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TO: **Bill Underwood**
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CC: **Dickson Streets Merchants**
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FROM: **Kit Williams**, City Attorney

DATE: **January 23, 2017**

RE: **Federal Courts invalidate regulations for begging and panhandling**

The absolutist language of Justice Thomas in *Reed v. Town of Gilbert* not only required some changes in cities' sign ordinances, but has spilled over into panhandling and solicitation regulations. Indeed, a decision finding a panhandling ordinance valid in *Norton v. City of Springfield*, 806 F 3d. 411 (7th Cir. 2015) was later reversed in light of *Reed*. The Seventh Circuit Court of Appeals had found that an ordinance which "prohibits panhandling in (Springfield's) historic district-less than 2% of the City's area" was not content based and therefore constitutional. After the United States Supreme Court handed down the *Reed* decision, The Seventh Circuit had to reverse itself and find Springfield's panhandling ordinance unconstitutional.

The same reversal occurred in the First Circuit Court of Appeals' initial approval of an ordinance which restricted panhandling in *Thayer v. City of Worcester*, 733 F 3d. 60 (2014). That decision was later vacated by the Supreme Court, 113 S. Ct. 2887 (2015). The Worcester City Solicitor told the Worcester City Council that "the (C)ity cannot legally prohibit peaceful panhandling that does not interfere with the movement of traffic or otherwise endanger public safety." "The City Solicitor noted, however, that 'certain methods of panhandling . . . are currently regulated by state law,' including laws against 'disorderly conduct,

trespass and assault.' " *Thayer v. City of Worcester*, 144 F. Supp. 3d 218,224 (United States District Court of Massachusetts 2015).

The Worcester City Council in response to ongoing citizen complaints decided to pass further ordinances regulating or banning panhandling on traffic islands and "aggressive panhandling" which included not only repetitive requests or threatening behavior, but 20 foot buffer zones around ATMs, sidewalk cafes, etc. Although these ordinances were originally approved by the Federal District Court and First Circuit Court of Appeals, the United States Supreme Court decision in *Reed v. Town of Gilbert* forced both courts to reverse course and find that the panhandling ordinances were unconstitutional violations of the Free Speech clause of the First Amendment. The City Solicitor in the *Thayer v. City of Worcester* case reported that the panhandlers' attorneys are seeking attorney fees in excess of $200,000.00 for prevailing in this §1983 Civil Rights violation case.

Several other federal courts have also fallen in line with *Reed v. City of Gilbert*'s holding that government "regulation of speech is content based (and thus presumptively unconstitutional) if a law applies to particular speech because of the topic discussed or the idea or message expressed," (135 S. Ct. at 2227) and found that panhandling ordinances are unconstitutional. These include most recently the United States District Court for the Eastern District of Arkansas. In *Rodgers v. Colonel Bill Bryant, Director of the State Police*, 4:16-CV-00775-BRW, November 22, 2016, the Court held: "I can imagine no interpretation shy of metaphysical contortions that would save the anti-begging law from constitutional concerns." The Court continued: "Arkansas's anti-begging law infringes on the freedom of speech guaranteed under the First Amendment to the Federal Constitution. Accordingly, as to the facial challenge, Plaintiffs' Motion for Injunction is GRANTED. . . ."

All of these cases brought pursuant to 42 U.S.C. § 1983 finding that cities have violated the panhandlers' First Amendment protected speech rights also provide generous attorney fees to the beggars' attorneys. With the constitutional law now so clear, I expect that there will be attorneys lining up to sue cities all over the nation who leave existing anti-panhandling ordinances in place. These will be easy cases for the panhandler attorneys to win so they can claim and be awarded attorney fees which will have to be paid by the cities' taxpayers. I do not want Fayetteville to suffer such attorney fees claims now that it is clear what decisions the Courts will make.

1 of 1 DOCUMENT

HOMELESS HELPING HOMELESS, INC., Plaintiff, v. CITY OF TAMPA, FLORIDA, Defendant.

CASE NO. 8:15-cv-1219-T-23AAS

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

2016 U.S. Dist. LEXIS 103204

August 5, 2016, Decided
August 5, 2016, Filed

COUNSEL: [*1] For Homeless Helping Homeless. Inc., Plaintiff: Andrew Kim, Brian T. Burgess, Frederick C. Schafrick, LEAD ATTORNEYS, PRO HAC VICE, Goodwin Procter, LLP, Washington, DC; David M. Snyder, LEAD ATTORNEY, Tampa, FL; Joseph P. Rockers, Kara A. Harrington, Kevin P. Martin, LEAD ATTORNEYS, PRO HAC VICE, Goodwin Procter, LLP, Boston, MA.

