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Seminar: Regulating Panhandling in the wake of *Reed v. Town of Gilbert, Ariz.*

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INTRODUCTION

The First Amendment to the United States Constitution, which is applicable to the States via the Due Process Clause of the Fourteenth Amendment, prohibits the enactment of laws "abridging the freedom of speech." U.S. Const., Amend. 1.

In 2015, the Supreme Court of the United States, in ruling on a content-based sign law from the Town of Gilbert, Arizona, discussed the appropriate scrutiny that applies when a law is content-based versus when a law is content-neutral. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015). If, under the test set out in *Reed*, a government regulation is considered content-based, it is presumptively unconstitutional and must pass strict scrutiny, i.e., the law is narrowly tailored to serve compelling state interests. *Id.* at 2226. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id*. at 2227. Also, content-based laws are those that require "a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id*.

Additionally, a facially content-neutral law is, nonetheless, considered content-based where it cannot be "'justified without reference to the content of the regulated speech,'" or where it was adopted by the government "'because of disagreement with the message [the speech] conveys.'" *Id*. (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

However, content-neutral laws should still be governed by *Ward*, which *Reed* explicitly discussed and reaffirmed regarding such laws. In reaffirming *Ward*, the Court in *Reed* found that a law is content-neutral where it is neutral on its face, where it does not regulate speech '"because of disagreement' with its message," and where it is "'justified without reference to the content of the speech.'" *Reed*, 135 S.Ct. at 2228-2229 (quoting *Ward*, 491 U.S at 791).

Reed requires that a court examine "whether a law is content neutral on its face before turning to the law's justification or purpose." *Reed*, 135 S.Ct. at 2228. "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." *Id.*

In *Ward*, the Supreme Court ruled "that a regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interest but that it need not be the least restrictive or least intrusive means of doing so." *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989) (emphasis added).[1] That is the test for intermediate scrutiny. The requirement of narrow tailoring under intermediate scrutiny is achieved "so long as the…regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Id. at 799* (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

[1] How important do you think this qualification in the ruling in *Ward* is, i.e., regulation of the time, place, or manner "***of protected speech***?' Because, if the regulation at issue does not regulate even the time, place, or manner of protected speech (but, rather, is strictly a public safety ordinance), would rational basis apply? An ordinance "that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld…if there is any reasonably conceivable state of facts that could provide a rational basis." *F.C.C. v. Beach Communications, Inc.* 508 U.S. 307, 313 (1993). So long as there is a rational relation to some legitimate end, courts will uphold laws that do not burden a fundamental right. *Romer v. Evans*, 517 U.S. 620, 631 (1996). "A law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group." *Id.* at 632.

A court will not invalidate such a regulation simply because a court concludes that the government's interest could be served by a less restrictive alternative. *Ward*, 491 U.S. at 800.

Below is a discussion of cases involving local governments' attempts to regulate panhandling, soliciting, and/or distributing money from, *inter alia*, motorists by pedestrians or vice versa. Soliciting donations in this manner has been found to be protected speech and, particularly following *Reed*, many courts have ruled such regulations unconstitutional in violation of the First Amendment. There are a few rare exceptions, and those are discussed herein as well.; *Watkins v. City of Arlington*, 123 F.Supp.3d 856 (N.D. Tex. 2015).

CASES APPLYING REED

1. United States District Court—Massachusetts

In *McLaughlin v. City of Lowell*, the United States District Court in Massachusetts found the City of Lowell's Panhandling Ordinance unconstitutional on First Amendment grounds, although Plaintiffs also made due process and equal protection claims under the Fourteenth Amendment. 140 F.Supp.3d 177 (2015). This was a civil case pursuant to 42 U.S.C. § 1983 brought by two homeless men (Plaintiffs) who had solicited donations by panhandling in Lowell. *Id*. at 181.

Procedurally, the case follows a common theme. The City enacted its original Ordinance in 2013. *Id*. at 182. The City then amended the Ordinance twice, which Plaintiffs alleged occurred due to the threat of litigation. However, no part of the Ordinance was enforced prior to the District Court's decision on the merits. *Id*. at 183. Instead, in response to Plaintiffs' petition for a temporary injunction, the City agreed not to enforce the Ordinance until the case was decided on the merits, rendering the request for a temporary injunction moot. *Id*.

The Ordinance in question banned panhandling which was defined as "the solicitation of any item of value through a request for an immediate donation." *Id*. An exemption to the amended Ordinance permitted panhandling that involved only "'passively,' standing, sitting or performing music." Such passive panhandlers were allowed to hold a sign requesting a donation, but could not make a "vocal request" except in response to an inquiry. *Id*. at 182.

