Overview of First Amendment Doctrine

Relevant to Anti-Panhandling Laws

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A. Panhandling is protected speech. A long line of Supreme Court decisions has made it clear that soliciting donations is protected speech.[1] In 1990, language in a Second Circuit decision upholding a ban on panhandling in the subway system provided a sliver of support for the argument that solicitation by individuals was not protected speech, even while solicitation by organizations was.[2] This case has not been followed in the Second Circuit or anywhere else since, although governments may raise the argument from time to time.[3]

B. Public forum analysis. If government restricts protected speech in a public forum, it bears the burden of establishing that the restriction is constitutional. "[P]ublic places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be public forums."[4] "Consistent with the traditionally open character of public streets and sidewalks," the Supreme Court has held that "the government's ability to restrict speech in such locations is very limited.'"[5] To the extent that panhandling is curtailed in public forums such as sidewalks, streets, and parks, the government must prove that the restriction satisfies either strict or intermediate scrutiny (as discussed below).

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[1] *Williams-Yulee v. Fla. Bar*, 575 U.S. 433 (2015) (solicitation by candidate for office); *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 677 (1992) (solicitation by religious organization); *United States v. Kokinda*, 497 U.S. 720, 738 (1990) (Kennedy, J., concurring) ("personal solicitations on postal property for the immediate payment of money" by volunteers for political party); *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988) (solicitation by charitable organization); *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 968 (1984) (same); *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 638 (1980) (same); *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940) (solicitation by religious proselytizer).

[2] *Young v. N.Y.C. Transit Auth.*, 903 F.2d 146, 156 (2d Cir. 1990) ("While organized charities serve community interests by enhancing communication and disseminating ideas, the conduct of begging and panhandling in the subway amounts to nothing less than a menace to the common good.")

[3] *Loper v. N.Y.C. Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993); *see also, e.g. Speet v. Schuette*, 726 F.3d 867, 875 (6th Cir. 2013) (collecting cases) ("begging is a form of solicitation that the First Amendment protects"); *Smith v. City of Fort Lauderdale*, 177 F.3d 954, 956 (11th Cir. 1999) ("Like other charitable solicitation, begging is speech entitled to First Amendment protection.").

[4] *United States v. Grace*, 461 U.S. 171, 177 (1983) (internal quotation marks omitted); *see also Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

[5] *McCullen v. Coakley*, 573 U.S. 464, 477 (2014) (internal quotation marks omitted).

While the Supreme Court hasn't weighed in directly, circuit courts also consistently find that medians constitute a public forum,[6] as exemplified by the extensive recent analysis in *McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1070 (10th Cir. 2020). And at least some portions of public beaches may qualify as public fora as well.[7]

In contrast, defendants may argue that the nature of a park or street make it not a public forum. Recently, one district court wrote a fairly lengthy opinion staking out the position that whether a median is a traditional public forum is a question of fact that requires the plaintiff to submit proof about the context, purpose, physical attributes, and historical use of the forum.[8] The responses to these arguments are 1) to cite to the overwhelming Supreme Court and appellate court precedent describing streets and parks as the quintessential public forum without requiring proof,[9] and 2) to explain how the features of the forum qualify as public. A recent example is the plaintiffs-appellants' Tenth Circuit brief in *McCraw*.[10]

The forum analysis takes on greater significance when a government restricts speech in a public space that might not be considered a public forum, such as an airport or government building.[11] Government has wider latitude to limit panhandling in non-public forums.[12] Those challenging such a restriction will either need to argue (and likely introduce proof) that the government has opened up the forum to make it a public forum or a designated public forum, [13] or that the restriction constitutes *viewpoint*-discrimination.[14]

C. Content-based analysis. When a government law inhibits speech in a public forum, the regulation is evaluated under either strict or intermediate scrutiny, depending on whether the regulation is content-based or content-neutral. Both standards are difficult for the government to meet, but strict scrutiny is a

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[6] *See, e.g., Cutting v. City of Portland*, 802 F.3d 79, 83 (1st Cir. 2015).
[7] *Smith*, 177 F.3d at 956.
[8] *McDonald v. City of Pompano Beach*, No. 20-60297-CIV, 2021 WL 3741646, at *14 (S.D. Fla. Aug. 24, 2021). As of this writing, the matter is proceeding to trial.
[9] *E.g., Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 555 (4th Cir. 2013) ("Although there is very little information about the Downtown Mall in the record, places such as parks, streets, and sidewalks fall into the category of public property traditionally held open to the public for expressive activity. . . . With this strength of authority, and without any indication to the contrary, we conclude that the Downtown Mall constitutes a traditional public forum." (internal quotation marks omitted)).
[10] McCraw v. Oklahoma City, Br. of Appellants, 2019 WL 2514158, at *36-41.
[11] *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 44 (1983) (not a panhandling case)
[12] *See United States v. Kokinda*, 497 U.S. 720, 738 (1990) (upholding solicitation ban in airport); *McFarlin v. Dist. of Columbia*, 681 A.2d 440, 446 (D.C. 1996) (upholding solicitation ban in subway station); *see also Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 809 (1985) (upholding speaker-based restriction on charitable solicitation in nonpublic forum of workplace charitable campaign)
[13] *Smith*, 177 F.3d at 956.
[14] *Ne. Pa. Freethought Soc'y v. Cnty. of Lackawanna Transit Sys.*, 938 F.3d 424, 435 (3d Cir. 2019).

