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FROM SIGNS TO PANHANDLING

PANHANDLING AND SOLICITATION AFTER REED

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PANHANDLING AND SOLICITATION IN LIGHT OF REED V. TOWN OF GILBERT***

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I. INTRODUCTION

This article discusses the state of panhandling and solicitation regulations in light of the recent Supreme Court case, *Reed v. Town of Gilbert*. In the Supreme Court case, *Village of Schaumburg v Citizens for a Better Environment*, the Court determined that charitable solicitation warranted full First Amendment protection, as it conveyed messages of political speech, and thus fell under the core purpose of First Amendment protection. While there is no Supreme Court case directly on point regarding the protection of panhandling, the general consensus was that individual acts of begging fell under the protection that *Schaumburg* offered. Various lower courts, as well as academic viewpoints, supported that assertion.

Despite the protection offered by the First Amendment, municipalities and local governments were still able to craft laws that regulated panhandling and solicitation, through regulating not the speech itself, but rather the time, place, and manner of the speech. Time, place, and manner regulations enjoy vast historical precedent in First Amendment jurisprudence, and are a method that governments can use to create regulations that pass examinations of their constitutionality.

However, in 2015, *Reed v. Town of Gilbert* was decided by the U.S. Supreme Court. *Reed*, a case involving a town's discriminatory treatment of signs, created an exceedingly broad rule regarding the method through which courts must examine the constitutionality of certain laws, ostensibly including panhandling and solicitation ordinances. While the vote in *Reed* was unanimous, the Court had deep divisions between its members regarding the methodology used in the majority opinion. Following the decision in *Reed*, the state of panhandling and solicitation regulations has been left extremely suspect, with many lower courts construing the holding of *Reed* to effectively preclude the possibility of municipalities or local governments creating ordinances that pass a constitutional test.

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The article discusses the state of the law both prior to and after *Reed*, and argues that (1) certain aspects of panhandling should be treated as conduct, rather than speech, and (2) the time, place, and manner category still provides a method for local governments to craft effective panhandling and solicitation ordinances. Part II discusses the state of the panhandling and solicitation laws prior to *Reed*. Part III discusses *Reed*, and the divisions within the Court. Part IV considers the state of panhandling and solicitation jurisprudence following *Reed,* and also offers possible avenues for governments to craft revised panhandling and solicitation regulations. Part V concludes. Appendix A offers an annotated draft ordinance on panhandling that might prove a helpful example for municipalities moving forward.

II. PANHANDLING AND SOLICITATION ORDINANCES PRE-REED

A. The Protection of Solicitation and Panhandling

The First Amendment and its protections are something that Americans take for granted, and generally hold as true without much more than a cursory thought. It is well understood that the First Amendment protects free speech – but there is a great deal of nuance that goes into what kinds of speech are actually protected, and what those protections actually entail. In other words, there are some types of speech that, according to the overall body of jurisprudence, warrant more protection than others. To start, the distinction between content-based and content-neutral laws is a vital component of First Amendment law, as content-based laws, or laws that regulate based on the message being conveyed, are subject to a higher degree of examination than are content-neutral laws (laws that are agnostic to the message conveyed, or only incidentally effect speech). Constitutional examination takes the form of scrutiny tests: to survive strict scrutiny, the most stringent constitutional test, a regulation must serve a compelling state interest as well as be narrowly tailored (using the least restrictive means possible) to achieve that interest,[1] while intermediate scrutiny imposes a less exacting test. Additionally, certain categories of speech are more protected than others: for instance, laws that suppress political speech are subject to strict scrutiny, while commercial speech generally only invokes intermediate scrutiny.[2]

[1] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
[2] Note, *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1990 (2016).

Because "almost all laws fail strict scrutiny and many others can pass intermediate scrutiny",[3] it is vital to understand where panhandling and charitable[4] solicitation fit on the protection spectrum, as solicitation and panhandling often include both commercial and political speech elements. While begging and charitable solicitation share many common strands of DNA, they are also distinct, as charitable solicitation typically involves the raising of funds for a larger organization, while begging is generally characterized as involving more isolated, personal activity.[5] In *Schaumburg v. Citizens for a Better Environment*,[6] the United States Supreme Court held that charitable solicitation warranted full First Amendment protection – meaning that laws restricting panhandling or solicitation would generally be subject to strict scrutiny. In *Schaumburg*, the Court considered a law requiring charities that solicited door-to-door to dedicate at least 75% of donations to charitable purposes.[7] The Court rejected the idea that canvassing for donations is purely commercial speech, because charitable solicitors advocate for particular social or political issues, as opposed to being engaged in a pure profit-making enterprise.[8] *Schaumburg* remains important, because it illustrates that even though soliciting for charitable donations or causes could be considered a form of commercial speech, or even more like conduct than speech, the Supreme Court is unwilling to differentiate between those aspects, and generally treats charitable solicitation as non-commercial protected speech.

Two other Supreme Court Cases, *Secretary of State of Maryland v. Joseph Munson Co.,*[9] and *Riley v. National Federation of the Blind of North Carolina, Inc*.,[10] affirmed the Supreme Court's protection of charitable solicitation in viewing solicitation regulations via a strict scrutiny approach. In *Joseph Munson Co.*, the Court struck down a ban on organizations that devoted more than a certain percentage of their contributions towards operating costs,[11] while in *Riley*, the Court struck down a more nuanced ban regarding stipulations of

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[3] Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 237 (2012).
[4] Commercial solicitation is distinct from charitable solicitation, and is generally subjected to intermediate scrutiny as a form of commercial speech. *See Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1990 (2016).
[5] Despite the distinction, the two concepts are often legally intertwined; further, many ordinances define ordinances in such a way that they necessarily encompass both charitable solicitation and panhandling. Thus, while some aspects of this memorandum touch only panhandling (aggressive panhandling, for instance), other parts treat them functionally as one.
[6] Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980).
[7] *See also* Anthony Lauriello, *Reed v. Town of Gilbert and the Death of Panhandling Regulation*, 116 COLUM. L.REV. at 5. [hereinafter Lauriello].
[8] *See* Lauriello, *supra* note7, at 5.
[9] 467 U.S. 947 (1984).
[10] 487 U.S. 781 (1988).
[11] In *Joseph Munson Co.*, a Maryland ordinance prohibited the solicitation of contributions for charitable organizations by disallowing organizations from allocating more than 25% of their received contributions to operating costs. *Id.* The Court, citing *Schaumburg*, noted that this created a chilling effect on charitable organizations, and that their First-Amendment protected fundraising and speech activity was infringed upon by the percentage ban. *Id* at 948.

contributions.[12] Both cases held that the regulations regarding how contributions were to be allocated impermissibly impeded the charitable organization's freedom to disseminate information.

While there is not a Supreme Court decision regarding the status of panhandling protection, the general consensus is that panhandling fits under the *Schaumburg* umbrella of protection.[13] The Supreme Court is silent on whether panhandling is considered protected speech.[14] However, most courts have interpreted panhandling as falling under the *Schaumburg* umbrella, and thus subject to strict scrutiny and First Amendment protections.[15] In *Loper v. New York City Police Department*,[16] the Second Circuit held that begging was defined as a "communicative activity" since there was little difference between begging and soliciting for a larger organization. Accordingly, the prohibitions in question warranted review under strict scrutiny.[17]

[12] In *Riley*, the North Carolina General Assembly created a scale, which delineated a three-tiered schedule of percentages regarding the reasonability of charitable organizations allocation of funds: up to 20% of contributions being used for operating costs was considered "reasonable"; 20-35% was deemed unreasonable if the organization could not show that the solicitation at issue involved "dissemination of information, discussion, or advocacy relating to public issues"; and amounts of 35% or more created a rebuttable presumption that the allocation was unreasonable. See *Riley*, 487 U.S. 781, 781 (1988). The Court held that while the state had an interest in protecting both charities and the public from fraud, the percentage-tier system was not narrowly tailored enough to withstand the strict scrutiny that solicitation regulation demands. *Id*.
[13] *See* Lauriello, *supra* note 7, at 14.
[14] *Id.*
[15] *Id.*
[16] Loper v. N.Y. City Police Dep't, 999 F.2d 699 (2d Cir. 1993) (striking down New York City's broad prohibition on loitering with the purpose of begging).
[17] *See* Lauriello, *supra* note 7, at 16.

The Fourth,[18] Sixth,[19] Seventh,[20] Ninth,[21] and Eleventh[22] circuits have all adopted a *Loper*-like approach to First Amendment protection for panhandling.[23] Blanket bans on panhandling, such as the ban in *Loper* and *Speet v. Schuette*,[24] were generally held to be unconstitutional (even prior to *Reed*) because they were so broadly constructed that they burdened more speech than was necessary to accomplish the underlying governmental interests.[25]

B. Public Forums and Time, Place, and Manner Restrictions

Public forums (such as street corners and designated portions of public parks) have a central place in First Amendment jurisprudence, since they serve as the quintessential "town square" where public dialogue is welcomed and First Amendment interests are jealously protected. For example, in 1939, the Supreme Court roundly rejected[26] a city ordinance banning the use of public places for political meetings where government discretion to ban such uses was virtually unfettered. The Court reasoned as follows:

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[18] *See* Reynolds v. Middleton, 779 F. 3d 222, 224 (4th Cir. 2015). Reynolds, a homeless man who supported himself by soliciting donations, challenged a Virginia town's ordinance that prohibited solicitation within county roadways and on medians. *Id.* The ordinance's intent was to curb accidents). *Id*. The Fourth Circuit, citing panhandling's First Amendment protection, struck down the ban because it was not supported by enough evidence, and thus prevented both dangerous and non-dangerous forms of solicitation. *Id*. *See also* Clatterbuck v. City of Charlottesville, 92 F.Supp. 3d 478 (W.D. Va. 2015). In *Clatterbuck*, the district court for the Western District of Virginia held that an ordinance prohibiting certain forms of solicitation was content-based, because it "plainly distinguish[ed] between types of solicitations on its face." *Id* at 487. Because the city did not demonstrate that the law was the least restrictive means through which to accomplish its interests, the law was ruled unconstitutional. *Id* at 491.