Additionally, the amended Ordinance prohibited "aggressive panhandling" which was defined as any of ten activities, which the Court broke into three categories: category 1 prohibited panhandling which also essentially violated other criminal laws such as assault, battery, another ordinance which restricted interfering with the passage of pedestrians or vehicles, and panhandling via the use of violent or threatening language or gestures likely to provoke an immediate violent reaction; category 2 prohibited continuing to panhandle from a person after the person had indicated a negative response, following a person with the intent to ask for money, and panhandling in a group or two or more in an 'intimidating fashion;' and category 3 created a twenty foot buffer zone where panhandling was prohibited (around a bank, ATM, mass transit facility, public restroom, theater, outdoor seating area, etc . . .). *Id*. at 182-83.

The court first ruled that panhandling, as defined by the Ordinance, was "expressive activity within the scope of the First Amendment." *Id*. at 183-84. Analogizing solicitation of funds by charitable organizations, the court found that solicitation of money by individuals was likewise protected conduct. *Id*. at 184. "People who panhandle 'may communicate important political or social messages in their appeals for money, explaining their conditions related to veteran status, homelessness, unemployment and disability, to name a few.'" *Id*. (quoting *Gresham v. Peterson*,

225 F.3d 899, 904 (7th Cir. 2000)). This was true, the court found, irrespective of whether the person soliciting funds uttered any words or not. *Id*. at 184.

The court then found that the Ordinance regulated protected speech in traditional public fora, i.e., sidewalks and parks. "In public for a, a regulation is subject to stricter scrutiny if it is content-based than if it is a content-neutral time, place or manner regulation, because content-based regulation 'raises a very serious concern that the government is using its power to tilt public debate in a direction of its choosing.'" *Id*. (quoting *Cutting v. City of Portland, Me.*, 802 F.3d 79, 83-84 (1st Cir. 2015)).

Applying *Reed v. Town of Gilbert, Ariz*, 135 S.Ct. 2218 (2015), the court found the Ordinance unconstitutional. A court must determine whether a law is content-based on its face, based on whether it 'applies to particular speech because of the topic discussed or the idea or message expressed.'" 140 F.Supp.3d at 185 (quoting *Reed*, 135 S.Ct. at 2227). Importantly, *Reed* held that a law that focuses on specific subject matter is content-based "even if it does not discriminate among viewpoints within that subject matter." *Reed*, 135 S.Ct. at 2230.

The court ruled that the Ordinance was plainly content-based because it distinguished solicitations for immediate donations from all others. 140 F.Supp.3d at 185. And, the court found that the Ordinance targeted a specific form of speech because, for instance, a person could ask a passerby to sign a petition, but not for a donation of money. The court also found the Ordinance content-based because it required officials enforcing the ordinance to "'examine the content of the message that is conveyed to determine whether a violation [of the Ordinance] has occurred.'" *Id*. at 186 (quoting *McCullen v. Coakley*, 134 S.Ct. 2518, 2531 (2014)). A police officer would be required to listen to a person's message to determine if he or she was requesting an immediate donation before finding a violation.

The district court applied strict scrutiny to Lowell's Ordinance and found it unconstitutional. *Id*. at 187-88. As to whether the Ordinance served a compelling governmental interest, the court noted that the Ordinance identified enhancing/protecting tourism[2] as the interest to be served. And the court found that such has never been found to be a compelling governmental interest. *Id*. at 189. ". . .[O]n streets and sidewalks a person might be 'confronted with an uncomfortable message' that they cannot avoid; this 'is a virtue, not a vice.'" *Id*. (quoting *McCullen*, 134 S.Ct. at 2529). "The City, having officially put forward its reasons for the Downtown Panhandling provisions, cannot add to those reasons in litigation." *Id*. at 190. Thus, absent a compelling governmental interest, the Ordinance failed to pass strict scrutiny.

The court likewise found the Aggressive Panhandling portion of the Ordinance unable to pass strict scrutiny. The Court found the Aggressive Panhandling provisions were enacted for the purpose of public safety, and the same was a compelling governmental interest. However, the court found that the three categories of aggressive panhandling restrictions failed the "least restrictive means" test in various regards. The court noted various less restrictive alternatives it could envision that would make the aggressive panhandling restrictions more likely narrowly tailored under strict scrutiny. 140 F.Supp.3d at 191-196.

