Panhandling and Solicitation After *Reed*

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Overview

- **A Possible Scenario**
- **Panhandlers and Panhandling**
- **First Amendment Overview**
  - Conceptual bases: content-based v. neutral; public forums; time, place, manner
  - *Reed v. Town of Gilbert* and its implications
- **Evolving Law of Panhandling**
  - Responding to Scenario Possibilities
  - Though the Lens of Lower Court Developments: Pre and Post *Reed*
- **Model Ordinance:** for your consideration
- **Questions and Comments**?

Picture This… City Council Meeting

Public Comment Session:

- 6 different business owners appear together and complain that there are increasing numbers of panhandlers downtown that are annoying their customers; when questioned one admits that the problem is primarily in the winter, not the summer

- City Council Member X:
  - Let's have the mayor appoint a task force with the police chief and all our downtown merchants so they can help fix the problem
- Mayor:
  - I don't want us to become a police state and the police have better things to do… and it would cost a lot if we have to add more personnel to police the downtown; let's put this on the agenda for next week;
  - **I think the city attorney can help us with this… ??? !!!**

What Kind of Policy Proposals Might City Attorney Expect and Prepare For?

Note: Citizens' or City Council members' proposals may not be legal; just consider what may be proposed so we see the landscape

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What Kind of Proposals?

- **Ban** panhandling **completely?**
- **Panhandling and more:** soliciting, electioneering?
- Impose **permit requirements** to panhandle?
- Limit **times** of panhandling? (e.g. at night)
- Limit **aggressive panhandling?**
- Limit **locations of panhandling:**
  - ATMs, building access points, bus stops
  - Sidewalk cafes, in front of businesses, historic district?
  - "Red light" panhandling: sidewalks in certain areas, certain or all roads, certain or all traffic medians?
- **Exceptions:** more complications **(electioneering? "fill the boot" campaigns?)**
- **Signs urging people to put coins in meters for nonprofit** helping homeless instead

Reality Check:
Where Do Assumptions re Panhandling Come From?

When I say “panhandling” what comes to mind?

- Images?
- Images v. Facts?



Panhandlers are druggies?

