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Mayor Paul Soglin
210 Martin Luther King Jr Blvd, Room 403
Madison, WI 53703

Transmitted electronically only: mayor@cityofmadison.com

Dear Mayor Soglin:

I am writing to follow up on letters I had sent the city of Madison in 2012, objecting to the city's ban on peaceful panhandling on First Amendment grounds. Last Friday, the U.S. Court of Appeals for the Seventh Circuit issued an opinion in *Norton v. City of Springfield*, No. 13-3581 (Aug. 7, 2015), that makes it clear that Madison's anti-panhandling ordinance is unconstitutional. For your convenience, I attach a copy of the *Norton* decision.

At issue in *Norton* was a Springfield, Illinois anti-panhandling ordinance materially indistinguishable from the Madison ordinance. The ordinance "prohibits panhandling in its 'downtown historic district'—less than 2% of the City's area but containing its principal shopping, entertainment, and governmental areas, including the Statehouse and many state-government buildings. The ordinance defines panhandling as an oral request for an immediate donation of money. Signs requesting money are allowed; so are oral pleas to send money later." *Slip op.* at 2. Although the 7th Circuit had originally upheld the ordinance, on Friday it granted rehearing and reversed, finding that the ordinance, which targeted a certain category of speech – *i.e.*, begging - was "content based" and thus invalid absent a compelling governmental interest. *Id*. at 2-4.

Norton is based on the recent U.S. Supreme Court opinion in *Reed v. Gilbert*, 135 S. Ct. 2218 (2015) which broadly condemned laws, like Madison's panhandling law, that discriminate based on the content of expressive activity. *Reed* clarifies that a law is content based if it *either* (1) "'on its face' draws distinctions based on the message the speaker conveys," *or* (2) "cannot be 'justified without reference to the content of the regulated speech,' or [was] adopted by the government 'because of disagreement with the message [the speech] conveys." *Id.* at 2227. A law that "defin[es] regulated speech by its function or purpose" – such as a panhandler's purpose to obtain money – creates a "facial distinction[]" "subject to strict scrutiny." *Id.*

Reed concerned a First Amendment challenge to the Town of Gilbert, Arizona's Sign Code, which set forth a comprehensive scheme regulating the placement of outdoor signs. *Id.* at 2224. That Code subjected certain signs—such as the "directional signs" that the *Reed* plaintiffs wished to post to advertise the time and location of their weekly religious services—to more stringent regulation than other types of outdoor signs, such as those "designed to influence the outcome of an election" or "communicat[e] a message or ideas for noncommercial purposes." *Id.* at 2224-5. The principal question presented was whether this differential treatment of signs, based on their different messages, was a content-based speech restriction to which strict scrutiny must be applied.

The Court held that it was. It first explained that, irrespective of the motive behind a law, a law is content based "on its face" if it "defin[es] regulated speech by particular subject matter" or "by function or purpose." *Id.* at 2227 (internal quotation marks omitted). Importantly, the Court held that where, as in *Reed*, a law "is content based on its face," courts "have no need to consider the government's justifications or purposes for enacting [it] to determine whether it is subject to strict scrutiny." *Id.*

This level of scrutiny applies "regardless of the government's benign motive, content neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.* at 2228 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993).) The Court expressly disapproved as "incorrect" any suggestion "that a government's purpose is relevant even when a law is content based on its face." *Id.* at 2228-9. The Court also took pains to specify that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id.* at 2230. It does not matter whether the law "target[s] viewpoints within [the regulated] subject matter": if it "singles out specific subject matter for differential treatment," then it is "a paradigmatic example of content-based discrimination," which must be subjected to strict judicial scrutiny. *Id. See also, Norton,* slip op. at 3-4 ("The majority opinion in *Reed* effectively abolishes any distinction between content regulation and subject-matter regulation. Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification.")

With the Court's decision in *Reed* and the 7th Circuit's decision in *Norton*, there no longer can be any doubt that Madison's ordinance is a content-based law to which strict scrutiny must be applied. Section 24.12(2) of the Madison Code of Ordinances defines "procur[ing] a handout" as "to request from another person an immediate donation of money, goods or other gratuity, and includes but is not limited to seeking donations." Under § 24.12(5), attempting to, or succeeding in, procuring a handout, is made unlawful in certain locations.[1] Thus, on its face, § 24.12(5) penalizes speech in those locations *only if* one conveys a particular message: asking for "an immediate donation of money, goods or other gratuity." Persons retain complete freedom to enter and remain within the Central Business District or other buffer zones that § 24.12(5) creates – and to engage in any form of conversation, including conversations targeted at third

[1] These locations are traditional public fora, including streets, sidewalks, and public parks, in which protection of speech is at its most robust, and in which the government's power to restrict private speech is at its lowest ebb. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

parties, political harangues, or any other communications - so long as they do not ask for money or an item of value. There can be no doubt, therefore, that within the meaning of *Reed* and *Norton,* § 24.12(5) "singles out specific subject matter"—asking for an immediate donation or other transaction—"for differential treatment" from other speech. It is consequently "a paradigmatic example of content-based discrimination," *Reed* at 2230, no matter what benign motives Madison claims to have had for its adoption. Under *Reed* and *Norton*, the ordinance cannot survive First Amendment review unless it withstands strict scrutiny, meaning that the restriction must be narrowly tailored to achieve a compelling government interest.

The city has not identified any interests that could be considered compelling. Creating a "pleasant" environment, which the City cites as a justification in the preamble to the ordinance (§ 24.12(1)), certainly is not a compelling interest; to the contrary, the First Amendment protects *unpleasant* speech. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. Indeed, the point of all speech protection … is to shield just those choices of content that to someone's eyes are misguided, or even hurtful." *Snyder v. Phelps,* 131 S.Ct. 1207, 1219 (2011) (citations and quotations omitted); *see also, e.g, Forsyth County, Ga. v. Nationalist Movement,* 505 U.S. 123, 134-5 (1992) (Speech may not be "punished or banned . . . simply because it might offend a hostile mob."); *Ovadal v. City of Madison,* 416 F.3d 531, 537 (7th Cir. 2005) ("The police must preserve order when unpopular speech disrupts it; does it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd. There is no heckler's veto.")

Facilitating pedestrian flow, while it may provide a justification for regulating large congregations of people, does not justify the content-discrimination against one-on-one requests for funds embodied in the ordinance. And with respect to the city's stated interest in a "harassment free climate," assuming *arguendo* that is a compelling interest, the law is grossly over-inclusive in banning non-aggressive, non-harassing requests for money. While the city may be able to address genuinely aggressive or intimidating behavior[2] it cannot stifle other forms of speech.

Because the city of Madison's ban on peaceful solicitation, in traditional public fora, is a content-based ordinance that does not satisfy strict scrutiny, the city should immediately repeal it. Clearly, Madison may not enforce this unconstitutional ordinance, must cease seeking to enforce any tickets or fines issued based on it, and must re-train its police officers to ensure they are no longer seeking to enforce this ordinance.

[2] It appears that the police have at times categorized repeated (but peaceful) requests for donations, or continued peaceful requests after being asked to stop, as "aggressive" panhandling. Such actions are similarly invalid and must be ended, as they punish protected speech. Making the same (peaceful and thus protected) request more than once does not and cannot turn a peaceful request into "aggressive" panhandling.

I anticipate your prompt response.

Sincerely,

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