[2] The City argued that the Downtown provisions of the Ordinance served compelling governmental interest of public safety. However, the Court found this to be a post-hoc rationalization for the Ordinance's provisions and said "after-the-fact explanations cannot help a law survive strict scrutiny." 140 F.Supp.3d at 190 (citing *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996)).

2. **United States Court of Appeals for the First Circuit**

In *Cutting v. City of Portland, Me.*, 802 F.3d 79 (1st Cir. 2015), the City's Ordinance stated: No person shall stand, sit, stay, drive or park on a median strip . . . except that pedestrians may use median strips only in the course of crossing from one side of the street to the other. *Id*. at 81-82. Found to be over-inclusive geographically, the ordinance encompasses all median strips in the entire City of Portland, ranging from eight feet to fifty feet wide. While the district court applied strict scrutiny, the First Circuit found error in the lower court's ruling that the city had adopted an "official interpretation" of the ordinance. *Id*. at 84.

The Court of Appeals found the ordinance did not take aim at – or give special favor to – any type of messages conveyed on the basis of what any particular message says. *Id*. at 85. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015). The Court continued, saying a content-neutral restriction on speech in a traditional public forum is facially unconstitutional if it does not survive the narrow-tailoring inquiry even though that ordinance might seem to have a number of legitimate applications. Id. at 86.

In analyzing whether the ordinance was narrowly tailored, the court first considered the median strips themselves. The ordinance applied to medians that are roughly eight feet wide, all the way to grassy expansions that run for several blocks and are as wide as fifty feet in various places. *Id*. at 88. Even if there are other places, like parks and sidewalks, where plaintiffs may engage in their speech, a flat ban on speech in a particular forum can fail narrow tailoring even if it leaves open other channels for plaintiffs to engage in their expressive activity. *Id*.

The court then looked at the City's interest in eliminating danger to drivers and other users of the streets, which was the City's focus when it enacted the ordinance. The record showed that the danger the City identified applied to only a limited number of median strips. *Id*. at 89. Furthermore, the City argued that the ordinance promotes public safety by ensuring that people are not on median strips and thus are not positioned to be hit by passing cars. *Id*. at 90.

The City offered 3 reports over a 4-year period where cars veered off roads and into median strips. None of these involved pedestrians. The only time a pedestrian was ever hit in the median strip was when a cyclist was struck by a car while using the strip to cross the road, an activity not prohibited by the ordinance. *Id*. at 91. The city did not show that it seriously undertook to address the problem with less intrusive tools readily available to it, such as limiting the ordinance to the few medians in Portland where the City had identified safety hazards in the past. *Id*. at 92.

3. **United States Court of Appeals for the Seventh Circuit**

In *Norton v. City of Springfield, Ill.*, the United States Court of Appeals for the Seventh Circuit found the City of Springfield's Panhandling Ordinance unconstitutional on First Amendment grounds. 806 F.3d 411, 411 (7th Cir. 2015). This was a civil case where the plaintiffs sought a preliminary injunction barring the City from enforcing the Ordinance which violated the Plaintiffs first amendment rights.

Procedurally, the Plaintiffs were cited for panhandling and then challenged the constitutionality of the Ordinance. Plaintiffs then moved for a preliminary injunction, which was denied by the district court. *Id*. The Plaintiffs appealed that decision and the Court of Appeals affirmed the district court's denial. *Id*. Plaintiffs then petitioned the court for a rehearing which was deferred until the Supreme Court decided *Reed*. *Id*. After Reed, the court decided this case on August 7, 2015.

The Ordinance in question banned panhandling in the City's "downtown historic district." Panhandling was defined as "[a]ny solicitation made in person ... in which a person requests an immediate donation of money or other gratuity." *Norton v. City of Springfield*, No. 13-3316, 2013 WL 5781663, at *2 (C.D. Ill. Oct. 25, 2013), aff'd sub nom. *Norton v. City of Springfield, Ill.*, 768 F.3d 713 (7th Cir. 2014), on reh'g, 806 F.3d 411 (7th Cir. 2015), and rev'd and remanded sub nom. *Norton v. City of Springfield, Ill.*, 806 F.3d 411 (7th Cir. 2015).

An exemption to the Ordinance permitted panhandling that involved only "passively standing or sitting or performing music, signing or other street performance with a sign or other indication that a donation is being sought, without any vocal request other than in response to an inquiry by another person." *Id*.

The "downtown historic district" is defined in the City's municipal code § 131.06(3) as follows:

> Downtown historic district: Public property within the area bounded on the south by Lawrence, on the east by 10th, on the north by Carpenter, and on the west by the Third Street railroad tracks from Carpenter south to Adams, then west on Adams to a line 100 feet west of Pasfield, then south to Edwards, then east on Edwards to the Third Street railroad tracks, south to Lawrence.

