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## Why We Need Reed: Unmasking Pretext in Anti-Panhandling Legislation

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# WHY WE NEED *REED*: UNMASKING PRETEXT IN ANTI-PANHANDLING LEGISLATION

*Joseph Mead\**

## I. INTRODUCTION

Over the past decade, there has been a dramatic increase in the number of areas where asking for help is restricted or banned.<sup>1</sup> Whether called begging, panhandling, or solicitation, cities were spurred on by concerns of business owners and residents to ban or highly restrict this type of speech from occurring in public areas. Yet laws such as these have been repeatedly struck down by courts in recent months, fueled in large part by the Supreme Court's decision in *Reed v. City of Gilbert*.<sup>2</sup>

Federal courts reviewing free speech challenges to laws must first decide how much scrutiny the law will receive. Courts review laws deemed content-based under the highest level of scrutiny, which almost always leads to a conclusion that the restriction is unconstitutional. Rigorous review is justified by a worry that "village tyrants"<sup>3</sup> will be swayed by constituents to suppress unpopular views from being expressed freely in their cities.<sup>4</sup> Content-neutral laws, in contrast, are still carefully examined, but with a more deferential posture. The level of scrutiny is often the deciding factor in a law's constitutionality. *Reed* clarified the test for determining the level of scrutiny to be used.

Prior to *Reed*, some federal courts upheld laws that, on their face, discriminated on the basis of content so long as the laws could be

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1. NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 21 (National Law Center on Homelessness and Poverty 2014), available at [http://www.nlchp.org/documents/No\\_Safe\\_Place](http://www.nlchp.org/documents/No_Safe_Place).

2. *Reed v. Town of Gilbert*, Ariz., 135 S. Ct. 2218, 2227 (2015).

3. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

4. Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261, 1264-65 (2014).

“justified” by a non-censorial motive.<sup>5</sup> This approach led to two circuit court decisions—subsequently reversed—that rejected First Amendment challenges to laws restricting speech that asked for a donation.<sup>6</sup> *Reed* clarifies that a non-discriminatory purpose will not save a law that discriminates on its face on the basis of content. Thus, *Reed* explained that 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.<sup>7</sup> Yet not everyone welcomed the Supreme Court’s clarification. For example, Adam Liptak penned a powerful essay in the *New York Times* suggesting that the potential sweep of the ruling is far broader than the Court could have realized.<sup>8</sup>

In this essay I argue that, at least in the context of anti-panhandling legislation, *Reed* was a needed answer to local governments passing overly broad restrictions motivated by a desire to drive an unpopular type of speech from the city square. To illustrate my argument, I use anti-panhandling ordinances from three local jurisdictions—the City Akron, the City of Fairlawn, and Summit County—as case studies in content-neutrality before and after *Reed*.

This essay relies on two primary arguments. First, I defend *Reed*’s clarification of the test for content-neutrality as a needed measure to prevent censorial purpose from being masked by local government in pretextual reasons. To develop this argument, I highlight the mischief caused in *Reed* by drawing on public records, newspaper articles, and other contemporary evidence of legislative intent to argue that anti-panhandling ordinances have become an exercise in concocting pretextual justifications that bear little resemblance to the true motives behind the restrictions.

Second, I argue that the restrictions found in anti-panhandling ordinances locally and nationally are poorly tailored to satisfy any weighty, non-censorial government objective, and therefore are an

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5. *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014), *vacated*, 135 S. Ct. 2887 (2015)

6. *Norton v. City of Springfield, Ill.*, 768 F.3d 713 (7th Cir. 2014), *rev’d*, 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).

7. *Reed*, 135 S. Ct. at 2227 (internal citations, quotations, and alterations omitted).

8. Adam Liptak, *Court’s Free Speech Expansion Has Far Reaching Consequences*, *N.Y. Times*, Aug. 17, 2015, *available at* [www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html?\\_r=0](http://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html?_r=0).

unconstitutional abridgement of the right to ask for help.<sup>9</sup> In fact, *every single* federal court in recent year (including several decisions issued over the past few months) has sided with free speech challengers to anti-panhandling laws.<sup>10</sup> I tie both arguments together as a way of illustrating the problems with the City of Akron’s anti-panhandling law, which I am currently in the process of challenging.

## II. WHY WE NEED *REED*: PANHANDLING LAWS AS A CASE STUDY IN PRETEXT

Before *Reed* was decided, the courts of appeals were in disarray over how to assess whether a law was content-neutral. Many decisions relied on language from the Supreme Court implying that restrictions were content neutral if they could be “*justified* without reference to the content of the regulated speech.”<sup>11</sup> Using this test for content-neutrality, courts would try to decipher the “purpose” behind a restriction to see if it was targeting speech based on content or not. Courts following this path would give only a cursory review even to ordinances that facially discriminated against some speech based on its content.

