. Cities*, NAT'L L. CTR. ON HOMELESSNESS & POVERTY 1, 20, https://www.nlchp.org/documents/No_Safe_Place.

⁸ NAT'L COAL. FOR THE HOMELESS, *supra* note 1.

⁹ 135 S. Ct. 2218 (2015).

¹⁰ 134 S. Ct. 2518 (2014).

¹¹ U.S. CONST. amend. I.

¹² *See Speiser v. Randall*, 357 U.S. 513, 530 (1958) (Black, J., concurring).

to decide on the constitutionality of panhandling restrictions directly, it has recognized charitable solicitation as a protected form of speech.¹³

In *Village of Schaumburg v. Citizens for Better Environment*, the Court held that an ordinance requiring a nonprofit environmental protection organization to use seventy-five percent of its revenue from charitable solicitations for charitable purposes was invalid because it was overbroad.¹⁴ The governmental interest in protecting the public from fraud, crime and undue annoyance, while substantial, was “only peripherally promoted by the 75 percent requirement and could be sufficiently served by measures less destructive of First Amendment interests.”¹⁵ The Court noted that solicitation activities are generally intertwined with informative and persuasive speech that seeks support for particular causes or views on economic, political or social issues.¹⁶ Thus, the Supreme Court found 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.”¹⁷ Several circuit courts have since recognized panhandling as a type of solicitation protected by the First Amendment, finding little difference between those who solicit for charities and those who solicit on behalf of themselves.¹⁸

B. Applicable Levels of Judicial Scrutiny

With the recognition of charitable solicitation as a protected form of speech, courts must determine what level of judicial scrutiny to apply when examining the constitutionality of an ordinance restricting panhandling. Courts apply a more rigorous standard of review to regulations restricting

¹³ See *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 629 (1980); *Riley v. Nat'l Federation of Blind of N.C., Inc.*, 487 U.S. 781, 788–89 (1988); *United States v. Kokinda*, 497 U.S. 720, 725 (1990).

¹⁴ *Schaumburg*, 444 U.S. at 636.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 632.

¹⁸ *Loper v. N.Y.C. Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993); *Gresham v. Peterson*, 225 F.3d 899, 904 (7th Cir. 2000); *Speet v. Schuette*, 726 F.3d 867, 870 (6th Cir. 2013); *Smith v. City of Ft. Lauderdale*, 177 F.3d 954, 956–57 (11th Cir. 1999); *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 556 (4th Cir. 2013).

speech in areas where panhandling primarily occurs—public sidewalks, streets and parks, which are traditional public fora.¹⁹ This is because public fora “have immemorially been held in trust for the use of the public” and used for “purposes of assembly, communicating thoughts between citizens, and discussing public questions.”²⁰

The level of scrutiny applied also depends on whether the regulation of speech is content-based or content-neutral.²¹ Content-based regulations are presumptively invalid and are subject to strict scrutiny.²² Such laws may be justified only if the government proves that the regulation is the least restrictive means to serve a compelling government interest.²³ The government, however, has somewhat wider leeway when enacting restrictions that are deemed content-neutral.²⁴ Content-neutral restrictions are subject to intermediate scrutiny and are valid if they are narrowly tailored to restrict no more speech than necessary, serve a significant government interest and leave open ample alternative channels of communication.²⁵

III. CONFLICT AMONG CIRCUIT COURTS PRIOR TO *REED*

A. Panhandling Ordinances as Content-Neutral v. Content-Based

The determination of whether a panhandling law is content-neutral or content-based is critical to determining the constitutionality of that law, and prior to *Reed*, federal circuit courts were divided on how to make such a determination. For example, in *American Civil Liberties Union v. City of Las Vegas*, the Ninth Circuit Court of Appeals found an ordinance banning

¹⁹ See *McCullen v. Coakley*, 134 S. Ct. 2518, 2522 (2014) (citing *United States v. Grace*, 461 U.S. 171, 180 (1983)). Restrictions in nonpublic fora need only be reasonable, as long as the regulation is not an effort to suppress the speaker’s message due to disagreement with the speaker’s viewpoint. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 687 (1992).

²⁰ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (citing *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

²¹ See *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011).

²² *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 817 (2000) (“When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded congressional enactments is reversed.”).

²³ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992); *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

²⁴ *McCullen*, 134 S. Ct. at 2529.