Id. The court first ruled that Springfield's anti-panhandling ordinance does not draw lines based on the content of anyone's speech. *Norton v. City of Springfield, Ill.*, 806 F.3d 411, 411 (7th Cir. 2015). The court relied on *Thayer v. Worcester*, 755 F.3d 60 (1st Cir.2014), which was also remanded after *Reed*. *Id*.

The court reasoned that the ordinance did not "interfere with the marketplace for ideas, that it does not practice viewpoint discrimination, and that the distinctions that plaintiffs call content discrimination appear to be efforts to make the ordinance less restrictive." *Id*. at 412. Basically, the court considered the ordinance as one that regulated subject matter rather than content or viewpoint. *Id*.

Applying *Reed v. Town of Gilbert, Ariz*, 135 S.Ct. 2218 (2015), the court found the Ordinance unconstitutional. In Reed, the Supreme Court wrote that "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id*. (citing Reed, 135 S.Ct. at 2227). "Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification." *Id*.

The court ruled that the Ordinance defining panhandling as an oral request for an immediate donation of money was a form of content discrimination and on this appeal the court was only concerned with whether the City was justified in enacting that Ordinance. *Id*. at 412-13. Overall, the court held that the ordinance was not justified and failed strict scrutiny.

4. **United States Court of Appeals for the Fourth Circuit**

In *Reynolds v. Middleton*, the United States Court of Appeals for the Fourth Circuit vacated the defendant's motion for summary judgment and remanded the case for further proceedings. The court found unconstitutional, the county ordinance that prohibited all solicitation within county roadways because there was lack of evidence to prove that the ordinance was narrowly tailored. 779 F.3d 222, 231 (4th Cir. 2015).

Procedurally, the Plaintiff, a homeless individual, brought action alleging that the county ordinance violated his first amendment rights. *Id*. at 224. The defendant filed a motion for summary judgment which the district court granted. *Id*. The plaintiff then filed this appeal. *Id*.

The Ordinance in question banned solicitation on all highways. *Id*. at 225. Highway was defined as "the entire width of a road or street that is improved, designed, or ordinarily used for vehicular travel and the shoulder, the median, and the area between the travel lane and the back of the curb." *Id*. "[T]he Amended Ordinance prohibit[ed] a homeless person from sitting (or standing) in a median with a sign asking for donations or offering to work in exchange for food, but it permits, for example, campaign workers with signs urging drivers to vote for their candidate to gather in the medians. Solicitation and other activities prohibited on the highways and medians remain permissible on County sidewalks, which are not included in the definition of 'highway.'" *Id*.

The court mentioned in a footnote that Reynolds did not challenge the district court's determination that the Ordinance is content neutral and that if he did, *Reed* would apply. Since the plaintiff did not raise the issue of whether the Ordinance was content neutral, the court went on to analyze the facts based on *McCullen v. Coakley*, 134 S. Ct. 2518, 2529, 189 L. Ed. 2d 502 (2014). The court stated that "[c]ontent-neutral time, place, and manner regulations of speech in traditional public forums are subject to intermediate scrutiny—that is, the restrictions must be 'narrowly tailored to serve a significant government interest and leave open ample alternative channels.'" 779 F.3d 222 at 225 (citation omitted). The court reasoned from its reading of *McCullen*, the following:

> First, … that the existence of a governmental interest may be established by reference to case law. Second, … that objective evidence is not always required to show that a speech restriction furthers the government's interests. Finally, … that intermediate scrutiny does indeed require the government to present actual evidence supporting its assertion that a speech restriction does not burden substantially more speech than necessary; argument unsupported by the evidence will not suffice to carry the government's burden.

Id. at 228-29.

The court then concluded based on the evidence presented that the county failed to show that the ordinance did not burden substantially more speech than necessary.

Under intermediate scrutiny, the county was required to demonstrate that the ordinance "materially advances an important or substantial interest by redressing past harms or preventing future ones." *Id*. at 229. The County argued that the solicitation activities that the Amended Ordinance prohibited could obstruct traffic and were dangerous to drivers and solicitors alike and that the Amended Ordinance furthered the County's interests in safety and unobstructed use of its highways. *Id*. It further argued that the Amended Ordinance eliminated the precise problem identified by the County – the disruption caused by transactional speech in the middle of the highway. *Id*. at 231.