[19] *See* Speet v. Schuette, 726 F. 3d 867(6th Cir. 2013) In *Speet*, the Sixth Circuit Court of Appeals struck down a Michigan law that banned and criminalized begging in the streets. *Id* at 870. The Court held that panhandling was protected, and that while preventing fraud and abuse was a valid government interest, the ordinance was not narrowly tailored enough to serve that interest. *Id* at 880.

[20] *See* Gresham v. Peterson, 225 F. 3d 899 (7th Cir. 2000). In *Peterson*, the Seventh Circuit Court of Appeals upheld a solicitation ban applicable in certain areas (such as near ATMs) and employing certain conduct (such as blocking passage of individuals being solicited) as falling under the time, place and manner umbrella of permissible regulation (*see infra* Part II, Section B). Importantly, however, the court acknowledged that begging fell under the *Schaumburg* and *Loper* protection of begging. *Id* at 907.

[21] *See* ACLU v. City of Las Vegas, 466 F. 3d 784 (9th Cir. 2006). Here, the Ninth Circuit struck down a panhandling regulation as an invalid restriction on First Amendment rights, thus incorporating panhandling into Schaumburg's protection umbrella. *Id* at 801. *See also Civil Liberties Union of Idaho, Inc. v. City of Boise*, 998 F. Supp. 2d 908 (D. Idaho 2014) (holding that a blanket ban on solicitation was invalid).

[22] *See* Smith v. Fort Lauderdale, 177 F. 3d 954 (11th Cir. 1999). In Fort Lauderdale, the Eleventh Circuit held that panhandling is protected under the First Amendment, but using similar reasoning as the Seventh Circuit in Gresham, upheld an ordinance prohibiting panhandling on beaches in order to protect the town's successful tourism trade. *Id* at 956.

[23] *See* Lauriello, *supra* note 7, at 18.

[24] *See* note 18, *supra.*

[25] *See* Lauriello, *supra* note 7, at 22.

[26] See Hague v. Committee for Industrial Organizing, 307 U.S. 496 (1939).

> Wherever the title of streets and parks may rest, they 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. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.[27]

Despite the considerable protection afforded speech in public forums, the courts have nonetheless recognized that government can regulate the time, place and manner of speech, provided such regulations are "content-neutral," "narrowly tailored to serve a significant government interest,"[28] and leave open ample alternative channels of communication."[29] This test, in contrast to strict scrutiny applicable to content-based speech, applies an intermediate level of review.

"Public forums" can be distinguished from limited or designated public forums (established by government for more limited purposes) or "nonpublic forums" (areas not designated as areas for speech or assembly). The landmark case that illustrates this concept is *International Society for Krishna Consciousness, Inc. (ISKCON) v. Lee*.[30] In *ISKCON,* the Port Authority of New York and New Jersey implemented an ordinance that restricted both the distribution of "flyers, brochures, pamphlets, books or any other written material,"

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[27] *Id*. at 515-516.

[28] See Ward v. Rock Against Racism, 491 U.S. 781, 786 (1989). Rock Against Racism was an organization that hosted several annual rock concerts in New York City promoting anti-racism. *Id* at 784. In response to a host of noise complaints over the years, the City created a set of guidelines relating to permissible noise levels. *Id* at 785. Rock Against Racism sued the city, stating that the guidelines violated its free speech rights. *Id* at 786. Justice Kennedy, writing the majority opinion, noted that while the concerts were considered to be the type of speech most protected by the First Amendment, the city's guidelines were appropriate time, place, and manner restrictions. *Id* at 799. *Ward* remains somewhat vague, as Justice Kennedy famously wrote that though time, place and manner regulations need not use the most restrictive means possible, the restrictions could not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id* at 799. Thus, the standard of "narrow tailoring" used in "time, place, and manner" cases involving public forums differs from that used when strict scrutiny is applied in which case restraints must be the "least restrictive or least intrusive" methods for accomplishing the government's interest. *Id.* at 798.

[29] *See* Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45 (1983).

[30] 505 U.S. 672 (1992). See also Young v. New York City Transit Authority, 903 F.2d 146 (2nd Cir. 1990). In *Young*, begging was banned in the New York City subway system. Id at 147. The Second circuit held that the ordinance banning begging was content-neutral, and thus constitutional. *Id* at 168.

as well as "the solicitation and receipt of funds" in airport terminals.[31] ISKCON, a religious organization that solicited funds and disseminated information about their organization in public places, brought suit, arguing that their First Amendment rights were violated by the ordinance.[32] In *ISKCON*, there was no debate as to whether the solicitation in question was a form of protected speech under the *Schaumburg* umbrella.[33] Rather, the vital turning point of the case was whether airport terminals should be treated as public forums.[34] If airport terminals were to be held as public forums, then the ordinance would be subject to strict scrutiny. If, on the other hand, airport terminals were considered to be a limited public forum, then the ordinance would be subject to less rigorous scrutiny. The Court distinguished airport terminals from streets and other established public forums, and thus subjected the ordinance to the "reasonable under the circumstances" test (an even less stringent test than applied to content-neutral time, place and manner regulations), concluding that the law was valid.[35]

There are several lower court decisions, pre-*Reed*, that illustrate valid restrictions on panhandling applicable in public forum locations, using content-neutral time, place, and manner provisions. In *Smith v. Fort Lauderdale*, the Eleventh Circuit upheld a ban in Fort Lauderdale, Florida, that specifically targeted begging on its beaches, a thriving tourist destination.[36] Utilizing the time, place, and manner test, the court noted that the city of Fort Lauderdale had a significant interest in protecting its tourist business.[37] The city's restriction, only on the beach areas, left ample alternatives for solicitation, and did not burden "substantially more speech than is necessary to further the government's interest."[38]

Other earlier cases, such as *Seattle v Webster*,[39] upheld ordinances limiting activities by panhandlers that interfered with pedestrian traffic. This case

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[31] ISKCON, 505 U.S. 672, 677 (1992). The Port Authority owned and operated three airports in the New York City Metropolitan Area: John F. Kennedy International Airport, La Guardia Airport, and Newark International Airport. *Id* at 675.

[32] ISKCON's practice of disseminating information and soliciting funds was a ritual known as *sankirtan* and its primary purpose is to raise funds for the religious movement. *ISKCON*, 505 U.S. 672, 674-75 (1992).

[33] *ISKCON*, 505 U.S. 672, 676 ("It is uncontested that the solicitation at issue in this case is a form of speech protected under the First Amendment . . . [b]ut it is also well settled that the government need not permit all forms of speech on property that it owns and controls.").

[34] ISKCON, 505 U.S. 672, 679 (1992).

[35] ISKCON, 505 U.S. 672, 680 (1992). Chief Justice Rehnquist, writing for the Court noted that, "the tradition of airport activity does not demonstrate that airports have been made available for speech activity," and further, that airport terminals "generally, have [not] been intentionally opened by their operators to such activity." *Id* at 680. Justice Kennedy offered a notable concurring opinion in *ISKCON*, one that focused on analysis of the time, place, and manner restrictions. That concurrence may have a bearing on post-*Reed* analysis of panhandling regulations as discussed in Part IV below.

[36] Smith v. Fort Lauderdale, 177 F. 3d 954 (11th Cir. 1999).

[37] *Id.* at 956.

[38] *Id.*

[39] Seattle v. Webster, 802 P2d 1333 (WA 1990)

upheld an ordinance which made it unlawful to intentionally obstruct pedestrian traffic in the face of overbreadth and vagueness challenges.

Additionally, the Seventh Circuit, in *Gresham v. Peterson*, upheld an even more nuanced ordinance relating to prohibitions on panhandling.[40] The ordinance was crafted to define panhandling as involving an oral request for money, and instead of creating an outright ban, restricted panhandling from sunset to sunrise.[41] At all hours, individuals were allowed to passively sit or stand and carry signs that included written requests for money.[42] Further, panhandling acts taking places near bus stops, public transportation venues, near banks or ATMs, and near parked motor vehicles were banned.[43] Finally, particularly aggressive panhandling acts were defined in the ordinance,[44] and banned at all times.[45] The court held that the ordinance served a valid government interest (creating a non-threatening public environment), was narrowly tailored[46] to accomplish the interest, and thus was an acceptable time, place, and manner restriction.[47]

C. Aggressive Panhandling Ordinances: Speech Plus Conduct

Aggressive panhandling ordinances are another method through which municipalities have attempted to regulate the negative aspects of panhandling. Aggressive panhandling ordinances vary across jurisdictions, but a common thread is that, instead of outright banning panhandling, they seek to curb behavior associated with panhandling that is threatening and dangerous to other individuals in public areas.[48] The First Circuit considered one such ordinance in *Thayer v.*

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[40] Gresham v. Peterson, 225 F. 3d 899 (7th Cir. 2000).
[41] *Id.* at 902.
[42] *Gresham*, 225 F. 3d 899, 902 (7th Cir. 2000).
[43] *Id.*
[44] The ordinance reads: "It shall be unlawful to engage in an act of panhandling in an aggressive manner. Including any of the following actions: (1) Touching the solicited person without the solicited person's consent; (2) Panhandling a person while such person is standing in line and waiting to be admitted to a commercial establishment; (3) blocking the path of a person being solicited, or the entrance to any building or vehicle; (4) following behind, ahead or alongside a person who walks away from the panhandler after being solicited; (5) Using profane or abusive language, either during the solicitation or following a refusal to make a donation, or making any statement, gesture, or other communication which would cause a reasonable person to be fearful or feel compelled; or (6)Panhandling in a group of two (2) or more persons." *Gresham*, 225 F. 3d 899, 902 (7th Cir. 2000).
[45] *Id.*
[46] The court noted that "under the ordinance, one could lawfully hold up a sign that says 'give me money' and sing 'I am cold and starving,' so long as one does not *voice words* to the effect of 'give me money.'" *Id* at 907.
[47] *Gresham*, 225 F. 3d 899, 906 (7th Cir. 2000) ("The city chose to restrict [panhandling] where it is considered especially unwanted or bothersome—at night, around banks and sidewalk cafes, and so forth . . . By limiting the ordinance's restrictions to only those certain times and places where citizens naturally would feel most insecure in their surroundings, the city has effectively narrowed the application of the law to what is necessary to promote its legitimate interest.").
[48] There is a lot of variation with these ordinance, with some denying actual violent conduct, while some take a very loose approach to "aggressive." *See* Lauriello, *supra* note 7, at 22.

