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Via Email and Mail

Mayor Dave Walters
Vice Mayor Susan Baldwin
Commissioner Mark Behnke
Commissioner Kaytee Faris
Commissioner Kate Flores
Commissioner Lynn Ward Gray
Commissioner Andy Helmboldt
Commissioner Deb Owens
Commissioner Mike Sherzer
City Manager Rebecca Fleury
City of Battle Creek
10 N. Division St.
Battle Creek, MI, 49014

Re: Battle Creek's Proposed Anti-Panhandling Ordinance

Dear Mayor, Vice Mayor, City Manager, and City Commissioners,

We write to express our concerns about the proposal to adopt an anti-begging ordinance in the City of Battle Creek. The proposed ordinance will violate the constitutional rights of people who are struggling to survive, will criminalize a great deal of speech other than panhandling, and will send a message that poor people are unwelcome in Battle Creek. We therefore urge you not to move forward with this proposal.

1. It Is Not A Crime To Be Poor, But It *Is* Unconstitutional To Ban Panhandling.

Anti-panhandling laws that punish the poor are not only harsh, they are unconstitutional. The Sixth Circuit has held that "begging, or the soliciting of alms, is a form of solicitation that the First Amendment protects." *Speet v. Schuette*, 726 F.3d 867, 878 (6th Cir. 2013); *see also Loper v. New York City Police Department*, 999 F.3d 699, 706 (2d Cir. 1993).

Battle Creek's proposed ordinance, like the state anti-begging law struck down in *Speet*, would not survive constitutional scrutiny. We set out below the principal legal problems with such ordinances, and also attach a summary of recent federal court decisions holding anti-begging laws to be unconstitutional.

a. The First Amendment Protects Begging in Public Places.

Public streets, sidewalks, and parks are "traditional public fora" which "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." *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). Therefore, the government's ability to restrict speech in those fora is "very limited." *McCullan v. Coakley*, 134 S.Ct. 2518, 2528 (2014). The First Amendment's right to speak freely in public places includes the right to ask for charity. *See Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

b. The City May Not Restrict Begging Because of Its Content.

The government may not regulate speech based on its content, which means it cannot criminalize begging while allowing similar sorts of speech. *See Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). For example, courts have repeatedly held that cities may not prohibit signs or requests for money in buffer zones or traffic medians, but then allow the same action for canvassing or for political, religious, or artistic signs. Such distinctions are content-based and are not justified by public safety concerns, which are implicated equally by the disfavored and favored forms of speech.[1] Thus, any restrictions that the City imposes on charitable solicitation must apply equally to everyone, whether they are panhandlers, Salvation Army bell-ringers, firemen, schoolchildren or political candidates.

The Supreme Court's recent decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 , 2227 (2015), explained that regulation of speech that "draws distinctions based on the message a speaker conveys" is content-based, and thus can only survive if it meets the high hurdle of strict scrutiny. There the Court held that an ordinance distinguishing between temporary directional signs and other types of signs was content-based. The ordinance did not survive strict scrutiny, because the city could not show how differentiating between temporary directional signs and other types of

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[1] *See, e.g., Cutting v. City of Portland*, No. 2:13–cv–359–GZS, 2014 WL 580155, at *9 (D.Me. Feb. 12, 2014) ("It defies logic and common sense to say that a person is more or less safe when placing a 'campaign' sign on a median than any other type of sign."); *A.C.L.U. of Idaho, Inc. v. City of Boise*, No. 1:13–CV–00478–EJL, 2014 WL 28821 (D.Idaho Jan. 2, 2014); *Kelly v. City of Parkersburg*, 978 F.Supp.2d 624, 629 (S.D.W.Va. 2013) ("Whether the Ordinance is violated turns solely on the nature or content of the solicitor's speech: it prohibits solicitations that request immediate donations of things of value, while allowing other types of solicitations, such as those that request future donations, or those that request things which may have no "value"—a signature or a kind word, perhaps."); *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 559 (4th Cir. 2013); *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009); *Lopez v. Town of Cave Creek*, 559 F.Supp.2d 1030, 1032 (D.Ariz. 2008); *A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784 (9th Cir. 2006). Any restrictions that the City imposes on charitable solicitation must apply equally to everyone, whether they are panhandlers, Salvation Army bell-ringers, firemen, schoolchildren or political candidates.

signs furthered a compelling governmental interest or was narrowly tailored to the reasons the city had for restricting signs.

Similarly here, the City cannot single out the speech of panhandlers for punishment. That would be an unconstitutional content-based restriction on speech. *See Thayer v. City Worcester*, 144 F.Supp. 3d 218 (D. Mass. 2015) (noting that courts considering anti-panhandling laws post *Reed v. Gilbert* have found such laws to be content based, and therefore presumptively invalid).

c. The City May Not Restrict Solicitation Because it Makes Some Uncomfortable.