While the court said the County's, arguments are not without some appeal, those arguments failed based on *McCullen* – lack of evidentiary support. *Id*. The County's evidence established, at most, a problem with roadway solicitation at busy intersections in the west end of the county.

Given the absence of evidence of a county-wide problem, the county-wide sweep of the Amended Ordinance burdened more speech than necessary. *Id*.

5. **United States District Court—Massachusetts**

In addressing a nearly identical "aggressive panhandling" Ordinance passed by the City of Worcester, the district court relied heavily on the ruling in *McLaughlin*[3], and found the Ordinance content-based, subject to strict scrutiny and unconstitutional. *Thayer v. City of Worcester*, 144 F.Supp.3d 218 (D. Mass. 2015). The court's advice to the City was to go back to the "drawing board and craft solutions which recognize an individual's [right] to solicit in accordance" with the First Amendment. *Id*. at 237. The court said, in that regard, the City "must define with particularity the threat to public safety they seek to address, and then enact laws that precisely and narrowly restrict *only* that conduct which would constitute such a threat. *Id*.

Two main things are important about this case, however, beyond that ruling. One, originally the district court and First Circuit upheld the Ordinance, the U.S. Supreme Court granted certiorari and vacated the First Circuit's opinion, instructing the lower court to consider the Ordinance in light of *Reed*. That tells us that the Supreme Court undoubtedly will apply *Reed*'s breadth to panhandling ordinances.

Also significant is the district court's assessment of another Ordinance (Ordinance 13-77) of the City of Worcester as against a First Amendment challenge. The Ordinance provided in part:

> No person shall, after having been given due notice warning by a police officer, persist in walking or standing on any traffic island or upon the roadway of any street or highway, except for the purpose of crossing the roadway at an intersection or designated crosswalk or for the purse of entering or exiting a vehicle at the curb or for some other lawful purpose.

Id. at 230. The court, in reviewing Ordinance 13-77, found that it was a content-neutral Ordinance warranting intermediate scrutiny. *Id*. 237-38. Noting *Cutting*'s ruling that banning speech from all medians was "'geographically over-inclusive,'" the court found that Ordinance 13-77 banned a person's presence on any traffic island and that such was a "sweeping ban." *Id*. The court ruled that the City could have pointed to specific intersections (medians and traffic islands) to which pedestrian use should be restricted in the name of public safety. *Id*. Thus, the court found that, although a significant and legitimate governmental interest in public safety existed, the Ordinance was not narrowly tailored enough. The court said a City regulation must recognize the "close fit between ends and means that narrow tailoring demands." *Id*. at 238. And the court noted the City should attempt to address the governmental interest with less intrusive tools available to it. *Id*.

6. **United States District Court—New Hampshire**

In *Petrello v. City of Manchester*, the district court found, under the First Amendment, the City of Manchester's Ordinance regarding "passive panhandlers who do not step into the road or otherwise physically obstruct traffic" unconstitutional and enjoined the City from enforcing that

[3] And for good reason, the aggressive panhandling Ordinance in *Thayer* was in many ways identical to the Ordinance in the City of Lowell.

provision. 2017 WL 3972477, **22-23 (D.N.H. 9/7/2017). The Court also found the provision of the Ordinance which prohibited "passing items to or from the occupant of a motor vehicle" facially violative of the First Amendment and enjoined that provision's enforcement. *Id*. at *23.

On Petrello's First Amendment claim, the court analyzed the MPD Policy as a content-neutral restriction, receiving intermediate scrutiny. The court said that Petrello faced criminal charges based on a third party's reaction to her protected speech and that its therefore not a narrowly tailored approach to addressing traffic safety problems. *Id.* at 11 (citing *Cf. Stahl v City of St. Louis*, 687 F.3d 1038, 1041 (8th Cir. 2012)). The Court went on to say there were two scenarios that could occur. Petrello could be panhandling when the light was green and when the light was red. Under both scenarios, Petrello's conduct would be the same: she would have been standing by the side of the road holding her sign, never stepping into the road. *Id*. at 12. The only way to ensure she isn't charged with disorderly conduct, is for her to leave the sidewalk and stop panhandling which would be a de facto ban on panhandling and thereby chills substantially more speech than necessary to serve the City's interest. *Id.*

Petrello was deemed to have standing to challenge the Ordinance because there is a "substantial risk" that Petrello will be charged under the Ordinance if she panhandles again in Manchester. *Id*. at 17; See *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). In striking down the City Ordinance, the court said the ordinance restricted the physical exchange of money on a sidewalk, a First Amendment protected activity that was in a traditional public forum. *Id*. at 18. Furthermore, the ordinance was content neutral, but was not narrowly tailored. According to the court, the ordinance failed the narrow tailoring inquiry for four main reasons: (1) the ordinance bans roadside exchanges that do not obstruct traffic or pose safety risks; (2) the Ordinance is geographically over-inclusive because it applies citywide; (3) the Ordinance is under inclusive because it penalizes only pedestrians, not motorists; and (4) the City has less speech-restrictive means available to address concerns. *Id*. at 19-20.