City of Worcester.[49] In *Thayer*, the First Circuit initially upheld an ordinance passed by the city of Worcester that banned forms of aggressive panhandling as well as panhandling in the middle of streets or on medians.[50] The city's aggressive panhandling ordinance was adopted out of concern that "'[p]ersons approached by individuals asking for money, objects or other things of any value are particularly vulnerable to real, apparent or perceived coercion when such request is accompanied by ... [certain forms of] aggressive behavior.'"[51] Former Supreme Court Justice David Souter, writing the opinion for the First Circuit, examined the regulations using a pre-*Reed* framework, and found that the city's ordinances were content-neutral, because they were not intended to discriminate as to messages amongst panhandlers.[52] Thus, the ordinances were subjected to intermediate scrutiny.[53] However, the Supreme Court's holding in *Reed* dramatically altered the outcome in *Thayer*. (See Part IV, Section B for a discussion of *Thayer*'s ultimate outcome.) The *Gresham v. Peterson* decision, considered above, also included provisions limiting aggressive panhandling (such as prohibitions on panhandling in certain sensitive locates such as near ATMs, or prohibitions on blocking individuals from walking away from panhandlers).[54]

D. The Captive Audience Doctrine

The "captive audience" is another important emerging doctrine that may have a bearing on analysis of panhandling and solicitation regulation. The basic idea of the captive-audience doctrine is that the First Amendment protects both a right to speak and a right to listen. In most situations, such as in a public forum, the listener can simply walk away if they do not like what they are hearing. A captive-audience situation would be a circumstance where a listener is forced, through one manner or another, to listen to a speaker. For instance, In *Hill v. Colorado*,[55] the United States Supreme Court upheld a regulation designed to protect people from protestors near abortion clinics. The Court observed that there exists a compelling government interest in protecting a citizen going from their house to a health care facility from encountering a confrontational setting.[56]

However, a more recent Supreme Court may have placed doubt on the applicability of the Court's holding in *Hill*. In *McCullen v. Coakley*,[57] Chief Justice John Roberts discussed the captive audience theory as bearing on the

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[49] Thayer v. City of Worcester, 755 F.3d 60 (1st Cir. 2014).
[50] *Id.*
[51] *Id.* at *64-65.*
[52] *Id* at 71. ("The district court had a sufficient basis in text, common experience, and evidence of the City's intent to conclude that the ordinances were not designed to suppress messages expressed by panhandlers, Girl Scouts, the Salvation Army, campaigning politicians, or anyone else subject to restriction.").
[53] Thayer v. City of Worcester, 755 F.3d 60, 71 (1st Cir. 2014).
[54] See text at notes 40-47, *supra*.
[55] 530 U.S. 703, 734 (2000).
[56] *Id.*
[57] 134 S. Ct. 2518 (2014).

marketplace of ideas, rather than as a First Amendment issue.[58] With regard to captive-audience situations, the Chief Justice noted that, "a listener often encounters speech he might otherwise tune out. In light of the First Amendment's purpose . . . this aspect of traditional public forums is a virtue, not a vice."[59] Thus, this holding seems to limit the opinion in *Hill*, by suggesting that an individual subject to unwanted speech in a captive-audience situation might actually benefit from this situation, rather than being harmed by it.

The Court's somewhat contradictory rulings regarding a possible captive-audience theory have presented a murky picture in terms of developing local ordinances. However, this potential theory is worth noting in connection with emerging strategies for developing effective panhandling or solicitation ordinances, especially in light of the ruling in *Reed*, to be discussed next.

III. *REED V. TOWN OF GILBERT*

The previous section explained that the protection of charitable solicitation was a settled area of First Amendment doctrine prior to *Reed*. While panhandling doctrine was not quite as clear-cut, many lower courts had concluded that some panhandling activity was protected while other forms of panhandling were not. Certainly, there was debate as to the extent to which jurisdictions could regulate panhandling and charitable solicitation, but the general consensus was the panhandling and solicitation were protected, with the understanding that governments could impose valid time, place, and manner restrictions on begging or solicitation in public forums. *Reed v. Town of Gilbert*, a case involving town signage, has created a good deal of uncertainty regarding the regulation of panhandling and solicitation going forward. This section traces the background of *Reed*, its holding, and finally the concurring opinions that may shed light on its limitations.

A. Background

Reed v. Town of Gilbert[60] dramatically altered the distinction between content-neutral and content-based laws, and has created wide-ranging consequences as a result. *Reed* involved an ordinance adopted by the town of Gilbert, Arizona creating a "comprehensive code governing the manner in which people may display outdoor signs."[61] The sign code created several sign categories constructed around the message(s) conveyed in the sign, and then created different restrictions for each category.[62] The Court singled out three particularly relevant sign categories: "Ideological Signs," "Political Signs," and "Temporary Directional Signs Relating to a Qualifying Event."[63] Ideological

[58] *See* Lauriello, *supra* note 7, at 13.
[59] McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014). *See also* Lauriello, *supra* note 7, at 13.
[60] 135 S. Ct. 2218 (2015).
[61] Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2224 (2015).
[62] *Id.*
[63] *Id.* at 2224-2225.

signs were treated most favorably and were allowed to be up to 20 square feet in area, and to be placed in all zoning districts without time limits.[64] Political signs were treated less favorably than ideological signs, and were allowed up to 16 square feet on residential property and up to 32 square feet on nonresidential property, undeveloped municipal property, and rights-of-way; these signs were permitted to be displayed up to 60 days prior to a primary election, and up to 15 days following a general election.[65] Temporary directional signs were subjected to stricter restrictions than the other two categories; they could be no larger than 6 square feet, and were allowed to be displayed no more than 12 hours prior to the qualifying event, and no more than 1 hour afterward.[66]

"Temporary Directional Signs Relating to a Qualifying Event," were signs directing the public to a meeting or gathering of a nonprofit group.[67] A local church, Good News Community Church, and its pastor, Clyde Reed, desired to promote the time and location of their Sunday church services.[68] However, the church was a small entity lacking in funds for a building of its own, and was accustomed to holding services at locations in and around the town.[69] In order to alert its attendees of the location, church members would place 15-20 temporary signs around the town, often in right-of-ways, and frequently kept the signs up from early on Saturdays to midday on Sunday.[70] The town became aware of this practice, and cited the church twice for violating the code. Reed later contacted the sign code compliance office to reach an understanding, but was unable to do so.[71] The church then filed suit then in the United States District Court for the District of Arizona, arguing that the sign code violated the church's freedom of speech.[72] The District Court granted summary judgment, and the Court of Appeals for the Ninth Circuit affirmed.[73] The Supreme Court granted certiorari, and reversed the decision of the two lower courts.[74]

B. The Holding

1. The Court's Analytical Framework

Justice Clarence Thomas wrote an opinion joined by the Chief Justice, and Justices Scalia, Kennedy, Alito, and Sotomayor. Justice Alito wrote a concurring opinion joined by Justices Kennedy and Sotomayor. Justice Breyer wrote an opinion concurring in the judgment, while Justice Kagan wrote an opinion concurring in the judgment that was joined by Justices Breyer and Ginsberg. In

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[64] *Id.* at 2224.
[65] *Id.* at 2224-2225.
[66] *Id.* at 2224.
[67] *Id.*
[68] *Id.* at 2225.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* at 2226.
[73] *Id.*
[74] *Id.*

short, although the Court reached a 9-0 vote to strike down the Gilbert, Arizona ordinance, its reasoning was remarkably splintered.

