

SENT VIA E-MAIL

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RE: Recent Developments Questioning Constitutionality of Many Ordinances on Panhandling, Public Camping, and Religiously-Hosted Encampments

Dear Ms. Watkins,

We write to encourage MRSC and WSAMA members to evaluate the constitutionality of their jurisdictions' panhandling and camping ordinances in light of recent developments in the law. Failure to do so—leaving unconstitutional ordinances on the books—causes significant harm, particularly when the ordinances trigger the criminal process including arrest, conviction, and incarceration. Unconstitutional ordinances also risk lawsuits that are expensive to defend and risk incurring liability and attorneys' fees. MRSC and WSAMA members can avoid expense and liability by suspending enforcement of and then promptly repealing unconstitutional ordinances. Studies across the nation have also shown that it is less expensive to provide housing and services than to force homeless people to cycle through hospitals and jails.

Courts have repeatedly recognized that people without housing are protected by the same constitutional rights as everyone else. A series of recent court decisions, including *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015)¹ and *City of Lakewood v. Willis*, 186 Wn.2d 210 (2016) on the free speech rights present in panhandling, and *Martin v. Boise*, 902 F.3d 1031 (9th Cir. 2018), *opinion amended on denial of rehearing, Martin*, No. 15-35845, 2019 WL 1434046 (9th Cir., April 1, 2019), on criminalization of public camping, have reaffirmed those rights and held unconstitutional municipal ordinances criminalizing such activities.

¹ The *Reed* ruling was extended specifically to panhandling in remand of *Thayer v. Worcester*, 755 F.3d 60 (1st Cir. 2014) (*Thayer*, 135 S. Ct. 2887 (2015) (remanding case to 1st Cir. in light of *Reed*)).

Because not every municipality is in compliance with the principles discussed in these cases, this letter provides a summary of what the law requires.

The Criminalization of Panhandling is Almost Always Unconstitutional

1. Panhandling is constitutionally protected speech and restrictions on it are subject to strict scrutiny

With *Reed*, 135 S. Ct. 2218 and the remand of *Thayer* based on *Reed*, the United States Supreme Court reconfirmed that a request for charity in a public place, which includes the typical panhandling activity of holding a sign asking for money, is speech protected by the First Amendment. *Reed* together with the *Thayer* remand further recognize that an ordinance attempting specifically to regulate panhandling is a “content based” regulation that is presumptively unconstitutional and subject to strict scrutiny.

2. Ordinances regulating panhandling near vehicles must be extremely narrow and justified by clear evidence of necessity

In *Lakewood*, 186 Wn.2d 210, the Washington Supreme Court followed *Reed* and found unconstitutional an ordinance forbidding “begging” at on and off ramps to state highways and at intersections of major/principal arterials. Its analysis shows that any ordinance attempting to regulate solicitation of people in vehicles must be (1) extremely narrow as to geographic area and conduct regulated, (2) content-neutral, and (3) justified by clear evidence of necessity (simply asserting a traffic hazard is not sufficient).

Although some Washington municipalities repealed their ordinances regulating activities at on and off ramps and traffic intersections, others passed amendments insufficient to comply with *Lakewood*, and some have failed to make any of the needed changes at all.

3. Broad restrictions on panhandling, time-based restrictions, and restrictions purporting to limit “coercion” are unconstitutional

Moreover, many other restrictions on panhandling, which significantly limit the locations or times where this protected free speech activity is permitted, are also unconstitutional under the principles of *Reed* and *City of Lakewood*. These ordinances should be removed

For example, in Aberdeen, Aberdeen Mun. Code § 9.02.050(C) (“AMC”) forbids “solicitation”:

1. While a person is approaching to use, or is using, or has just finished using, an automated teller machine which shall

- include within twenty (20) feet of said machine;
2. At the entrance of a building, unless the solicitor has permission from the owner or occupant;
 3. While a person is approaching to use, or is using, or has just finished using, a public pay telephone;
 4. While a person is approaching to use, or using, or has just finished using a self-service car wash;
 5. While a person is approaching to use, or is using, or has just finished using, a self-service fuel pump;
 6. While a person is at a public transportation stop, or shortly after such person disembarks from a public transportation vehicle;
 7. Any parked vehicle as occupants of such vehicles enter or exit such vehicle;
 8. At ingress or egress between private and public property, unless the solicitor has permission from the owner or occupant;
 9. In any public transportation facility or public transportation vehicle; or
 10. After sunset or before sunrise.

Similar provisions can be found across the state, including in Lakewood Mun. Code § 9.04 (2017), Centralia Mun. Code § 10.37 (2017), and Chehalis Mun. Code § 7.04.320(I) (2015), to name just a few.

Courts across the country have repeatedly confirmed these provisions are an unconstitutional infringement of protected speech. 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*, 573 U.S. 464, 477 (2014). Courts use the most stringent standard—strict scrutiny—to review such restrictions. *See, e.g., Reed*, 135 S. Ct. at 2226-27 (holding that content-based laws may survive strict scrutiny only if “the government proves that they are narrowly tailored to serve compelling state interests.”); *McCullen*, 573 U.S. at 486.