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9. These two arguments go well beyond the ground covered in my earlier essay on anti-panhandling laws, which primarily focused on responding to common rationales justifying anti-panhandling restrictions. Joseph Mead, *First Amendment Protection of Charitable Speech*, 2015 OHIO STATE LAW JOURNAL FURTHERMORE 57 (2015).

10. Norton v. City of Springfield, Case No. 13-3581, 2015 WL 4714073, at \*2 (7th Cir. Aug. 7, 2015); Reynolds v. Middleton, 779 F.3d 222, 232 (4th Cir. 2015); Speet v. Schuette, 726 F.3d 867 (6th Cir. 2013); Clatterbuck v. City of Charlottesville, 708 F.3d 549 (4th Cir. 2013); Thayer v. City of Worcester, No. 13-40057-TSH, 2015 WL 6872450 (D. Mass. Nov. 9, 2015); McLaughlin v. City of Lowell, No. 14-10270-DPW, 2015 WL 6453144 (D. Mass. Oct. 23, 2015); Browne v. City of Grand Junction, Colorado, No. 14-CV-00809-CMA-KLM, 2015 WL 5728755 (D. Colo. Sept. 30, 2015); Norton & Otterson v. City of Springfield, Case No. 3:15-cv-03276, ECF #14 (C.D. Ill. Sept. 23, 2015); American Civil Liberties Union of Idaho, Inc. v. City of Boise, 998 F. Supp. 2d 908, 917 (D. Idaho 2014); Guy v. County of Hawaii, 2014 WL 4702289, at \*5 (D. Hawaii 2014); Kelly v. City of Parkersburg, 978 F. Supp. 2d 624, 631 (S.D.W.Va. 2013); *see also* Planet Aid v. City of St. Johns, 782 F.3d 318, 328 (6th Cir. 2015); Cutting v. City of Portland, Me., No. 14-1421, 2015 WL 5306455, at \*7 (1st Cir. Sept. 11, 2015); Joseph Mead, *First Amendment Protection of Charitable Speech*, 2015 OHIO STATE LAW JOURNAL FURTHERMORE 57 (2015). Two recent appellate decisions initially upheld anti-panhandling ordinances, but each was subsequently vacated in light of new Supreme Court guidance, and ultimately led to a final judgment declaring the ordinances unconstitutional. Norton v. City of Springfield, Ill., 768 F.3d 713 (7th Cir. 2014), *rev’d*, 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).

11. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (“The government’s purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of expressive activity is content neutral so long as it is ‘justified without reference to the content of the regulated speech.’” (internal citations omitted)).

This pre-*Reed* case law was a recipe for mischief (particularly but not only in the context of anti-panhandling ordinances) for several reasons: (1) it was difficult to determine purpose, (2) it was unsettled which purposes were constitutionally suspect and which were not, and (3) it led to a charade where law departments would invent rationales for laws and throw them into ordinance preambles that were so unrelated to the concerns actually considered by the legislators. These issues led to an underprotection of speech that was disliked by majorities.

First, investigation into legislative purpose exists on perilous terrain. Such inquiries are criticized even when conducted into the relatively formal proceedings of the United States Congress.<sup>12</sup> At the local level, the challenges grow exponentially. For most cities, there are no committee reports, no records of extensive floor debates, no discussion over amendments to legislative language. The few required legislative procedures that do exist are commonly short-circuited by councils eager to adopt new ordinances. In Ohio, for example, while cities are typically required to give new legislation three readings, councils can bypass this rule by deeming an “emergency” and enacting a new law immediately.<sup>13</sup> Both Akron and Summit County exploited this loophole when enacting their most recent anti-panhandling legislation, reducing the time for the proposed law to be formally considered.<sup>14</sup> In light of the rushed formal deliberative procedures of city councils, divining purpose becomes the difficult task of aggregating a variety of individual motives into some sort of coherent legislative purpose.

Beyond information problems are the conceptual ones. Courts struggled to define which government objectives were impermissible attempts to silence disliked speech, and which were permissible.<sup>15</sup> Early decisions upheld panhandling bans after citing government interests in creating a “pleasant environment,” attracting tourists, and preventing exposure to “nuisance” were legitimate goals.<sup>16</sup> By placing interests of

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12. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2707 (2013) (Roberts, C.J., dissenting).

13. OHIO REV. CODE 731.17.

14. SUMMIT CO., OH, ORDINANCE 2013-331 (2016); AKRON, OH, ORDINANCE 356-2006 (2015).

15. Clay Calvert, *Content-Based Confusion and Panhandling: Muddling A Weathered First Amendment Doctrine Takes Its Toll on Society's Less Fortunate*, 18 RICH. J.L. & PUB. INT. 249, 251 (2015); Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CAL. L. REV. 297, 316-17 (1997) (“[T]hese cases reveal an extraordinary doctrinal confusion over the most basic questions underlying the Court’s content jurisprudence, and suggest that at least part of that confusion is related to the Court’s failure to develop an adequate framework to engage in purpose scrutiny.”).