Justice Thomas began his analysis by stating that content-based laws are de-facto unconstitutional, unless the government can prove that they are narrowly tailored to serve a compelling state interest.[75] He then offered a new definition of "content-based" regulations that included situations in which "a law applies to particular speech because of the topic discussed or the idea or message expressed."[76] Stating that this approach relied upon a common-sense understanding, Justice Thomas wrote that courts were required to contemplate whether a regulation of speech "on its face" draws distinctions based on the message conveyed.[77] The Court noted that some facial distinctions based on a message are obvious (such as those addressing regulated speech in terms of its particular subject matter), while others are more subtle (addressing regulated speech with an eye to its function or purpose).[78] The Court held that both distinctions were to be assessed based upon information related to promulgation of the regulation, and concluded that both types were subject to strict scrutiny.[79] Justice Thomas accordingly stressed that some facially content-neutral regulations would be considered content-based regulations of speech (and subject to strict scrutiny) if they involved "laws that cannot be 'justified without reference to the other content of the regulated speech,'' or that were adopted by the government "because of disagreements with the message the speech conveys."[80]

2. Framework Applied

The principal opinion held that the Town of Gilbert's sign code was content-based on its face, because of the distinctions it made when defining the different sign categories.[81] In deciding the case, the Supreme Court rejected the lower court's reasoning that suggested the government did not regulate the sign based on a disagreement or that its regulations were not based on the communicative content of the sign.[82] Justice Thomas noted that "because strict scrutiny applies either when a law is content-based on its face or when the purpose and justification for the law are content-based, a court must evaluate each question

[75] *Id.*
[76] *Id.* at 2227.
[77] *Id.* at 2227
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.* The ordinance defined temporary directional signs on the basis of whether a sign conveys the message of directing the public to church or another qualifying event; political signs were defined on the basis of whether a sign's message "designed to influence the outcome of an election; and ideological signs were defined based on whether a sign "communicates a message or idea" that do not fit within the Code's other categories. *Id.*
[82] *Id.*

before it concludes that the law is content neutral and thus subject to a lower level of scrutiny."[83]

The Thomas opinion additionally rejected the idea that "content-neutrality" is flexible, or that it is meant to be applied only to protect viewpoints and ideas from government censorship or favoritism.[84] Justice Thomas stated that it is "well established" that the First Amendment's opposition to content regulation not only applies to the censoring of certain viewpoints, but also the prevention of public discussions on topics in their entirety.[85] He further noted that "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter."

One final area touched on by the principal opinion was the idea of speaker-based distinctions. Justice Thomas's opinion rejected the notion that the town sign code's distinctions were speaker based; in other words, he rejected the idea that the signs hinged on "the content-neutral elements of who is speaking through the sign and whether and when an event is occurring."[86] The principal opinion went further, saying that even if the sign code was speaker-based, this did not automatically render it content-neutral. Justice Thomas insisted that "laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflects a content-preference."[87] Thus, they essentially held that laws distinguishing amongst speakers requires strict scrutiny, because the preference for certain speakers could bely a preference for certain content.

C. The Concurrences & Reed's Applicability Beyond Signs

Reed's holding went far beyond the facts of the case in creating a broad rule of applicability that presumably implicates almost any municipal ordinance imaginable that regulates speech. Three concurring opinions were filed in *Reed* (two of them concurring in the judgment only as noted above). All of the concurrences appeared at least somewhat concerned with the widespread effects that the principal opinion could have on regulations.[88] The concurring opinions suggest that though there was a general agreement with the outcome of the case, there were deep divisions regarding the majority's analytical framework. Normally, concurring opinions might be treated as mere footnotes to a majority decision. However, with the recent passing of Justice Antonin Scalia, it is unclear if the Court will retain its stance. Thus, these concurrences may shed light on how the Court would treat future cases involving panhandling or solicitation regulation.

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[83] *Id* at 2228.
[84] *Id* at 2229.
[85] *Id.*
[86] *Id.* at 2230.
[87] *Id.*
[88] *Id* at 2239.

Justice Alito, joined by Justices Kennedy and Sotomayor filed a joint concurring opinion in which these three Justices sought to add qualifying language to the reasoning reflected in the principal opinion.[89] In Justice Alito's view, the content-based First Amendment classification system was important, and underscored Justice Thomas's reasoning, saying that "limiting speech based on its 'topic' or 'subject' . . . may interfere with democratic self-government and the search for truth."[90] Justice Alito's opinion stressed the understanding of the three justices joining it that, notwithstanding language in the principal opinion, municipalities would not be "powerless" to enact and enforce reasonable sign regulations.[91] Justice Alito's concurring opinion mentioned a number of scenarios where he believed certain sign regulations would not be content-based.[92] Perhaps most importantly, Justice Alito's concurrence did not suggest the application of Justice Thomas's reasoning in situations that do not involve rule signs.[93]

Justice Breyer filed his own separate opinion concurring only in the judgment and also joined Justice Kagan's separate opinion concurring only in the judgment.[94] Justice Breyer's opinion argued for more nuance regarding the content-based distinctions, and was troubled by the amount of weight that might be given labeling a regulation or law as content-based label.[95] Justice Breyer argued that instead of treating the content-based "category" as the definitive tool with which to parse through the constitutionality of laws, the category should be treated as a strong, but not determinative factor weighing against the constitutionality of a law.[96] Justice Breyer observed that a more precise method would be to weigh the damage being done to First Amendment principles versus the regulatory goals being accomplished.[97] According to Justice Breyer, his approach would require examination of "the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so."[98] Justice Breyer concluded his opinion concurring in the judgment by noting that, in his view, strict scrutiny was not warranted in *Reed*, because it involved no traditional public forum, nor any effort to censor a particular viewpoint, but the Town of Gilbert's regulations violated the First Amendment even using a less stringent standard.[99]

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[89] *Id.* at 2233-34.
[90] *Id.*
[91] *Id.*
[92] *Id.* at 2233-34.
[93] *Id.*
[94] *Id* at 2234-39.
[95] *Id* at *2235.*
[96] *Id.* ("The better approach is to generally treat content-discrimination as a strong reason weighing against the constitutionality of a rule where a traditional public forum, or where viewpoint discrimination, is threatened, but elsewhere treat it as a rule of thumb, finding it a helpful, not determinative legal tool, in an appropriate case, to determine the strength of a justification.").
[97] *Id* at 2236.
[98] *Id* at 2236.
[99] *Id* at 2236.

Finally, Justice Kagan, joined by Justices Ginsburg and Breyer, authored an opinion concurring only in the judgment. Justice Kagan, a noted First Amendment scholar prior to her appointment to the Supreme Court,[100] wrote that a large number of ordinances were adopted in "cities and towns across America" regulating sign posting, and exempting some entire categories based on their subject matter.[101] Justice Kagan noted that though the subject-matter distinctions in these ordinances was often entirely innocuous,[102] the laws would be subject to strict scrutiny under *Reed*'s bright line rule for content-discrimination, and thus inevitably principal opinion's constitutional test.[103] Justice Kagan noted two prime reasons that the Supreme Court subjected content-based speech regulations to strict scrutiny: (1) to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail," and (2) to ensure that the government has not regulated speech based on opposition or agreement towards the underlying message being espoused.[104] However, according the Justice Kagan's argument, most of the subject matter discrimination prevalent in sign codes do not raise those important concerns. Kagan noted that protection from subject-matter discrimination was meant to safeguard the public from the government's skewing the public's debate of ideas, but that the safeguard "need not last forever," and that it should be possible to "administer our content-regulation doctrine with a dose of common sense, so as to leave standing laws that in no way implicate its intended function."[105] Ultimately, Justice Kagan concluded that the Town of Gilbert's sign ordinance did not pass strict scrutiny, intermediate scrutiny, or even the "laugh test," and thus, there was no reason to "cast a constitutional pall on reasonable regulations quite unlike the law before us."[106]

Justice Kagan's concurring opinion may prove to be prophetic regarding the difficulty that municipalities and governments would incur when trying to pass benign legislation on a myriad of topics unrelated to signage. Panhandling and solicitation have been particularly affected, because of the First Amendment

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[100] For examples of her work, see Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. CHI. L. REV. at 413-517 (1996); Elena Kagan, *The Changing Faces of First Amendment Neutrality: R.A.V. v. St. Paul, Rust v Sullivan, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29-77 (1992); Elena Kagan, *Regulation of Hate Speech and Pornography after R.A.V.*, 60 U. CHI. L. REV. 873-902 (1993).

[101] *Id.*

[102] *See id*. Kagan noted that "some municipalities generally prohibit illuminated signs in residential neighborhoods, but lift that ban for signs that identify the address of a home or the name of its owner or occupant." Another example she cited was that safety signs in some municipalities are allowed to be posted without a permit, though other signs require permits. Finally, Kagan noted that the federal Highway Beautification Act limits signs along interstate highways unless they direct travelers to notable locations, and also that, generally speaking, historical sign markers are exempt from regulations. *Id*.

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] *Id.* at 2239.

related protections afforded such activities. Perhaps the most important and controlling aspect of *Reed's* ruling and its applicability to panhandling or solicitation legislation is found in the text of the holding itself. *Reed's* central holding—the idea that "speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter"[107]—is the controlling factor, because even mentioning the subject matter means that, under *Reed*, the regulation is content-based, and thus subject to strict scrutiny. Seventh Circuit Judge Frank Easterbrook noted this as a vital consequence of the holding, saying that it "effectively abolishes any distinction between content regulation and subject-matter regulation."[108] Essentially, this proposition means that by even touching the topic of panhandling or solicitation, ordinances may invoke strict scrutiny from a court, and thus fail a constitutional test.

A broad interpretation of *Reed* would effectively disregard the idea of government suppression of certain messages as the problem and instead embrace a broader rule that treats all regulations as content-based just by singling out a subject or topic for regulation. In other words, reading *Reed's* rule broadly "divorces the content distinction from its intended purpose of ferreting out impermissible government motive."[109] Further, this rule is possibly broad enough to cover nearly all conceivably relevant regulations.[110] The provision that a regulation is found to be content based whenever it cannot be "justified without reference to the content of the regulated speech" could be read to include "any regulation that even incidentally distinguishes between activities or industries."[111] Thus, because of the elimination of the content-based distinction, many panhandling laws that would previously have been upheld as constitutional have been struck down. The next section explores competing interpretations of *Reed*, and the ability for local governments to create effective panhandling and solicitation ordinances in light of *Reed's* holding.

