



NATIONAL LAW CENTER
ON HOMELESSNESS & POVERTY

August 28, 2018

Via U.S. First-Class and electronic mail to:

David Izraelevitz, Los Alamos County Council Chair
Los Alamos County
1000 Central Avenue
Los Alamos, NM 87544
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RE: Los Alamos' "Safety in Public Places" Ordinance

Dear Chairman Izraelevitz:

Your municipality is one of several New Mexican municipalities with a municipal code that makes it illegal, in one form or another, to panhandle. Los Alamos' law is titled "Safety in Public Places" and is codified at Los Alamos County Code of Ordinances §§ 28-212 through 28-213 ("Ordinance"). This Ordinance not only unfairly targets poor and homeless persons whose pleas for assistance are protected by the First Amendment, but it is also legally indefensible. We write to ask that Los Alamos immediately initiate the steps necessary to repeal the ordinance and take it off the books. While the process of repeal is unfolding, law enforcement should be instructed not to enforce this Ordinance.

In recent years, this nation and New Mexico have seen a marked uptick in enforcement of laws that effectively criminalize homelessness and extreme poverty, including many laws that prohibit individuals from peacefully asking passersby for help.¹ Not only do these ordinances violate the constitutional rights of impoverished people, but they are costly to enforce and serve to exacerbate problems associated with homelessness and poverty. Harassing, ticketing and/or arresting poor persons for asking for help is inhumane, counterproductive and, in most cases, illegal. That is why the ACLU has devoted resources in recent years to reviewing and challenging such ordinances here in New Mexico. Recently, we filed an action in federal court challenging the constitutionality of Albuquerque's anti-panhandling ordinance.² We urge Los Alamos to seek alternatives to criminalizing homelessness. Numerous communities have opted for compassionate, needs-driven approaches to homelessness that are more effective, more humane and less costly.³

¹ 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>.

² See Albuquerque Journal, *City agrees not to enforce panhandling ordinance for now*, February 18, 2018, <https://www.abqjournal.com/1133182/city-agrees-not-to-enforce-panhandling-ordinance.html>.

³ For example, recently Philadelphia, Pennsylvania substantially 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*,

Solicitation of charity is protected by the First Amendment

It is well-settled that peacefully soliciting charity in a public place is protected by the First Amendment.⁴ This constitutional protection applies not just to organized charities, but also to the humblest solitary beggar asking for spare change to get through the day. More than twenty years ago, the Second Circuit explained that begging or panhandling is communicative activity that the Constitution protects:

Begging frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation. Even without particularized speech, however, the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance. We see little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed. The former are communicating the needs of others while the latter are communicating their personal needs. Both solicit the charity of others. The distinction is not a significant one for First Amendment purposes.⁵

In 2015, the ACLU of Colorado received a favorable ruling in its challenge to Grand Junction's panhandling ordinance. In that case, the federal district court similarly underscored the significance of panhandling's communicative function:

This court believes that panhandling carries a message. Often, a request for money conveys conditions of poverty, homelessness, and unemployment, as well as a lack of access to medical care, reentry services for persons convicted of crimes, and mental health support. The City's attempt to regulate this message is an attempt to restrain the expression of conditions of poverty to other citizens.⁶

In the years since the *Loper* decision, numerous courts have held that regulations or outright prohibitions of solicitation violate the First Amendment.⁷ Indeed, since the Supreme

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."

⁴ 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.").

⁵ *Loper v. New York Town Police Department*, 999 F.2d 699, 700 (2d Cir. 1993).

⁶ *Browne v. City of Grand Junction*, 2015 WL 3568313, at *5 (D. Colo. June 8, 2015).

⁷ See, e.g., *Speet v. Schuette*, 726 F.3d 867, 870 (6th Cir. 2013) (invalidating Michigan's anti-panhandling statute, which "bans an entire category of activity that the First Amendment protects"); *Clatterbuck v. City of Charlottesville*, 708 F.3d 549 (4th Cir. 2013) (subjecting regulation of solicitation to strict scrutiny); *ACLU of Idaho v. City of Boise*, 998 F. Supp. 2d 908 (D. Idaho 2014) (issuing preliminary injunction); *Kelly v. City of Parkersburg*, 978 F. Supp. 2d 624 (S.D. W. Va. 2013) (issuing preliminary injunction); *Guy v. County of Hawaii*, 2014 U.S. Dist. Lexis 132226 (D. Hawaii Sept. 19, 2014) (issuing temporary restraining order).

Court's landmark ruling in *Reed v. Gilbert* in 2015, every panhandling ordinance challenged in federal court – 25 to date – has been found constitutionally deficient.⁸ Further, at least 31 additional cities have repealed their panhandling ordinances when informed of the likely infringement on First Amendment rights. Here in New Mexico, the City of Gallup recently rescinded its panhandling law after being informed by the ACLU that the ordinance was likely unconstitutional.