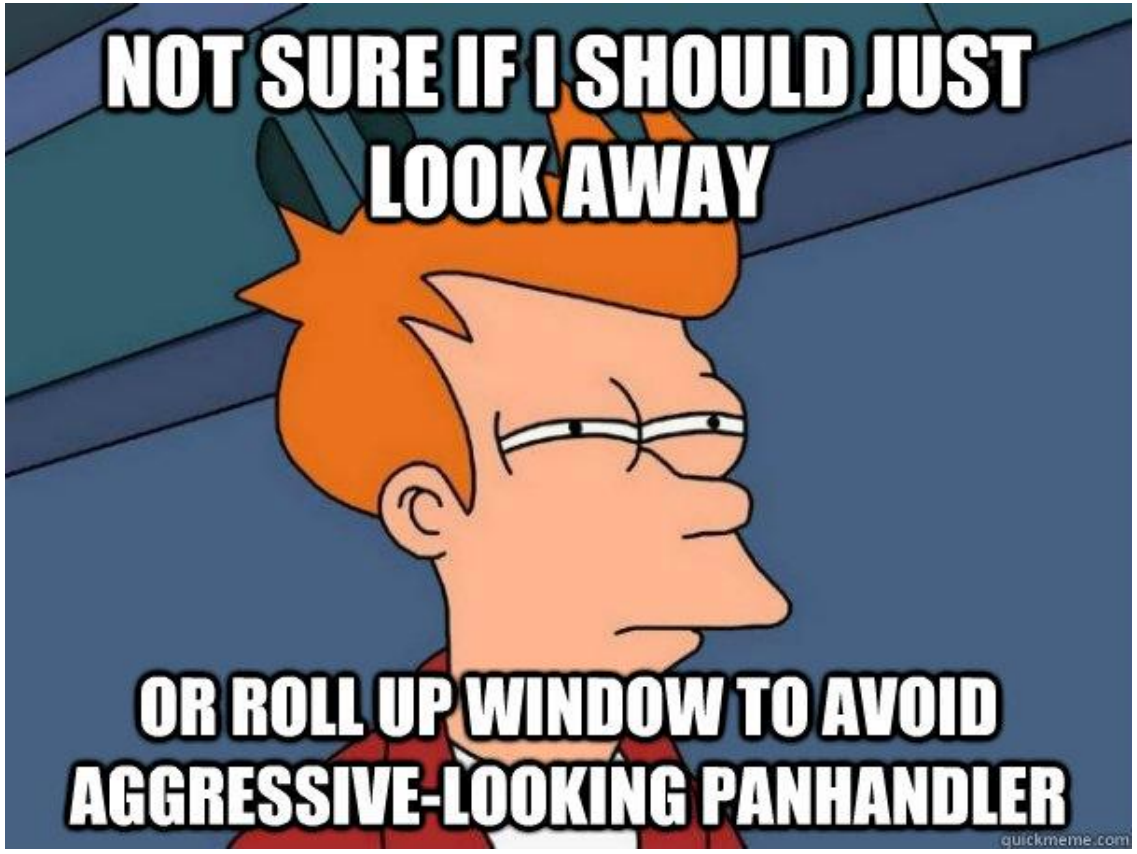


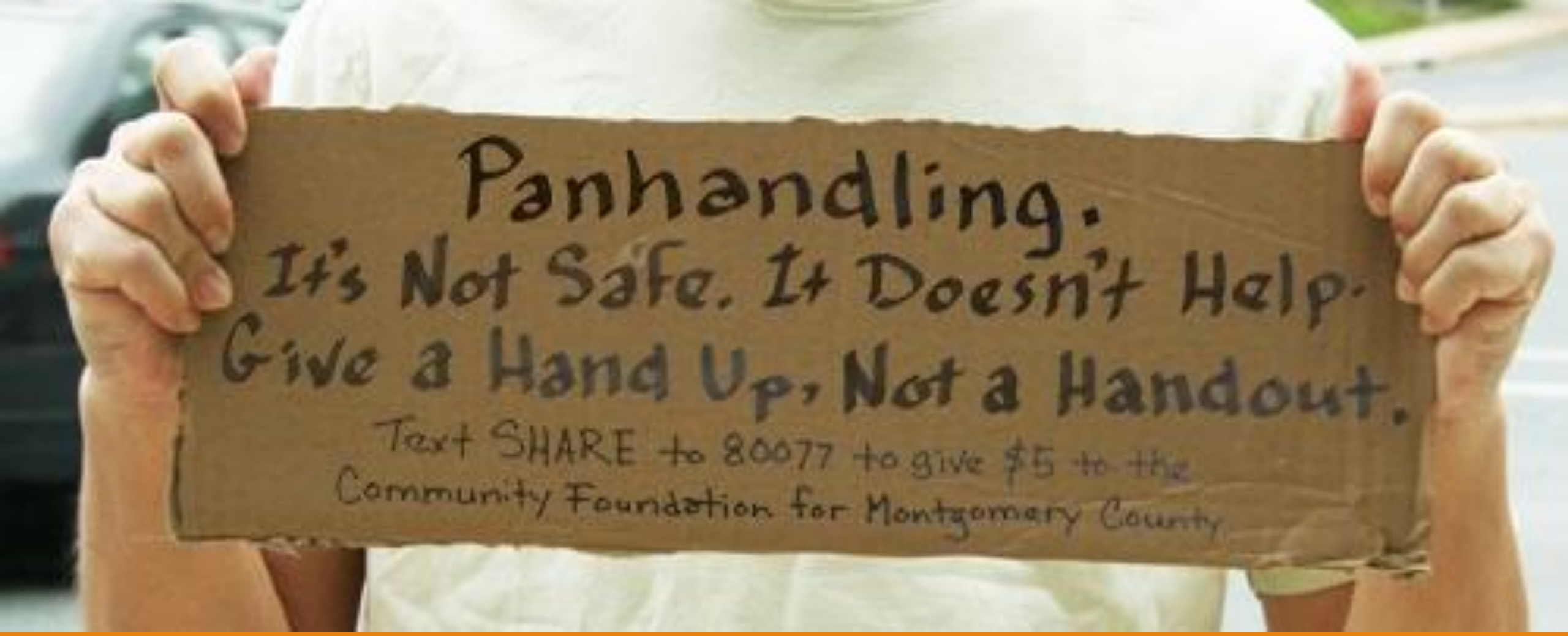
Kickstarter request to fund film on panhandler, “Red Light Larry”… who’s the panhandler here?



Panhandlers are wise guys?

Panhandlers, citizens, and aggression…?