IV. COMPETING INTERPRETATIONS OF *REED* IN THE CONTEXT OF PANHANDLING

While *Reed*'s facts involve signs, which are fundamentally different than begging or verbal requests for donation, the broad nature of its ruling appears to render it applicable to a variety of different subjects that raise First Amendment concerns, including panhandling and charitable[112] solicitation. Additionally, the

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[107] *Id.* at 2230.
[108] Noah Feldman, *Brother Can You Spare Me A Dime. Or Else*, BLOOMBERG VIEW (May 10, 2016, 3:09 PM), https://www.bloomberg.com/view/articles/2016-05-10/panhandling-isn-t-always-free-speech.
[109] *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1983 (2016)
[110] *Id.*
[111] *Id.*
[112] Commercial and charitable solicitation are distinct entities, and *Reed* did not mention commercial solicitation in its holding. In light of this silence, lower courts have upheld various laws where solicitations, in a purely commercial context, have been banned. One quite recent example is *Vivint La., LLC v. City of Shreveport*, a case in the United States Court for the Western District of Louisiana. In *Vivint*, an ordinance was passed that banned door to door solicitation for

Supreme Court has, in no uncertain terms, professed the decision's apparent applicability given a remand to the First Circuit to reconsider a panhandling ordinance in the *Thayer* case in light of *Reed*. Further, various other lower courts have reconsidered their positions after *Reed*, even when not told explicitly by the Supreme Court to do so. Despite *Reed*'s seeming applicability to regulations of panhandling and solicitation, this section suggest that the courts may be construing *Reed* too broadly, especially in the aftermath of Justice Scalia's death. Additionally, it appears that there are two likely paths forward for towns aiming to craft effective panhandling legislation. Towns might argue that (1) aggressive panhandling is distinct from regular panhandling, and should be treated more as conduct than as constitutionally protected speech; and that (2) appropriate time, place, and manner restrictions remain unaffected by *Reed*'s holding, and still provide meaningful regulatory strategies. This section proceeds by discussing the general response to *Reed* by courts, before turning to the applicability of time, place, and manner restrictions. It concludes by touching once again on the captive audience doctrine.

A. Panhandling and Solicitation Regulation After Reed – General Response

1. Broad Bans and Lower Court Trends

The widespread view about the significance of *Reed* is that though that decision endangered virtually all panhandling or solicitation regulation, blanket bans are likely the most vulnerable. Asking for money is a form of speech, even if it contains elements of conduct. As a Columbia Law Review article puts it, "it would be impossible to know if a solicitation took place or was immediate without determining the content of the solicitation."[113] For instance, banning panhandling would require an inquiry to determine "whether the panhandler simply said, 'Good morning,' or, 'Good morning, can you spare some change?'"[114] As Justice Thomas said in *Reed*: "speech regulation targeted at specific subject matter is content-based even if it does not discriminate among viewpoints within that subject matter."[115] Additionally, even if a court viewed a blanket ban as content-neutral, it would most likely fail intermediate scrutiny as over-inclusive because it would not be reasonably tailored to the problem at hand.[116]

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goods: "It shall be unlawful for any solicitor, peddler, hawker, itinerant merchant or transient vendor of merchandise to go in and upon an private residence in the city, not having been requested or invited to do so by the owner or occupant of such residence, for the purpose of soliciting orders for the sale of goods, wares and merchandise, or for the purpose of disposing of or peddling or hawking such goods, wares and merchandise." *See Vivint La., LLC v. City of Shreveport*, CIVIL ACTION NO. 15-0821 (W.D. La. Sep. 30, 2016). The district court upheld the ban, stating that the city of Louisiana had a substantial interest in regulating commercial speech to protect the privacy of individuals in their own homes. *Id*. Thus, pure commercial solicitation is likely unaffected by *Reed*.

[113] *See* Lauriello, *supra* note 7, at 31.

[114] *Id.*

[115] Reed v. Town of Gilbert, Ariz., 135 S. Ct. 2218, 2230 (2015) (internal citations omitted).

[116] *See* Lauriello, *supra* note 7, at 32.

Various lower courts have interpreted *Reed*'s virtual elimination of traditional content-based distinctions as leaving little room for the creation of constitutionally valid panhandling and solicitation ordinances. One prime example is *Norton v. City of Springfield*,[117] a case that arose prior to *Reed*, and eventually had to be reconsidered in light of *Reed's* holding. In *Norton*, the City of Springfield, Illinois passed an ordinance defining panhandling as "an oral request for an immediate donation for money," and banned the act in its downtown historic area.[118] However, signs requesting money were allowed, as well as vocal requests for money to be sent later.[119] The Springfield ordinance reflected the view that requests for money to be given instantly, particularly at night, or where there are no other bystanders in the immediate area, could be found threatening to individuals going about their business, and thus singled out these forms of panhandling for regulation.[120]

The plaintiffs in Springfield argued that the rule barring oral requests for immediate contributions of money, but allowing requests for money to be paid at a later date, was a form of content discrimination.[121] The Seventh Circuit, in its initial opinion, disagreed, and upheld the town's ordinance. The Seventh Circuit focused on the idea that the ordinance violated neither of the Supreme Court's two traditional content-based classifications: (1) regulation restricting speech based on the content it conveys; or (2) regulation that restricts speech because the government disapproves of its message.[122] The Seventh Circuit reasoned that the regulation was "indifferent to the solicitor's stated reason for seeking money, or whether the requester states any reason at all," explaining that the an immediate request for money did not encompass any political idea, nor did it regulate a certain type of request for money.[123]

Upon rehearing in light of *Reed*, however, the Seventh Circuit was forced to reconsider its previous approach. The court, in an opinion by Judge Easterbrook, applying the Supreme Court's holding in *Reed* that speech regulation aimed at a specific topic is content-based, even if does not distinguish among viewpoints within that subject matter, and found that because Springfield's ordinance regulated panhandling on its face, it was content-based discrimination and thus failed to pass strict scrutiny for lack of justification.[124] On February 29, 2016, the Supreme Court denied the City of Springfield's petition for certiorari,

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[117] 768 F.3d 713 (7th Cir. 2014).
[118] Norton v. City of Springfield, Ill., 768 F.3d 713, 714 (7th Cir. 2014).
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.* at 717.
[123] *Id.* ("Springfield's ordinance does not regulate speech by the pitch used; it does not say, for example, that 'give me money because I'm homeless' or 'give me money because I support the governor' is permissible, while 'give me money because my daughter is sick' or 'give me money because the distribution of income is inequitable' is forbidden.").
[124] *See* Norton v. City of Springfield, Ill., 806 F.3d 411, 413 (7th Cir. 2015).

thus tacitly approving of *Reed's* applicability to the panhandling ordinance in *Norton*.[125]

2. Aggressive Panhandling as Just Speech: Are the Courts Correct?

One of the interesting aspects of panhandling and solicitation ordinances post-*Reed* is that courts have focused primarily on the speech aspect of panhandling, and have not probed whether a different approach may be needed where both speech and conduct is involved. This distinction would seem to be particularly important when considering regulation of "aggressive panhandling," often distinguished from "passive panhandling" involving only vocal requests alone or raising signs without more.

"Aggressive panhandling" ordinances typically prohibit panhandling in groups, voicing threats, pursuing a potential donor who has declined, making physical contact, approaching someone in a constrained space, and so on. The prototypical Supreme Court case involving "speech plus conduct" is *United States v. O'Brien*. [126] *O'Brien* involved a criminal prosecution for burning a draft card during the volatile years of the Vietnam War, after Congress in 1965 had prohibited willful destruction of draft cards. The Court recognized that O'Brien's actions (burning his draft card) served as a reflection of his views on the war and on the military draft, but concluded that the case not only related to speech and the relevant draft regulations, but regulated expressive conduct rather than speech as such. In reaching its decision that O'Brien could be prosecuted, the Court considered whether the obligation to maintain an intact draft card was intended as a means of punishing speech with which the government disagreed, or whether the regulation should be assessed under a more complex standard. Writing for the Court, Chief Justice Warren held that, when a law or regulation limited this sort of hybrid of speech and conduct, it needed justification under the following test: There must be a sufficiently important governmental interest in regulating the non-speech element so as to justify incidental limitations on freedoms protected by the First Amendment, the regulation must be within the constitutional power of the government to enact, the regulation must further an important or substantial government interest, that interest must be unrelated to the suppression of speech (or "content neutral"), and no more speech can be prohibited than is essential to override the government interest.[127]

It would seem that "aggressive panhandling" should properly be considered under this standard, rather than under *Reed,* at least where ordinances defining and regulating "aggressive panhandling" actually define conduct in a way that relates to important governmental interests. Case law prior to *Reed* (such as the *Lopez* and *Young* cases discussed earlier) considered *O'Brien* as part of the

[125] City of Springfield, Ill. v. Norton, 136 S. Ct. 1173, 194 L. Ed. 2d 178 (2016)
[126] 391 U.S. 367 (1968).
[127] Id at 376-77.

analysis. Since *Reed*, however, the case law to date has not grappled with this distinction.

Thayer v. City of Worcester is a prime example of this trend. The First Circuit's opinion in *Thayer* initially upheld the City of Worcester's panhandling ordinance.[128] However, a writ of certiorari was granted by the Supreme Court, and the Court vacated the First Circuit's ruling and remanded the case to the appeals court, expressly requiring the circuit court to reconsider the case in light of the *Reed* holding.[129]

On remand, the Massachusetts federal district court applied *Reed* quite stringently. [130] The Worcester ordinance in question included extensive limitations, including those that prohibited "aggressive panhandling," restricted use of traffic islands, and limited solicitation of any person in public after dark. The district court took careful note of Massachusetts statutes that themselves prohibited assault and battery, accosting a vehicle's inhabitants for purposes of solicitation, and obstructing streets and sidewalks. The district court concluded that the prohibition on aggressive panhandling was content-neutral on its face and had as its purpose attention to public safety concerns. The court then reviewed provisions to determine whether they were narrowly tailored to serve legitimate content-neutral government interests albeit not necessarily by the least restrictive means, and concluded that the ordinance sought to address concerns for public safety and welfare. However, the court found the prohibition on nighttime solicitation was overbroad, and viewed provisions regarding aggressive panhandling as "content-based," where, in the court's view the kind of conduct addressed could have been adequately addressed under state criminal law. The broad ban on solicitation and other activities on traffic medians throughout the jurisdiction was overbroad and lacked adequate supporting evidence.