much higher burden. Whether strict or intermediate scrutiny is triggered depends on whether the law is considered content-based or content-neutral. (Note: if a law discriminates on the basis of *viewpoint*—for example, speech discouraging panhandling is allowed but speech encouraging it is banned—that triggers even more severe constitutional scrutiny)[15].

Text-Based Approach: Under *Reed*, Laws that Expressly Reference Panhandling or Begging Are Content-Based. As the Supreme Court clarified in 2015, a law is a content-based restriction on speech if *either* of the following are true: (1) the *text* of the law makes distinctions based on speech's "subject matter . . . function or purpose," *or* (2) the *purpose* behind the law is driven by an objection to the content of a message.[16]

The first *Reed* category covers any law that on its face subjects panhandling or begging to time, place, or manner conditions that do not exist for other types of speech. This captures the vast majority of anti-panhandling ordinances that passed between 1990 and 2015, including ordinances that prohibit panhandling, begging, or soliciting donations near an ATM, near a roadway, or after dark. By placing limits only on panhandling and not other forms of speech, these laws are content-based under *Reed* and thus are subject to strict scrutiny, as many courts have consistently held.

Some governments or courts that misunderstand the First Amendment doctrine may argue that as long as an activity isn't completely banned, it is evaluated as a content-neutral, or time/place/manner, restriction. This is incorrect. The time/place/manner analysis applies only when the restriction is content-neutral, and *Reed* confirms that any law that references the content of the speech is content-based.[17] When a law is content-based, restrictions on time/place/manner must satisfy strict scrutiny, where they start with a presumption of unconstitutionality that is very difficult to overcome.[18]

Note that, prior to *Reed*, some courts (but not all[19]) concluded that buffer zones and other laws that placed limits on where, when, and how panhandling could be conducted were content-neutral and need only meet intermediate

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[15] See, e.g., Rosenberger v. Rector & Visitors of Univ. of Virginia, 515 U.S. 819, 830 (1995).
[16] *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015) (internal citations, quotations, and alterations omitted).
[17] *Blitch v. City of Slidell*, 260 F. Supp. 3d 656, 667 (E.D. La. 2017) ("[i]t is of no moment that" Slidell "does not impose a complete prohibition" on panhandling); *see also Homeless Helping Homeless, Inc. v. City of Tampa*, No. 8:15-CV-1219-T-23AAS, 2016 WL 4162882, at *5 (M.D. Fla. Aug. 5, 2016) ("[U]nder *Reed*, the City's otherwise benevolence toward the homeless is immaterial in determining whether Section 14-46(b) imposes an impermissibly content-based infringement of the right to free speech.").
[18] *Reed*, 576 U.S. at 164, 171.
[19] *See, e.g., ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 789 (9th Cir. 2006); *Kelly v. City of Parkersburg*, 978 F. Supp. 2d 624, 631 (S.D.W. Va. 2013); *Benefit v. City of Cambridge*, 679 N.E.2d 184, 187 (Mass. 1997)

scrutiny.[20] Defendants may mistakenly cite these older cases, but they are clearly no longer good law after *Reed*. Indeed, this can be seen most dramatically by the immediate post-*Reed* overruling of two 2014 decisions by the First and Seventh Circuits, respectively.[21] For example, in 2014, the Seventh Circuit initially upheld an ordinance of Springfield, Illinois, that prohibited panhandling downtown. Noting disagreement among courts over the proper standard to apply and admitting that the judges "do not profess certainty about our conclusion," the panel originally concluded that the law was content-neutral because, the court thought, it was neither adopted "because of the ideas [panhandling] conveys" nor "because the government disapproves of [panhandler's] message."[22] Then *Reed* came down, and the panel reversed course because the Supreme Court "understands content discrimination differently."[23] "The majority opinion in *Reed* effectively abolishes any distinction between content regulation and subject-matter regulation. Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification."[24] Because the city conceded that the law could not survive strict scrutiny, it was struck down.

