NATIONAL LAW CENTER
ON HOMELESSNESS & POVERTY

August 28, 2018

Mayor
Members of Council
[redacted]
OH [redacted]

RE: Ordinance Section [redacted]

Dear Mayor and Members of Council,

ACLU
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
Ohio

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Jack Guttenberg
President

J. Bennett Guess
Executive Director

We write with respect to [redacted] Ordinance Section [redacted] (the "Ordinance"). Since the Supreme Court decided *Reed v. Gilbert* in 2015, every panhandling ordinance challenged in federal court – at 25 of 25 to date – including many with features similar to the ones in [redacted] ("the City"), has been found unconstitutional. *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* National Law Center on Homelessness and Poverty, HOUSING NOT HANDCUFFS: A LITIGATION MANUAL (2017), https://www.nlchp.org/documents/Housing-Not-Handcuffs-Litigation-Manual. For example, Akron and Cleveland repealed similar ordinances after we filed suit, and numerous other cities – including Columbus, Dayton, and Toledo – repealed their anti-panhandling ordinances rather than face First Amendment litigation. 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 the City to immediately repeal the Ordinance and instead consider more constructive alternatives or risk potential litigation.

The First Amendment protects 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."); *Speet v. Schuette*, 726 F.3d 867, 880 (6th Cir. 2013) ("begging, or the soliciting of alms, is a form of solicitation that the First Amendment protects") 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 plainly unconstitutional under the First Amendment.

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, e.g.*, *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."). By singling out requests for donations for special restrictions that do not apply to other types of speech or behavior, the law is plainly content-based. *See, e.g.*, *Planet Aid v. City of St. Johns, MI*, 782 F.3d 318, 324 (6th Cir. 2015).

And it does so by prohibiting an entire class of First Amendment protected activity from all parks. Public parks, however, are "quintessential public forums." *Bays v. City of Fairborn*, 668 F.3d 814, 820 (6th Cir. 2012). As a "content-based" restriction on speech in a public forum, the Ordinance 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). This is "the most demanding test known to constitutional law." *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1050 (6th Cir. 2015) (quotation omitted). 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. 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.").

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. A complete ban of all solicitation in all park locations is the opposite of narrowly tailoring. 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).

Unsurprisingly, every court to consider content-based restrictions on the public places that solicitation may occur have struck down the law—even when the law was far less restrictive than that here. *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) (en banc); *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… 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, Colorado, 2015 WL 5728755, at *13 (D. Colo. Sept. 30, 2015).

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 [redacted] 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* National Law Center on Homelessness and 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 emphasized "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 community 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. Based on the foregoing, you should immediately:

1. Stop enforcing Section [redacted]. This requires instructing any law enforcement officers charged with enforcing the municipal code that this section is no longer to be enforced in any way, including by issuance of citations, warnings, or move-on orders.

2. Immediately initiate the steps necessary to repeal Section [redacted].

3. If there are any pending prosecutions under Section [redacted], dismiss them.

Sincerely,

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Elizabeth Bonham
Staff Attorney, ACLU of Ohio

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