Los Alamos' ordinance violates the First Amendment

The government's authority to regulate public speech is exceedingly restricted, "[c]onsistent with the traditionally open character of public streets and sidewalks...."⁹ Los Alamos' Ordinance is well outside the scope of permissible government regulation as it overtly distinguishes between types of speech based on subject matter, function or purpose.¹⁰ Section 28-213 of the Ordinance prohibits myriad forms of panhandling while other types of speech such as the holding of signs to boycott a business, communicate a message or support a certain political candidate are unaffected by the law. Such distinctions are unconstitutional, content-based restrictions on speech.

In analyzing content-based restrictions, courts use the most stringent standard – strict scrutiny – to review them. In order to meet strict scrutiny, a law must be narrowly tailored to serve a compelling state interest.¹¹ Los Alamos' Ordinance cannot survive strict scrutiny. First, it 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."¹²

⁸ 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) (anti-panhandling statute is content-based and subject to strict-scrutiny); *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276, 1287 (D. Colo. 2015) (same); *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014) (same), *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>.

⁹ *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014).

¹⁰ See *Reed*, 135 S.Ct. at 2227; *Norton v. City of Springfield, Ill.*, 806 F.3d 411, 412 (7th Cir. 2015) ("Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification.").

¹¹ See, e.g., *Reed*, 135 S. Ct. at 2226 (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*, 134 S. Ct. at 2534.

¹² *McCullen* 134 S. Ct. at 2529; see also *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. Theoretical discussion of the problem is not enough: “the burden of proving narrow tailoring requires the County to prove that it actually *tried* other methods to address the problem.”¹³ The City may not “[take] a sledgehammer to a problem that can and should be solved with a scalpel.”¹⁴

Los Alamos’ law prohibits panhandling in a variety of locations including that which takes place near financial institutions, parks, cafés, bus stops, bus stations and publicly owned or operated buildings; on medians, streets roads and highways; and when it involves an occupant of a motor vehicle that is in traffic. However, it does not prohibit individuals from standing in those exact same locations to engage in other sorts of speech such as sharing political messages, advertising for a business or simply engaging in conversation with an occupant of a vehicle. Unsurprisingly, every court to consider a regulation that bans requests for charity within an identified geographic area has stricken the regulation.¹⁵

The Ordinance’s time restrictions regarding panhandling are similarly problematic. With respect to time, the Ordinance limits speech constituting panhandling to daytime hours, *see* § 28-213 (a), yet provides no similar time limitations for other forms of speech. There is no evidence suggesting that the Ordinance’s time-based restriction on requests for charitable donations hews closely to a compelling interest. Courts regularly strike down such restrictions.¹⁶ The Ordinance cannot be said to further a compelling state interest.

For the foregoing reasons, Los Alamos’ Ordinance is extremely vulnerable to a constitutional challenge.

Required Action

We can all agree would like to see a Los Alamos where homeless people are not forced to solicit assistance 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 achieve this goal.

Based on the foregoing, we ask Los Alamos to take the following immediate actions:

¹³ *Reynolds v. Middleton*, 779 F.3d 222, 231 (4th Cir. 2015).

¹⁴ *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276, 1294 (D. Colo. 2015).

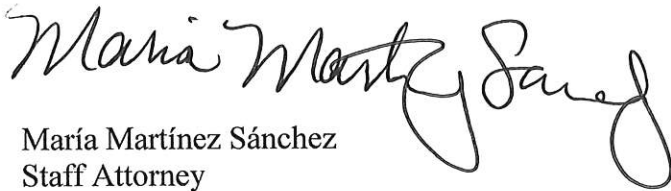
¹⁵ *See, e.g., Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015); *Cutting v. City of Portland, Maine*, 802 F.3d 79 (1st Cir. 2015); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 949 (9th Cir. 2011) (en banc); *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 237 (D. Mass. 2015) (“[M]unicipalities must go back to the drafting board and craft solutions which recognize” 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).

¹⁶ *See, e.g., Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276 (D. Colo. 2015) (finding that city did not show that a blanket prohibition on panhandling at night was necessary to advance public safety); *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 580 (6th Cir. 2012) (striking down 6 pm curfew for door-to-door solicitation).

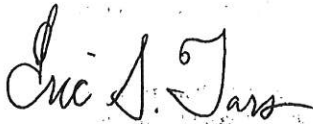
1. **Stop enforcing Los Alamos' Safety in Public Places Ordinance. This requires instructing any law enforcement officers charged with enforcing the Ordinance that it is no longer to be enforced in any way, including by issuance of citations, warnings, or move-on orders.**
2. **Immediately initiate the steps necessary to repeal Los Alamos' Safety in Public Places Ordinance.**
3. **Dismiss any pending prosecutions under Los Alamos' Safety in Public Places Ordinance.**

In the event Los Alamos does not take steps to remedy its unconstitutional ordinance, the ACLU of New Mexico will consider all options to ensure that the law is no longer enforced. Please inform us by **September 11, 2018** with the steps Los Alamos intends to take to address the issues detailed in this letter.

Sincerely,



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