Austin v. Reagan Advertising Does Not Change the Analysis. This line of cases may come under attack due to language in the 2022 Supreme Court decision in *City of Austin v. Reagan National Advertising of Austin, LLC*, 142 S. Ct. 1464, 1473 (2022). The case was about billboard signs, but the majority had a lot to say about the regulation of solicitation, and it could mean trouble for future challenges to anti-panhandling laws.

The City of Austin adopted different rules for advertising signs depending on whether the business being advertised is on the same premises or not. Applying *Reed*, the court of appeals had determined that this distinction was content-based, and therefore subject to strict scrutiny. The court of appeals reasoned that the law required the official to "read a sign's message" to determine whether the law was violated. *Id.* at 1470 (citation omitted). The Supreme Court reversed, describing this as "too extreme an interpretation" of *Reed*. *Id.* at 1471. Instead, the majority said the key question when deciding whether a law is content-based or content-neutral is whether the government's restriction is based on "substantive" or "communicative" message. *Id.* at 1471, 1472. Along the way, the Court downplayed *Reed*'s command that restrictions based on a message's "function or purpose" were necessarily

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[20] *L.A. All. For Survival v. City of Los Angeles*, 993 P.2d 334, 346 (Cal. 2000); *Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir. 2000).

[21] *Norton v. City of Springfield*, 768 F.3d 713 (7th Cir. 2014), *rev'd on rehearing*, 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 Champion v. Commonwealth*, 520 S.W.3d 331, 336 (Ky. 2017) ("The circuit court disagreed and declared the ordinance content-neutral. But Lexington now concedes, in light of *Reed*, that its ordinance distinguishes speech based on the underlying message.")

[22] *Norton*, 768 F.3d at 717.

[23] *Norton*, 806 F.3d at 412.

[24] *Id.*

content-based. *Id.* at 1474 (rejecting position that "any classification that considers function or purpose is always content based"). Governments may attempt to argue that laws restricting speech that seeks a donation is a classification based on function or purpose, no longer automatically considered content-based after *Austin*.

To support its reasoning, the Court identified "regulations of solicitation" as an example of a content-neutral regulation, relying upon a 1981 case about regulations in a state fair. Already some government defendants have taken the *Austin* Court's discussion of solicitation to mean that laws targeting *charitable* solicitation are also content-neutral, and this may be an issue that will have to be litigated.

Although some of the *Austin* analysis could be problematic and potentially destabilize the precedent against anti-panhandling laws that had been coalescing in the lower courts, there are strong arguments that it doesn't and shouldn't change the analysis.[25] To begin, *Austin* preserves the essential framework from *Reed:* Laws that, on their face, target particular speech are content-based regardless of motive. This is the part from *Reed* that drove lower courts to consistently conclude laws that target panhandling on their face are content-based, and *Austin* does not disturb this analysis. Put differently, the *Austin* Court's holding was not sufficiently clear to overturn the precedent that had been accumulating post-*Reed*.

The law upheld in *Austin* is readily distinguishable from anti-panhandling laws. The distinction *Austin* recognized as content-neutral – on-premises versus off-premises advertising – requires scrutiny of the expression only in an extremely limited sense: the location of the advertiser. Using location as a trigger is further removed from the expressive elements of the regulated speech than an anti-panhandling law that is triggered by an expression of need and a request for help, which cut to the heart of the expression.

The *Austin* Court itself notes that a law restricting solicitation will be content-neutral *only* if it "do[es] not discriminate based on topic, subject matter, or viewpoint."[26] A solicitation restriction meets this standard when it "'applie[d] evenhandedly to all who wish[ed] . . . to solicit funds,' whether for 'commercial or charitable' reasons."[27] Thus, a law that targets solicitation for a *donation* is targeting the substantive content of the solicitation, while a law regulating all solicitation generically would not. Under this approach, it's not the "solicitation" trigger that makes a law content-based, but rather the content of *what* is being solicited, i.e., charity. (We can expect governments to start passing laws targeting solicitation generically in response, but as of mid-2022 most laws target specific forms of solicitation, not generic solicitation as a category). Somewhat tricky is a

[25] It's not a very satisfying answer, but the *Austin* Court's actual holding is not about solicitation at all, making many of its observations on that front dicta.

[26] Austin, 142 S. Ct. at 1473.