In public fora "the government may not selectively…shield the public from some kinds of speech on the ground that they are more offensive than others." *McCullen*, 134 S.Ct. at 2529. In *McCullen*, the U.S. Supreme Court unanimously struck down a law that created buffer zones around abortion clinics, holding that while a person walking through a public space may encounter an uncomfortable message that he or she cannot avoid, "this aspect of traditional public fora is a virtue, not a vice." *Id.* Furthermore, an ordinance "would not be content-neutral if it were concerned with undesirable effects that arise from the direct impact of speech on its audience or listeners' reactions to speech." *Id.* at 2532.

No matter how unpopular or uncomfortable begging may be to some, an anti-panhandling ordinance justified by shielding listeners from their discomfort is a content-based and presumptively unconstitutional ban on free speech. *Id. See also Berger v. City of Seattle*, 569 F.3d 1029, 1054 (9th Cir. 2009) (striking anti-solicitation law because "we cannot countenance the view that individuals who choose to enter [public parks], for whatever reason, are to be protected from speech and ideas those individuals find disagreeable, uncomfortable or annoying"); *A.C.L.U. of Idaho v. City of Boise*, 2014 WL 28821, at *5 (D.Idaho Jan. 2, 2014) ("Business owners and residents simply not liking panhandlers in acknowledged public areas does not rise to a significant governmental interest.").

d. The Proposed Ordinance Restricts a Great Deal of Non-Panhandling Speech.

Because, under the First Amendment, any restrictions on panhandling must apply equally to all charitable solicitation, it is virtually impossible to draft an ordinance that does not criminalize a great deal of speech that we assume Battle Creek has no desire to prohibit. For example, if Battle Creek prohibits panhandler from requesting funds in the downtown area, then politicians and fundraisers similarly could not ask donors for money while in the restricted area.

Whenever the government regulates speech, rather than conduct, it runs a considerable risk of writing a law that is unconstitutionally overbroad. Although the City may be intending to target only panhandling – targeting which itself is unconstitutional – in practice it is very difficult to write a content-neutral ordinance that restricts panhandling, and still allows favored forms of speech.

e. The Proposed Ordinance is Not Narrowly Tailored to the City's Asserted Interests in Public Safety

The City does, of course, have a legitimate interest in public safety. However, under the First Amendment that interest must always be measured against the burden on free speech. Thus, even if an anti-solicitation ordinance is content-neutral and directed at all forms of solicitation, in order to survive constitutional scrutiny as a "time, place and manner" restriction, any limit on speech must be narrowly tailored to serve a significant governmental interest and must leave ample alternative channels for communication. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

Courts have regularly struck down anti-solicitation ordinances, similar to the one under discussion here, because such ordinances fail to meet the narrow tailoring test, and "burden substantially more speech than is necessary to further the government's legitimate interests."[2] *Ward*, 491 U.S. at 791. Here, not only does the proposed ordinance restrict a great deal of non-panhandling speech, it also criminalizes peaceful begging in many locations within the city.

In *McCullen*, the Supreme Court made very clear that even where certain speech is associated with particular problems, the government may not simply silence speech. Rather, the narrow "tailoring requirement "prevents the government from too readily sacrificing speech for efficiency."*McCullen*, 134 S.Ct. at 2534. A court must review the history of the alleged problems and prior attempts to address them before finding that restrictions on speech are narrowly tailored. If buffer zones are not narrowly tailored in the context of the well-documented problems outside abortion clinics, then the buffer zones in Battle Creek's proposed ordinance cannot survive scrutiny.

That is particularly true given that the charitable solicitation occurring in Battle Creek has not been in any way problematic. There is simply no evidence of serious safety problems in Battle Creek resulting from Salvation Army bell-ringers asking for change; children begging for candy

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[2] *See, e.g.*, A.C.L.U. *of Idaho, Inc. v. City of Boise*, No. 1:13–CV–00478–EJL, 2014 WL 28821, at *5 (D. Idaho Jan. 2, 2014) (finding that even if the anti-solicitation ordinance were content-neutral, "Business owners and residents simply not liking panhandlers in acknowledged public areas does not rise to a significant governmental interest. While the ordinance does leave open the ability to sit or stand passively in a very limited public area with a sign requesting money or property, this is not an ample alternative channel for communication of the information."); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 948-49 (9th Cir. 2011) (finding that solicitation ordinance presumed to be content-neutral was facially unconstitutional and overly broad because: 1) it regulated more speech than was necessary to achieve the city's interests in traffic safety and traffic flow; and 2) was geographically overinclusive of all public places where there was no evidence of traffic problems) ("The Ordinance technically appl[ies] to children selling lemonade on the sidewalk in front of their home, as well as to Girl Scouts selling cookies on the sidewalk outside of their school…to a motorist who stops, on a residential street, to inquire whether a neighbor's teen-age daughter or son would be interested in performing yard work or babysitting… to school children shouting 'carwash' at passing vehicles.") (internal quotations and citations omitted).

at Halloween; or fundraisers requesting donations over a meal in a downtown restaurant. Nor is there evidence that panhandling has caused public safety problems. Absent such evidence, it is highly unlikely that a court would consider Battle Creek's proposed ordinance to be narrowly tailored.

f. Enforcing Existing Laws Targeting Criminal Conduct Associated With Panhandling Protects *Both* Free Speech and Public Safety.

