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RE: Panhandling Ordinance, and Jailing Persons for Failure to Pay Fines

Dear Attorney May:

I am writing to follow up on prior exchanges we have had concerning Madison's panhandling ordinance, and to bring to your attention our serious concerns regarding the city's apparent practice of jailing persons for failure to pay fines. The city's behavior in both these areas raises constitutional concerns.

I. Continued Citations for Peaceful Panhandling are Unconstitutional.

First, on Aug. 26, 2015, you wrote that you had instructed the city of Madison to cease enforcing a ban on non-aggressive panhandling. As noted below, however, it is clear that the MPD has continued to enforce location-based components of the ordinance against peaceful panhandlers. Prohibiting peaceful panhandling in certain locations is still a content-based restriction. A violation of these provisions cannot be established without evaluating what the person said, since the ordinance does not ban, for example, requests for future donations, requests for donations by favored persons or entities (such as firefighters for the "Fill the Boot' campaign), or requests for something other than money. Enforcing these provisions thus runs afoul of the 7th Circuit's decision in *Norton v. City of Springfield,* 806 F.3d 411 (7th Cir. 2015).

Second, in an Oct. 9 email to me, you stated that the MPD would continue to enforce the aggressive panhandling ordinance. In your email, you also asserted that, regarding our "concern that the MPD is mistaking regular panhandling for aggressive, that is something we warn them about and try to avoid. To the rare extent that an officer sometimes mischarges, we try to take care of it in the processing of the citation." It is evident, however, that this is a recurring problem and not just an isolated event. As the summary below makes clear, even after the *Norton* decision

was issued (and after our August 11, 2015 letter raising concerns about ongoing constitutional violations), Madison police officers have continued to cite persons for peaceful behavior, often by, improperly and unconstitutionally, labeling it as "menacing" or "aggressive" without any indication of actual menacing behavior.

Moreover, the city's aggressive and menacing panhandling ordinances impose content-based restrictions: the city does not cite people, for example, for aggressively trying to get others to sign petitions. As we discussed in our Aug. 28 letter to you, Sec. 24.12(4) also allows consideration of improper and unconstitutional factors, such as status as a "known panhandler," "continu[ing] to beckon to . . . or follow or ask passer(s)-by for a handout after the passer(s)-by has failed to respond or has told the person 'no,'" and "utiliz[ing] bodily gestures . . . to impede the path of any passer(s)-by" may also be unconstitutional. Moreover, as we also noted at page 2-3 of our Aug. 28 letter, the ordinance's use of a multi-factor assessment to determine whether a person has engaged in prohibited "aggressive" panhandling renders the ordinance unconstitutionally vague. "[S]tandards of enforcement must be precise enough to avoid 'involving so many factors of varying effect that neither the person to decide in advance nor the jury after the fact can safely and certainly judge the result.'" *Columbia Natural Res., Inc. v. Tatum*, 58 F.3d 1101, 1105 (6th Cir. 1995) (quoting *Cline v. Frink Dairy Co.*, 274 U.S. 445, 465 (1927)).

Since *Reed*, several district courts have confirmed that "aggressive" panhandling bans that forbid actions such as making repeated requests for donations, following a person, panhandling in particular locations, and imposing heightened penalties on panhandlers who commit violations punishable under other provisions of law, such as those prohibiting assault, also unconstitutionally criminalize protected conduct. *See, e.g., McLaughlin v. City of Lowell*, --- F.Supp.3d ---, 2015 WL 6453144 at *9 (D.Mass., Oct. 23, 2015) ("A panhandler who asks for change from a passerby might, after a rejection, seek to explain that the change is needed because she is unemployed or state that she will use it to buy food. These additional post-rejection messages do not necessarily threaten public safety; their explanations of the nature of poverty sit at the heart of what makes panhandling protected expressive conduct in the first place."); *id*. ("The Ordinance gives Lowell law enforcement officials the option to seek an additional penalty on a panhandler who commits assault or obstructs the sidewalk, one which might be exercised in addition to existing laws or instead of them. . . The City has not demonstrated that public safety requires harsher punishments for panhandlers than others who commit assault or battery or other crimes.") (*citing R.A.V.* v. *City of St. Paul, Minn.*, 505 U.S. 377, 379-80, 395-96 (1992)); *Browne v. City of Grand Junction*, --- F.Supp.3d ---, 2015 WL 5728755 at *13 (D. Colo. Sept. 30, 2015) (city failed to show that repeatedly asking for donations, or asking for donations near ATMS, bus stops, outdoor patios, or other public locations, threatens public safety); *Thayer v. City of Worcester*, --- F.Supp.3d ---, 2015 WL 6872450 (D.Mass., Nov. 9, 2015). The city of Madison has failed to establish that its broad ban is necessary to protect public safety, as required to sustain a content based-regulation.