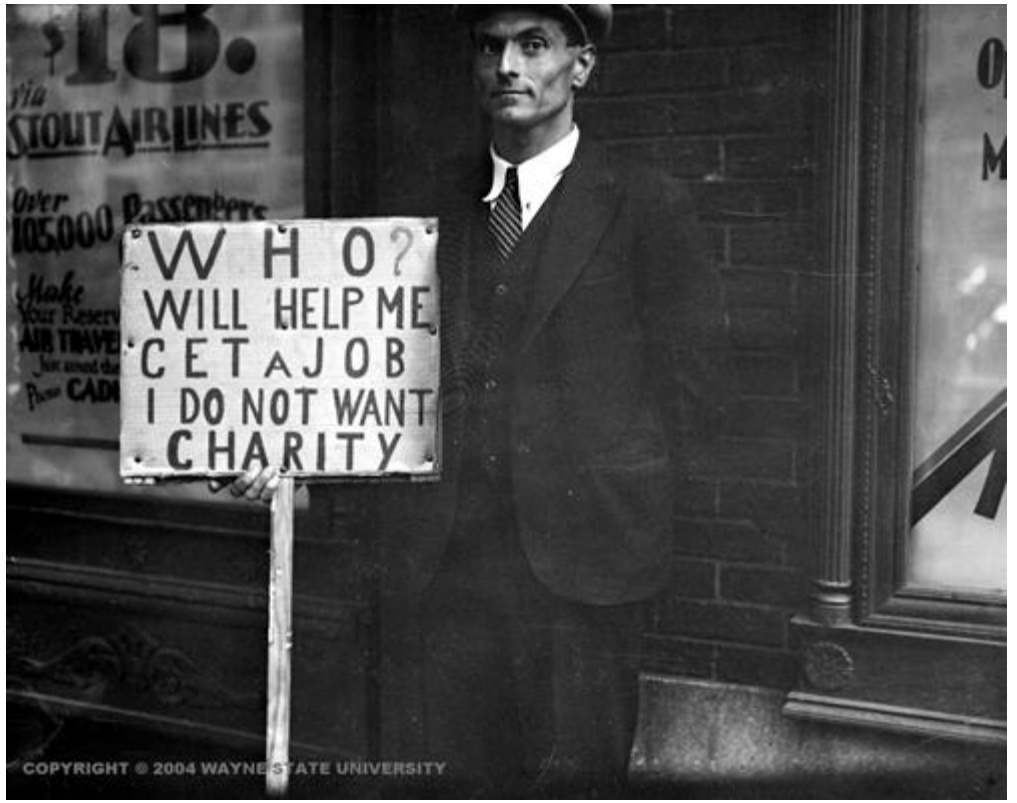




Contributions are better used by non-panhandlers…?

Compare Panhandling in Days Past?





Brother, can you spare a dime…?



They used to tell me I was building a dream,
And so I followed the mob.
When there was earth to plow or guns to bear
I was always there right on the job.

They used to tell me I was building a dream
With peace and glory ahead.
Why should I be standing in line
Just waiting for bread?

Why regulate panhandling?

- *Reduce homelessness*
- *Address public concerns about disorder, security, and safety*
- *Limit public begging*
- *Maintain clean and orderly view-scapes*
- *Protect traffic safety*
- *Reduce adverse effects on business*

Some Connections: Why **Panhandle**?

THE GOOD

- Lost job
- Lost savings
- Lost home
- Health problems
- Can raise more funds than
  - if paying work not available
  - If work full-time at minimum wage job
- If are homeless and have no other place to be or things to do

THE BAD AND THE UGLY

- Mental health problems
  - Including growing number of veterans with PTSD and brain injuries?
- Substance abuse?
- “Scam artists”/ “lazy louts”?
- Recidivists?

Panhandling and Poverty…

2017 POVERTY GUIDELINES FOR THE 48 CONTIGUOUS STATES AND THE DISTRICT OF COLUMBIA	
PERSONS IN FAMILY/HOUSEHOLD	POVERTY GUIDELINE
For families/households with more than 8 persons, add $4,180 for each additional person.	
1	$12,060
2	$16,240
3	$20,420
4	$24,600
5	$28,780
6	$32,960

Full time work @ federal minimum wage ($7.25/hour) = $15,080 per year
Student experiment in Oregon: Panhandling yields $11.10/hour v. $8.95 state minimum wage over 12 day period (2014)

Panhandling and Homelessness

National Law Center on Poverty and Homelessness: Housing Not Handcuffs (2016): **Increasing criminalization of homelessness**… how and why?