For City of Tampa, Florida, Defendant: Jerry M. Gewirtz, Toyin Kemi Aina-Hargrett, LEAD ATTORNEYS, City of Tampa Attorney's Office, Tampa, FL.

For Peter J. Grilli, Mediator: Peter John Grilli, LEAD ATTORNEY, Peter J. Grilli, PA, Tampa, FL.

JUDGES: STEVEN D. MERRYDAY, UNITED STATES DISTRICT JUDGE.

OPINION BY: STEVEN D. MERRYDAY

OPINION

ORDER

Challenging an ordinance that bans in parts of Tampa, Florida, the solicitation of "donations or payment," Homeless Helping Homeless, Inc., sues (Doc. 42) for an injunction against the City of Tampa's enforcing the ordinance and for a declaration that the ordinance unconstitutionally infringes the right of free speech protected both by the *First Amendment to the United States Constitution* and by *Article I, Section 4, of the Florida Constitution*. Under *Rule 12(c), Federal Rules of Civil Procedure*, Homeless Helping Homeless moves (Doc. 47) for a judgment on the pleadings.

Reed v. Town of Gilbert, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015), an opinion accompanied by three distinct concurring opinions joined by a total of seven justices and an opinion adjudicating [*2] a sign-ordinance dispute, appears to govern this action. In other words, an opinion that resolves a dispute about parishioners temporarily planting some small signs directing people to a church service is

written in such sweeping terms that the opinion appears to govern a dispute about an ordinance that regulates face-to-face demands for money from casual passers-by.

This action illustrates (as *Reed* illustrates) the frailties of governing discrete local issues, which are otherwise decided by local officials subject to periodic election, by force of intermittently issued decrees, which are conveyed as constitutional directives; which are issued by a majority (or, sometimes, only a plurality) of nine lawyers serving during "good behavior"; and which are uttered in the course of resolving a different dispute in another locality. Nonetheless, this order dutifully applies *Reed* and resolves the present dispute against the City and in favor of Homeless Helping Homeless. Without *Reed*, which governs for the moment (despite prominently featuring the badges of a transient reign), I would follow Judge Easterbrook in *Norton v. City of Springfield, 768 F. 3d 713 (7th Cir. 2014)*, and similar decisions, and I would uphold the City's ordinance, which results [*3] from a constructive and demonstrably benign legislative attempt to manage fairly and humanely a tangible and persistent problem in a manner narrowly and artfully tailored to fit the compelling facts in the affected community.

BACKGROUND

1. Homeless Helping Homeless

Homeless Helping Homeless, a charity based in Tampa, offers emergency shelter to the homeless. (Doc. 42 ¶ 14) According to the allegations in the amended complaint, Homeless Helping Homeless quarters approximately seventy persons every night, feeds approximately three thousand persons every month, distributes hygiene kits, and assists persons "in obtaining social services, educational assistance, and permanent employment." (Doc. 42 ¶ 16) Homeless Helping Homeless's mission "is to break societal stereotypes by giving homeless men and women the opportunity to better their own lives thorough service." (Doc. 42 ¶ 14)

To "carry out its operations and fulfill its mission," Homeless Helping Homeless relies on staff and volunteers to pursue private money. (Doc. 42 ¶ 17) From 2011 to 2013, Homeless Helping Homeless's money-raising focused on downtown Tampa and Ybor City[1] because each neighborhood offers both "a broad audience" and "wide [*4] sidewalk space to solicit safely without causing disruptions." (Doc. 42 ¶ 32) In 2013, as a result of soliciting in downtown Tampa and Ybor City, Homeless Helping Homeless raised more than $26,000. (Doc. 42 ¶ 32)

1 Ybor City, a historic district in Tampa, adjoins downtown Tampa to the east-northeast.

2. *Section 14-46 of the Tampa Municipal Code*

Beginning in May 2013, the Tampa City Council held meetings about public solicitation for money. (Doc. 56 at 9) At one meeting, the president of a college in Tampa stated that the problem of "[v]agrancy and panhandling is more than an inconvenience to our 8,000 students and 400 employees. It is [a] distraction to our learning process and our core operations." (Doc. 45-10 at 3; Doc. 56 at 9) The owner of a business in Tampa stated that "there are some things that I believe we could [do] to support a more usable environment for all community members. One of those could be the discussion of a strict panhandling exclusion zone in Ybor City and downtown." (Doc. 45-10 at 5; Doc. 56 at 9-10) Others agreed. (Doc. 56 at 8-10) From May to July 2013, the Tampa City Council discussed enacting an ordinance to create zones, "particularly in tourist areas," in which a person "could be [*5] free from all types of [oral] unsought solicitation." (Doc. 56 at 10)

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DEBRA BROWNE, MARY JANE SANCHEZ, CYNTHIA STEWART, and HUMANISTS DOING GOOD, Plaintiffs, and GREENPEACE, INC., Plaintiff-Intervenor, v. CITY OF GRAND JUNCTION, COLORADO, Defendant.