The following are examples of apparently unconstitutional citations, none of which indicate that there was a threat to public safety. That these were all issued in fewer than two months, and all issued subsequent to the *Norton* decision, shows that the city continues to have a pattern and practice of unconstitutionally citing persons for protected panhandling.

Date	Person	Charge	Behavior
8/18/15	[redacted]	aggressive panhandling	approach people and ask for money; if they hesitated approached more directly
8/21/15	[redacted]	menacing panhandling	holding sign at parking lot entrance
8/23/15	[redacted]	menacing panhandling	standing in median with sign and approaching vehicles
8/26/15	[redacted]	panhandle w/in 25 ft of intersection	standing with sign
9/8/15	[redacted]	menacing panhandling	three people said he had asked for money
9/11/15	[redacted]	panhandle w/in 25 ft of alcohol estab.	approach person and ask for money
9/18/15	[redacted]	menacing panhandling	standing on median and approaching vehicles
9/30/15	[redacted]	menacing panhandling	stop traffic and ask for money
10/14/15	unnamed	panhandle w/in 25 ft of intersection	standing with signs; officer told them told them "aggressive panhandling" at intersection prohibited to "educate him about municipal ordinance;" confiscated signs; "told the subject that if he was homeless that he would be arrested and transported to the Dane County Jail…."

Further, it does not appear that the city has conducted any meaningful training – or any training at all - on this issue. I filed an open records request with the MPD for training materials related to panhandling, and received nothing other than a single email which, I was told, was legal advice from your office, and thus was completely redacted. There was no other training material whatsoever provided. As I am sure you are aware, the failure to train officers may subject the city to liability when the city has notice of officers' violations of constitutional rights and fails to act. *See, e.g., King v. Kramer*, 680 F.3d 1013, 1021 (7th Cir. 2012) (when government entity is "'faced with actual or constructive knowledge that its agents will probably violate constitutional rights, [it] may not adopt a policy of inaction.'")(internal citation omitted); *Pindak v. Dart*, ---

F.Supp.3d ---, 2015 WL 5081363 at *26 (N.D. Ill., Aug. 27, 2015) (jury could reasonably find that failure to train security guards in response to repeated incidents of unconstitutional removal of panhandlers from public plaza constitutes deliberate indifference, where entity knew of violations and training materials contained no information about panhandling).

II. Incarceration of Poor People for Failure to Pay Fines is Unconstitutional.

We are also concerned that the city appears to have incarcerated impoverished residents, including homeless people charged with panhandling ordinance violations, when they are unable to pay their court-ordered fines.[1] In particular it appears that the Madison City Attorney's office may have a policy and/or practice of requesting the Municipal Court to issue warrants for persons who have failed to pay their fines. It is our understanding that such persons have been picked up on these warrants and jailed, without regard for or inquiry into their ability to pay – even though most, if not all, of the persons so jailed are indigent. A copy of one such request – related to a person we believe the city knows to be homeless – is attached. It is our understanding that persons for whom such warrants are issued are taken to jail, are not given legal representation, and are not taken before a judicial officer to determine their present ability to pay before being taken to jail (or at all on such warrants). These actions appear to be clearly unconstitutional.

The Supreme Court has long recognized that "if the State determines a fine or restitution to be the appropriate and adequate penalty for the crime, it may not thereafter imprison a person solely because he lacked the resources to pay it." *Bearden v. Georgia*, 461 U.S. 660, 667 (1983); *see also Tate v. Short*, 401 U.S. 395, 398 (1971) (holding that "jailing an indigent for failing to make immediate payment of any fine" violates the Equal Protection Clause). It is also well established that a court may not find an individual in contempt when he does not have the ability to comply with the court's order. *See, e.g.*, *Turner v. Rogers*, 564 U.S. 431, 131 S.Ct. 2507 (2011); *Hicks v. Feiock*, 485 U.S. 624, 638 n.9 (1988); *Shillitani v. United States*, 384 U.S. 364, 371 (1966). Poor people who do not have the money to pay their fines do not have the ability to comply with the court's order to pay and, therefore, cannot be found in contempt of court.