- Camping in public
- Sleeping in public
- Lying down or sitting in public
- Loitering, loafing, vagrancy
- Begging in public
- Living in vehicles
- Food sharing bans

•See www.nlchp.org for 2016 survey of urban practices (Housing Not Handcuffs, pp. 52 et seq)

Housing Not Handcuffs (pp. 52 et seq)

2016 PROHIBITED CONDUCT CHART												
		Sleeping, Camping, Lying and Sitting, and Vehicle Restrictions						Loitering and Vagrancy		Begging		Food Sharing
State	City	Sleeping in public city-wide	Sleeping in particular public places	Camping in public city-wide	Camping in particular public places	Sitting/ lying in particular public places	Lodging, living, or sleeping in vehicles (or parking a vehicle used as a lodging/ living accommodation)	Loitering/ Loafing/ Vagrancy city-wide	Loitering/ Loafing in particular public places	Begging in public places city-wide	Begging in particular public places	Food Sharing city-wide or in particular public places (i.e. bans)
Total number of surveyed cities with this type of ordinance		34	50	61	93	88	73	60	100	50	114	12
Percent of surveyed cities with this type of ordinance		18.2%	26.7%	32.6%	49.7%	47.1%	39.0%	32.1%	53.5%	26.7%	61.0%	6.4%



And now, for something completely different … a (legal) perspective…

First Amendment Overview

- **Does First Amendment apply to panhandling**?
- **What Standard of Review Applies?**
  - **Content-based?** If so, strict scrutiny
  - **Content-neutral?**
    - Does speech occur in **"public forum"** or elsewhere?
    - **Does speech include associated conduct that can be regulated?**

First Amendment Coverage?

Is panhandling "speech" covered by the First Amendment? If so, why?

- ***Village of Schaumburg v. Citizens for a Better Environment*** (US 1980 (Charitable solicitation involves speech and is protected by the First Amendment)
- ***Secretary of State of Maryland v. Joseph Munson Co.*** (1984) held strict scrutiny applies to content-based regulations of charitable solicitations
- **Numerous lower court cases have treated panhandling/asking for alms as similarly protected** although the SCOTUS has not ruled on that precise point

First Amendment: What is the Relevant Analysis?

- **Content-based regulation of speech**: (e.g. banning **"begging"** orally or with sign)

****Traditional test*: (strict scrutiny)**

Compelling government interest, regulation necessary to achieve that objective & narrowly tailored to employ least restrictive means; presumption against constitutionality

First Amendment Analysis: continued…

- **Regulation of speech and conduct through "forum" analysis**

Test: **"public forum," content-neutral, & "time, place and manner" restriction:

McCullen v. Coakley (US 2014) (buffers on sidewalks adjacent to abortion clinics fails):

if public forum, must justify regulation without reference to content; show significant government interest, narrowly tailored, have ample alternative channels of communication

****Compare**

- ***International Society for Krishna Consciousness, Inc. v. Lee*** (US 1992): airport terminal and literature distribution (nonpublic forum); note Kennedy, J. concurrence
- ***Ball v. City of Lincoln, Nebraska,*** (8th Cir. 8/17): Pinnacle Bank Arena not public forum throughout and leafleting can be constrained

First Amendment Analysis…continued

Regulation of conduct associated with speech ("speech plus"):

**Traditional test (O'Brien) (burning draft cards) (intermediate scrutiny):

- Is government action within government's constitutional power?;
- Does it further an important or substantial government interest?
- Is it unrelated to suppression of free expression?
- Is the incidental restriction on First Amendment freedom no greater than essential in furtherance of government interest?

Captive Audience doctrine: still in flux

Summary: First Amendment *Pre-Reed*

- **Panhandling is protected under First Amendment (prior cases re solicitation)**
- **Fatal: strict scrutiny**
  - **Content-based total ban**
  - **Other content-based regulation unless can survive strict scrutiny**
    - **Compelling government interest, regulation necessary to achieve that objective & narrowly tailored to employ least restrictive means; presumption against constitutionality**
  - ***But, what is "content-based"?*** **(*Reed*)**
- **Maybe: Intermediate Scrutiny:**
  - **"Public forum" and content neutral if**
    - **"time, place, manner" regulation or**
    - **"speech plus" (speech plus conduct)**
  - **Test: must justify regulation without reference to content; show significant government interest, narrowly tailored, have ample alternative channels of communication**

Reed v. Town of Gilbert, Arizona (S.Ct. 2015)

Reed v. Town of Gilbert (US 2015)

Town sign code: (temporary, noncommercial signs, but broader implications?)