[27] *Id.* (alterations in original) (quoting *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981)).

commonplace law that prohibits soliciting "employment, business, or contributions," since it applies to both "commercial or charitable" reasons (to use the *Austin* Court's phrase), but there is still a persuasive argument that such laws are content-based because they restrict only certain categories of solicitation by referencing the content of what is being solicited.[28] The first two district courts to consider this argument have reached different outcomes, so this is an argument to watch.[29]

The *Austin* majority does not cite – and presumably leaves intact[30] – the other Supreme Court decisions on charitable solicitation, which struck down a series of then-popular restrictions on charity fundraising.[31] Although the test from these cases has always been a bit muddled (sometimes being called "exacting" scrutiny), the Court does indicate in *Riley* that restrictions that fall entirely on charitable solicitation were content-based regulations and subject to strict scrutiny.[32]

Instead of citing the cases on charitable solicitation, the *Austin* majority cites a 1981 decision that underscores the narrowness of the holding. In *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), the Court upheld, as content-neutral, a State Fair rule that "all persons, groups or firms which desire to sell, exhibit or distribute materials during the annual State Fair must do so only from fixed locations on the fairgrounds." The parties agreed that this was broad enough to preclude the type of leafletting and solicitation for donations that the

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[28] *See, e.g,*. Plaintiff's MSJ Memo at 13, Singleton v. Taylor, Case No. 2:20-cv-99, ECF No. 112-1 (M.D. Al. filed October 5, 2022) ("The Statute criminalizes Mr. Singleton and the Class for soliciting 'employment, business, or contributions' from motorists on any Alabama street, including requests for charity, but not for soliciting signatures for a political cause, directions to the nearest gas station, or conversion to a religious faith.").

[29] *Compare Henagan v. City of Lafayette*, No. 6:21-CV-03946, 2022 WL 4546721, at *3 (W.D. La. Sept. 27, 2022) ("as Defendants acknowledge, City of Austin reaffirms longstanding precedent that 'the First Amendment allows for regulations of solicitation,' *provided* that such regulations do not discriminate based on 'topic, subject matter, or viewpoint.'") *with Nat'l Fed'n of the Blind of Texas Inc. v. City of Arlington, Texas*, No. 3:21-CV-2028-B, 2022 WL 4125094, at *7 (N.D. Tex. Sept. 9, 2022) (holding restriction on "donation boxes" was content-neutral "because it does not discriminate based on the solicitation's topic, subject matter, or viewpoint, but treats bin-based signage soliciting donations *to be deposited in that location* differently from communications soliciting donations for deposit elsewhere or pickup.").

[30] *E.g., Agostini v. Felton*, 521 U.S. 203, 237–38 (1997) ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent.").

[31] *E.g., Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980).

[32] *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). *See also, e.g.*, Plaintiffs' Resp. to Obj. to R&R at 4, Henagan v. City of Lafayette, 6:21-cv-03946, ECF No. 93 (W.D. La. Sept 13, 2022) ("Further, *Reagan*'s language regarding the regulation of solicitation is in the context of a case about commercial solicitation. The solicitation of charitable donations has long been treated as protected speech—the regulation of which engenders strict scrutiny—as opposed to less-protected commercial speech.")

Krishnas sought to do, but concluded "the Rule applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds. No person or organization, whether commercial or charitable, is permitted to engage in such activities except from a booth rented for those purposes." *Id.* at 649. The actual language of the rule was not limited to a particular form of solicitation; indeed, on its face, it did not mention solicitation at all. This makes it quite different than a restriction that falls only on a category of solicitation, such as a law that applies only to the solicitation of donations.[33]

Further, Justice Breyer's concurring opinion in *Austin* laments that *Reed* opens the door to courts striking down "entirely reasonable" regulations. He identifies Alabama's anti-panhandling law, Ala. Code § 13A–11–9(a), as an example, noting that it regulates based "on the content of speech" but implies that he believes it should be upheld. Justice Breyer's complaints are helpful because they recognize that, under the majority's approach, anti-panhandling laws continue to be subject to strict scrutiny. (Justice Jackson, who replaced Justice Breyer, rejected a pre-*Austin* motion to dismiss a challenge to DC's anti-panhandling law, reasoning that "the complaint's First Amendment claims are plainly plausible, insofar as Plaintiffs assert that the Panhandling Control Act is both subject to strict scrutiny (because it prohibits requests for immediate donations of money in various public areas and not any other speech—i.e., it is a content-based restriction), and does not satisfy strict scrutiny (because other less restrictive alternatives are available).")[34]

So while *Austin*'s analysis clouds the picture, it doesn't materially change the law, and lawyers should push back hard on arguments that restrictions on panhandling are no longer content-based. Moreover, as noted below, even content-neutral anti-panhandling laws are regularly struck down under intermediate scrutiny, and *Austin* does not undermine those fallback arguments at all.

Alternative Approach: Impermissible Motive. In addition to laws that target the content of speech on their face, *Reed* also recognizes a category of laws "that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be 'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement

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[33] The *Austin* Court also cited language from a 1940 decision which struck down a city law making it a crime to "solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause," unless that person first received permission from the city, which had discretion to grant or deny a license. *Cantwell v. Connecticut*, 310 U.S. 296, 301–02 (1940). The Austin decision ratified only the *Cantwell* statement that "States were 'free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience.'" *Austin*, 142 S. Ct. at 1473 (quoting 310 U.S. at 306-07).