7. **United States District Court—N.D. Texas**

The Ordinance at issue in *Watkins v. City of Arlington*, stated:

> No person who is within a public roadway may solicit or sell or distribute any material to the occupant of any motor vehicle stopped on a public roadway in obedience to a traffic control signal light. It is specifically provided, however, that a person, other than a person twelve years of age or younger; may solicit or sell or distribute material to the occupant of a motor vehicle on a public roadway so long as he or she remains on the surrounding sidewalks and unpaved shoulders, and not in or on the roadway itself, including the medians and islands.

123 F.Supp.3d 856, 861 (N.D. Tex. 2015). The Plaintiffs were not panhandlers soliciting money or donations. Rather, one of the Plaintiff was an organization that, among other things, would provide pocket sized copies of the Constitution and other literature to individuals requesting the materials, including those who are in motor vehicles stopped at a traffic light. *Id*. Like other cases, after the complaint was filed, an amended Ordinance (that noted above) was passed and the Plaintiff amended the complaint to challenge the new Ordinance. And, thereafter the parties filed cross motions for summary judgment. *Id*. at 862.

On its face, the Ordinance made no distinctions between any speakers. Rather, Plaintiffs made the following argument: a Texas state statute allowed government employees such as firefighters to enter the roadway to solicit charitable donations; despite the language of Arlington's Ordinance, the City would have to allow government employees to make such solicitations in compliance with state law; thus, in complying with the state statute, the Ordinance was in practice, content-based. *Id*. at 864-66. The court noted that it was appropriate in certain circumstances to impose a limiting construction on a law such as the Ordinance *if* it was "'readily susceptible to such a construction.'" *Id*. at 865-66. Nevertheless, the court found that the plain language of the Ordinance made no distinction between speakers. *Id*. at 866. While the City noted its intention to abide by state law, that amounted to an as-applied challenge to the Ordinance the court had previously dismissed as not ripe. So, the court simply did not reach the issue. *Id*. at 866.

So, the court was left with a facial challenge and, without regard to state law and whether the City would, as applied, make a distinctions based on who the speaker was, the court ruled that the Ordinance made no distinctions "based upon the speaker, subject matter, or viewpoint on its face . . . ." *Id*. at 867. Therefore, the court concluded the Ordinance was a content-neutral time, place, or manner regulation subject to intermediate scrutiny. Quoting the rules from *Ward*, the court found that, to pass intermediate scrutiny, the Ordinance must: (1) "be 'justified without reference to the content of the regulated speech;' (2) be 'narrowly tailored to serve a significant governmental interest;' and (3) 'leave open ample alternative channels for communication of information.'" *Id*. at 867 (quoting *Ward*, 491 U.S. 781, 791).

The court found the Ordinance was justified without reference to the content of the regulated speech and, thus, content-neutral. *Id*. at 867. **Importantly**, the court found that Arlington's stated purpose for the regulation, i.e., pedestrian and traffic safety, was a significant governmental interest and noted Arlington's reliance on, *inter alia*, National Highway and Transportation Safety Administration (NHTSA) statistics regarding pedestrian traffic fatalities. *Id*. Also, the City presented evidence regarding crashes by year and month in Arlington. *Id*.

Next the Court addressed whether the Ordinance was narrowly tailored to serve the governmental interest identified. The court said:

> "'For a content-neutral time, place, or manner regulation to be narrowly tailored, it must not burden substantially more speech than is necessary to further the government's legitimate interests. Such a regulation, unlike a content-based restriction of speech, need not be the least restrictive means or least intrusive means of serving the government's interest. But the government still may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals. Rather, the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'"

Id. at 867-68 (quoting *McCullen*, 134 S.Ct. at 2535 (quoting *Ward*, 491 U.S. at 798-99)). The court found that, although the City bears the burden of establishing evidence of its justification for the regulation, including "objective evidence showing that the restriction serves its interest in public safety," the City had met its burden with the afore-mentioned statistical evidence. *Id*. at 868.

