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Mayor Paul Soglin (mayor@cityofmadison.com)
Common Council Pres. Cnare & Madison Alders (allalders@cityofmadison.com)
City of Madison
210 Martin Luther King Jr Blvd
Madison, WI 53703-3340

Transmitted electronically only

Dear Mayor Soglin, Council Pres. Cnare, and City Alders:

The ACLU of Wisconsin strongly urges reconsideration of the panhandling ban the City of Madison passed on Sept. 18, 2012. We object to the city's decision to penalize non-aggressive efforts to "procure a handout" ("panhandle") - as well as charitable solicitation efforts - in most of downtown and substantial portions of the rest of the city. In particular, we object to the flat ban on all forms of panhandling in the "Central Business District" and the citywide ban on panhandling within 25 feet of all intersections.

The U.S. Supreme Court has consistently held that "mere public intolerance or animosity cannot be the basis for abridgment of . . . constitutional freedoms," *Coates v. City of Cincinnati*, 402 U.S. 611, 615 (1971), and speech cannot be punished on account of its "profound unsettling effects," "public inconvenience, annoyance, or unrest." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949); *see also Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992) ("Listeners' reaction to speech is not a content neutral basis for regulation."). In other words, the City has no constitutionally legitimate interest in banning panhandling citywide or in a "solicitation-free zone" because some residents and visitors might prefer not to see or hear the messages of panhandlers.

Solicitation for money is constitutionally protected speech. In *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980), the U.S. Supreme Court recognized that "charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes – that are within the protection of the First Amendment." *Id.* at 632. Lower courts, including the Seventh Circuit, have concluded that there is no meaningful distinction under the First Amendment between charitable solicitations by organized charities and personal solicitations for financial assistance, as well as that begging is a form of political speech. *Gresham v. Peterson*, 225 F.3d 899, 904 (7th Cir. 2000); *Loper v. N.Y. City Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993); *Speet v. Schuette*, __ F. Supp. 2d __, 2012 WL 3865394, *3-*4 (W.D. Mich. Aug. 24, 2012); *Blair v. Shanahan*, 775 F. Supp. 1315, 1322-3 (N.D. Cal. 1991); *Benefit v. City of Cambridge*, 679 N.E.2d 184, 188 (Mass. 1997).

In addition, content-based restrictions on speech are "presumptively invalid." *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992); *see also Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). Thus, as the common council seems to have recognized, the City cannot single out the speech of panhandlers for punishment, while permitting the speech of others who solicit funds. However, some ordinance supporters seem to believe that if *all* verbal requests for donations – from those of panhandlers to those of Salvation Army bell-ringers – are prohibited, the ordinance is content-neutral. That is simply incorrect: it is still prohibiting one category of speech, soliciting donations, while permitting other categories of speech, such as solicitation of passersby to sign a petition. That is a content-based restriction because one must evaluate what a person says – the *content* of her speech – to determine whether she has violated the ordinance. *See, Speet*, 2012 WL 3865394 at *5 (ordinance content-based "because it distinguishes between types of speech – charitable solicitations vs. other types of advocacy"); *Loper*, 999 F.2d at 705 (anti-begging statute was "not content neutral because it prohibit[ed] all speech related to begging," while allowing speech on other topics).

Moreover, the ordinance imposes these broad prohibitions on speech for panhandlers, charitable organizations, and others,[1] in traditional public fora – all of downtown Madison's Central Business district (including sidewalks and parks) and all sidewalks in the city within 25 feet of intersections[2] – where an individual's right to freedom of expression is at its strongest and the government's power to regulate speech is at its lowest. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). When a law imposes an "absolute prohibition on a particular type of expression" within a traditional public forum, it "will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *United States v. Grace*, 461 U.S. 171, 177 (1983); see also *Boos v. Barry*, 485 U.S. 312, 321 (1988); *Perry*, 460 U.S. at 45. A speech restriction also must "leave open ample alternative channels of communication to allow individuals" to convey their message. *Horina v. City of Granite City, Illinois*, 538 F.3d 624, 635 (7th Cir. 2008). Although an "adequate alternative does not have to be the speaker's first or best choice," it "must be more than 'merely theoretically available' - 'it must be realistic as well.'" *Id.* (internal citations omitted). The Seventh Circuit has "'shown special solicitude for forms of expression' that involve less cost and more autonomy for the speaker than the potentially feasible alternatives." *Id.* (internal citations omitted).

In this case, the City's stated justification for its complete ban on panhandling in downtown Madison – providing a "pleasant environment" to encourage visitors to frequent the area – barely qualifies as a *legitimate* government interest, much less a *compelling* one. The desire to protect

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[1]Under the ordinance, § 24.12(2), "'procure a handout' means to request from another person an immediate donation of money, goods or other gratuity, and includes but is not limited to seeking donations." Thus, the express language of the ordinance bans not only begging and charitable solicitations, but any form of requesting money or goods from another – even one individual asking a friend or acquaintance for a couple of dollars to buy a cup of coffee. This highlights its overbroad and unreasonable scope.

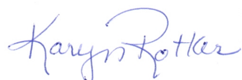
[2]The city may have a safety interest in precluding panhandling (or any form of solicitation) in the streets themselves, but the same cannot be said for all sidewalks adjacent to intersections.

people from the discomfort caused by panhandlers (or other charitable solicitations) or exposure to poor people does not justify suppressing speech. *See Coates*, 402 U.S. at 615; *Terminiello* 337 U.S. at 4. Even words and conduct that are "deeply offensive to many," including "virulent ethnic and religious epithets, vulgar repudiations of the draft, and scurrilous caricatures" are protected from prosecution. *United States v. Eichman*, 496 U.S. 310, 318-19 (1990) (citations omitted); *see also Cohen v. California*, 403 U.S. 15, 18-22 (1971). Certainly, the much more commonplace urban inconvenience of being asked peacefully for a donation cannot be banned in a traditional public forum.

The government does have a legitimate interest in protecting citizens from intimidation and harassment, and we do not object to reasonable restrictions on aggressive panhandling.[3] But the pre-existing ordinance already addressed this interest and the amendments do much more than restrict aggressive or coercive panhandling, and thus are not narrowly tailored to achieve that interest. The ban completely eliminates any kind of verbal solicitation for money or goods in substantial swaths of downtown Madison and much of the rest of the city, including some of the most, if not *the* most, pedestrian-traveled areas of the city, providing no realistic alternatives for productive solicitation. Such a broad ban on speech is impermissible.

For these reasons, we urge the City of Madison to rescind this unnecessary, excessive and unconstitutional expansion of its restrictions on the speech of its poorest residents. Should the city decline to do so, we will consider all legal options.

Sincerely,



Karyn L. Rotker
Senior Staff Attorney

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[3] We note that using a person's status as a "known panhandler" (which includes persons with "any" *civil* (as well as criminal) panhandling convictions in the past year, § 24.12(2)) as a factor in determining whether a person has engaged in threatening, coercive or aggressive panhandling, *see,* §§ 24.12(3),(4), calls for evidence that would not be admissible under Wis. Stat. § 904.04(2)(a), which prohibits evidence of past crimes or bad acts to demonstrate propensity to commit the charged act. The rules of evidence are generally applicable in municipal court, pursuant to Wis. Stat. § 800.08(4).