16. *Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir. 2000); *Smith v. City of Fort Lauderdale, Fla.*, 177 F.3d 954, 956 (11th Cir. 1999).

potential listeners over speakers, these decisions gave governments wide latitude to censor unpopular speech.

In 2014, the Supreme Court firmly rejected the notion that listener reaction to uncomfortable messages supplied a content-neutral rationale for restrictions on speech, at least in the context of public sidewalks and fora. In the course of considering a ban on speech near abortion clinics, the Court explained that 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.” If, for example, the speech outside Massachusetts abortion clinics caused offense or made listeners uncomfortable, such offense or discomfort would not give the Commonwealth a content-neutral justification to restrict the speech.”<sup>17</sup>

The Court emphasized 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.”<sup>18</sup> Under this new standard, courts have consistently rejected arguments that speech such as panhandling can be restricted simply because it is bad for business or tourism.<sup>19</sup>

In contrast to concerns of listener annoyance and offense, intimidation and public safety are potentially non-censorial motives, and a government restriction based squarely on these might have satisfied the test for content-neutrality prior to *Reed*.<sup>20</sup> But danger of censorial motives remained even with laws purporting to promote safety. Once more, this danger is vividly illustrated by the adoption of anti-panhandling ordinances. It was simply too easy for law departments to invent valid government rationales and throw them into an ordinance’s preamble.<sup>21</sup> These supposed justifications for the ordinance manufactured by the law department would be barely noted by the

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

18. *Id.*

19. *McLaughlin*, 2015 WL 6453144, at \*7 (“The First Amendment does not permit a city to cater to the preference of one group, in this case tourists or downtown shoppers, to avoid the expressive acts of others, in this case panhandlers, simply on the basis that the privileged group does not like what is being expressed.”); *American Civil Liberties Union of Idaho, Inc. v. City of Boise*, 998 F. Supp. 2d 908, 917 (D. Idaho 2014) (“Business owners and residents simply not liking panhandlers in acknowledged public areas does not rise to a significant governmental interest.”).

20. *See Reynolds*, 779 F.3d at 232 (4th Cir. 2015).

21. *E.g.*, Christopher Childree, *How McCullen Affects San Antonio’s Anti-Panhandling Ordinance*, 46 ST. MARY’S L.J. 603, 608 (2015) (citing evidence that real purpose behind San Antonio’s anti-panhandling ordinance was to promote tourism, not to protect traffic flow as recited in preamble).

proponents of panhandling restrictions, who instead tend to rest primarily on a dislike of panhandler speech.

For example, prior to *Reed*, a First Circuit panel considered an anti-panhandling ordinance with a preamble that mostly (but not exclusively) cited valid government reasons, but had been justified by its proponents as a needed measure to suppress panhandling as a type of disliked speech.<sup>22</sup> In a decision that has been subsequently reversed, the First Circuit decided to simply credit the preamble and ignore the evidence of censorship, upholding the ordinance after a deferential review.<sup>23</sup> *Reed* abrogated this decision, and on remand the ordinance previously upheld was permanently enjoined in its entirety as unconstitutional.<sup>24</sup>

Or, consider the City of Youngstown, Ohio. The City initially adopted an ordinance that simply banned “begging” anywhere in the City. After I worked with the ACLU of Ohio to convince the City that this flat ban was clearly unconstitutional,<sup>25</sup> the City repealed the ordinance and replaced it with one that restricts solicitation in specific ways.<sup>26</sup> This history suggests that Youngstown’s first preference would be a flat ban on begging, but, failing that, restrictions to limit solicitation as much as possible will work as a second-best alternative.

There is evidence suggesting a similar dynamic is at play behind the anti-panhandling ordinances in Akron, Fairlawn, and Summit County. Panhandling came to the Akron City Council’s attention several times following complaints by merchants and visitors about what they perceived to be too much panhandling downtown.<sup>27</sup> In 2006, prior to the adoption of some of the ordinance’s most severe provisions, Akron Deputy Mayor Dave Lieberth explained that restrictive anti-panhandling rules would cut down on amount of panhandling, observing that “When we survey downtown businesses, panhandling is usually the No. 1 or No. 2 complaint.”<sup>28</sup> He testified that the ordinance was needed to combat “a definite decline in downtown luncheon business” due to

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22. Thayer v. City of Worcester, 755 F.3d 60, 68 (1st Cir. 2014).

23. *Id.* at 68-69.