The court's ruling appeared to hinge on the fact that the Ordinance only restricted persons from entering the roadway at traffic lights (intersections) and, thus, it was sufficiently narrowly tailored.

8. United States Court of Appeals for the Eighth Circuit Court of Appeals and United States District Court, E.D. Missouri

In a pre-*Reed* decision regarding the propriety of a preliminary injunction against a "distribution" Ordinance from Desloge, Missouri, the Eighth Circuit found the Ordinance at issue content-neutral and applied intermediate scrutiny. *Traditionalist Am. Knights of the Ku Klux Klan v. City of Desloge, Mo.*, 775 F.3d 969, 974-75 (8th Cir. 2014). The key provisions of the Ordinance at issue stated:

> (2) No person shall stand in or enter upon a Roadway for the purpose of distributing anything to the occupant of any vehicle.
> (3) ... [T]he Distribution described in subparagraph 2[is] permissible to an occupant of a non-moving vehicle on the Roadway adjacent to the sidewalk and if the person doing so is on the adjacent sidewalk.

Id. at 972. Following *Reed*, one might be tempted to believe the Court or the lower court on remand, would have concluded the Ordinance was content-based, but not so. *Traditionalist Am. Knights of the Ku Klux Klan v. City of Desloge, MO*, 2016 WL 705128, 4 (E.D. Mo. 2016)

As to the application of intermediate scrutiny, the Eighth Circuit said:

> To be narrowly tailored, a regulation must not " 'burden substantially more speech than is necessary to further the government's legitimate interests.' " *McCullen v. Coakley*, ––– U.S. ––––, 134 S.Ct. 2518, 2535, 189 L.Ed.2d 502 (2014), quoting *Ward*, 491 U.S. at 799, 109 S.Ct. 2746. The city was therefore required to make a "threshold showing that the factual situation demonstrate[d] a real need for [it] to act to protect its interest." *Assoc. of Comm. Orgs. for Reform Now v. St. Louis Cnty.*, 930 F.2d 591, 595 (8th Cir.1991). Once a governmental entity has made such a showing, its "choice among the means to accomplish its end is entitled to deference," *St. Louis County*, 930 F.2d at 595, and the regulation " 'need not be the least restrictive or least intrusive means of' serving the government's interests," *McCullen*, 134 S.Ct. at 2535, quoting *Ward*, 491 U.S. at 798, 109 S.Ct. 2746.

Id. at 975.

NHTSA statistics regarding fatalities of pedestrians interacting with vehicular traffic, as well as expert testimony were offered in the district court. *Id*. at 973. Citing an earlier case involving solicitation in a roadway, the Eighth Circuit said: "Expert testimony indicated that 'in-the-roadway solicitation generally is dangerous' and no known techniques would make it safe." *Id*. at 975 (quoting *Assoc. of Comm. Orgs. For Reform Now v. St. Louis Cnty.*, 930 F.2d 591, 594, 596 (8th Cir. 1991)). There, the court said that the county "demonstrated a 'real need' to act to protect its significant governmental interest in safety . . . there can be no doubt from the evidence, as well as one's own common sense, that soliciting in the streets is inherently dangerous.'" *Id*. ". . . ***[G]overnment need not wait for accidents to justify safety regulations***.'" 775 F.3d at 975 (quoting *St. Louis Cnty.*, 930 F.2d at 596)).

9. United States District Court—M.D. Florida

Homeless Helping Homeless is a charity offering shelter to the homeless population of Tampa, Florida. *Homeless Helping Homeless, Inc. v. City of Tampa, Florida*, 2016 WL 4162882 (M.D. Fla. 2016). As part of its charity, Homeless Helping Homeless relies on staff and volunteers

pursuing private money through the solicitation of charity on the sidewalks of downtown Tampa. In July 2013, the Tampa City Council enacted Ordinance 2013-95, which banned the solicitation of donations or payments in downtown Ybor, public transit stops, sidewalk cafes, or areas within fifteen (15) feet of an automatic teller machine or entrance to a financial institution. In response to the ordinance, Homeless Helping Homeless filed suit for an injunction against the City of Tampa to enjoin the ordinance's enforcement.

Ultimately, the court ruled that under *Reed* the ordinance that bans the solicitation of "donations or payment," unconstitutionally infringes the right of free speech under the First Amendment to the U.S. Constitution and thus granted an injunction against the City of Tampa's enforcing the ordinance. The court noted that the ordinance singled out a specific type of speech for its penalties, i.e. soliciting and requesting donations. However, all other types of protected speech would not result in a penalty under the ordinance. For example, political speech, petitioning, leafleting, and any all other types of speech remained open under the ordinance. Differentiating amongst speech resulted in the court applying strict scrutiny to the ordinance. The court also noted that ordinance required an examination of the messages communicated to determine if the ordinance is violated, which is another mark of a content-discriminatory rule.