²⁵ *Ward v. Rock Against Racism*, 491 U.S. 781, 804 (1989); *Perry Educ. Ass’n*, 460 U.S. at 45.

solicitation in downtown Las Vegas to be content-based because it prohibited a certain type of solicitation—begging for “the purpose of obtaining money, charity, business or patronage, or gifts or items of value for oneself or another person or organization.”²⁶ As a content-based restriction, the ordinance did not survive strict scrutiny.²⁷ Similarly, in *Loper v. New York City Police Department*, the Second Circuit Court of Appeals found that an ordinance prohibiting loitering in a public place for the purpose of begging was content-based because it prohibited all speech related to begging.²⁸ Likewise, in *Clatterbuck v. City of Charlottesville*, the Court of Appeals for the Fourth Circuit found that a statute prohibiting solicitations could conceivably be content-based.²⁹ There, the ordinance prohibited requests only for “immediate donations,” thereby permitting requests for future donations, and “plainly distinguish[ing] between types of solicitations on its face.”³⁰ However, the court held that “not every content distinction merits strict scrutiny; instead, a distinction is only content-based if it distinguishes content with a censorial intent to value some forms of speech over others”³¹ The court, unable to reach a conclusion regarding the censorial purpose, held that the district court erred in finding the ordinance content-neutral as a matter of law and remanded the case back to the trial court for further proceedings.³²

In contrast, in *ISKCON of Potomac, Inc. v. Kennedy*, the D.C. Circuit Court of Appeals concluded that the National Park Service’s panhandling law prohibiting “soliciting or demanding gifts, money, goods or services” in the area of the National Mall in Washington, D.C. was content-neutral and valid.³³ The court held that because the regulation prohibited only in-person requests for immediate donations, rather than all requests for donations, it was a regulation on the manner in which the message was conveyed rather than on the content of the message.³⁴ The court cited Justice Kennedy’s concurrence in *ISKCON v. Lee*, in which he stated that a regulation

²⁶ *Am. Civil Liberties Union v. City of Las Vegas*, 466 F.3d 784, 793 (9th Cir. 2006).

²⁷ *Id.* at 797.

²⁸ *Loper v. N.Y.C. Police Dep’t*, 999 F.2d 699, 705 (2d Cir. 1993).

²⁹ *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 556 (4th Cir. 2013).

³⁰ *Id.* at 556.

³¹ *Id.* (internal quotations omitted).

³² *Id.*

³³ *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 959 (D.C. Cir. 1995).

³⁴ *Id.* at 955.

prohibiting in-person solicitation for immediate payment regulated the manner but not the content of the expression.³⁵

Several circuit courts of appeal have not yet reached a determination on whether similar ordinances are content-based restrictions. For example, in *Smith v. City of Fort Lauderdale*, the Court of Appeals for the Eleventh Circuit allowed the panhandling ordinance on Fort Lauderdale's beaches, finding that the prohibition was narrowly tailored to serve a legitimate interest in promoting tourism.³⁶ However, the issue of whether the ordinance was content-based was never raised.³⁷ More recently, in *Speet v. Schuette*, the Sixth Circuit Court of Appeals held that a Michigan statute criminalizing begging in public places violated the First Amendment because it was substantially overbroad.³⁸ The court, however, never reached a formal determination on whether the restriction was content-based.³⁹ In *Los Angeles Alliance for Survival v. City of Los Angeles*, the Court of Appeals for the Ninth Circuit deferred the question of whether a Los Angeles anti-solicitation ordinance was content-based to the California Supreme Court.⁴⁰ In response to the certified question, the California Supreme Court found that a ban on all aggressive solicitation for immediate donations and a ban on all requests for immediate donations in certain captive audience areas should be considered content-neutral because such a regulation could be "justified without reference to the content of the regulated speech."⁴¹ Relying on *Ward v. Rock Against Racism*, the court reasoned that literal content neutrality is not necessary for the regulation to be content-neutral, it is only required that the regulation be justified by legitimate governmental concerns unrelated to any "disagreement with the message conveyed."⁴²

³⁵ *Id.* at 955 (citing *ISKCON v. Lee*, 505 U.S. 672, 706 (1992)).

³⁶ *Smith v. City of Ft. Lauderdale*, 177 F.3d 954, 956–57 (11th Cir. 1999).

³⁷ *Id.*

³⁸ 726 F.3d 867, 870 (6th Cir. 2013).