This subsequent district court decision in *Thayer* is among the most limiting to date involving regulation of panhandling and solicitation by local governments in the aftermath of *Reed.* The court's view that conduct that was criminalized by state statute could not be treated as part of a panhandling ordinance seems artificial and exceptional. It may be, however, that the broad range of prohibitions (no nighttime solicitation, no panhandling on traffic islands) suggested that the point of the ordinance was to criminalize homelessness and panhandling excessively so that its purpose was in fact to penalize panhandling (thus falling under the "purpose" strand of Justice Thomas's *Reed* analysis).

It may also be that the First Circuit and its district courts by coincidence ended up addressing a number of problematic, overly-broad panhandling ordinances and thus began a strand of jurisprudence that might not be accepted

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[128] 755 F.3d 60 (1st Cir. 2014),

[129] Thayer v. City of Worcester, Mass., 135 S. Ct. 2887 (2015) (remanding).

[130] 144 F.Supp.3d 218 (D. MA 2015).

elsewhere. For example in *Cutting v. City of Portland, Maine*,[131] the First Circuit considered a Portland, Maine ordinance that made all median strips in the city off-limits to sitting, standing, staying, parking or driving. The court concluded that median strips constituted traditional public forums, so a high standard of review was justified. Although enforcement of the ordinance was directed at panhandling, it was not narrowly tailored given its application not only to 8 inch medians but to broader medians. Strikingly, the court found that *Reed* was inapplicable where the ordinance on its face was content-neutral, notwithstanding the city's informal interpretation that allowed placement of campaign signs on medians. The court concluded that alternative sites for panhandling such as sidewalks were not sufficient to offset the wholesale ban on median activities. It carefully considered the city's public safety justification but concluded that public safety concerns were not supported by evidence where medians throughout the city had different characteristics and where the city did not produce evidence of those on medians moving off medians into streets. The ordinance accordingly failed the "narrow tailoring requirement" and also failed the requirement that no less restrictive means of controlling danger (such as limiting certain medians from panhandling or other activities) would suffice.

One further district court decision from the First Circuit bears mentioning. In *McLaughlin v. Lowell*,[132] the District Court for the District of Massachusetts struck down elements of the local panhandling ordinance that banned "vocal" panhandling in the downtown area (regarding that prohibition as content-based and lacking in justification) and "aggressive" panhandling including panhandling in groups of two or more elsewhere in city (citing the *Cutting* and *Thayer* decisions). The court noted that the city's "definition of panhandling targets a particular form of expressive speech—the solicitation of immediate charitable donations—and applies its regulatory scheme only to that subject matter."[133] Thus, the court subjected the ordinance to strict scrutiny, which it duly failed to meet for not having the requisite narrow tailoring.[134]

Despite the reasoning in these various lower court opinions, as noted at the outset of this section, there is another viable way for courts to consider aggressive panhandling ordinances that would allow for a more favorable outcome for municipalities: treat aggressive panhandling acts as conduct. On a fundamental level, the treatment of aggressive panhandling as conduct makes sense: what is being banned is not any form of speech or requests, it is the aggressive act or acts that infringe upon other people's ability to go about their day unobstructed. As noted earlier, the Supreme Court has never actually considered whether or to what extent panhandling alone is constitutionally protected. While regular panhandling would almost certainly fall under the *Schaumburg* penumbra, it does seem a bit of a stretch to include violent or imprudently persistent acts as the constitutional

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[131] 802 F.3d 79 (1st Cir. 2015).
[132] McLaughlin v. City of Lowell, 140 F. Supp. 3d 177 (D. Mass. 2015).
[133] *Id.* at 185.
[134] *Id.* at 185.

equivalent of the charitable solicitations considered in *Schaumburg* and other like cases.

Harvard Professor Noah Feldman, who specializes in constitutional and First Amendment law, supports this proposition.[135] Professor Feldman has argued that *Reed* might not have the wide-ranging applicability that most courts have so far assumed. As Professor Feldman puts it, "the *Reed* decision wasn't intended to stop the government from outlawing a course of conduct that is put into action through words. The facts in the *Reed* case had nothing to do with conduct. The sign ordinance that the court struck down simply treated different temporary signs differently based on what they said." He further argues that blackmail and harassment are courses of conduct that the government can regulate, and that regulations of these activities are not intended to "curb speech;" rather, they are attempting to stop harmful conduct from occurring, and in the process, are incidentally suppressing some amount of speech.[136] Professor Feldman argues that aggressive panhandling is more akin to the some of the courses of conduct that governments are allowed to ban, rather than the speech protected by *Schaumburg*.

Taking Professor Feldman's argument one step further, it may be possible that aggressive panhandling, if treated as conduct, might not even trigger strict scrutiny, because the aggressive conduct is the target, not the speech. In First Amendment jurisprudence, laws that are primarily targeted towards conduct, but incidentally burden speech in the process, are subject to intermediate scrutiny.[137] Further, there is actually some precedent for treating begging or the solicitation of donations as conduct: Justice Kennedy's concurring opinion in *ISKCON*. In *ISKCON*, Justice Kennedy observed that the direct soliciting of funds was a "nonspeech [*sic*] element of expressive conduct," and thus subject to intermediate scrutiny.[138] This concurring opinion is admittedly not controlling; however, it speaks to the notion that there may be more to the legality of panhandling and solicitation ordinances than is commonly understood, especially post-*Reed*.

Practically speaking, the conceptual argument that aggressive panhandling should be treated as "speech plus conduct" rather than "speech alone" may mean little in the way of a proactive legal strategy for municipalities. They still must

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[135] Noah Feldman, *Brother Can You Spare Me A Dime. Or Else*, BLOOMBERG VIEW (May 10, 2016, 3:09 PM), https://www.bloomberg.com/view/articles/2016-05-10/panhandling-isn-t-always-free-speech. See also Enrique Armijo, *Reed v. Town of Gilbert: Relax, Everybody*, 58 B.C. L. REV. 65 (2017) (arguing that *Reed* only stands for proposition that ordinance that on its face targets particular speech or has the purpose of targeting such speech must withstand a higher level of scrutiny).

[136] Noah Feldman, *Brother Can You Spare Me A Dime. Or Else*, BLOOMBERG VIEW (May 10, 2016, 3:09 PM), https://www.bloomberg.com/view/articles/2016-05-10/panhandling-isn-t-always-free-speech.

[137] As previously discussed, *see* United States v. O'Brien, 391 U.S. 367 (1968). In *O'Brien*, the Supreme Court upheld a ban on the burning of draft cards in the Vietnam era; the Court held that while the burning of cards was a political message, the true target of the law was conduct. *Id* at 377.

[138] Int'l Soc'y for Krishna Consciousness, Inc.(ISKCON) v. Lee, 505 U.S. 672, 703 (1992).

craft ordinances and wait for law suits in order to defend those ordinances as valid. However, municipalities could carefully frame ordinances in such a way that they specifically target problematic and violent conduct (as opposed to some of the broader aggressive panhandling ordinances discussed in Part II), and hold the conduct argument in their back pocket for legal defenses. The reality is that local communities cannot sit idly by and wring their hands in despair as a result of *Reed*. Local governments need to continually craft ordinances that probe *Reed* in attempts to find meaningful limits or viable paths for constitutionally valid regulations. The treatment of aggressive panhandling as conduct is one theoretical concept that these governments can use to find such limits or paths. Even if the argument that aggressive panhandling would not trigger strict scrutiny is without merit because properly drafted "aggressive panhandling" ordinances should address "speech plus conduct," ordinances that are carefully constructed to only target legitimately harmful behavior may pass strict scrutiny, because they narrowly target behavior averse to human safety, a fundamentally justifiable government interest

B. Time, Place, and Manner Restrictions and their Role Post-Reed

There have been a number of federal district court cases involving local governments' attempts to create time, place, and manner regulations on panhandling, and almost all of them have failed judicial review. However, this section argues that courts may be reading the content-discrimination ruling in *Reed* too strictly, and that narrowly crafted approaches might survive review.

Examples of "time" restrictions often include prohibition on panhandling or solicitation at any time during nighttime hours (typically from 30 minutes after sunset to 30 minutes before sunrise). "Place" restrictions have tended to target areas where prospective donees may feel particularly vulnerable and potentially feel coerced (such as locations close to ATM machines, or in sidewalk cafes), areas that may be crowded (such as historic districts or downtown commercial districts), or areas where public safety concerns may be particularly notable (need to maintain pedestrian access on sidewalks and avoid congestion and accidents related to activities on traffic medians).

One of the most perplexing questions created by *Reed* is the fate of the "time, place, and manner" category of First Amendment regulations. The notion of "time, place, and manner" regulations arises in a very specific context: when use of a "public forum" is at issue (an area historically and presumptively entitled to be available for speech by members of the public), but there are strong, content-neutral reasons to the government to manage its use for the benefit of all (typically by using regulations of when, where, and how activities can take place in such forums). Traditionally, where public forums are involved, and the government does not seek to regulate the content of speech (so the context is one of content-neutrality), the government can nonetheless impose "time, place, and manner" restrictions so long as the regulations pass a heightened level of scrutiny in which the government demonstrates a significant government interest, narrowly

tailored to meet that interest, and preserves ample remaining alternative channels for communication.[139] Insofar as panhandling and solicitation are concerned, traditional regulatory actions are directly tied to management of time, place, and manner of solicitation in some locales while leaving others more open as alternative channels for communication.