For the ordinance to survive strict scrutiny, the City had to demonstrate that the ordinance constituted the least restrictive means of advancing a compelling governmental interest. Fatal to the City's argument is that it conceded that no compelling governmental interest supported the ordinance. The court thus held the ordinance unconstitutional in violation of the First Amendment to the U.S. Constitution.

10. **United States District Court—South Carolina**

The City of Charleston regulated the prerequisites to obtaining a tour guide license. *Billups v. City of Charleston*, 194 F. Supp. 3d 452 (D.S.C. 2016). Before one could obtain a license, the applicant had to pass a written examination and obtain a business license. After obtaining a tour guide license, tour guides must attend certain continuing education courses every three years to maintain their license. Under Charleston's regulatory system a " 'tour guide' is a 'person who acts or offers to act as a guide for hire through any part of' certain regulated areas . . . 'tour or touring' [is] 'the conducting of or the participation in sightseeing . . . for hire or in combination with a request for donations.'"

The plaintiffs were individuals who failed to pass the tour guide licensing written examination. On January 28, 2016, plaintiffs filed a complaint alleging that the City's tour guide license requirement violated the First Amendment of the United States Constitution, both facially and as applied to them.

Following various motions, the court denied: 1) the City's motion to dismiss the complaint, and 2) denied the plaintiffs' motion for a preliminary injunction.

First, the court held that the regulations were arguably subjected to intermediate scrutiny because of their focus on conduct. The city's definition of "tour or touring" as "conducting of or the participation in sightseeing" makes no mention of what speech is prohibited or encouraged. The court did not believe that *Reed* applied so broadly as to mandate strict scrutiny when a regulation only implicates conduct and not speech. "Whatever the Court intended when it held that a law

may be content-based if it facially distinguishes between categories of speech defined by their 'function or purpose,' . . . it cannot have meant that every law restricting conduct also imposes a content-based restriction on speech made in the course of such conduct."

However, the court ultimately held that for the purposes of the City's motion to dismiss that it would presume strict-scrutiny applied. Thus, the court denied the motion to dismiss.

Next, as it relates to the motion for a preliminary injunction, the court held that the tour guide licensing requirements advanced a substantial governmental interest. At this point, the court applied intermediate scrutiny to the tour guide license regulations. The court found that under intermediate scrutiny the plaintiffs had not shown a likelihood of success on the merits. At this preliminary stage the court held that preventing unqualified individuals from misleading potential customers is sufficient to uphold a content neutral regulation. Finally, the court held that the plaintiffs failed to show irreparable harm and the balance of equities were in favor of the City.

11. **United States District Court—Colorado**

In *Browne v. City of Grand Junction*, the United States District Court in Colorado found two provisions enacted by the City violated the First Amendment. *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276 (D. Colo. 2015). This case involves two related ordinances passed by the City of Grand Junction. Each ordinance regulated panhandling at various times and places, and the latter ordinance prohibited panhandling in various areas including within 20ft of ATMs, bus stops, public parking garages, and within 100 feet of school grounds. Under the latter ordinance panhandling is defined as meaning:

"to 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."

Several individuals and a nonprofit corporation brought action against a city, claiming the ordinances violated the First Amendment as well as the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the U.S. Constitution. Both parties moved for summary judgment, the court held that the ordinances were not necessary to serve a compelling governmental interest in public safety, and thus the provisions failed to survive strict scrutiny on a First Amendment challenge.

12. **Supreme Court of Kentucky**

The Supreme Court of Kentucky stated that a city's interest in ensuring safe and efficient roadways can be content-neutral and narrowly tailored by restricting conduct. *Champion v. Commonwealth*, 520 S.W.3d 331, 339 (Ky. 2017). In *Commonwealth*, the City's Ordinance stated that "no person shall beg or solicit upon the public streets or at the intersection of said public streets within the urban area." *Id.* at 333. After finding that the Ordinance was content-based and unconstitutional, the Kentucky Supreme Court stated that "there remain a number of content-neutral ways the city could achieve the same goals [of public safety] without unjustifiably

abridging individual rights to free speech." *Id* at 339. "For instance, [the City] could prohibit all individuals from approaching stopped motorists—this more directly targets the behavior the city seeks to alleviate and does so without regard to *why* an individual steps into traffic." *Id.*