³⁹ *Id.* See also *Gresham v. Peterson*, 225 F.3d 899, 905–06 (7th Cir. 2000) (finding that although a "colorable argument" could be made that the challenged panhandling ordinance was content-based, the court need not decide that issue because the parties agreed that the regulation was content-neutral).

⁴⁰ *L.A. All. for Survival v. City of L.A.*, 157 F.3d 1162 (9th Cir. 1998).

⁴¹ *L.A. All. for Survival v. City of L.A.*, 22 Cal. 4th 352, 379 (Cal. 2000) (quoting *Clark v. Cmty. for Creative Non-Violence*, 485 U.S. 288, 293 (1984)).

⁴² *Id.* at 368 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

B. McCullen Offers Guidance

McCullen v. Coakley offered a new source of support to those challenging panhandling laws. In June 2014, the Supreme Court unanimously ruled that statutorily required “buffer zones” around abortion clinics in Massachusetts violated the First Amendment.⁴³ The law criminalized knowingly standing on a “public way or sidewalk” within thirty-five feet of an entrance to any “reproductive health care facility.”⁴⁴ Although the Court ultimately held the ordinance to be invalid,⁴⁵ the Court found the ordinance to be content-neutral in part because it did not require enforcement authorities to examine the content of the speech within the buffer zone to determine whether a violation had occurred.⁴⁶ One could violate the statute by merely standing within the buffer zone without uttering a word.⁴⁷ Thus, the Court suggested that the determination of whether a restriction is content-neutral is not simply based on whether the law can be justified without reference to the speech.⁴⁸ This is significant because most panhandling ordinances have provisions that operate like buffer zones—prohibiting panhandling within a certain distance of ATMs, restaurants, bus stops and other locations.⁴⁹ However, unlike the buffer zone in *McCullen*, most panhandling ordinances permit individuals to speak within these so-called buffer zones, even request signatures or future donations, without violating the ordinance.⁵⁰ The ordinances are violated only if the speech within the buffer zone is an immediate request for money or an item of value, which requires enforcement authorities to listen to the content of the speech to

⁴³ *McCullen v. Coakley*, 134 S. Ct. 2518, 2541 (2014).

⁴⁴ *Id.* at 2541.

⁴⁵ The Court found that the buffer zone was not narrowly tailored, and thus burdened more speech than necessary to achieve the government’s legitimate interest in public safety, patient access to healthcare and unobstructed use of public sidewalks and roadways. In failing to use a more targeted means to address the issue, the statute unnecessarily applied to nonviolent individuals and their speech and burdened their ability to initiate one-on-one communications with patients entering the clinic. *Id.* at 2535–38.

⁴⁶ *Id.* at 2531 (citing *Fed. Commc’ns Comm’n v. League of Women Voters of Cal.*, 468 U.S. 364, 377 (1984)).

⁴⁷ *Id.*

⁴⁸ See *McCullen*, 134 S. Ct. at 2523 (citing *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

⁴⁹ NAT’L COAL. FOR THE HOMELESS, *supra* note 1.

⁵⁰ See discussion *infra* Part IV.D.

determine whether a violation has occurred. This is precisely the kind of law that the Court in *McCullen* described as content-based.⁵¹

IV. THE IMPLICATIONS OF *REED V. TOWN OF GILBERT* ON PANHANDLING ORDINANCES

A. *Reed v. Town of Gilbert*

Even after *McCullen*, the principle inquiry in determining content neutrality remained whether the government adopted the regulation because of its disagreement with the message conveyed.⁵² Courts looked to the government's motivation for enacting the regulation and deemed the regulation content-neutral if it served a purpose unrelated to the content of expression.⁵³ However, *Reed v. Gilbert* offers a different approach to determining content neutrality, which will significantly impact how courts analyze the constitutionality of panhandling ordinances in the future.

In *Reed*, the Supreme Court held that an ordinance imposing restrictions on outdoor signs based on the information the sign conveyed was a content-based regulation that failed to survive strict scrutiny.⁵⁴ Under the ordinance, outdoor signs posted for public display—temporary event signs, political signs and ideological signs—were each subject to different display time limits and size restrictions.⁵⁵ Greater restrictions were imposed on the plaintiff's temporary directional signs, directing the public to a church, than on campaign signs or signs conveying other messages.⁵⁶

The Court reversed the Ninth Circuit decision, which had upheld the ordinance.⁵⁷ Relying on *Hill v. Colorado*,⁵⁸ the Ninth Circuit had found the

⁵¹ *McCullen*, 134 S. Ct. at 2531 (quoting *League of Women Voters of Cal.*, 468 U.S. at 383, 377).