24. Thayer v. City of Worcester, 755 F.3d 60, 68 (1st Cir. 2014), *vacated and remanded*, 135 S. Ct. 2887 (2015), *on remand*, No. 13-40057-TSH, 2015 WL 6872450 (D. Mass. Nov. 9, 2015).

25. Letter from ACLU Attorney Joseph Mead to John McNally, Mayor of Youngstown, and Charles Sammarone, Youngstown City Council President (June 4, 2015) *available at* [http://www.acluohio.org/wp-content/uploads/2015/06/LetterToYoungstownOhioRePanhandling2015\\_0604.pdf](http://www.acluohio.org/wp-content/uploads/2015/06/LetterToYoungstownOhioRePanhandling2015_0604.pdf).

26. YOUNGSTOWN, OH, ORDINANCE 509.08 (2016).

27. H’rg before the Akron Public Safety Committee, June 21, 2006 (on file with the Akron Clerk of Court) (at 1:21).

28. Sandra M. Klepach, *Strategy targets begging in Akron: Council, mayor hope stricter rules would cut down on panhandling*, AKRON BEACON JOURNAL, June 13, 2006.

panhandlers.<sup>29</sup> Mayor Plusquellic chimed in that panhandling “is really an almost disgusting way to take advantage of someone’s kindness.”<sup>30</sup> During a hearing, Councilmember Williams commented “there isn’t any disagreement that we have a problem” and that panhandling was “adversely affecting a number of people, whether it be businesses, or people working downtown.”<sup>31</sup> And downtown businesses and institutions testified in support of the restrictions as well, explaining that panhandling was bad for business and needed to be stopped.<sup>32</sup> According to press reports, the Act’s supporters repeatedly explained that the goal of the panhandling restrictions were to cut down on the number of panhandlers in the city.<sup>33</sup> Instead of panhandling, the Deputy Mayor argued, “Akron as a city has quality programs in place to manage hungry and homeless people . . . . What we want people to do is give money to those programs instead.”<sup>34</sup>

The preamble to Akron’s ordinance admits the unconstitutional goal to simply reduce the number of panhandlers to satisfy the business community. The preamble explains that “excessive and aggressive panhandling has become a concern to business and restaurant owners and their patrons,” and that panhandling was needed to “protect[] . . . enjoyment of public spaces, particularly in the downtown area.”<sup>35</sup> It was in the public interest, explained the preamble, to make public areas “inviting for residents and visitors:” “persons should be able to move freely upon the streets and sidewalks of the city without undue

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29. Stephanie Kist, *Panhandling issue draws impassioned testimony*, AKRON LEADER ONLINE, June 22, 2006.

30. Sandra M. Klepach, *Council considers solicitors: Proposal to register city’s panhandlers on tap Monday*, AKRON BEACON JOURNAL, June 17, 2006.

31. H’rg before the Akron Public Safety Committee, June 21, 2006 (on file with the Akron Clerk of Court) (at 11:27).

32. *Id.*

33. *E.g.*, Sandra M. Klepach, *Strategy targets begging in Akron: Council, mayor hope stricter rules would cut down on panhandling*, AKRON BEACON JOURNAL June 13, 2006 (“City Council will consider legislation Monday that would attempt to curtail what city officials call ‘the panhandling business.’”); Phil Trexler, *New Akron law tightens panhandling*, AKRON BEACON JOURNAL, June 4, 2008, available at <http://www.ohio.com/news/new-akron-law-tightens-panhandling-1.99496> (“Two years ago, the city of Akron passed legislation hoping to get a handle on panhandlers by forcing them to register with Akron police and giving them stricter guidelines on where they can ply their trade.”).

34. Sandra M. Klepach, *Strategy targets begging in Akron: Council, mayor hope stricter rules would cut down on panhandling*, AKRON BEACON JOURNAL, June 13, 2006. Interestingly, the program that the City apparently wanted to support is not actually a City program at all, but a church that requires all individuals to attend a chapel service before receiving any help. Service information about the Haven of Rest, HAVEN OF REST, <https://havenofrest.org/do-you-need-help/>

35. AKRON, OH, ORDINANCE 356-2006 (2015).

interference from or intimidation or harassment by panhandlers.”<sup>36</sup> The only evidence cited in support of the ordinance were unidentified “studies and reports” and “testimony” on the “effects of panhandling on businesses and individuals.”<sup>37</sup> Yet also thrown into the preamble are unadorned invocations of public safety and access which also purportedly justify the law.<sup>38</sup> Supporters of the law testified that panhandling wasn’t actually unsafe,<sup>39</sup> and these safety concerns were not the focus of the testimony considered by council in support of the legislation.<sup>40</sup> Yet they were thrown in as part of the charade that the pre-*Reed* cases required cities to act out. Prior to *Reed*, a reviewing court deciding whether the ordinance was content-based would have to undertake an undefined inquiry into all of this evidence—and more—to ascertain which statements and motives count, and for which purpose.

