

September 6, 2019

Mayor David Smith & Members of the City
Council of Winchester, Virginia
Rouss City Hall 15 North Cameron Street
Winchester, VA 22601

Dear Mayor Smith and members of the Winchester City Council:

This letter supplements previous correspondence, sent on August 22, 2019, which referenced only one of the two problematic provisions concerning solicitation on the books in Winchester. The American Civil Liberties Union of Virginia urges you to repeal Winchester City Code Sec. 16-6.2, which, regardless of enforcement, is still the law in effect on panhandling in the City. In addition, we urge you to reconsider the ordinance limiting solicitation of motorists, Sec. 14-115(4), recently passed by the Winchester City Council on June 25, 2019. As discussed below, broad provisions prohibiting certain forms of speech may not withstand a legal challenge under the First Amendment of the United States Constitution.

The Supreme Court of the United States has held that the solicitation of money is protected speech under the First Amendment. *See Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980). This protection has been extended to individuals who are begging. *See, e.g., Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 553 (4th Cir. 2013) (recognizing that “the speech and expressive conduct that comprise begging merit First Amendment protection.”); *Smith v. City of Fort Lauderdale*, 117 F.3d 954, 956 (11th Cir. 1999) (“Like other charitable solicitation, begging is speech entitled to First Amendment protection.”); *Loper v. New York City Police Dep’t*, 999 F.2d 699, 704 (2d Cir. 1993) (“We see little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed.”). Because solicitation is constitutionally protected speech, any regulation of it must, at a minimum, satisfy the requirements for time, place, and manner restrictions; that is, the limitations must be content neutral, narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *See Clatterbuck*, 708 F.3d at 555.

Regarding the ordinance passed on June 25, 2019, there is reason to believe this code provision may not be narrowly tailored to



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survive constitutional scrutiny. The Fourth Circuit, in *Reynolds v. Middleton*, found that Henrico County’s solicitation ordinance prohibiting the distribution of “handbills, leaflets, bulletins, literature, advertisements or similar material to the drivers of motor vehicles or passengers” was not narrowly tailored to serve the County’s legitimate safety interests. 779 F.3d 222, 225 (4th Cir. 2015). This provision is similar to Winchester’s newly passed ordinance, which prohibits a pedestrian or driver from exchanging “any item while the operator’s motor vehicle is located in a traffic or travel lane on city roadways,” including “handbills, leaflets, bulletins, literature, advertisements, or similar material[s.]” Winchester City Code, Sec. 14-115(4). In *Reynolds*, the court observed that the ordinance “burdens a wide range of protected speech,” specifically highlighting political leafletting and soliciting any kind of contribution. *Id.* at 230-31. “Given the absence of evidence of a county-wide problem, the county-wide sweep of the Amended Ordinance burdens more speech than necessary[.]” *Id.* As the plaintiff in *Reynolds* asserted, “the County has other, less restrictive means available to further its asserted . . . safety interest by enforcing existing traffic laws—such as those governing jaywalking, obstructing traffic, loitering, and the like—against any roadway solicitors who in fact obstruct traffic or otherwise cause problems.” *Id.* at 230; *see also id.* at 228-230 (referencing *McCullen v. Coakley*, 573 U.S. 464, 494 (2014), where the Supreme Court observed that “the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it” or “that it considered different methods that other jurisdictions have found effective.”) The same is true of Winchester’s new ordinance, which lacks the tailoring required of a legitimate time, place, and manner restriction.

The language of Winchester’s other panhandling provision, City Code Sec. 16-6.2, prohibiting “*without limitation*, the spoken, written or printed word or such other acts as are conducted in furtherance of obtaining alms or an immediate donation of money” mirrors language of the Charlottesville ordinance that the Fourth Circuit struck down as unconstitutional. Winchester City Code, Sec. 16-6.2 (emphasis added) *compare with Clatterbuck*, 708 F.3d 549 at 552 (prohibition defining solicitation as a “request [for] an immediate donation of money or other thing of value from another person . . . [which] may take the form of, without limitation, the spoken, written, or printed word, or by other means of

communication” is unconstitutional). Like the language of the Charlottesville ordinance, Winchester’s provision violates the First Amendment and is indicative of a “censorial intent to value some forms of speech over others to distort public debate, to restrict expression because of its message, its ideas, its subject matter, or to prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Clatterbuck*, 708 F.3d at 556. Put simply, the Winchester code provision is a “speech restriction . . . based on a content distinction,” that violates the First Amendment. *Clatterbuck*, 708 F.3d at 556. Even if it is unenforced, the city should take affirmative steps to repeal this restriction from the local code.

For all these reasons, the ACLU of Virginia encourages the Winchester City Council to consult with counsel and to reconsider these restrictions.

Thank you for your immediate attention to this matter. Please do not hesitate to call me if you have questions or concerns. My direct line is 804-523-2146.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Claire G. Gastañaga". The signature is fluid and cursive, with the first name being the most prominent.

Claire G. Gastañaga
Executive Director



AMERICAN CIVIL LIBERTIES UNION
FOUNDATION

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