⁵² *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

⁵³ *Id.*

⁵⁴ *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2224 (2015).

⁵⁵ *Id.*

⁵⁶ *Id.* at 2223–26.

⁵⁷ *Reed v. Town of Gilbert*, 707 F.3d 1057, 1062 (9th Cir. 2011), *rev'd and remanded*, 135 S. Ct. 2218 (2015).

⁵⁸ *Hill v. Colorado*, 530 U.S. 703, 719–20 (2000) (finding that a Colorado statute imposing a buffer zone around unwilling listeners within 100 feet of a health care facility was content-neutral because: (1) the statute was not adopted because of disagreement with the message conveyed, it applied equally to all demonstrators, regardless of viewpoint; and (2) the State's interests were unrelated to the content of the speech).

ordinance to be content-neutral because the town did not adopt the regulation because of disagreement with the signs' messages, and the town's interest in preserving aesthetics and traffic safety were unrelated to the content of the signs.⁵⁹ The Supreme Court disagreed, finding that the sign regulation was content-based on its face, and thus determined it was not necessary to consider the town's justifications for the sign restriction.⁶⁰ In the majority opinion, Justice Thomas wrote, "[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."⁶¹ The Court then determined that giving one type of sign, whether ideological, political or directional, more favorable treatment than another was a "paradigmatic example" of content-based discrimination.⁶²

While the opinion in *Reed* did not address panhandling restrictions, its effect on such laws are significant. *Reed* clarified that the initial content-based inquiry is "whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys."⁶³ Accordingly, a law regulating speech should first be evaluated on its face to determine if it applies to particular speech because of the message expressed.⁶⁴ If it does, the law is deemed to be content-based, without an inquiry into the law's purpose.⁶⁵ Therefore, a speech restriction targeted at a specific subject matter is content-based regardless of the content-neutral justification for the law.⁶⁶ This approach to determining content neutrality presents a significant challenge to defenders of panhandling ordinances. The implications are

⁵⁹ *Reed*, 707 F.3d at 1071.

⁶⁰ *Reed*, 135 S. Ct. at 2228.

⁶¹ *Id.* (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993) (internal quotations omitted)).

⁶² *Id.* Finding the law to be content-based, the court held that the sign ordinance failed to survive strict scrutiny because it was not narrowly tailored to serve the government's purported interests in preserving aesthetic appeal and traffic safety. *Id.* at 2231–32. More specifically, the town failed to show how limiting the number, size, and display duration of directional signs, while allowing larger ideological or political signs to be displayed for a longer period of time, was necessary to preserve the aesthetics of the town or traffic safety. *Id.*

⁶³ *Id.* at 2227.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

evident in two recent circuit court rulings: *Norton v. Springfield*⁶⁷ and *Thayer v. City of Worcester*.⁶⁸

B. *Norton v. City of Springfield*

Norton v. City of Springfield was the first federal circuit court decision to interpret *Reed* in the panhandling context.⁶⁹ Two months after the *McCullen* decision, the Seventh Circuit, in *Norton*, upheld a City of Springfield ordinance that prohibited panhandling in the city's downtown historic district.⁷⁰ Under the ordinance, immediate oral requests for money were prohibited, but written requests or requests for future donations were permitted.⁷¹ In analyzing whether a regulation was content-based, the court only considered two factors—whether the city regulated the targeted speech because of the ideas it conveys and whether the city regulated the speech because it disapproved of its message.⁷² The court ruled that the ordinance was a valid content-neutral restriction.⁷³ Shortly after the decision in *Reed*, however, the Seventh Circuit granted a rehearing of *Norton* to apply the analysis from *Reed*.⁷⁴

In its decision on rehearing, the Seventh Circuit noted that the Supreme Court changed how content discrimination is to be understood when it opined in *Reed* that, “regulation of speech is content-based if a law applies to particular speech because of the topic discussed *or* the idea or message expressed.”⁷⁵ The court found that *Reed* abolishes a distinction between content regulation and subject-matter regulation, meaning that “any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification.”⁷⁶ Under this analysis, the court found that the Springfield ordinance was content-based because it regulated

⁶⁷ 806 F.3d 411 (7th Cir. 2015).

⁶⁸ 144 F. Supp. 3d 218, 233 (D. Mass. 2015).