A similar dynamic existed in Fairlawn. The preamble to the City of Fairlawn’s anti-panhandling ordinance cites only “safety and welfare” concerns,<sup>41</sup> yet according to press reports, the comments from the members of council simply emphasized ridding the town of undesired speakers. The Mayor expressed his disbelief that begging was constitutionally protected.<sup>42</sup> City Council President explained that “I’ve always been of the belief that if you want to give, give to a charity, not the people on the streets.”<sup>43</sup> Another Council Member hoped that the law would “deter people from panhandling. It gives the city a better appearance.”<sup>44</sup> These unconstitutional motives<sup>45</sup> help explain why the law is written as broadly as it is, do little to tailor restrictions to public

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36. *Id.*

37. *Id.*

38. *Id.*

39. H’rg before the Akron Public Safety Committee, June 21, 2006 (on file with the Akron Clerk of Court).

40. H’rg before the Akron Public Safety Committee, June 21, 2006 (on file with the Akron Clerk of Court). Indeed, the strongest “evidence” adduced during the testimony in support of the safety rationale were a few “friend of a friend” anecdotes of criminal behavior—behavior, such as theft that was already illegal under existing law—supposedly committed by a solicitor. The Act’s supporters admitted that the real concern was the *perception* of safety: even when there is no threat, suburbanites experience fear when being approached by a stranger asking for a donation. *Id.* One supporter implied that someone being approached by a “black man, a black gentleman” who is asking for money would feel intimidated. *Id.* (25:00). This is hardly the stuff of solid constitutional decision-making.

41. FAIRLAWN, OH, ORDINANCE 2012-016A (2015).

42. Scott Piepho, *Are Fairlawn’s Panhandling Regulations Constitutional?*, DAILY LEGAL NEWS (May 2, 2012), available at <http://www.akronlegalnews.com/editorial/3621>

43. *Id.*

44. *Id.*

45. Mead, *supra* note 9.

safety concerns, and instead effectively driving all panhandling from the City.<sup>46</sup>

Prior to *Reed*, these anti-solicitation laws were constitutionally questionable, but they stood a fighting chance in court. As long as law directors were clever enough to throw in some public safety recitations, there was always the chance that courts would ignore the substantial evidence of pretext, and uphold even laws that on their face target a single type of speech. Perhaps more troubling, discussed below, the ultimately enacted restrictions often bore so little relationship with the supposed interests being advanced that it became almost laughable.

*Reed* changes the calculus. No longer is the city law director's job simply an imaginative exercise in writing fictitious preambles. *Reed* tells cities to instead pass restrictions that either don't discriminate on the basis of content, or that are narrowly tailored to further a compelling government interest. As discussed in the next section, this analysis is fatal for anti-solicitation ordinances.

### III. ORDINANCES THAT SINGLE OUT SOLICITATION FOR SPECIAL RESTRICTIONS ARE UNCONSTITUTIONAL

Under *Reed*, any law that draws distinctions based on speech's "subject matter . . . function or purpose" is a content-based rule that is presumptively unconstitutional that must overcome strict scrutiny.<sup>47</sup> Anti-panhandling ordinances on their face impose restrictions on solicitation that do not exist for other types of speech, and therefore are content-based, regardless of the government's supposed purpose in enacting them.<sup>48</sup>

Content-based laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests."<sup>49</sup> This is "the most demanding test known to constitutional law."<sup>50</sup> Virtually every law fails to survive the

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46. Sean Patrick, *Fairlawn panhandling rules get thumbs up*, Akron.Com (May 31, 2012) available at <http://akron.com/akron-ohio-community-news.asp?aID=16096>.

47. *Reed*, 135 S. Ct. at 2228.

48. *See id.* at 2229 (citing an "improper solicitation" regulation as a content-based restriction); *Planet Aid*, 782 F.3d at 328 (restriction on "charitable solicitation and giving" was content-based); *accord, e.g.*, *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015) (concluding anti-panhandling law was content-based); *Thayer v. City of Worcester*, 2015 WL 6872450, at \*15 (D. Mass. Nov. 9, 2015) (same); *McLaughlin*, 2015 WL 6453144 (same); *Browne v. City of Grand Junction, Colorado*, 2015 WL 5728755 (D. Colo. Sept. 30, 2015) (same).

49. *Reed*, 135 S. Ct. at 2226.