[34] *Brown v. Gov't of D.C.*, 390 F. Supp. 3d 114, 125 (D.D.C. 2019).

with the message [the speech] conveys.'"[35] *Austin* reaffirms that "[i]f there is evidence that an impermissible purpose or justification underpins a facially content-neutral restriction, for instance, that restriction may be content based."[36] Before *Reed*, the Supreme Court had given inconsistent treatment to whether a censorial motive behind a law is relevant to the law's constitutionality, and the test is not well developed.[37] The best, most recent articulation comes from *McCullen v. Coakley*, where the majority instructed a law "would not be content neutral if it were concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech.'"[38] However, "a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics."[39] Thus, for example, creating a buffer zone around abortion clinics had the obvious effect of restricting anti-abortion protesting, but because the state justified the law by invoking content-neutral rationales about congestion and sidewalk obstruction, the law was evaluated as content-neutral.

When it comes to applying these standards to facially content-neutral laws restricting panhandling, "[c]aselaw on the topic is relatively sparse, as many restrictions held to be content based are found to be so on their face (rendering inquiry into the justification prong unnecessary)."[40] Because the law is unsettled, we urge caution in making this argument.[41] Moreover, proving an impermissible motive can be difficult factually, and will often require more resources than a challenge driven by a regulation's text.

A Law that Is Not Content-Based Under Either Alternative Approach Is Content-Neutral. If a law is not considered content-based under either of *Reed*'s dual tests, it will be considered content-neutral and must satisfy intermediate scrutiny. This is still a demanding test, as seen below.

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[35] *Reed*, 576 U.S. at 164 (citations omitted).
[36] *Austin*, 142 S. Ct. at 1475.
[37] William D. Araiza, *Invasion of the Content-Neutrality Rule*, 2019 B.Y.U. L. REV. 875, 927 n.39 (2019) ("A sizable literature considers the question whether subjective intent, ex post justification, or simply effects should determine whether a law should be considered content based for First Amendment purposes."); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996); *compare, e.g., United States v. O'Brien*, 391 U.S. 367, 383 (1968))("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.") *with, e.g., Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,* 473 U.S. 788, 812–13 (1985) ("We decline to decide in the first instance whether the exclusion of respondents was impermissibly motivated by a desire to suppress a particular point of view. Respondents are free to pursue this contention on remand.")
[38] 573 U.S. 464, 481 (2014)
[39] *Id.* at 480.
[40] *Martin v. City of Albuquerque*, 396 F. Supp. 3d 1008, 1025 (D.N.M. 2019).
[41] For example, in the appeal of *Brewer v. City of Albuquerque*, *see infra* notes 48–50, the plaintiffs chose to concede and focus their arguments on why the law failed a content-neutral, intermediate scrutiny test.

The government may argue that if a law does not mention speech on its face, the First Amendment does not apply at all. This is mistaken, as seen in the numerous cases applying intermediate scrutiny. For example, in the Supreme Court's *McCullen* decision that struck down restrictions on standing on a public way or sidewalk (without mentioning speech): "even though the Act says nothing about speech on its face, there is no doubt . . . that it restricts access to traditional public fora and is therefore subject to First Amendment scrutiny."[42]

D. Apply Appropriate Scrutiny

1. Strict scrutiny.

"Few categories of regulation have been as disfavored as content-based speech restrictions."[43] If a law is content-based under either of *Reed*'s alternate tests, it is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests."[44] "[S]trict scrutiny, in practice, is virtually impossible to satisfy."[45] To our knowledge, only one unreported district court decision has ever suggested any aspect of an anti-panhandling law would be constitutional under a strict scrutiny analysis, and its analysis is cursory, and the court later denied the government's motion to dismiss.[46] In fact, defendants regularly concede that their laws do not satisfy strict scrutiny.[47]

In the rare circumstance that a panhandling ordinance is defended under the strict scrutiny standard, the government typically asserts an interest in traffic flow or public safety as justifications.[48] Even assuming that these interests are compelling,[49] the argument is readily defeated with two lines of attack. First, this argument typically cannot justify why a *speech*-specific restriction is needed.[50] For