⁶⁹ *Norton*, 806 F.3d at 411.

⁷⁰ *Norton v. Springfield*, 768 F.3d 713, 718 (7th Cir. 2014), *rev'd on reh'g*, No. 15-3276, 2015 U.S. Dist. LEXIS 162705, at *1, *2 (C.D. Ill. Dec. 4, 2015).

⁷¹ *Id.* at 714.

⁷² *Id.* at 717.

⁷³ *Id.*

⁷⁴ See *Norton*, 806 F.3d at 411.

⁷⁵ *Id.* at 412 (quoting *Reed*, 135 S. Ct. at 2227) (emphasis in original).

⁷⁶ *Id.*

speech based on the topic discussed.⁷⁷ As such, the restriction required a compelling justification and the city could not meet that burden.⁷⁸

Following the Seventh Circuit's ruling in the rehearing of *Norton*, Springfield adopted a new panhandling ordinance which made it unlawful for any individual to ask pedestrians for "an immediate donation of money or other gratuity," while "knowingly approaching within five feet" of the individual.⁷⁹ The city argued that this ordinance regulates activity, not speech.⁸⁰ In December 2015, an Illinois District Court held that Springfield's revised panhandling ordinance was still a content-based restriction.⁸¹ The court noted that:

[Individuals] can ask for the time, talk about the weather, ask someone to sign a petition, or even solicit support (either nonmonetary support or for a future contribution) for causes or organizations while approaching within five feet of the person being addressed. However, [they] are not permitted to ask pedestrians for "an immediate donation of money or other gratuity" while "knowingly approaching within five feet" of the individual.⁸²

Therefore, because the ordinance prohibited one type of speech, while allowing other types, the court held that the ordinance was content-based and failed to survive strict scrutiny.⁸³

C. *Thayer v. City of Worcester*

In *Thayer v. City of Worcester*, the First Circuit Court of Appeals upheld a City of Worcester ordinance prohibiting immediate requests for donations within twenty feet of various public locations, including bus stops and restaurants.⁸⁴ The court stated that the principal inquiry for determining whether a regulation of speech is content-based is whether the government adopted the regulation because it disagreed with the message certain speech

⁷⁷ *Id.*

⁷⁸ *Id.* at 413.

⁷⁹ *Norton v. City of Springfield*, No. 15-3276, 2015 U.S. Dist. LEXIS 162705, at *1, *2 (C.D. Ill. Dec. 4, 2015).

⁸⁰ *Id.* at *4.

⁸¹ *Id.*

⁸² *Id.* at *4–5.

⁸³ *Id.* at *6.

⁸⁴ *Thayer v. City of Worcester*, 755 F.3d 60, 64–71 (1st Cir. 2014), *vacated*, 135 S. Ct. 2887 (2015).

conveys.⁸⁵ The court found that even though the ban applied only to “immediate” donations, that distinction alone does not render the ordinance content-based as long as the distinction is justified by a legitimate, non-censorial motive.⁸⁶ Finding the ordinance to be content-neutral, the court found that the appellants failed to make the *prima facie* showing necessary to trigger the government’s burden of proving that the ordinance survives intermediate scrutiny, and the restriction was therefore valid.⁸⁷

In June 2015, nearly two weeks after deciding *Reed*, the Supreme Court granted *Thayer*’s petition for a writ of certiorari, vacated the First Circuit’s upholding of the panhandling ordinance, and remanded the case “for further consideration in light of [*Reed*].”⁸⁸ On remand, the district court, relying on *Reed*, ruled that a law may be content-based on its face regardless of whether the legislature’s purpose or justification for enacting the law was content-neutral.⁸⁹ Accordingly, the court held that “*Reed* mandates a finding that [the ordinance] is content based because it targets anyone seeking to engage in a specific type of speech, *i.e.*, solicitation of donations.”⁹⁰

The court then applied the reasoning from two post-*Reed* decisions that analyzed nearly identical panhandling ordinances as those at issue in *Thayer—McLaughlin v. City of Lowell* and *Browne v. City of Grand Junction*.⁹¹ As in *McLaughlin* and *Browne*, the court found that the panhandling ordinances at issue failed to survive strict scrutiny because they were not the least restrictive means of achieving the governments’ purported interests in promoting safety and were duplicative of existing criminal laws.⁹² In particular, the court found that there was no justification for the city’s determination that banning solicitations within twenty feet of ATMs and various other facilities, rather than a smaller distance, was the least restrictive means available to protect the public.⁹³ The court further found that the city’s temporal solicitation ban which prohibited soliciting any person in public

⁸⁵ *Id.* at 67.

