



AMERICAN CIVIL LIBERTIES UNION OF UTAH FOUNDATION, INC
355 NORTH 300 WEST, SALT LAKE CITY, UT 84103
(801) 521-9862 PHONE • (801) 532-2850 FAX
ACLU@ACLUUTAH.ORG • WWW.ACLUUTAH.ORG

Mayor Ralph Becker
Office of the Mayor of Salt Lake City
PO Box 145474
Salt Lake City, UT 84114-5474
mayor@slcgov.com

September 18, 2009

Re: Salt Lake City's Proposed Commercial Solicitation Ordinance

Dear Mayor Becker:

The ACLU of Utah appreciates the opportunity to submit comments to you regarding your proposed "Commercial Solicitation Ordinance" (hereafter "the proposed ordinance"). Following is a compilation of our concerns, as well as our suggestions for alternatives.

I. CONCERNS WITH "COMMERICAL SOLICITATION ORDINANCE"

A. Name of Ordinance is Misleading

We feel that the name of the proposed ordinance is misleading as to the nature of the expression it attempts to restrict. Your proposed ordinance purports to target "commercial solicitation." However, the Supreme Court of the United States has long recognized that charitable solicitations fall within a category of speech close to the heart of the First Amendment, distinguishable from "purely commercial speech." Commercial speech is "primarily concerned with providing information about the characteristics and costs of goods and services," and as such enjoys lesser first amendment protection.¹ Courts have recognized that "[b]eggars at times may communicate important political or social messages in their appeals for money, explaining their conditions related to veteran status, homelessness, unemployment and disability, to name a few....While some communities might wish all solicitors, beggars and advocates of various causes be vanished from the streets, the First Amendment guarantees their right to be there, deliver their pitch and ask for support."²

B. Activities Defined in Ordinance are Sufficiently Regulated Already

While the city's goals in enacting such a regulation may be laudable in its attempt to create a safer atmosphere for citizens, laws already exist which punish criminal activity on public streets

¹ See *Schaumburg*, 444 U.S. 620, 632 (1980) ("[C]haritable appeals for funds, on the street or door to door, involve a variety of speech interests ... that are within the protection of the First Amendment.").

² *Gresham v. Peterson*, 225 F.3d 899 (7th Cir. 2000).

including impeding traffic and menacing, disorderly conduct. As such, it is our position that the proposed ordinance is unnecessary.

C. Potential Constitutional Issues with Regards to Free Speech

While courts have issued mixed rulings regarding anti-panhandling ordinances, some more recent rulings indicate that courts have found similar ordinances to be unconstitutional under theories that state constitutions may provide greater free speech protection. In Utah, our Supreme Court has recognized that the free speech clause contained in the Utah Constitution is broader than that contained in the corresponding Federal clause, and so any regulation restricting speech may prove vulnerable to challenge under state law.

As you know, cities that have enacted similar anti-panhandling ordinances have been subject to legal challenges, on grounds that anti-panhandling ordinances violate the First Amendment to the Constitution as well as state constitutional provisions protecting free speech. Indeed, in the majority of cases where this issue is considered, courts have held that panhandling or solicitation for money is speech entitled to First Amendment protection.³ While courts have come to different conclusions regarding the constitutionality of anti-panhandling ordinances, several recent decisions have struck down similar laws as violating state free speech provisions under state constitutions.⁴

In March 2009, a judge in Oregon ruled that the city of Medford's anti-panhandling ordinance violated Article 1, Section 8, of the Oregon Constitution, which prohibits passing any law restricting freedom of speech.⁵ The court concluded that the ordinance's prohibition against "in-person requests" for "immediate donations" in certain locations was unconstitutional under the Oregon Constitution.⁶

While not yet tested as applied to charitable solicitation, Utah's constitutional provisions regarding free speech have been interpreted by the Utah Supreme Court as providing for