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[42] 573 U.S. at 476.
[43] *Otto v. City of Boca Raton*, 981 F.3d 854, 862 (11th Cir. 2020).
[44] *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).
[45] *Washington Post v. McManus*, 944 F.3d 506, 520 (4th Cir. 2019).
[46] *Gbalazeh v. City of Dallas*, 3:18-CV-0076, ECF No. 86 (N.D. Tex. Apr. 11, 2019) (denying preliminary injunction); 394 F. Supp. 3d 666 (N.D. Tex. 2019) (denying motion to dismiss, finding First Amendment claims could proceed). The district court erred by believing the case was controlled by *International Society for Krishna Consciousness of New Orleans, Inc. v. City of Baton Rouge*, 876 F.2d 494, 497 (5th Cir. 1989), which involved a content-neutral analysis that has been rejected by *Reed*.
[47] *E.g. Norton v. City of Springfield*, 806 F.3d 411, 413 (7th Cir. 2015); *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 797 (9th Cir. 2006) ("As the City concedes, the solicitation ordinance cannot survive strict scrutiny.").
[48] *See, e.g.,* District of Columbia Motion to Dismiss, *Brown v. Dist. of Columbia*, Case No. 15-01380, ECF No. 48-1 (D.D.C.).
[49] *Messina v. City of Fort Lauderdale*, No. 21-CV-60168, 2021 WL 2567709, at *8 (S.D. Fla. June 23, 2021) ("The first is that, in some cases, a city may not even be able to articulate the 'compelling' interests that animated its decision to enact a panhandling prohibition.")
[50] *Fernandez v. St. Louis Cnty.*, 538 F. Supp. 3d 888, 900 (E.D. Mo. 2021) ("defendant has not given clear reasons for singling out solicitation from all other speech to promote traffic safety")

example, if a law restricts someone standing in the roadway to panhandle because it obstructs traffic, it is the standing in the roadway and not the communicative aspect that is problematic. Second, it is usually not hard to identify instances covered by a statute that do not implicate the government's asserted interests. For example, if the government attempts to defend a ban on asking for a donation more than once on the grounds of avoiding coercion, it is not hard to imagine any number of situations where a person might ask again where those concerns are not present.[51]

2. Intermediate Scrutiny

Intermediate scrutiny is the proper standard for reviewing a law that burdens speech but does not trigger strict scrutiny. Over the past several years, the Supreme Court has increased the burden on governments who are defending a law against intermediate scrutiny.[52] Under intermediate scrutiny, a law "still must be narrowly tailored to serve a significant governmental interest."[53] This means the law "must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'"[54] Unlike strict scrutiny, intermediate scrutiny allows for a greater range of governmental interests to be considered, and the law "need not be the least restrictive or least intrusive means of serving the government's interests."[55]

Critically, several appellate courts have interpreted *McCullen* to put the burden of proof on the government: "the burden of proving narrow tailoring requires the [government] to *prove* that it actually *tried* other methods to address the problem."[56] And simply citing to another case that upheld a similar law will not be enough; there's an evidentiary burden that the government must satisfy.[57]

In fact, there have been several federal appellate decisions striking down content-neutral anti-panhandling laws on intermediate scrutiny.

One of the most common content-neutral responses to *Reed* has been to restrict behavior on medians. For example, the City of Albuquerque, New Mexico, adopted an ordinance criminalizing presence in any median narrower than 6 feet, standing within 6 feet of the road near an exit ramp, or receiving an item from a vehicle. In a lengthy opinion, the Tenth Circuit affirmed the district court's decision

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[51] *Messina*, 2021 WL 2567709, at *8 ("'aggressive panhandling' ordinances often sweep in much more speech than is necessary to promote public safety—including speech that is entirely innocuous—while omitting conduct that's genuinely threatening").
[52] Of particular help – for both the language it uses and the standard it announces – is *McCullen v. Coakley*, a case involving a challenge to Massachusetts' law establishing buffer zones around abortion clinics. 573 U.S. 464, 478 (2014).
[53] *Id.* at 486.
[54] *Id.* (quotations omitted).
[55] *Id*. (quotations omitted).
[56] *Reynolds v. Middleton*, 779 F.3d 222, 231 (4th Cir. 2015) (emphasis in original) (pre-*Reed*); *Brewer v. City of Albuquerque*, 18 F.4th 1205, 1217 (10th Cir. 2021).
[57] *Brewer*, 18 F.4th at 1243.

striking down the ordinance. Even though the law was content-neutral on its face and subject only to intermediate scrutiny, the city did not meet its burden of proving that the ordinance was narrowly tailored. For instance, the court noted that the city failed to offer evidence that anyone was injured while located on one of these medians, and emphasized that the ordinance applied to all ramps throughout the city rather than just a few particularly dangerous areas:

> First, the evidence that the City relies on to make its narrow tailoring showing does not indicate that the Ordinance alleviates in a direct and material way a real, non-speculative harm . . . . Second, the City has almost completely failed to even consider alternative measures that restrict or burden the speech at issue less severely than does the Ordinance. . . .[58]

Other courts have struck down similar city-wide restrictions against presence on medians.[59]

Another approach that cities have used is to restrict the exchange of an item between a pedestrian and a vehicle. Depending on the language, these laws may be content-based,[60] but they have also been struck down on a content-neutral analysis.[61] For example, a district court found such a ban failed intermediate scrutiny for four reasons:

> (1) the Ordinance bans roadside exchanges that do not obstruct traffic or pose safety risks; (2) the Ordinance is geographically overinclusive because it applies citywide; (3) the Ordinance is underinclusive because it penalizes only pedestrians, not motorists; and (4) the City has less speech-restrictive means available to address its concerns.[62]

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[58] *Id*. at 1221.