- Sign permit required, except for "temporary directional signs for qualifying event," "political signs," "ideological signs"
- Temporary directional signs could be put in right of way, could be put up 12 hours before event, and had to be taken down 1 hour afterward

Good News Community Church:

- 17 temporary signs announcing services at schools
- Town said in violation of sign ordinance since church did not take down between services
- Church said 1st Amendment violation since temporary sign requirements "content based"

Reed history, continued

9th Circuit

- *Held reasonable "time, place, manner" restrictions*; not content-based re message (typical treatment of temporary signs)
- *Narrowly tailored* to address concern re safety and aesthetics; even though political and ideological signs not as significantly constrained in terms of period for posting
- *Ample alternative means of communication*
- *US Supreme Court: favoring political and ideological messages v. church/directional?*

Reed Decision: Majority

9-0 agreement on result, ***but differences in rationale; Scalia now gone***

Resolved circuit split re meaning of "content-neutral":

Thomas majority opinion (with *Roberts, Scalia, Kennedy, Alito & Sotomayor*)

- Seemed to focus on **either** effect **or** purpose of regulations
- If you have to read the sign to know what's required, *then not content neutral* (absolutist approach)
  - Don't consider function/purpose of regulation;
  - If content-based, subject to strict scrutiny (compelling government interest, least restrictive means then required)
- Speaker-based or event-based signs also content-based
- Content-neutral still okay (e.g. time, place, matter) if standards met (but question not really engaged)?

Reed Concurrences: Do They Now Control?

Alito concurring (with Kennedy and Sotomayor) (so that's three votes):

- **Gives some observations re what should be okay**
  - Regulations on size and location such as on-building v. free-standing, lighted v. unlighted, fixed messages and electronic signs with changing messages, placement of signs on commercial and residential property, total number of signs allowed per mile of roadway
  - Government speech re government's own signs okay
  - Distinctions between on-premises and off premises okay; imposing time restrictions on signs advertising a *one-time event* (seems to treat as content neutral?)

Reed Concurrences… More

Breyer & Kagan each concurring and asking questions (2 more votes)

- **Breyer**: Concern that will water down strict scrutiny; would treat content discrimination as a factor in burden/benefit balancing
- **Kagan**: why had to go so far? (could not have survived intermediate scrutiny)

Bigger questions (COURTS GO WILD):

- Does First Amendment now relate to any economic regulation???

Reed: Implications

Categories of signs not allowed?

Content neutrality redefined and decided on face

- Does regulation on its face distinguish based on message a speaker conveys
- **Defines regulated speech by function or purpose**
- Cannot be justified without reference to content of speech or adoption because of disagreement with message conveyed
- **Strict scrutiny applies: what justifications satisfy?**

Regulation of time, place, manner still okay

Can still regulate commercial speech v. noncommercial?

Can regulate billboards? (Federal highways?)

On-premises v. off-premises distinctions still permissible?

Regulation of temporary political signs?

Can content-based regulations ever survive strict scrutiny?

Is core concern really about treating religious activity the same as political?

Key Questions Going Forward

- How **broadly** should *Reed* analysis apply in contexts other than sign regulation?
- **How will SCOTUS treat this precedent** in the future given **splintered Court** and Scalia's death?
- How might First Amendment analysis apply **where content-based and content-neutral distinctions remain confusing**?
- How does **"speech plus" doctrine** apply to panhandling involving both speech and conduct (aggressive panhandling)?
- How does **public forum, content-neutral, time/place/manner doctrine apply** to panhandling regulations going forward?

Back to Scenario

Ban panhandling completely?