³ See *Henry v. Cincinnati*, 2005 WL 1198814 (S. D. Ohio 2005) (upholding ordinance as valid time, place, manner restriction, but recognizing that panhandling is a protected form of speech); *Smith v. City of Ft. Lauderdale*, 177 F.3d 954 (11th Cir. 1999) (upholding law but acknowledging that begging is a form of speech); *Blair v. Shanahan*, 919 F. Supp. 1361 (N.D. Cal. 1996) (striking down ordinance as unconstitutional); *Heathcott v. Las Vegas Metropolitan Police Officers*, No. CV-S-93-045 (D. Nev. Mar. 3, 1994) (striking down ordinance that prohibited all panhandling); *Loper v. New York City Police Department*, 999 F.2d 699 (2nd Cir. 1993) (striking down law and holding that begging constitutes expressive conduct or communicative activity for the purposes of First Amendment analysis); *Benefit v. Cambridge*, 424 Mass. 918 (1997) (striking down law as a violation of the First Amendment); *Ledford v. State*, 652 So.2d 1254 (Fla. Dist. Ct. App. 1995) (striking down statute that prohibited all begging).

⁴ See *Volkart v. City of Medford*, No. OB-1030-E1 (Oregon Circuit Court March 19, 2009) (order granting summary judgment); *Los Angeles Alliance For Survival v. Los Angeles*, 987 F. Supp. 819 (C.D. Cal. 1997).

⁵ *Volkart v. City of Medford*, No. OB-1030-E1 (Oregon Circuit Court March 19, 2009) (order granting summary judgment).

⁶ *Id.*

greater protection than the federal counterpart.⁷ As such, any ordinance passed which implicates free speech is necessarily vulnerable to challenge under the more exacting Utah standards.

The First Amendment is meant to protect many messages and varieties of speech that may be difficult and uncomfortable for the public to confront. It is important that all messages, with only the most reasonable of restrictions, are allowed to be shared in the increasingly rare true public spaces of our city. Regulations enacted to shield citizens from the ugly and painful truth of poverty are decidedly inappropriate, particularly in these hard economic times.

D. Practical Enforcement Difficulties

Anti-panhandling ordinances are difficult to enforce in a sustained manner over time, as police and prosecutorial resources are scarce, targets of this type of ordinance are unlikely to have funds to pay fines or to appear in court and jails have limited space and are already overcrowded with serious offenders. While on its face the proposed ordinance outlaws commercial solicitation in any form and by any individual, this type of ordinance can invite selective enforcement on the part of law enforcement; individual police officers may be inclined to allow solicitation by established charities, such as a group of firefighters or the Salvation Army but enforce the ordinance against a homeless war veteran, despite the fact that both are exercising the same First Amendment right.

Section B(4) of the proposed ordinance presents a particularly difficult enforcement scenario. Under this section of the proposed ordinance, police officers would be charged with spending valuable police time determining whether an individual is being truthful in soliciting charity. Pursuant to this provision, ostensibly police officers would be required to verify whether a war veteran requesting a donation had documentation to prove that he/she had served in a war, establish whether an indigent individual actually has funds, and determine whether a disabled person suffers a disability, among others. Surely Salt Lake City is better served when police officers devote their time to the investigation of serious crime.

E. Public Safety Concerns

There are serious practical consequences of passing such a regulation with regards to public safety. While few studies exist to establish the consequences of passing anti-panhandling ordinances, the experience of Toronto, Ontario in outlawing "squeegee workers" from 2000 to 2003 may prove instructive. During the 1990s, many homeless individuals derived income from cleaning windshields at public intersections.⁸ In 2000, the city of Toronto passed a statute prohibiting "squeegeeing" and other forms of active panhandling. Several years later, a survey of homeless youth was conducted to determine how these former "squeegee workers" now gain an income.⁹ The results indicated that many homeless youth had turned to far more dangerous

⁷ See *Provo City Corp. v. Willden*, 768 P.2d 455, 456, n. 2 (Utah 1989); see also *American Bush v. City of South Salt Lake*, 2006 UT 40 ¶21.