⁸⁶ *Id.* at 69.

⁸⁷ *Id.* at 73.

⁸⁸ *Thayer v. City of Worcester*, 135 S. Ct. 2887 (2015).

⁸⁹ *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 233 (D. Mass. 2015) (emphasis in original).

⁹⁰ *Id.* at 233 n.2.

⁹¹ *Id.* at 236–37. See *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177 (D. Mass. 2015); *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276 (D. Colo. 2015).

⁹² *Thayer*, 144 F. Supp. 3d at 236–37. See *McLaughlin*, 140 F. Supp. 3d; *Browne*, 136 F. Supp. 3d.

⁹³ *Id.* at 237.

after dark was invalid because “the City ha[d] not cited to any evidence or provided any meaningful argument to establish that a ‘blanket prohibition on panhandling at night [wa]s necessary to advance public safety.’”⁹⁴

D. Aggressive Panhandling Laws

As seen in *Thayer*, local governments attempting to avoid constitutional challenges to their anti-panhandling laws have enacted aggressive panhandling laws. These laws attempt to narrow the scope of panhandling restrictions by banning panhandling involving coercive conduct or menacing acts.⁹⁵ However, many “aggressive” panhandling laws include blanket prohibitions on solicitations during certain times and near certain locations, regardless of if the conduct associated with the panhandling is aggressive.⁹⁶ For example, Nashville’s aggressive panhandling ordinance makes it unlawful for any person to panhandle at a bus stop, sidewalk café, within twenty-five feet of an ATM facility and within ten feet of an entrance to any building open to the public, including commercial establishments.⁹⁷ New Orleans’ aggressive panhandling ordinance prohibits panhandling in certain locations within its Downtown Development District, including in public parks and within thirty feet of cafés.⁹⁸ In addition to prohibiting “aggressive” panhandling, Atlanta’s ordinance restricts panhandling within fifteen feet of the entrance or exit of any building, whether publicly or privately owned as well as within fifteen feet of any parking pay station, pay telephone, public toilet and ATM facility.⁹⁹ It also creates “Restricted Monetary Solicitation Zones,” which restrict panhandling in the city’s most populated streets.¹⁰⁰ Similarly, Orlando makes it unlawful to panhandle in public parks, fairgrounds, sporting facilities and on public property in the Downtown Core District,¹⁰¹ and Pittsburgh prohibits panhandling in various “captive audience areas,” including within twenty-five feet of a line of people waiting to gain

⁹⁴ *Id.* at 235 (quoting *Browne*, 136 F. Supp. 3d at 1292–93).

⁹⁵ See NAT’L COAL. FOR THE HOMELESS, *supra* note 1.

⁹⁶ *See id.*

⁹⁷ NASHVILLE, TENN., CODE OF ORDINANCES § 11.12.090 (2008).

⁹⁸ NEW ORLEANS, LA. CODE OF ORDINANCES § 54-412 (2016).

⁹⁹ ATLANTA, GA. CODE OF ORDINANCES § 106-85 (2016).

¹⁰⁰ *Id.*

¹⁰¹ ORLANDO, FLA., CODE OF ORDINANCES § 43.86(2) (2002).

admission to a place and within twenty-five feet of the entrance to a place of religious assembly.¹⁰²

Additionally, panhandling ordinances frequently make it illegal to panhandle in groups of two or more or to repeat the request after the person solicited gives a negative response.¹⁰³ Many local governments also have blanket prohibitions against panhandling after dark.¹⁰⁴ New Orleans, for example, makes it unlawful to engage in panhandling after 7:00 p.m. or before 6:00 a.m.¹⁰⁵ These types of ordinances—prohibiting panhandling at night or within high traffic areas—restrict peaceful solicitations and limit panhandling in areas where solicitation is most likely to be profitable. They also aim to restrict a particular type of solicitation—oral requests for immediate donations of money or items of value. Such ordinances do not criminalize other kinds of solicitation such as requests for future donations, signatures or offers to sell goods or services. *Reed* mandates that laws aimed at targeting individuals engaged in a specific type of speech are content-based and subject to strict scrutiny. In order to satisfy strict scrutiny, the law must be the least restrictive means of achieving a compelling government interest.¹⁰⁶

Courts will likely refuse to recognize that blanket time and place prohibitions within aggressive panhandling ordinances are the least restrictive means of achieving a compelling government interest. Local governments may argue that banning panhandling at night or within a certain distance of an ATM is necessary to prevent listeners from feeling uncomfortable or intimidated.¹⁰⁷ However, concern for listeners' discomfort is not a sufficient justification to restrict speech.¹⁰⁸ And while promoting

¹⁰² PITTSBURGH, PA., CODE OF ORDINANCES § 602.04(a)(1) (2014).