Civil Action No. 14-cv-00809-CMA-KLM

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

136 F. Supp. 3d 1276*; *2015 U.S. Dist. LEXIS 132835

September 30, 2015, Decided
September 30, 2015, Filed

PRIOR HISTORY: *Browne v. City of Grand Junction, 2014 U.S. Dist. LEXIS 37515 (D. Colo., Mar. 21, 2014)*

COUNSEL: [**1] For Debra Browne, Mary Jane Sanchez, Cynthia Stewart, Steve Kilcrease, Humanists Doing Good, Greenpeace Inc, Plaintiffs: Rebecca Teitelbaum Wallace, Sara R. Neel, Mark Silverstein, American Civil Liberties Union-Denver, Denver, CO.

For City of Grand Junction, Colorado, Defendant: Josh Adam Marks, Katherine M. L. Pratt, Berg Hill Greenleaf & Ruscitti, LLP, Boulder, CO.

JUDGES: CHRISTINE M. ARGUELLO, United States District Judge.

OPINION BY: CHRISTINE M. ARGUELLO

OPINION

[*1280] **ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT, GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, DENYING PLAINTIFFS' MOTION FOR LEAVE TO FILE A SECOND SUPPLEMENTAL COMPLAINT, AND DENYING DEFENDANT'S MOTION TO STAY THE COURT'S CONSIDERATION OF THE CROSS-MOTIONS FOR SUMMARY JUDGMENT**

This case involves a constitutional challenge to a municipal ordinance that regulates panhandling. Currently before the Court are cross-motions for summary judgment. Defendant City of Grand Junction ("Grand Junction" or "the City") filed its motion for summary judgment on February 17, 2015. (Doc. # 84.) That same day, Plaintiffs Debra Browne, Mary Jane Sanchez, Humanists Doing Good, and Eric Niederkruger and Plaintiff-Intervenor [**2] Greenpeace, Inc. (collectively "Plaintiffs") filed

> I said, I'm sorry, sir, you are going to need to leave. And he had a few choice words and walked off.
>
> . . .
>
> I was pulling money out of a bank and a gentleman stood there and waited until I finished. He says, Can you spare some of that money you just pulled out? And I said, No, sir. He said, All right, thank you, and he walked off. Those are my personal experiences.

(Doc. # 84-1 at 23.)

Grand Junction argues that Ordinance No. 4627 is narrowly tailored because it "only addresses conduct in certain limited zones and at limited times" and it "does not sweep in any more [**35] conduct than is necessary to address the City's legitimate interest in promoting public safety." (Doc. # 84 at 25.) The Court does not question that "public safety" is a compelling governmental interest. *See, e.g., Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 375, 117 S. Ct. 855, 137 L. Ed. 2d 1 (1997)* (discussing "public safety and order" as a valid governmental interest). However, Grand Junction cannot demonstrate that the challenged provisions of Ordinance No. 4627 are necessary to serve that interest.

Simply put, the challenged portions of Ordinance No. 4627 are over-inclusive because they prohibit protected speech that poses no threat to public safety. For example, subsection (a) of section 9.05.040 of Ordinance No. 4627 prohibits panhandling "[o]ne-half (1/2) hour after sunset to one-half (1/2) hour before sunrise." (Doc. # 25-4 at 5.) Grand Junction has not demonstrated that this prohibition on protected speech is necessary for public safety. None of the alleged instances of "aggressive panhandling" --the stated impetus for Ordinance No. 4627--occurred at night. In fact, Chief Camper himself stated that they "don't see a lot of" nighttime panhandling in Grand Junction. (Doc. # 86-2 at 23.) There is no indication that panhandling at night--no matter the location in Grand Junction--is inherently dangerous [**36] or threatening to the public. Therefore, Grand Junction has not shown that a blanket [*1293] prohibition on panhandling at night is necessary to advance public safety.