⁸ Ontario Safe Streets Act, 1999, S.O., ch.8 (Can.).

⁹ O'Grady, Bill and Carolyn Greene, *A Social and Economic Impact Study of the Ontario Safe Streets Act on Toronto Squeegee Cleaner*, Online Journal of Justice Studies 1 (1)(2003).

and socially unacceptable behavior, including selling drugs, and participating in prostitution, in order to survive.¹⁰

Additionally, we expect that enforcement of this ordinance will be guided primarily by business owners demanding intervention by our city police department. Time spent confronting, citing, dispersing, arresting and detaining beggars is time that otherwise could be spent dealing with serious crime that actually threatens the safety – rather than simply the delicate sensitivities – of Salt Lake City residents. This ordinance will criminalize harmless panhandling activities as truly harmful activities associated with panhandling, such as obstructing traffic and physically threatening pedestrians, are already against the law. We prefer that our tax-funded police force be free to investigate more serious crimes that disrupt life in our city.

II. ALTERNATIVES TO INCREASED CRIMINALIZATION THROUGH REGULATION

While many localities have turned to criminalizing behavior in an effort to clean up city centers, it has become clear that *this approach alone is not effective in remedying the underlying problem*.¹¹ Those localities that have taken a more constructive approach to tackling the poverty, homelessness, mental illness, drug addiction and other problems that underlie the practice of panhandling, have enjoyed greater success.

For example, in Broward County, Fla., non-profit agencies have partnered with law enforcement to: inform individuals of social services available in the community; ensure access to bed and services; and successfully lobby the state for a detoxification program specifically for homeless people. Such community efforts, with contributions from law enforcement and social service agencies aim to resolve the roots of the problem of homelessness, rather than simply criminalize its more innocuous – though inconvenient – symptoms.

After anti-panhandling ordinance was enacted in Cincinnati, an outreach team made up of non-profit organizations and the Downtown Business Improvement District worked to help frequently -arrested panhandlers receive services such as job placement, mental health counseling and government benefits.

In Washington D.C., members of the Downtown D.C. Business Improvement District fund a day center to meet the needs of the homeless during the hours when shelters are closed. The facility serves up to 260 people a day with indoor seating, laundry, showers and a morning meal. Local service providers come regularly to the day center to provide medical, psychiatric, legal, substance abuse and employment services. Business owners finance the center through a 1-cent tax per square foot of property owned.

We appreciate that Salt Lake City has already made similar strides to end homelessness in our community. Unfortunately, we fear that the proposed ordinance will only serve to hamper these efforts.

¹⁰ *Id.*

¹¹ *CONSTRUCTIVE ALTERNATIVES TO CRIMINALIZATION*, viewed at <http://www.nationalhomeless.org/publications/crimreport/alternatives.html>

III. CONCLUSIVE RECOMMENDATIONS

It is our sincere belief that the proposed ordinance is unnecessary and infringes on protected speech activity. We recommend that the city not enact this regulation. Should the city nonetheless choose to enact regulation, it should do so in conjunction with social services to cure the causes underlying panhandling. Otherwise, a very vulnerable population of our city will be continually subjected to criminal prosecution for activities to which there are few actual alternatives.

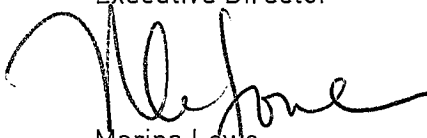
The ACLU of Utah applauds the city's recent actions to make Salt Lake an open, diverse and welcome place to all as evidenced by the City's proposed non-discrimination ordinance. We hope that this sentiment will extend to these vulnerable members of our community as well, without regard to the appearance of these residents or the inconvenience they may appear to pose to others.

Please feel free to contact us should you have any questions.

Sincerely,



Karen McCreary
Executive Director



Marina Lowe
Staff Attorney

Cc: Members of Salt Lake City Council