A clear pre-*Reed* example of time, place and manner regulation of public forums is provided by *Gresham v. Peterson*,[140] a Seventh Circuit decision regarding an Indianapolis ordinance decided in 2000. The Indianapolis ordinance had a broad reach, prohibiting panhandling or other charitable solicitation upon any street, place or park where a person requested immediate donation of money or other gratuity, other than passively standing or sitting with a sign without a vocal request. The ordinance also prohibited panhandling after sunset or before sunrise, panhandling where the panhandler or person solicited was situated at a bus stop or public transportation facility, at a parked or stopped vehicle, in a sidewalk café, or within 20 feet of an ATM or bank entrance. It also prohibited "aggressive panhandling" including panhandling in groups of two or more, and imposed a hefty fine of $2500 per incident. The Seventh Circuit applied the traditional "public forum/time, place, and manner" tests and considered whether the ordinance was narrowly tailored to achieve important government objectives and whether adequate channels of communication were preserved. The court found that the city could reasonably conclude that vocal and aggressive panhandling, panhandling at night or near ATMs could give rise to intimidation and threaten by citizens; and determined that ordinance preserved adequate channels of communication for panhandling both during the day and at night.

Unfortunately, if *Reed* is interpreted to make nearly all forms of regulation appear to be "content-based," courts may never reach appropriate consideration of the "public forum" framework discussed in *Gresham,* which in many respects is the one that should typically apply (at least if there is no over-reaching targeting of regulations to deliberately deter panhandling in comparison to other types of free speech activity. If *Reed* is given a sweeping application at the initial point of classification, regulation of panhandling would then be subject to "strict scrutiny" (a somewhat more exacting standard than that application to time, place and manner regulations). *Reed* itself invokes a "strict scrutiny" test for sign regulations when it treats them as *content-based* (whether facially content-based or with a purpose that is content-based); and under that standard, certain sign regulations are presumptively unconstitutional unless the government can show that it is *necessary* to achieve a *compelling government interest* while using *the least restrictive means*.

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[139] See McCullen v. Coakley, 134 S.Ct. 2518 (2014) (addressing buffer zones on sidewalks that are public forums, where the zones were applicable to abortion clinics); Ward. v. Rock Against Racism, discussed at note 24, (relating to sound regulations applicable in Central Park (another traditional public forum).

[140] 225 F.3d 899 (7th Cir. 2000)

Obviously, the *Reed* standard is intended to be a more stringent one, even if not necessarily a fatal one (as is more common when strict scrutiny is used to address race-based equal protection problems). Yet, it can be very difficult to distinguish between "significant" and "compelling" government concerns (are traffic safety and aesthetic concerns merely "significant" but not "compelling"?) and even harder to determine whether a particular regulatory strategy is not only "well-tailored" but also "least restrictive." While Justice Thomas references the traditional cases and tests for "time, place, and manner" regulations as part of his *Reed* discussion,[141] he does not really grapple with tensions that arise when "public forum" analysis is obviously called for (as with many panhandling regulations) and his blurring of content-neutral and content-based classification at the outset makes it harder to bring the appropriate analytical framework into play.

Although there have been a number of cases since *Reed* that address situations involving public forums (particularly sidewalks and access to traffic island medians within highways), there has not been a great deal of in-depth analysis of the question just posed. Instead, it appears that many municipalities have in fact moved to regulate panhandling in traffic medians but have done so in a blunderbuss fashion, prohibiting panhandling in such areas throughout their jurisdictions, often without addressing why panhandling should be prohibited, but firefighters "Fill the Boot" charitable campaigns or electioneering activities should be allowed in the self-same locations. These ill-conceived strategies have (not surprisingly) resulted in losses in court. Going forward, however, local governments should recognize that panhandling and solicitation ordinances addressing activities in public forums can potentially be salvaged if adequate evidence is provided of real problems is adduced and legitimate time, place, and manner regulations can be crafted to meet their concerns in settings such as these.

A brief review of post-*Reed* decisions reveals both the short-comings of blunderbuss strategies and the potential for sustaining more targeted regulation of panhandling using well-tailored time, place, and manner regulations provided that adequate analysis, justifications, and evidence are employed.

In *Browne v. City of Grand Junction*,[142] the federal district court addressed Grand Junction, Colorado ordinances that banned panhandling in the following regards:

- Panhandling was limited within 30 minutes after sunset and 30 minutes before sunrise;
- Panhandling was prohibited when the panhandler knowingly continued to request the person solicited for money or other thing of value after the person solicited has refused the panhandler's initial request;
- Panhandling was conducted within twenty (20) feet of an automatic teller machine (ATM) or of a bus stop;

[141] See note 24 and associated text *supra*.
[142] 136 F.Supp.3d 1276 (D. CO 2015).

- Panhandling was conducted in a public parking garage, parking lot or other parking facility;
- Panhandling was directed toward a person within the patio or sidewalk serving area of a retail business establishment that serves food and/or drink, or waiting in line to enter a building, an event, a retail business establishment, or a theater.[143]

The ordinance defined panhandling to mean "knowingly approach, accost or stop another person in a public place and solicit that person without that person's consent, whether by spoken words, bodily gestures, written signs or other means, for money, employment or other thing of value."[144] Using the *Reed* analysis, as well as the decisions in *Thayer* and *Norton*,[145] the Colorado federal district court ruled that the ordinance was content-based, and thus subject to strict scrutiny.[146] The court's conclusion offers some bottom-line guidance: "the problem in this case is that Grand Junction has taken a sledgehammer to a problem that can and should be solved with a scalpel."[147] Indeed, it is striking that the plaintiffs did not challenge prohibitions on aggressive panhandling that involved threatening behavior, of the sort discussed in the section just above, and that portion of the ordinance was upheld. The structure and definitional approaches used in the ordinance made it difficult for the court to view the overall approach as other than an effort to limit panhandling writ large.

Another federal district court case involving a city's attempt to create time, place, and manner restrictions is *Homeless Helping Homeless, Inc. v. City of Tampa, Florida*.[148] In *Homeless Helping Homeless*, the city of Tampa created an ordinance that banned aggressive requests for money, persistently requesting money even after being denied, and impeding the "free movement of the solicited person."[149] This aspect of the ordinance (addressing aggressive panhandling) was not challenged. In addition, however, the ordinance limited panhandling in certain zones, including a particular downtown area, sidewalk cafes, and nearby to ATMs or bank entrances, but carefully defined these constraints as not applying when panhandlers used only signs to convey their message.[150] Resigned to invoking *Reed*,[151] the district court refuted the idea that the ordinance was content

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[143] *Id.* at 1281.
[144] *Id.* 1297.
[145] The court noted that, "Although only persuasive, the Court believes that the outcomes in *Thayer* and *Norton* provide yet additional support for the correctness of its prior conclusion that Ordinance No. 4627 is a content-based speech restriction." *Id.* at 1291.
[146] *Id.* at 1291-94.
[147] *Id*. at 1294.
[148] No. 8:15-CV-1219-T-23AAS, 2016 WL 4162882 (M.D. Fla. Aug. 5, 2016)
[149] *Id.* at 2 (M.D. Fla. Aug. 5, 2016).
[150] *Id.*
[151] The district court judge, Steven D. Merryday, suggested in his opinion that though he was bound by Reed, he did not agree with its holding: "[w]ithout *Reed*, which governs for the moment (despite prominently featuring the badges of a transient reign), I would follow Judge Easterbrook in *Norton v. City of Springfield*, and similar decisions, and I would uphold the City's ordinance, which results from a constructive and demonstrably benign legislative attempt to manage fairly

neutral, because it drew distinctions based on the expressed message of individuals.[152] In other words, the law punished those who asked for donations or payment, but was silent on all other forms of communication. Thus, this distinction, according to the judge, required strict scrutiny in keeping with the ruling in *Reed*.[153] Because of the stringent standards associated with strict scrutiny, and the city's admission that its ordinance was not the least restrictive means of advancing its interest, Judge Merryday was forced to strike the ordinance.[154] Although Judge Merryday eventually (and begrudgingly) invoking *Reed* in his ruling, he spoke to the troubling nature of *Reed*, observing that:

> *Reed v. Town of Gilbert*, an opinion accompanied by three distinct concurring opinions joined by a total of seven justices and an opinion adjudicating a sign-ordinance dispute, appears to govern this action. In other words, an opinion that resolves a dispute about parishioners temporarily planting some small signs directing people to a church service is written in such sweeping terms that the opinion appears to govern a dispute about an ordinance that regulates face-to-face demands for money from casual passers-by.[155]

Judge Merryday's statement underscores the problems inherent in reading *Reed* so broadly. Apparently the City of Tampa also read *Reed* quite broadly since it conceded that it had no compelling governmental interest to support the limitations on locations for panhandling involving active speech (rather than just holding up signs), and that least restrictive means had not been used, even though another jurisdiction might have taken a different stance on that point. *Reed*'s framework appears to invite strict scrutiny for nearly every ordinance involving any sort of regulation of message or expression, simply by the ordinance having broached the subject matter in its text.

Two recent post-*Reed* state supreme court decisions are also noteworthy for the possibilities they reveal, if not for the results that they achieve.[156] In *City*

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and humanely a tangible and persistent problem in a manner narrowly and artfully tailored to fit the compelling facts in the affected community. Homeless Helping Homeless, Inc. v. City of Tampa, Florida, No. 8:15-CV-1219-T-23AAS, 2016 WL 4162882 at 2 (M.D. Fla. Aug. 5, 2016).