50. *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1050 (6th Cir. 2015) (quotation omitted).

strict scrutiny analysis.<sup>51</sup>

When one appreciates the demands of the strict scrutiny test, it is not surprised that *every single federal court* to consider the matter has found anti-panhandling ordinances to fail strict scrutiny.<sup>52</sup> In fact, recognizing the futility of the argument, other cities have not even bothered to defend their laws against a strict scrutiny analysis.<sup>53</sup>

It is common for anti-panhandling ordinances to impose limits on when, where, and how people are permitted to ask for an immediate donation of money. The City of Akron, for example, bans solicitation after sunset.<sup>54</sup> During winter months, when hours of daylight are limited in Northeast Ohio, this can mean that solicitation must stop as early as 5 in the afternoon.<sup>55</sup> This restriction explicitly includes solicitation that takes place on private property, thus making it illegal for the food bank, the art museum, the University of Akron, or anyone else in the city to request a donation after sunset even on their own property. There has been no evidence before, during, or after the ordinance's enactment that would explain how such a broad and clumsy ban is carefully written to further a compelling interest. Indeed, both the Supreme Court and the Sixth Circuit have struck down such time restrictions on solicitation.<sup>56</sup>

Another common—but regularly struck down<sup>57</sup>—provision found

51. *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012).

52. *E.g.*, *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015); *Thayer v. City of Worcester*, 2015 WL 6872450, at \*15 (D. Mass. Nov. 9, 2015); *McLaughlin*, 2015 WL 6453144; *Browne v. City of Grand Junction, Colorado*, No. 14-CV-00809-CMA-KLM, 2015 WL 3568313, at \*1 (D. Colo. June 8, 2015); *American Civil Liberties Union of Idaho, Inc.*, 998 F. Supp. 2d at 917; *Guy*, 2014 WL 4702289, at \*5; *Kelly*, 978 F. Supp. 2d at 631.

53. *Norton v. City of Springfield, Ill.*, 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.”).

54. AKRON, OH, ORDINANCE 135.10(B) (2015).

55. AKRON, OH, USA — SUNRISE, SUNSET, AND DAYLENGTH, <http://www.timeanddate.com/sun/usa/akron?month=1> (last visited April 22, 2016).

56. *Ohio Citizen Action v. City of Englewood*, 671 F.3d 564, 580 (6th Cir. 2012) (striking down 6:00 P.M. curfew for door-to-door solicitation); *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1558 (7th Cir. 1986) (“Watseska has failed to offer evidence that its 5:00 P.M. to 9:00 P.M. ban on solicitation is narrowly tailored to achieve Watseska’s legitimate objectives. Watseska failed to show both the necessary relationship between the ban and its objectives, and that it could not achieve its objectives by less restrictive means.”), *aff’d without opinion*, 479 U.S. 1048 (1987). “[L]ower courts are bound by summary decisions by this Court until such time as the Court informs them that they are not.” *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (internal alterations and quotations omitted).

57. *See, e.g.*, *Norton v. City of Springfield*, 806 F.3d 411, 413 (7th 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*, 2015 WL 6872450, at \*15 (D. Mass. Nov. 9, 2015); *McLaughlin*, 2015 WL 6453144; *Browne v. City of Grand Junction, Colorado*, 2015 WL 5728755, at \*13 (D. Colo. Sept. 30, 2015); *Wilkinson v. Utah*, 860 F.Supp.2d 1284, 1290 (D. Utah 2012).

in anti-panhandling ordinances are solicitation-free buffer zones around various locations in a city. Consider, for example, the City of Akron's decision to establish solicitation-free zones around churches, the Akron Art Museum, the Lock 3 Park, the Akron Civic Theater, Canal Park Stadium, outdoor restaurants, and various other landmarks within the City.<sup>58</sup> No valid government objective is apparent in these zones; they can be explained only by the censorial goal of sparing churchgoers, museum patrons, and park visitors the indignity of being exposed to panhandlers.<sup>59</sup> A similar problem exists for solicitation-free zones around outdoor restaurants and bus stops,<sup>60</sup> which have been struck down repeatedly by courts over the lack few years for being insufficiently tailored to a valid government goal.<sup>61</sup>

Other buffer zones bear at least a plausible connection to legitimate government goals, but the lack of narrow tailoring has proved fatal for these geographic restrictions time and again. For example, restrictions on panhandling near busy intersections at least plausibly further a non-censorial objective of preventing injury to panhandlers and motorists.

Indeed, many cities' geographic restrictions on panhandling are so ill-suited to further safety goals that they would fail even under the more friendly intermediate scrutiny. Under this more forgiving standard, a law "still must be narrowly tailored to serve a significant governmental interest."<sup>62</sup> "As the [Supreme] Court explained in *McCullen*, however, the burden of proving narrow tailoring requires the County to *prove* that it actually *tried* other methods to address the problem."<sup>63</sup> Even potentially content-neutral bans on behavior commonly associated with panhandling—such as standing near a roadway—have failed to survive intermediate scrutiny given the lack of tailoring and evidence to support the restrictions.<sup>64</sup>

Similarly unconstitutional are the ordinance's provisions that

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58. AKRON, OH, ORDINANCE 135.10(B) (2015).