- Is panhandling protected by First Amendment?
- Is this content-based regulation?
- What are government interests?
- Is this narrow tailoring?
- **Impermissible:**
  - Loper (2nd Cir. 1993) (NYC ban on loitering)
  - Speet (MI 2013) (Michigan state statute criminalizing begging in public places unconstitutional on its face)

Panhandling v. Soliciting: Scope of Regulation

- Note from overview: targeting panhandling as targeting homelessness?
- Targeting panhandling alone is clearly content-based
- Growing tendency to regulate "solicitation" including panhandling, begging, charitable solicitation, electioneering through more comprehensive ordinances
- Implications: not content-based if focus on comparable conduct?
- Implications: political will may be lacking to treat all similar conduct of a piece, but that's a good check on whether at root is content-based regulation

Limit times of solicitation? (e.g. at night)

- ***Gresham v. Peterson*** (7th Cir., 2000, pre-*Reed):*
  - Upheld for Indianapolis ordinance, treating as content neutral; other times/places available under content-neutral test re tailoring
  - Justification tied to feeling threatened at night
  - Under *Reed* would likely be seen as content-based since only panhandling, and other forms of solicitation likely would not be barred at night
- ***Browne v. City of Grand Junction*** *(ED CO 2015) (post Reed)*
  - Struck down as lacking in justification that would show experience with problems and threats at night
  - Note that Grand Junction ordinance overall targeted panhandling in a variety of respects
-

Impose permit requirements to solicit?

- ***Blitch v. Sliddel*** (E.D. LA 2017)
  - Required permit to be secured from police dep't in advance
  - Onerous requirements and review standard
  - Not content neutral since targeted panhandling specifically
  - Also overbroad and not just addressing dangerous conduct
- ***Battle v. City of Seattle***, 89 F.Supp.3d 1092 (WD WA, 2015) (pre-*Reed*)
  - Permit requirement for ordinance regulating "tabling" on median gave too much discretion to officials

Limit "aggressive" "panhandling"?

- ***Gresham v. Peterson**, 7th Cir., 2000 (pre-Reed):*
  - *Indianapolis ban on aggressive panhandling upheld*
  - *But note that bundled many different forms of conduct together*
- ***McLaughlin v. City of Lowell** (D MA 2015) (post-Reed)*
  - *Ordinance was content-based in targeting "panhandling"*
  - *Court concluded that not "least restrictive" approach when ordinance imposed more stringent penalties than would apply under state criminal law on certain activities (e.g. for assault); had not justified, clearly articulated, or used least restrictive means for other coercive conduct*
  - *Note that definition of "aggressive" panhandling bundled in non-aggressive conduct in areas where someone might feel threatened*
- ***Thayer v. City of Worcester** (D MA 2015)*

Limit locations of solicitation/panhandling?: Districts

- ***Smith v. City of Fort Lauderdale***, 177 F.3d 954 (11th Cir. 1999) (pre-*Reed*)
  - Allowed city to ban panhandling on sidewalk and 5 mile stretch of beach to promote tourism; likely would not be permitted post-Reed since total ban in that area and not content-neutral
- ***Post-Reed***: bans on panhandling in various districts struck down as content-based and not narrowly tailored
  - ***Norton v City of Springfield, Ill.*** (7th Cir. 2015): content-based, excessive area
  - ***McLaughlin v. City of Lowell*** (D. MA 2015): content-based, excessive area
  - ***Homeless Helping Homeless v. City of Tampa*** (MD FL 2016): content based, excessive

Limit Locations of Panhandling/Soliciting?

- **Examples:**
  - ATMs, building access points, bus stops?
  - Sidewalk cafes; in front of businesses?
- **Cases generally call into question**
  - *Often bundled in with content-based focus on "panhandling" w/ broad prohibitions*
  - *Often lacking in evidence to provide justification*
  - *See*
    - ***ACLU of Idaho, Inc. v. City of Boise*** *(D. ID 2014) (pre-Reed)*
    - ***Browne v. City of Grand Junction*** *(ED CO 2015)*
    - ***McLaughlin v. City of Lowell*** *(D MA 2015) (seems to suggest might be able to fix ordinance if true threat/safety concern)*

Panhandling/Solicitation & Traffic

- ***Reynolds v. Middleton,*** *779 F.3d 222 (4th Cir. 2015, pre Reed) (content-neutral prohibition on all solicitation/handbills "in highway" throughout the county was not tailored since no evidence that danger in all cases)*
- ***Cutting v. City of Portland, ME,*** *802 F.3d 79 (1st Cir. 2015) (content-neutral prohibition on soliciting in medians throughout the city was overly inclusive)*
- ***City of Lakewood v. Willis****, 186 Wash.2d 210 (WA 2016) (en banc) (ban on "begging" at freeway on-ramps was content-based and overly broad)*
- ***Champion v. Commonwealth of KY,*** *520 S.W.3d 331 (KY 2017) (en banc) (comprehensive ban on "soliciting alms" at intersections/on streets was content-based and did not rest of any evidence of danger; struck down as poorly tailored)*
- ***Petrello v. City of Manchester*** *(D. NH, 9/7/17) (invalidating targeted enforcement of panhandlers on sidewalk for interfering with traffic when motorists not also targeted)*

Exceptions re Medians?