[59] *Cutting v. City of Portland*, 802 F.3d 79 (1st Cir. 2015); *McCraw v. City of Oklahoma City*, 973 F.3d 1057 (10th Cir. 2020); *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 237 (D. Mass. 2015); *cf. Reynolds v. Middleton*, 779 F.3d 222, 232 (4th Cir. 2015) (treating pre-*Reed* law as content-neutral). One exception is *Evans v. Sandy City*, 944 F.3d 847 (10th Cir. 2019), which upheld a content-neutral law prohibiting standing on a median of less than 36 inches. Note that the decision has been limited by subsequent Tenth Circuit decisions in *McCraw* and *Brewer*.

[60] *Rodgers v. Stachey*, 382 F. Supp. 3d 869 (W.D. Ark. 2019) (finding law prohibiting physical interaction with a vehicle was content-based).

[61] *Watkins v. City of Arlington*, No. 4:14-CV-381-O, 2014 WL 3408040, at *8 (N.D. Tex. July 14, 2014)

[62] *Petrello v. City of Manchester*, No. 16-CV-008-LM, 2017 WL 3972477, at *20 (D.N.H. Sept. 7, 2017).

Recent Decisions (2015 to 2021)[63]

Content-Based/Applying Strict Scrutiny

Appellate Decisions

- *Champion v. Commonwealth*, 520 S.W.3d 331, 333 (Ky. 2017) (striking down law prohibiting begging or soliciting)
- *Lakewood v. Willis*, 375 P.3d 1056, 1057 (Wash. 2016) (striking down state law prohibiting begging)
- *Mass. Coal. for the Homeless v. City of Fall River*, 158 N.E.3d 856, 867 (Mass. 2020) (striking down state law criminalizing signaling a vehicle "for the purpose of soliciting any alms, contribution or subscription or of selling any merchandise")
- *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015) (finding aggressive solicitation ordinance violated constitution)
- *Rodgers v. Bryant*, 942 F.3d 451, 457 (8th Cir. 2019) (enjoining state law making it a crime to linger for purpose of asking for a donation "(A) In a harassing or threatening manner; (B) In a way likely to cause alarm to the other person; or (C) Under circumstances that create a traffic hazard or impediment")

District Court Decisions

- *Blitch v. City of Slidell*, 260 F. Supp. 3d 656, 659 (E.D. La. 2017) (striking down law requiring panhandlers to register)
- *Brown v. Gov't of D.C.*, 390 F. Supp. 3d 114, 124 (D.D.C. 2019) (Jackson, J.) (allowing constitutional challenge to proceed against DC law making it a crime to "ask, beg, or solicit alms, including money and other things of value" in an aggressive manner in any place open to the general public)
- *Clatterbuck v. City of Charlottesville*, 92 F. Supp. 3d 478, 479 (W.D. Va. 2015) (judgment for plaintiffs in challenge to law prohibiting solicitation in certain areas)
- *Dumiak v. Vill. of Downers Grove*, 475 F. Supp. 3d 851, 856 (N.D. Ill. 2020) (denying motion to dismiss in challenge to law criminalizing soliciting money without a permit/from motorists)
- *Fernandez v. St. Louis Cnty*, 538 F. Supp. 3d 888 (E.D. Mo. 2021) (striking down law requiring solicitors obtain a permit and restricts soliciting near roadwaysplaintiffs awarded $150k in damages + $138k in attorney's fees)

[63] You can access court opinions, briefs, and other documents related to most of these cases in the National Homelessness Law Center's Housing Not Handcuffs HighQ online library, or email the author at JM3468@georgetown.edu