59. In a different context and a different city, sidewalk congestion could conceivably be a non-censorial motive for a content-neutral ban on speech in limited areas. However, the idea that sidewalk congestion is a genuine concern in the City of Akron is laughable.

60. AKRON OH, ORDINANCE 135.10(C)(1), (8) (2015); FAIRLAWN, OH, ORDINANCE 636.26(b)(C), (E) (2015); SUMMIT CO., OH, ORDINANCE 537.15(c)(1)(C), (E) (2016).

61. McLaughlin, 2015 WL 6453144, at \*11 ("No theory or evidence has been offered as to how pedestrians walking *near* an outdoor café are unusually threatened by panhandlers."); *American Civil Liberties Union of Idaho, Inc.* 998 F.Supp.2d at 917.

62. *McCullen*, 134 S. Ct. at 2534 (quotation omitted).

63. *Reynolds*, 779 F.3d at 231 (emphasis in original).

64. *Cutting*, No. 14-1421, 2015 WL 5306455, at \*7 (striking down content-neutral restrictions used against panhandlers); *Reynolds*, 779 F.3d at 232 (same); *Thayer v. City of Worcester*, 2015 WL 6872450, at \*14 (D. Mass. 2015) (same).

impose limits on how a donation may be requested. For example asking for a donation is a group of two or more is deemed “intimidating” in Fairlawn and Summit County and flatly prohibited,<sup>65</sup> variously criminalizing two Salvation Army volunteers standing together to collect holiday donations, two Girl Scouts raising money for an animal shelter, or even a Halloween trick-or-treater accompanied by a parent. Plainly, this ban sweeps much more broadly than could possibly be justified by evidence-backed governmental objective, and “violate[s] not only speech rights but association and assembly rights as well.”<sup>66</sup> In fact, the Supreme Court has already struck down a similar prohibition for exactly these reasons.<sup>67</sup> This example provides an excellent illustration on why courts should look behind a city’s labeling of speech as “aggressive” or “intimidating,” and probe what precisely is being prohibited.

Other restrictions on solicitation labelled “aggressive” raise similar issues. Akron, Fairlawn, and Summit County have adopted restrictions prohibiting a solicitor from blocking the path of a person, walking alongside a person, or asking a person to reconsider a “no” answer.<sup>68</sup> These provisions are not sufficiently related to the City’s goal of public safety (or any other compelling interest) to be justified. The City can regulate “true threats,” but standing in the middle of a sidewalk, walking alongside a person for a few feet while making your case, or asking a person who said “no” to reconsider hardly meets this standard.<sup>69</sup> The lack of narrow tailoring proved fatal to three other ordinances containing indistinguishable provisions in the last year.<sup>70</sup>

The broader issue with restrictions on solicitation labelled “intimidating” (or, for that matter “misleading”<sup>71</sup>) is that there is no

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65. FAIRLAWN, OH, ORDINANCE 636.26(c)(1)(E) (2015); SUMMIT CO., OH, ORDINANCE 537.15(d)(1)(E) (2016).

66. Mead, *supra* note 9, at 62.

67. Coates v. City of Cincinnati, 402 U.S. 611, 615 (1971) (striking down ordinance that made it unlawful to assemble in 3 or more persons in a manner “annoying” to others).

68. AKRON, OH, ORDINANCE 135.10(D) (2015); FAIRLAWN, OH, ORDINANCE 636.26(c)(B), (C) (2015); SUMMIT CO., OH, ORDINANCE 537.15(d)(1)(B), (C) (2016).

69. Virginia v. Black, 538 U.S. 343, 359 (2003).

70. See, e.g., Thayer v. City of Worcester, 2015 WL 6872450 (D. Mass. Nov. 9, 2015) (striking down provisions against blocking path and following a person after they gave a negative response); *McLaughlin*, 2015 WL 6453144, at \*9 (“The bans on following a person and panhandling after a person has given a negative response are not the least restrictive means available”); Browne v. City of Grand Junction, Colorado, 2015 WL 5728755, at \*12-13 (D. Colo. Sept. 30, 2015) (“[T]he Court does not believe[] that a repeated request for money or other thing of value necessarily threatens public safety.”).

