Speech: Anti-Panhandling Ordinance Which Prohibits Verbal Requests for Immediate Contributions but Allows Deferred or Sign-Based Requests is Narrowly Tailored to Avoid Threatening Solicitations

Don Norton v. City of Springfield, No. 13-3581 (7th Cir. Sept. 25, 2014).

The Seventh Circuit has upheld a Springfield, Illinois anti-panhandling ordinance that prohibits verbal requests for money immediately but allows requests via a sign or for contributions in the future, relying in part on Justice Kennedy's language in *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) that upholds solicitation ordinances designed to limit only "aggressive" or "threatening" panhandling.

Springfield, Illinois' panhandling ordinance (§ 131.06 of the Municipal Code) prohibits panhandling in its "downtown historic district"—less than 2% of the City's area but containing its principal shopping, entertainment, and governmental areas, including the Statehouse and many state-government buildings. The ordinance defines panhandling as an oral request for an immediate donation of money. The law does not prohibit asking for money to be sent later or using signs to request money. The Springfield scheme thus appears to view signs or requests for deferred donations as less imposing than oral requests for an immediate handout, which some persons (especially at night or when no one else is nearby) might find threatening. Don Norton and others were cited under this ordinance. The group filed suit, alleging the law violated the First Amendment and seeking a preliminary injunction. The District Court denied the plaintiffs' motion, holding the ordinance, on its face, is content-neutral.

HELD: The majority affirmed that the ordinance is content-neutral and a lawful time, place, and manner restriction.

DISCUSSION: Plaintiffs argued that the ordinance was not content-neutral because it distinguished between verbal requests for money now (which was prohibited) and requests by sign or for money later (which was allowed). In essence, the plaintiffs' position was that the very efforts Springfield had made to limit the scope of the ordinance—prohibiting only potentially threatening solicitations for money—caused the law to be unconstitutional; it had a better chance of success if it applied across the board.

The Seventh Circuit noted a split among other appeals courts on the question of whether rules similar to Springfield's are content-based. Three circuits have answered "yes" and held them invalid. *ACLU v. Las Vegas*, 466 F.3d 784 (9th Cir. 2006); *Clatterbuck v. Charlottesville*, 708 F.3d 549 (4th Cir. 2013); and *Speet v. Schuette*, 726 F.3d 867 (6th Cir. 2013). But two circuits have concluded that anti-panhandling laws are content-neutral and valid. *ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 954–55 (D.C.Cir. 1995); and the recently-decided *Thayer v. Worcester*, 755 F.3d 60 (1st Cir. 2014) (Souter, J.).

However, the Circuit Court looked past the appellate-level split to find guidance in Supreme Court precedent. *Heffron v. International Society for Krishna Consciousness, Inc*., 452 U.S. 640 (1981), holds that a state fair may prohibit panhandling and other fundraising by anyone walking its grounds, limiting solicitation to rented booths. *United States v. Kokinda*, 497 U.S. 720 (1990), holds that the Postal Service may forbid all fundraising on a sidewalk leading to a post

office. *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992), holds that an airport authority may prohibit all solicitation and receipt of funds within the terminal.

Plaintiffs maintained that these decisions were irrelevant, because each rested in part on a conclusion that the venue was not a traditional public forum. But the Seventh Circuit found them, particularly *Lee*, to be dispositive. In *Lee*, Justice Kennedy concluded that an airport should be treated the same as a city street and that restricting panhandling is permissible in both settings. As the Seventh Circuit explained:

> What made the regulation permissible, [Kennedy] concluded, was that it had been narrowly tailored so that it dealt only with potentially threatening (or advantage-taking) confrontations. He explained (505 U.S. at 707, citation omitted): "we have held that to be narrowly tailored a regulation need not be the least restrictive or least intrusive means of achieving an end. The regulation must be reasonable, and must not burden substantially more speech than necessary. Under this standard the solicitation ban survives with ease, because it prohibits only solicitation of money for immediate receipt."

In other words, what saved the regulation in Justice Kennedy's eyes was exactly what condemned it in plaintiffs' eyes: the limit to solicitation for immediate receipt, which Justice Kennedy saw as "the soul of reasonableness."

Moreover for the majority, the government's regular practice of distinguishing speech by subject matter is of no special concern. Citing *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978), it noted there have ever been issues with making a course of conduct illegal because it was initiated or carried out by language – for example, it is perfectly legal to limit information exchange under the SEC rules, and the exchange of price and product information between competitors, and to prohibit employers from threatening retaliation against employees. For the majority, this meant that "content-based" regulations, and the limits on them, were a unique subset of speech laws in general broken into two categories – restricting speech based on the ideas it conveys and because the government disapproves of the message it conveys. The Springfield anti-panhandling ordinance did not violate either prohibited category.

The fact that there has been much disagreement about how to distinguish between content-based and content-neutral regulations, and a circuit split on this, indicated to the majority it was "difficult to be confident about how the line . . . is drawn." But in evaluating the regulation for time, place, and manner restrictions the ordinance was deemed within Springfield's power.

DISSENT: Judge Manion dissented, arguing the ordinance was content-based. As for the three Supreme Court cases the majority evaluated, the dissent pointed out the regulations in those cases all banned all forms of solicitations.

The dissent disagreed that *Thayer*, the recent First Circuit opinion upholding Worcester's anti-panhandling law, conflicted with the three circuits that deemed the ordinances content-based. The ordinance at issue in the First Circuit was meant to "combat the ill effects of aggressive solicitation and prohibits continuing to solicit from a person *after the person has given a negative response to such solicitation . . .* or soliciting someone in a manner . . . likely to cause a reasonable person to fear immediate bodily harm." (emphasis in original) (internal citations omitted). Thus, the majority got it wrong because "what was criminal in the City of Springfield is legal in the First Circuit."