The best way to mitigate and address the criminal conduct sometimes associated with panhandling is not by enacting new legislation, but by enforcing existing laws that were designed to address precisely such conduct. As Judge Jonker ruled in *Speet v. Schuette*, municipalities have an arsenal of already existing ordinances at their disposal to combat the conduct underlying anti-panhandling concerns:

> Nothing prohibits the government from regulating directly the conduct the government identifies as problematic. The government can and does prohibit fraud, assault, and trespass. But what the government cannot do without violating the First Amendment is categorically prohibit the speech and expressive elements that may sometimes be associated with the harmful conduct; it must protect the speech and expression, and focus narrowly and directly on the conduct it seeks to prohibit.

Speet v. Schuette, 889 F. Supp. 2d 969, 977 (W.D. Mich. 2012).

The Supreme Court similarly pointed out the utility of existing laws in *McCullen*, stating that while the state had a legitimate interest in public safety and the free flow of traffic, in creating buffer zones the state had

> fail[ed] to look to less intrusive means of addressing its concerns. Any such obstruction can readily be addressed through existing local ordinances....in addition to available generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like....The point is instead that the Commonwealth has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate.

McCullen, 134 S.Ct. at 2538. *See also Comite de Jornaleros*, 657 F.3d at 948-49 (holding that anti-solicitation ordinance was not a reasonable or narrowly tailored time, place and manner regulation because the city could have achieved their traffic interests simply by enforcing already existing traffic laws that were less restrictive of speech).

We encourage the City of Battle Creek to study its current ordinances regulating traffic safety, fraud, assault, vandalism, etc. to determine if these existing enforcement mechanisms have been underutilized before resorting to a new anti-solicitation ordinance that is bound to prohibit constitutionally-protected free speech.

2. The City Should Show Compassion for, Not Cruelty Towards, the Poor.

Battle Creek has historically been a caring and welcoming community for people from many different backgrounds. An ordinance that punishes poor people for asking for charity reflects an atmosphere of cruelty and exclusion, rather than of compassion. We must ask ourselves if we want to live in a society where a fellow human being's plea for food or change is so repulsive and offensive that we are willing to throw them in jail, charge them exorbitant fines that we know they cannot afford, and prosecute them for the crime of being poor – all of which only make it harder for the person to seek sustainable employment and housing. Whatever discomfort Battle Creek residents may feel when they are forced to witness poverty is inconsequential when measured against the brutal discomfort that our fellow citizens experience when they are forced to beg for every necessity and comfort that we take for granted.

3. Criminalizing Poverty Costs More than Preventing Poverty.

Anti-panhandling ordinances do not alleviate or prevent poverty. Even setting aside the moral and legal arguments, the financial costs of anti-solicitation ordinances strongly undercut their economic appeal.

It is a considerably cheaper for cities to provide housing and services to the homeless than it is to arrest, jail, and prosecute them. For example, a Florida study revealed that cities spent roughly $30,000 per homeless person on annual costs associated with the enforcement of nonviolent offenses such as trespassing, public intoxication or sleeping in parks; jail stays; emergency-room visits and hospitalization for medical and psychiatric treatment.[3] Yet the cost to cities to provide chronically homeless persons with permanent housing and services is roughly $10,000 per person per year, at a savings of over $350 million over a decade and 68 percent less than the cost to keep the homeless on the streets.[4]

Rather than spending precious municipal resources and dollars to ineffectually police the poor, Battle Creek would be far better served by partnering more closely with poverty and homeless service agencies and advocacy groups to design a more permanent solution to the problems of poverty that motivate the panhandling activity the City seeks to discourage.

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As the Supreme Court most recently advised in its unanimous *McCullen* decision, "When selecting among the various options for combating a particular problem, legislatures should be encouraged to choose the one that restricts less speech, not more." *McCullen*, 134 S.Ct. at 2532.

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[3] Kate Santich, *Cost of homelessness in Central Florida? $31K per person*, ORLANDO SENTINEL, May 21, 2014, http://articles.orlandosentinel.com/2014-05-21/news/os-cost-of-homelessness-orlando-20140521_1_homeless-individuals-central-florida-commission-tulsa.

[4] Scott Keyes, *Leaving Homeless Person On The Streets: $31,065. Giving Them Housing: $10,051*, THINKPROGRESS.ORG, May 27, 2014, http://thinkprogress.org/economy/2014/05/27/3441772/florida-homeless-financial-study/.

We ask that you reject the proposed anti-panhandling ordinance, and hope that you will instead evaluate how the City of Battle Creek might better utilize municipal resources to address problems of poverty and uphold the moral convictions and constitutional rights of its residents.

Sincerely,

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