71. AKRON, OH, ORDINANCE 135.10(E) (2015). As was true for behavior deemed “intimidating,” the types of speech designated “misleading” are broader than simple fraud. For example, by restricting use of makeup and “indicia of physical disability,” Akron made it illegal for

reason why a *content-based* restriction is needed, particularly given the existence of content-neutral laws against, for instance, disorderly conduct and fraud.<sup>72</sup> Even in the limited areas such as true threats, fighting words, obscenity, and fraud which are carved out from First Amendment protection, a government typically cannot impose content-based bans.<sup>73</sup> For example, even though a state may regulate obscenity, “it may not prohibit . . . only that obscenity which includes offensive *political* messages.”<sup>74</sup> Even if the ordinances were more carefully written to prohibit only true threats and actual fraud, governments have no compelling reason for selectively criminalizing these categories based on the subject matter of the speech. And, once more, a court recently struck down a law against coercive panhandling on precisely these grounds.<sup>75</sup>

Finally, perhaps the most odious provision of the Akron and Fairlawn ordinances are their mandate that all solicitors pre-register with the police by visiting a downtown police station, filling out an application, being photographed and fingerprinted, and obtaining a license before asking anyone for help.<sup>76</sup> “It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.”<sup>77</sup> Thus, the City of Cincinnati repealed its similar registration requirement for panhandlers following an adverse court decision.<sup>78</sup> Tellingly, the City of Canton’s law director explained that a permit requirement for panhandlers would be unconstitutional.<sup>79</sup>

The unconstitutionality of the registration mandates are underscored by the motives for enacting them. As explained in the

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trick or treaters to ask for donations to a charity while dressed as, for instance, a one-eyed, hook-handed, or peg-legged pirate—despite the absence of any true risk of fraud. Akron Ord. 135.10(E)(4)-(6).

72. Ohio Rev. Code 2917.11.

73. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992) (striking down content-based statute that regulated fighting words, even though government could have outlawed the same conduct in a content-neutral manner).

74. *Id.*

75. *McLaughlin*, 2015 WL 6453144, at \*9 (striking down law against coercive panhandling).

76. AKRON, OH, ORDINANCE 135.10(F) (2015); FAIRLAWN, OH, ORDINANCE 832.01 (2015).

77. *Watchtower Bible & Tract Soc’y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 165–66 (2002).

78. *Henry v. City of Cincinnati, Ohio*, No. C-1-03-509, 2005 WL 1198814 at \*10 (S.D. Ohio 2005).

79. Kelly Byer, *Panhandlers give their side; regulations, opinions differ*, CantonRep.com, <http://cantonrep.com/article/20140707/NEWS/140709530>.

testimony of Akron police captain Daniel Zampelli, the registration requirement would increase the “hassle factor” by “mak[ing] it easier for police to approach and question panhandlers, check for outstanding warrants and make sure they’re in compliance, even if they’re not being aggressive.”<sup>80</sup> As the Act’s chief proponent, Deputy Mayor Lieberth, put it: “By requiring registration, we make it difficult for people to come into Akron and panhandle and then go back to their communities.”<sup>81</sup> Clearly, hassling speakers and making it difficult to speak are not legitimate government interests.<sup>82</sup> Like the other pieces of these ordinances, the registration provisions are supported simply by a desire to censor instead of any valid government purpose.

#### IV. CONCLUSION

Given the unanimity of recent decisions, anti-panhandling ordinances that target charitable solicitations for special restrictions appear doomed. In light of the Supreme Court’s teachings in *Reed* and *McCullen*, and the dozen lower court decisions implementing them, cities should revisit their anti-panhandling laws. Going forward, hopefully city councils will learn to respect the constitutional rights of everybody to ask for help, even when some in the community would prefer less speech.

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80. *Council tightens restrictions on beggars: City hopes to satisfy merchants while avoiding free speech suit*, AKRON BEACON J., July, 11 2006.

81. Sherry Karabin, *Business owners weigh in on the city’s panhandling ordinance*, AKRON LEGAL NEWS, May 27, 2011, available at <http://www.akronlegalnews.com/editorial/233>; see also Phil Trexler, *New Akron law tightens panhandling*, AKRON BEACON JOURNAL, June 4, 2008 (“Akron police say registration has helped keep the number of beggars constant.”).

82. The goal of deterring panhandlers worked to some extent, as spontaneous speech (a person who is stranded, for example) is made virtually impossible and the difficulties of traveling to the police station to register deter countless others. Bob Dyer, *Beggars Multiply in Akron*, AKRON BEACON JOURNAL, Oct 12, 2009 (“If you’re thinking about registering as a panhandler, be forewarned: It’s tougher than it looks. Of the folks who take out a temporary license, 62 percent do not follow through and get their permanent license.”). In fact, one of the supporters of the ordinance was a city officer who praised the fact that the registration requirement prohibited an individual who was passing through Akron and were “panhandling to get on a bus, or something like that” from communicating that need with Akron citizens. H’rg before the Akron Public Safety Committee, June 21, 2006 (on file with the Akron Clerk of Court) (at 34:00). Yet the ordinance also backfired, since it created a “City sanctioned ‘job’ called begging for money.” Brian Davis Testimony, NORTHEAST OHIO COALITION FOR HOMELESSNESS, available at <http://www.neoch.org/akron-panhandling-ordinance/>.