Subsection (e) of section 9.05.040 of Ordinance No. 4627 prohibits panhandling if "[t]he person panhandling knowingly continues to request the person solicited for money or other thing of value after the person solicited has refused the panhandler's initial request." In one of the examples of "aggressive panhandling" discussed by Chief Camper, the panhandlers were allegedly "very persistent." (Doc. # 84-1 at 19.) The Court interprets this to mean that the panhandlers requested money or a thing of value more than once. In addition, in the encounter described by City Manager Englehart that took place when he was driving his car, it appears that he may have been solicited more than once. (Doc. # 84-1 at 23.) However, in neither instance does it appear that the safety of the person being solicited was threatened simply because the person doing the soliciting had made a second request after the initial request was refused. Grand Junction has not shown--and the Court does not believe--that a repeated request for money or other thing of value necessarily threatens public [**37] safety. Thus, a ban on multiple requests is not necessary to serve a compelling governmental interest.

Subsection (g) of section 9.05.040 of Ordinance No. 4627 prohibits panhandling "[w]ithin twenty (20) feet of an automatic teller machine or of a bus stop." (Doc. # 25-4 at 5.) During his deposition, City Manager Englehart described an instance in which he personally was solicited after obtaining money from an ATM. (Doc. # 84-1 at 23.) City Manager Englehart stated

that after he denied the request for money, the requester said, "All right, thank you," and walked away. (Doc. # 84-1 at 23.) The Court does not see how that interaction in particular threatened City Manager Englehart's safety or, more generally, how any request for money, simply because it occurs within 20 feet of an ATM (whether or not the person solicited used or planned to use the ATM), constitutes a threat to public safety. With regard to the ban on panhandling within 20 feet of a bus stop, none of the specifically identified instances of "aggressive panhandling" identified by Grand Junction occurred within 20 feet of a bus stop. Grand Junction has not shown--and the Court does not believe--that a request for money, simply because it occurs within 20 feet [**38] of a bus stop, threatens public safety. Therefore, the ban on panhandling with 20 feet of an ATM or bus stop is not necessary to serve a compelling government interest.

Subsection (i) of section 9.05.040 of Ordinance No. 4627 prohibits panhandling "[i]n a public parking garage, parking lot or other parking facility." (Doc. # 25-4 at 5.) None of the specifically identified instances of "aggressive panhandling" identified by Grand Junction occurred in a public parking garage, parking lot, or other parking facility. Similar to the other prohibitions set forth in Ordinance No. 4627, Grand Junction has not shown--and the Court does not believe--that a solicitation for money or other thing of value is a threat to public safety simply because it takes place in a public parking garage, parking lot, or other parking facility. Therefore, the ban on panhandling in these areas is not necessary to serve a compelling government interest.

Lastly, subsection (j) of section 9.05.040 of Ordinance No. 4627 prohibits panhandling "[w]hen the person solicited is present within the patio or sidewalk serving area of a retail business establishment that serves food and/or drink, or waiting in line to enter a building, an event, a retail business, or a theater." (Doc. # 25-4 at 5.) [**39] None of the specific instances of "aggressive panhandling" [*1294] identified by either Chief Camper or City Manager Englehart took place while the person solicited was either within the patio or sidewalk serving area of a restaurant, café, or bar, or waiting in line to enter a building, an event, a retail business, or a theater. Nevertheless, like all of the other challenged prohibitions, Grand Junction has not shown--and the Court does not believe--that the panhandling of an individual in the areas identified in subsection (j), without more, constitutes a threat to public safety. Therefore, the ban on panhandling individuals in the locations specified in subsection (j) is not necessary to serve a compelling government interest.

The Court notes that certain behavior that may be engaged in by solicitors when soliciting could threaten public safety. For example, the solicitor may engage in conduct that is intimidating, threatening, coercive, or obscene and that causes the person solicited to reasonable fear for his or her safety. Such conduct, in fact, is expressly prohibited by subsection (b) of section 9.05.040 of Ordinance No. 4627. Tellingly, Plaintiffs do not challenge subsection (b). At times, threatening behavior may accompany panhandling, but the correct solution [**40] is not to outlaw panhandling. The focus must be on the threatening behavior. Thus, the problem in this case is that Grand Junction has taken a sledgehammer to a problem that can and should be solved with a scalpel. In attempting to combat what it sees as threatening behavior that endangers public safety, Grand Junction has passed an ordinance that sweeps into its purview non-threatening conduct that is constitutionally protected. Thus, the Court is compelled to strike down subsections (a), (e), (g), (i), and (j) of section 9.05.040 of Ordinance No. 4627.[9]

9 The free speech protections afforded by *Article II, Section 10 of the Colorado Constitution* is "of greater scope than that