- **Examples**
  - "Fill the boot" campaigns?
  - Electioneering cycle?
- **Watch out for even-handed treatment**
  - ***Traditionalist American Knights of the Ku Klux Klan v. City of Desloge, MO***, *775 F.3d 969 (8th Cir. 2014) (upholding even handed application of rules re pamphleteering at intersections*
  - ***Ass'n of Community Organizations for Reform Now v. St. Louis County***, *930 F.2d 591 (8th Cir. 1991) (upholding limits for soliciting during red lights)*
  - ***2016 Mich. OAG No. 7291 (Mich.A.G.),*** 2016 WL 4166374 (no authority for town to authorize charitable solicitors in traffic given state statutes)
- ***Watch out not to undercut rationale re safety regulation year round***

Town Support for Nonprofit Messages?



Is this government speech?

Strategies for Model Ordinance

Crafting a Model Ordinance

Some fundamental questions…

- **Why are you acting and what problems that you are trying to address?**
- **What burden of proof will you be required to carry?**
- **How might you proceed to gather evidence to guide proposed government action?**
- **How can you frame the ordinance in a way that is understandable to lay people?**
- **How should you structure the ordinance?**
- **How might communities and policymakers who believe that panhandling is closely related to homelessness proceed?**
- **How might communities and policymakers avoid wasting time on unsustainable ordinances?**

Model Ordinance: Scope

- Ordinance addresses range of topics to justify stance that *Reed's* focus on "content-based" regulation is inapplicable
- Matters covered include
  - Panhandling/begging
  - Charitable solicitation
  - Political solicitation/electioneering
- City council members might be inclined to regulate panhandling separately, but the approach proposed will significantly enhance likelihood of upholding ordinance; it is important to help policymakers see that similar conduct should be regulated in a similar manner

A Policy Matrix … what do you think?

Type of conduct	Regulations Apply	Penalty
Passive (written or oral) in non-designated areas	Non-designated areas (no showing of personal security/privacy or public safety/traffic)	None; soliciting is permitted in non-designated areas
Passive in Sensitive Protected Areas (personal security/privacy) **OR could create disincentive for aggressive panhandling in such areas by imposing a "most severe" penalty in such cases**	Designated areas with higher personal security/privacy concerns (ATMs, bus stops, congested sidewalks, etc.)	Moderate (drafted in this fashion) Most severe if aggressive panhandling in such areas? (could revise accordingly if desired)
Passive in Dangerous Areas (relates to public safety/traffic congestion)	Traffic medians that are too small or designated high volume/high speed traffic area	Moderate
Aggressive (defined)	Everywhere in jurisdiction	Severe

Model Ordinance: What's Not There

- **No ban on panhandling/solicitation at night**: do you need it?
- **No ban on "fraudulent" panhandling/solicitation**: could you prove it?
- **No directives re penalties**: depends on local circumstances, public service obligations better than fines, link between limits on panhandling sites and probation may be appropriate incentive
- **No recommendation re permits** (difficult to implement and may be overly broad; recent *Slidell, LA* case struck down broad permit requirement)
- **No attempt to address other solid strategies (see sources suggesting non-enforcement strategies) (e.g. pp. 17-30 of** https://cops.usdoj.gov/html/cd_rom/inaction1/pubs/Panhandling.pdf)
- **No suggestion to urge citizens NOT to give to panhandlers but to give to homelessness organizations** (some places are trying this solution, including using parking-meter like collection mechanisms)

What do you think?

- **What concerns and regulatory strategies** are you seeing in your jurisdiction?
- **Will city councils be willing to consider comprehensive approaches** to "solicitation" that includes not only panhandling but charitable solicitation and electioneering?
- What **changes do you think are needed to improve the proposed model ordinance?**
- **What other insights would you like to offer on related topics?**
- **Thanks for your interest.** If you have questions, feel free to contact us:
- Judith_Wegner@unc.edu or judithwegner@gmail.com