- *Gbalazeh v. City of Dallas*, 394 F. Supp. 3d 666, 669 (N.D. Tex. 2019) (cursory analysis allowing challenge to city law prohibiting solicitation to proceed)
- *Homeless Helping Homeless, Inc. v. City of Tampa*, No. 8:15-CV-1219-T-23AAS, 2016 WL 4162882, at *1, 2016 U.S. Dist. LEXIS 103204 (M.D. Fla. Aug. 5, 2016) (declaring unconstitutional law that made it a crime to "solicit donations or payment" of anyone at certain locations)
- *Ind. C.L. Union Found., Inc. v. Superintendent, Ind. State Police*, 470 F. Supp. 3d 888, 894 (S.D. Ind. 2020) (enjoining Indiana's anti-panhandling law)
- *Leatherman v. Watson*, No. 17-cv-05610-HSG, 2019 WL 827633, 2019 U.S. Dist. LEXIS 27929, at *1 (N.D. Cal. Feb. 21, 2019) (denying motion to dismiss challenge to law prohibiting solicitation on medians near intersections and certain other locations)
- *Messina v. City of Fort Lauderdale*, 546 F. Supp. 3d 1227 (S.D. Fla. 2021) (enjoining law criminalizing aggressive panhandling, panhandling near roadways and in certain public locations)
- *Norton v. City of Springfield*, 324 F. Supp. 3d 994 (C.D. Ill. 2018) (striking down law prohibiting panhandling within 5 feet of pedestrian)
- *Rodgers v. Stachey*, 382 F. Supp. 3d 869 (W.D. Ark. 2019) (law prohibiting interacting physically with vehicle considered content-based and struck down)
- *Sacramento Reg'l Coal. to End Homelessness v. City of Sacramento*, No. 2:18-CV-00878-MCE-AC, 2020 WL 2836762, 2020 U.S. Dist. LEXIS 95821 (E.D. Cal. June 1, 2020) (noting that court preliminarily enjoined aggressive solicitation ordinance; awarding $321k in attorney's fees)
- *Singleton v. Taylor*, 2021 WL 3780806, 2021 U.S. Dist. LEXIS 160637 (M.D. Ala. Aug. 25, 2021) (granting preliminary injunction against law prohibiting loitering "in a public place for the purpose of begging" and prohibiting individuals from "stand[ing] on a highway for the purpose of soliciting . . . contributions")
- *Thayer v. City of Worcester*, 144 F. Supp. 3d 218 (D. Mass. 2015) (striking down law on aggressive panhandling)
- *Vigue v. Shoar*, 494 F. Supp. 3d 1204, 1225 (M.D. Fla. 2020) (on appeal) (striking down state law prohibiting soliciting on roadways without a permit)

Content-Neutral/Applying Intermediate Scrutiny

Appellate Decisions

- *Brewer v. City of Albuquerque*, 18 F.4th 1205, 1217 (10th Cir. 2021) (judgment against law that prohibited pedestrians from (1) congregating within six feet of a highway entrance or exit ramp, and (2) occupying median less than 6 feet across on street with >30 MPH limit)

- *Cutting v. City of Portland*, 802 F.3d 79 (1st Cir. 2015) (permanent injunction against law prohibiting sitting or standing on all medians)
- *Evans v. Sandy City*, 944 F.3d 847 (10th Cir. 2019) (**rejecting constitutional challenge**) (upholding city law prohibiting standing on a median of less than 36 inches)
- *McCraw v. City of Oklahoma City*, 973 F.3d 1057 (10th Cir. 2020) (reversed judgment for the city in challenge to law prohibiting sitting, standing, or remaining on medians on streets with >40 MPH speed limit)
- *Reynolds v. Middleton*, 779 F.3d 222, 232 (4th Cir. 2015) (pre-*Reed* decision assumes intermediate scrutiny applies to ordinance prohibiting solicitation near highway)

District Court Decisions

- *McDonald v. City of Pompano Beach*, 556 F. Supp. 3d 1334 (S.D. Fla. 2021) (denied motion to dismiss in challenge to ban on standing on medians between 3-5 feet)
- *Petrello v. City of Manchester,* No. 16-CV-008-LM, 2017 WL 3972477, 2017 U.S. Dist. LEXIS 40379 (D.N.H. Sept. 7, 2017) (striking down: "No person shall knowingly distribute any item to, receive any item from, or exchange any item with the occupant of any motor vehicle when the vehicle is located in the roadway.")
- *Rhode Island Homeless Advoc. Project v. City of Cranston by & through Capuano*, No. CV 17-334 S, 2017 WL 3327573, 2017 U.S. Dist. LEXIS 122189 (D.R.I. Aug. 3, 2017) (issuing preliminary injunction against city law prohibiting exchange of items between pedestrian and vehicle)
- *Thayer v. City of Worcester*, 144 F. Supp. 3d 218 (D. Mass. 2015) (struck down law prohibiting standing or walking on median)
- *Watkins v. City of Arlington*, 123 F. Supp. 3d 856, 861 (N.D. Tex. 2015) (**rejecting constitutional challenge**) (law that made it a crime to "solicit or sell or distribute any material" to a vehicle was content-neutral; "Given the evidence of ongoing driver-pedestrian accidents, the Court concludes that the ordinance that on its face prohibits individuals from distributing literature in roadways only at traffic-light controlled intersections is a narrowly tailored means to advance Arlington's significant interest in public safety.")