In *Bearden*, the Court held that a court "must inquire" into a defendant's reasons for nonpayment, and if a defendant cannot pay despite a good faith effort to do so, the court "must consider" other measures of punishment in order to protect poor people from being jailed for inability to pay. 461 U.S. at 672. In *Turner v. Rogers*, the Supreme Court held that Due Process requires that a defendant who has failed to make a court-ordered payment "receive clear notice that his ability to pay would constitute the critical question" in a hearing to determine whether he would be incarcerated for failure to pay. *Id.* at 2520. Further, a court must hold a hearing at which the defendant responds to questions seeking information about ability to pay. *Id*. Finally, a court may not resort to incarceration for failure to pay unless it has made an express finding that

[1] Some officers also appear to be engaging in the clearly unconstitutional action of threatening to jail individuals on the basis of homelessness. As the Oct. 14, 2015 narrative above – written BY an officer – makes clear, the officer told a panhandler his conduct was unlawful and then "told the subject that if he was homeless that he would be arrested and transported to the Dane County Jail…." We request that you ensure that the MPD immediately ceases threatening people with incarceration for being homeless and promptly confirm that you have done so.

the defendant has the ability to pay the amount owed. *Id*. Such "procedures . . . assure a fundamentally fair determination of the critical incarceration-related question, whether the [defendant] is able to comply with the [court] order" to pay. *Id.* at 2512.

Moreover, proceedings in which the government is the opposing party – especially if it is represented by counsel - may be more likely to require that counsel be provided for the defendant. *Id.* at 2520; *see also, e.g., Fant v. City of Ferguson*, ---F.Supp.3d---, 2015 WL 3417420 at *13 (E.D. Mo., May 26, 2015) ("Plaintiffs have stated a plausible claim that the City's failure to appoint counsel or obtain waivers thereof violated Plaintiffs' due process rights, particularly in light of their allegations that they were also not afforded any hearing, inquiry into ability to pay, or alternative procedural safeguards in connection with their incarceration."); *Colson v. Joyce*, 646 F.Supp. 102, 109 (D. Me. 1986), *affirmed* 816 F.2d 29 (1st Cir. 1987) (If "there is no present ability to pay . . . the present indigency of the Petitioner transforms his imprisonment into criminal punishment to which an absolute right to the assistance of counsel attaches.").

Beyond the constitutional prohibition, there are many fiscal and policy reasons why poor people should not be incarcerated when they cannot pay a debt. Many of the persons affected are the same homeless and impoverished people who are inundated by municipal citations and fines, ones the city knows they are unable to pay.[2] Incarceration under these circumstances returns Madison to the days of debtors' prisons, which were long ago abolished in this country. The practice of jailing poor people for debt not only violates the federal constitution, but also serves to entrench poverty, generates additional costs to the court and jail systems, and is ultimately counterproductive to the governmental interest in collecting fines to compensate victims and defray costs.

Incarcerating the poor for their inability to pay creates a two-tiered system of justice in which the poorest defendants are punished more harshly than the ones with means. Although courts attempt to collect fines from indigent and affluent defendants alike, those who can afford to pay their legal debts avoid jail, complete their sentences, and can move on with their lives. Those unable to pay end up imprisoned or under continued court supervision. And at least some of that debt is based on fines for peaceful panhandling that the city never should have imposed.

Jailing an indigent defendant does nothing to advance the city's interest in collecting fines and, in fact, wastes taxpayer money and resources. Imprisoning an impoverished person for debt does not get the fine paid. Indeed, there is double *loss* to the taxpayer when a municipality imprisons a defendant in order for that defendant to "pay off" his fine. The taxpayer must pay for the cost of housing, feeding and providing medical care to the person in the jail, and the person who is incarcerated is unable to earn money to pay the unpaid fine. When the city's actions unconstitutionally convert fines into jail sentences, the court is less likely to collect any of the defendant's fine. In contrast, alternatives such as community service might generate a net benefit – and would certainly reduce the public costs.

[2] For example, the city has imposed more than $19,000 in fines on the homeless individual for whom the warrant described in the attachment was sought. As any reasonable observer would realize, there is no way this person will be able to pay even a fraction of those penalties.

III. To comply with federal and state law, Madison must undertake significant changes in policy and practice.

We urge the city of Madison to eliminate fines it has imposed for peaceful panhandling (whether or not it was labeled as such). We also urge the city to immediately take measures ensure that it is not unconstitutionally ticketing panhandlers and does not jail indigent persons for failure to pay a fine. These should include:

1. Cessation of any enforcement or, preferably, repeal, of the panhandling ordinance, which at this point has not been and is not being constitutionally administered;

2. Training all MPD officers regarding the constitutional right to peacefully panhandle;

3. Cessation of the practice of arresting and jailing persons for failure to pay fines unless and until there is a judicial determination that the individual is in contempt of court for *willful* failure to comply with the court's order to pay; and

4. Ensuring that any contempt proceeding for failure to comply with a court order to pay includes, at a minimum, clear notice of the allegation of contempt and that the defendant's ability to pay is the critical factor in determining whether he or she will be found in contempt; a hearing during which the court elicits information about the defendant's present ability to pay; and a judicial finding on the record regarding whether the defendant has the ability to pay. Moreover, particularly if the city is represented by counsel at such proceedings, we believe the city may constitutionally be required to provide counsel for defendants.

We anticipate your prompt response to these concerns.

Sincerely,

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