The ordinances listed above, banning panhandling (but not other forms of speech) whenever there is a person at a bus stop or leaving a parked car, or in any location “after sunset or before sunrise,” cannot survive strict scrutiny because they do not serve any compelling state interest and they are not narrowly tailored. In fact, every court to consider similar regulations has stricken the regulation. *See, e.g., Norton v. City of Springfield*, 806 F.3d 411, 413 (7th Cir. 2015); *Cutting v. City of Portland, Maine*, 802 F.3d 79 (1st Cir. 2015); *Comite de Jornaleros de Redondo Beach v. City of Redondo*

Beach, 657 F.3d 936, 949 (9th Cir. 2011); *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 237 (D. Mass. 2015) (“[M]unicipalities must go back to the drafting board and craft solutions which recognize an individual[’]s... rights under the First Amendment...); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 189 (D. Mass. 2015); *Browne v. City of Grand Junction, Colo.*, 136 F. Supp.3d 1276, 1293 (D. Colo. 2015).

Similarly, time-based restrictions on requests for charitable donations (prohibiting solicitation between sunset and sunrise) have been repeatedly struck down by the courts. *See, e.g., Browne*, 136 F. Supp. 3d at 1292-93 (30 minutes after sunset to 30 minutes before sunrise); *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 580 (6th Cir. 2012) (6 pm curfew for door-to-door solicitation).

Another regulation found in many municipalities’ ordinances, including Aberdeen at AMC § 9.02.050(D), forbids “Solicitation by Coercion[.]” Again, these ordinances have repeatedly been found to fail the requirement that they be narrowly tailored to serve a compelling state interest. *See, e.g., Thayer v. City of Worcester*, 144 F.Supp.3d 218 (D. Mass. 2015) (the municipality had multiple existing ordinances that could address aggressive contact, the content-based ordinance was not the least restrictive means); *McLaughlin*, 140 F. Supp. 3d 177; *Browne*, 136 F. Supp. 3d 1276; *Cutting*, 802 F.3d 79.

For these reasons, jurisdictions’ panhandling ordinances should be carefully reviewed for constitutional validity.

The Criminalization of Public Camping is Unconstitutional When Shelter is Not Available

In many jurisdictions, people without housing are forced to live on public property because the shelters are full, have time limits, condition entry on religious participation, condition entry on separation from one’s family members, or require compliance with onerous rules. People camping in public have nowhere else to go, and cannot survive without some form of shelter. Criminally punishing the involuntary act of living while homeless is unconstitutional.

In *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), the Ninth Circuit concluded that “so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds [in shelters]” for the homeless, Los Angeles could not enforce an ordinance against homeless individuals “for involuntarily sitting, lying, and sleeping in public.” Although the *Jones* case was vacated pursuant to a settlement agreement, *Jones*, 505 F.3d 1006 (9th Cir. 2007), the Ninth Circuit recently reaffirmed the *Robinson/Jones* analysis in *Martin*, 902 F.3d 1031, *order*

amended and rehearing en banc denied, Martin, No. 15-35845, 2019 WL 1434046, holding a Boise anti-camping ordinance unconstitutional:

[T]he Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter.

Martin, No. 15-35845, 2019 WL 1434046, at *14 (citing *Martin*, 902 F.3d at 1048).

Applying similar reasoning, Washington courts have also struck down anti-camping or anti-sleeping ordinances, since they effectively deny homeless people the right to engage in activities essential to human survival (shelter, sleep). *City of Everett, Wash. v. Bluhm*, No. CRP 7006 (Everett, Wash. Mun. Court Jan. 12, 2016); *City of North Bend, Wash. v. Bradshaw*, No. Y123426A (Issaquah, Wash. Mun. Court Jan. 13, 2016). The cities in those cases chose not to appeal the rulings. In Tacoma, the City dismissed numerous anti-camping criminal cases rather than defend the validity of its ordinance and cities and counties across the state have announced suspensions of their anti-camping ordinances in light of *Martin*. There is no justification for keeping constitutionally suspect laws like these on the books when the cities are on notice that punishing public camping when essential to survival is cruel and unusual punishment under the United States Constitution.

Interference with Religiously-Hosted Encampments is Prohibited

We have also received reports about various jurisdictions subjecting residents of religiously-hosted encampments to interrogation, demands for identity, and searches that fail to comply with Washington’s constitutional protections against unreasonable searches and seizures. RCW 36.01.290 specifically protects the right of religious institutions to host temporary encampments for people experiencing homelessness, and forbids municipalities from enacting ordinances or regulations or “tak[ing] any other action” that imposes any conditions other than those necessary to protect public health and safety and even then only if such actions do not substantially burden the decisions or actions of the religious organization. Subjecting the beneficiaries of the religious organizations’ hosting to police activities that other citizens could not be subject to violates not only basic constitutional requirements but also RCW 36.01.290.

Conclusion

Criminalization of panhandling and public camping is inhumane and counterproductive in addition to being unconstitutional as described above, plus unlawful anti-panhandling and anti-camping ordinances are costly to enforce and only exacerbate problems associated with homelessness and

poverty. Numerous communities have created alternatives that are more effective, and that address the concerns of neighborhoods, businesses, city agencies, and elected officials. *See* National Law Center on Homelessness and Poverty, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES (2018), <https://nlchp.org/wp-content/uploads/2018/10/Housing-Not-Handcuffs.pdf>.

We urge your members to place an immediate moratorium on enforcement of questionable ordinances and proceed with a rapid repeal to avoid potential litigation.

Sincerely,

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