

NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY

Board of Directors

Eric A. Bensky
Chair

Murphy & McGonigle PC

Julia M. Jordan
Vice-Chair

Sullivan & Cromwell LLP

Robert C. Ryan
Treasurer

American Red Cross

Kirsten Johnson-Obey
Secretary

NeighborWorks

Paul F. Caron
Microsoft Corporation

Bruce J. Casino
Attorney

Rajib Chanda
Simpson Thacher & Bartlett LLP

Dwight A. Fettig
Porterfield, Fettig & Sears LLC

Deborah Greenspan
Blank Rome LLP

Steve Judge
Private Equity Growth
Capital Council (retired)

Georgia Kazakis
Covington & Burling LLP

Pamela Malester
U.S. Department of Health and
Human Services (retired)

Edward R. McNicholas
Ropes & Gray LLP

Tashena Middleton
Attorney

Matthew Murchison
Latham & Watkins LLP

G.W. Rolle
Missio Dei Church

Jeffrey A. Simes
Goodwin Procter LLP

Vasiliki Tsaganos

Franklin Turner
McCarter & English LLP

Robert Warren
People for Fairness Coalition

Khadijah Williams
Rocketship Public Schools

Maria Foscarinis
President
Executive Director

*Affiliations for identification
purposes only*

July 9, 2019

Mayor Todd Strange

Via email: mayor@montgomeryal.gov

RE: Ordinance No. 24-2019

Dear Mayor Strange,

We write to urge you to not sign Ordinance No. 24-2019 (the “Ordinance”), which prohibits panhandling in the City of Montgomery (“the City”) and was passed by City Council on July 2, 2019. Since the landmark *Reed v. Gilbert* case in 2015, every panhandling ordinance challenged in federal court—at 25 of 25 to date—including many with features similar to the ones in Montgomery, 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* NAT’L LAW CTR. ON HOMELESSNESS & 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 At least 31 additional cities have repealed their panhandling ordinances when informed of the likely infringement on First Amendment rights.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, it is also bad policy, and numerous examples of better alternatives now exist which the City could draw on. We call on you to not sign this bill, and to urge the city council to reconsider 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 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 also 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.”); *Blich v. City of Slidell*, 260 F. Supp. 3d 656, 667 (2017) (holding unconstitutional a panhandling ordinance because it was facially content-discriminatory and “burden[ed] speech and/or conduct by its subject matter and by its purpose”); *Homeless Helping Homeless, Inc. v. City of Tampa*, 2016 WL 4162882 at *4–*5

2000 M Street, N.W., Suite 210, WASHINGTON, DC 20036 | www.nlchp.org | PHONE: 202.638.2535 | FAX: 202.628.2737

The National Law Center on Homelessness & Poverty is a 501(c)3 charitable organization. Its federal tax ID is 52-1633883. No goods or services were given in exchange for this gift. Your donation is tax-deductible to the extent of the law. Please retain this letter for your records as your official receipt.

(M.D. Fla. Aug. 5, 2016) (same). By criminalizing the act of panhandling, the Ordinance differentiates speech that involves “requesting an immediate donation of money or other thing of value for oneself or another person or entity” from other types of speech. Ordinance No. 24-2019 § 1(2). As a result, a court will likely hold the Ordinance is a “content-based” restriction on speech that is presumptively unconstitutional. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2232 (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. The City purports to enact this Ordinance to “promote the prosperity, and improve the morals, order, comfort and convenience of its inhabitants.” However, the Ordinance will disproportionately impact the City’s homeless inhabitants. Furthermore, 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.”); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 189 (holding that a city’s interest in promoting tourism and business was not sufficiently compelling to justify a content-based prohibition on solicitation); *Homeless Helping Homeless, Inc. v. City of Tampa*, 2016 WL 4162882 at *4–*5 (M.D. Fla. Aug. 5, 2016) (striking down a solicitation ban on the grounds that the city’s interest in promoting tourism and economic activity its downtown area and historic district was not sufficiently compelling to survive strict scrutiny).

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. In the City Council Meeting on July 2, 2019, Councillor Lee claimed that the problem of panhandling exists “at just about every intersection” in the City of Alabama, but revealed that the city has not attempted to protect achieve the goals of protecting the “safety and improve the order, comfort, and convenience of its citizens” through the use of any means other than the criminal legal system before enacting this unconstitutional restriction on free speech. City of Montgomery, Ala., *City Council Meeting Videos* (July 1, 2019), <http://www.montgomeryal.gov/city-government/city-council/city-council-meeting-videos>. And even if the City had considered other means of addressing public solicitation before enacting the Ordinance, 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).

Though “public safety” is an important state interest, the Ordinance is not narrowly tailored to serve that interest. The act of soliciting an immediate donation of money is not in itself a threat to public safety. Though aggressive confrontations are a legitimate public safety concern, the Ordinance is overinclusive by prohibiting even peaceful solicitations for money. *See Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276, 1294 (D. Colo. 2015) (“At times, threatening behavior may accompany panhandling, but the correct solution is not to outlaw panhandling.”). Thus, the City should address public safety concerns by correcting threatening behavior, not

the act of panhandling itself. *See id.* The City can use already existing Alabama laws that address harassment in the form of physical aggression, or “abusive or obscene language or . . . gesture.” Ala. Code § 13A-11-8(a)(1). As a result, the Ordinance cannot be said to further public safety and is therefore not narrowly tailored to serve a compelling government interest. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015).

Unsurprisingly, every court to consider a regulation that, like the Ordinance, bans requests for charity within an identified geographic area 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) (holding unconstitutional an ordinance prohibiting all expressive activity on median strips); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011) (en banc) (striking down an ordinance that prohibited, among other things, solicitation of contributions on streets and highways); *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 individuals [sic] . . . rights under the First Amendment”); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 189 (D. Mass. 2015) (striking down an ordinance that banned vocal panhandling in a city’s downtown area, as well as within twenty feet of a bank, ATM, check-cashing business, transit stop, public restroom, pay telephone, theater, outdoor seating area, and associated parking areas); *Browne v. City of Grand Junction, Colorado*, 2015 WL 5728755, at *13 (D. Colo. Sept. 30, 2015). By prohibiting solicitation in any public place as well as any place “routinely or customarily frequented by the general public,” the Ordinance places an impermissible place restriction on protected speech. Ordinance No. 24-2019 § 1(2).

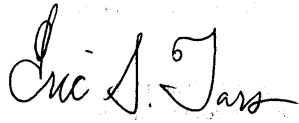
For these reasons, among others, the Ordinance cannot pass constitutional muster. Further, it is simply not good policy. Harassing, ticketing and/or arresting people who ask for help in a time of need is inhumane and counterproductive. Unlawful anti-panhandling ordinances, such as Ordinance No. 24-2019, 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* NAT’L LAW CTR. ON HOMELESSNESS & 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 explained that “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 addressing its symptoms.

We can all agree that we would like to see a Montgomery 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 get to this goal. Please do not sign the Ordinance into law, and work with the city council to prevent a veto override and avoid potential litigation, and then develop approaches that will lead to the best outcomes for all the residents of Montgomery, housed and unhoused alike.

We look forward to your response on or before Friday, July 12, 2019.

Sincerely,

A handwritten signature in black ink that reads "Eric S. Tars". The signature is written in a cursive style with a large, stylized "E" and "T".

Eric S. Tars
Legal Director, National Law Center on Homelessness & Poverty

Cc: Craig Baab, Chair, ABA Commission on Homelessness & Poverty