[152] *Id.*

[153] *Homeless Helping Homeless, Inc. v. City of Tampa, Florida*, 2016 WL 4162882 (M.D. FL. Aug. 5, 2016)

[154] *Id.*

[155] *Id.* at 2.

[156] See also Clatterbuck v. City of Charlottesville, 92 F.Supp.3d 478 (W.D. VA 2015) (in case challenging criminalization of panhandling (where ordinance prohibited panhandling on two streets intersecting downtown mall, and created 50 foot panhandling buffer zone), concluding that requisite evidence was missing to support connection between ordinance provisions and demonstrable problems, where evidence did not support claims of driver distraction or danger; and citing *McCullen v. McCloskey*, 134 S.Ct. 2518 (2014) in support of conclusion, in decision rendered pre-*Reed*).

of Lakewood, Utah v. Willis,[157] the Utah Supreme Court considered a City of Lakewood ordinance that prohibited panhandling near or on major roadways within the community (including at on- and off-ramps connecting city roadways or overpasses with state intersections, and at intersections of major arterials or islands on principal arterials). The court concluded that these seeming "place" restrictions could not be upheld because the prohibitions in question only targeted panhandlers and solicitors seeking to obtain "money or goods as a charity" and not solicitation more generally (for example of votes or customers). Even more recently the Kentucky Supreme Court, in *Champion v. Commonwealth,*[158] considered a Lexington-Fayette Urban County ordinance prohibiting all "begging and solicitation of alms" on public streets and intersections throughout county (imposing penalties up to $100 per incident or jail time of 10-30 days for violations). The court held the ordinance invalid following *Reed*, after concluding that whether the regulation was facially content-based on content-neutral but intended to limit panhandling communication. Applying strict scrutiny, the court concluded that the ordinance only targeted panhandling rather than other types of messages, failed adequately to justify its broad application on grounds of public safety and efficient traffic management, and was both over- and under-inclusive insofar as it regulated all roadways and intersections while failing to address other types of activities (such as electioneering) that could disrupt traffic and raise safety issues. [159]

In striking contrast to the above cases that address ordinances that comprehensively try to limit panhandling generally, it is worth considering a recent Seventh Circuit decision involving Wrigley Field in Chicago. In *Left Field Media, LLC v. City of Chicago*,[160] the court upheld a Chicago ordinance that prohibited peddling on sidewalks adjacent to Wrigley Field, where the relevant area for pedestrian passage was especially narrow and crowds would otherwise spill into the street. The court concluded that there was a clear rational basis for the ordinance, and judged that *Reed* was not applicable where no distinction had been made based on content of speech.

What, then, are the overall lessons to be learned about how municipalities might address panhandling within the framework of permissible time, place, and manner regulations for public forums? It is worth considering the pre-*Reed*

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[157] 375 P.3d 1056 (UT 2016) (en banc)

[158] 2017 WL 636420 (KY, 2017).

[159] Compare Watkins v. City of Arlington, 123 F.Supp.3d 856 (N.D. TX 2015) (city ordinance prohibited solicitation or sale/distribution of any material to the occupant of any motor vehicle stopped on a public roadway in obedience to a traffic control sign light by someone on a public roadway, but allowing such conduct by someone not in the roadway itself or on medians or islands; court concluded that state statute allowing firefighters to solicit contributions for charity while standing in roadway was permissible and not susceptible to narrowing construction; ordinance was content-neutral and was narrowly tailored to protect significant governmental interests in pedestrian and traffic safety and adequate alternative channels of communication remained available). This decision seems questionable based on other courts' analysis.

[160] 822 F.3d 988 (7th Cir. 2016)

Gresham decision as an initial framework. Under *Gresham*, (1) the focus was on curbing the negative effects of panhandling and solicitation rather than trying to shut down panhandling speech altogether. *Gresham* also (2) provided a clear definition of panhandling (vocal requests for money), (3) targeted abusive panhandling actions (not just speech) as ones to be prohibited, (4) restricted panhandling in only those areas that would harm or impede individuals from going about their business, (5) allowed all forms of panhandling (including vocal requests, but not including violent or aggressive acts) for all daylight hours, but restricted such actions from sunset to sunrise; and (6) allowed for beggars to make non-vocal requests for money (e.g. holding signs with a request for money) and sit or stand at times, so long as they do not vocally request money.[161]

The ordinance in *Gresham* is distinct from that in *Browne*, because its definition is less broad, and finely balances the needs and concerns of charitable solicitors, panhandlers and those experiencing homelessness by granting all of them significant time periods to solicit and request donations, while also allowing municipalities to grapple with ways to ensure safe and unobstructed public areas. The shortcomings identified in later cases must also be carefully considered. The later cases appear to have targeted all panhandling more aggressively, reflecting social discomfort with having to encounter those in poverty face-to-face. While recent ordinances seem to have continued to focus on aggressive panhandling as a central concern, they have often created definitions of panhandling that blur definitions of the kind of activities regulated and where and how those activities can be conducted. By trying to do all that they can to eliminate panhandling from their jurisdictions, municipalities likely will continue to lose in court and may miss a chance to develop fairer and more balanced approaches to dealing with homelessness and poverty within their populations.

Reed certainly seems a formidable stumbling block to panhandling and solicitation ordinances, especially with regard to the use of time, place, and manner restrictions. However, though *Reed* was seemingly decided unanimously, there are deep divisions in methodology and viewpoint underlying the decision. Time, place, and manner restrictions have historically been a major aspect of First Amendment doctrine. Despite *Reed*'s apparently far-reaching consequences, the historical applicability of time, place, and manner restrictions, Justice Scalia's passing, the sheer number of justices adding qualifying language through concurrences in *Reed*, and Justices Kennedy's previous writings all suggest that there may still be a place for panhandling and solicitation ordinances using the time, place, and manner doctrine, provided adequate attention is given to developing clear justifications and adequate evidence to support government concerns and actions.

C. Captive Audience and Its Applicability

[161] Gresham v. Peterson, 225 F. 3d 899, 902 (7th Cir. 2000).

Another possible, though admittedly uncertain, area of analysis potentially relating to panhandling and solicitation policies, is the captive audience doctrine. Though the applicability of captive-audience to anything other than abortion clinics is murky at best, it is a doctrine worth briefly discussing. Ordinances that outlaw solicitors or beggars from conducting their activities when their audience has no meaningful opportunity to escape, such as in subways, or other constricted areas, may be able to survive under this theory, as *Reed* did not seem to impact the doctrine. It also could be used as a theory in defense of certain aggressive panhandling acts where individuals are cornered or threatened. However, the Supreme Court's ruling in *Hill* seems to place a limit on the extent of the captive-audience doctrine theory's scope. Even without *Hill*, it is unclear as to how captive audience could fit within the current First Amendment legal landscape, as most of the physical places governed by the doctrine would be treated as non-public forums, and thus open to other legal avenues for municipalities. Nonetheless, municipalities may wish to continue to track the evolution of this area of doctrine in case it opens the way for relevant regulation going forward.

V. CONCLUSION

While the First Amendment's protection of charitable solicitation was relatively clear prior to the *Reed* decision, the state of panhandling regulation has become more muddled, especially with the lack of direct Supreme Court precedent regarding its protection. Despite this relative uncertainty, lower courts have been able to render reasonable decisions regarding panhandling and solicitation ordinances based on a large body of First Amendment precedent. However, *Reed*, using a blunt instrument where a fine scalpel was required, may have crafted a broad rule that seems to undercut nearly every attempt local governments can make to regulate in this arena. This article has contended that *Reed* simply cannot and should not be read so broadly, as doing so would result in the virtual elimination of a long-standing doctrines of valid government regulations: those relating to regulation speech that is intertwined with conduct and those relating to regulating speech in public forums through time, place, and manner restrictions.

This article has also contended that interpreting *Reed* generally to prohibit panhandling or solicitation ordinances is simply incorrect. Professor Noah Feldman put it succinctly: "the First Amendment shouldn't be read in such an absolute way [as in *Reed*] -- and if it is, the consequences for the rest of our law are apt to be disastrous."[162] So far, some courts have been tempted to interpret *Reed* in this absolute fashion, and the result has been the striking of many panhandling and solicitation regulations. *Reed* itself involves a dispute over signs, and has no mention of conduct, which is heavily implicated in any definition of aggressive panhandling. Further, it is inconceivable that the content-

[162] Noah Feldman, *Brother Can You Spare Me A Dime. Or Else*, BLOOMBERG VIEW (May 10, 2016, 3:09 PM), https://www.bloomberg.com/view/articles/2016-05-10/panhandling-isn-t-always-free-speech.

discrimination aspect of *Reed* can be held to wipe out the time, place, and manner body of regulation applicable to public forums such as those often implicated in panhandling. Even disregarding the flaws in the principal opinion in *Reed*, the Court itself was extremely divided. Seven of the eight current justices either filed or joined concurring opinions attempting to qualify or limit the holding. This fact, the effect of Justice Scalia's passing, and Justice Kennedy's past concurring opinion in *ISKCON*, all suggest that *Reed* is not the definitive statement on panhandling and solicitation that some might think it to be.

If *Reed* is not the obstinate obstacle to municipal regulation that some contend, local governments may do more to craft panhandling ordinances that observe appropriate limits on time, place and manner regulation in public forums and also grapple with issues associated with combined conduct and speech. Municipalities do not have the luxury of giving up their prerogative to craft ordinances to better their jurisdiction simply because of troubling legal precedent. One approach to municipal regulation is provided in the model municipal panhandling ordinance included in Appendix A.