¹⁰³ See, e.g., ATLANTA, GA., CODE OF ORDINANCES § 106-85(b) (2015).

¹⁰⁴ See NASHVILLE, TENN., CODE OF ORDINANCES § 11.12.090(C) (2008); PITTSBURGH, PA., CODE OF ORDINANCES, § 602.03(a) (2013).

¹⁰⁵ NEW ORLEANS, LA. CODE OF ORDINANCES § 54-412 (2016).

¹⁰⁶ *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014) (citing *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 813 (2000)).

¹⁰⁷ Editorial, *A Monkey Wrench in Cities' Panhandling Laws*, DENVER POST, Oct. 2, 2015, http://www.denverpost.com/editorials/ci_28913262/monkey-wrench-cities-panhandling-laws.

¹⁰⁸ *McCullen*, 134 S. Ct. at 2532.

safety on public sidewalks and streets is a legitimate government interest,¹⁰⁹ as discussed in *Thayer* and *Browne*, there is no evidence that panhandling at night is inherently dangerous or threatening to the public.¹¹⁰ Similarly, there is no indication that public safety is threatened simply because the person doing the solicitation had made another request after an initial request was refused, or was standing a certain distance away from an ATM, or was with a friend.¹¹¹ Therefore, ordinances will fail under strict scrutiny, unless local governments can particularize why their panhandling provisions are the least restrictive means of addressing public safety.¹¹² Such a task will be challenging as most of the conduct that aggressive panhandling laws aim to prohibit is sufficiently regulated through pre-existing laws that address threats to public safety directly.¹¹³ Ordinances that prohibit stopping a vehicle, obstructing streets and sidewalks, and engaging in assault and battery could all be applied to the conduct aggressive panhandling ordinances are intending to address.¹¹⁴ Therefore, local governments can advance public safety by enacting and enforcing laws narrowly tailored to address coercive and harassing conduct, without restricting innocent speech.¹¹⁵ With these less restrictive means of addressing public safety available, courts will likely find many panhandling restrictions burden more speech than necessary and thus are constitutionally invalid.

CONCLUSION

In light of *Reed v. Town of Gilbert*, courts are likely to strike down anti-panhandling laws as constitutionally invalid, content-based restrictions, as they treat requests for immediate donations less favorably than other types of solicitation, drawing the distinction based on the content of the message the speaker conveys. Non-enforcement of existing panhandling laws is not a

¹⁰⁹ See *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 768 (1994); *Schenck v. Pro-Choice Network*, 519 U.S. 357, 375 (1997); *Heffron v. Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 650 (1981).

¹¹⁰ *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276, 1292 (D. Colo. 2015); *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 235 (D. Mass. 2015).

¹¹¹ *Thayer*, 144 F. Supp. 3d at 236.

¹¹² See *Browne*, 136 F. Supp. 3d at 1292.

¹¹³ *Thayer*, 144 F. Supp. 3d at 223.

¹¹⁴ *Id.* at 223–24.

¹¹⁵ *McCullen v. Coakley*, 134 S. Ct. 2518, 2538 (2014).

sufficient remedy because it will leave many individuals unsure of their rights, leading them to simply abstain from constitutionally protected speech, which not only harms those seeking to solicit donations, but also deprives society of an uninhibited marketplace of ideas.¹¹⁶ Therefore, local governments should modify their panhandling laws to restrict only that conduct which constitutes a threat to public safety. When local governments create laws to protect public safety, they must ensure those laws do not infringe upon First Amendment rights. The current trend, post-*Reed*, of invalidating laws that impose greater restrictions on panhandling than on other forms of speech will likely continue. Moving forward, perhaps this trend will encourage more efforts to address the issue of homelessness and poverty directly, rather than simply trying to reduce its visibility.

¹¹⁶ *Virginia v. Hicks*, 539 U.S. 113, 119 (2003).