August 30, 2018

Via E-mail & U.S. Mail

Alachua County Board of County Commissioners
12 SE 1st Street, 2nd Floor
Gainesville, FL 32601

RE: Sec. 117.02—Interactions between Pedestrians and Vehicles Prohibited, Alachua County Code of Ordinances

Dear Alachua County Board of County Commissioners,

We write with respect to Sec. 117.02, Alachua County Code of Ordinances (the "Ordinance"), enacted on January 23, 2018. Since the landmark Supreme Court *Reed v. Gilbert* case in 2015, every panhandling ordinance challenged in federal court – at 25 of 25 to date – including many with features similar to the ones in Alachua County ("the County"), has been found constitutionally deficient. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015)*; see, e.g. Norton v. City of Springfield, Ill.*, 806 F.3d 411 (7th Cir. 2015); *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014), *vacated*, 135 S. Ct. 2887 (2015), *declaring ordinance unconstitutional on remand*, 144 F. Supp. 3d 218, 238 (D. Mass. 2015). In Florida, the U.S. District Court for the Middle District declared a Tampa panhandling ordinance unconstitutional. *Homeless Helping Homeless, Inc. v. City of Tampa*, 2016 WL 4162882, at *6 (M.D. Fla. Aug. 5, 2016). Florida state courts have also followed this precedent in striking down panhandling ordinances. *Toombs v. State of Florida*, 25 Fla. L. Weekly Supp. 505a, Case No. 15-220 AC (Fla. 11th Jud. Cir. 2017) (holding City of Miami ordinance unconstitutional).

Other cities in Florida, such as the City of Gainesville, have stopped enforcement or repealed their panhandling ordinances when informed of the likely infringement on First Amendment rights. After a lawsuit was filed against it, the City of Pensacola repealed its ordinance almost immediately after passing it. As was the case with these other Florida cities, the County ordinance almost certainly violates the constitutional right to free speech protected by the First Amendment to the United States Constitution. We call on the County to repeal the Ordinance and instead consider more constructive alternatives.

The First Amendment protects peaceful requests for charity in a public place. *See, e.g., United States v. Kokinda*, 497 U.S. 720, 725 (1990) ("Solicitation is a recognized form of speech protected by the First Amendment."). The government's authority to regulate such public speech is exceedingly restricted, "[c]onsistent with the traditionally open character of public streets and sidewalks…." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (quotation omitted). As discussed below, the Ordinance is outside the scope of permissible government regulation.

The County previously enforced an ordinance restricting begging, panhandling or soliciting (Chapter 118), but ceased enforcement in 2017. This Ordinance was unconstitutional because it overtly distinguished between types of speech based on "subject matter … function or purpose." *See Reed*, 135 S.Ct. at 2227 (internal citations, quotations, and alterations omitted; *See, e.g., Norton*, 806 F.3d at 412-13 ("Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification.").

The County enacted the new Ordinance (Sec. 117.02) in 2018 specifically to address *Reed* and removed any mention of soliciting on the face of the Ordinance. Instead, the County's new approach states that no person is allowed to "occupy" a public street and "interact with, or invite interaction between, that person and an operator or occupant of any vehicle." Sec. 117.02(b). Although the County has removed references to begging, panhandling, or soliciting funds, the public debate and legislative history indicates that the intent of the Commissioners in enacting this Ordinance was to discourage people experiencing homelessness from asking their neighbors for help in this manner. *See Reed*, 135 S. Ct. at 2227.

Enforcement of this Ordinance to date underscores this fact as it has been used to arrest individuals for holding signs asking for money or other assistance. As a result, a court will likely hold the Ordinance is a "content-based" restriction on speech that is presumptively unconstitutional. *See Reed*, 135 S. Ct. at 2226; *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009). Courts use the most stringent standard – strict scrutiny – to review such restrictions. *See, e.g., Reed*, 135 S. Ct. at 2226 (holding that content-based laws may only survive strict scrutiny if "the government proves that they are narrowly tailored to serve a compelling state interest").

The Ordinance cannot survive strict scrutiny because it neither serves any compelling state interest, nor is it narrowly tailored. None of the challenged panhandling ordinances that have been subjected to this level of scrutiny have survived court challenges. Shielding unwilling listeners from messages disfavored by the state is not a permissible state interest. As the Supreme Court explained, the fact that a listener on a sidewalk cannot "turn the page, change the channel, or leave the Web site" to avoid hearing an uncomfortable message is "a virtue, not a vice." *McCullen*, 134 S. Ct. at 2529; *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 (1992) ("The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.").

Even if a court finds that the County's Ordinance is content neutral, it would still likely fail constitutional review as it is not narrowly tailored to meet the County's asserted traffic safety interests. *McCullen*, 134 S. Ct. at 2534 (content neutral ordinances must be narrowly tailored to serve a significant governmental interest). The Supreme Court demands a "close fit between ends and means" and as such, "the tailoring requirement prevents the government from too readily sacrific[ing] speech for efficiency." *Id.* The government may not "'regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.'" *Id.* at 2535.

Courts have found similar ordinances unconstitutional due to lack of narrow tailoring. *See Petrello v. City of Manchester*, 2017 WL 3972477, at *19-20 (D. New Hampshire, Sept. 7, 2017) (content neutral ordinance restricting interactions between pedestrians and vehicles on the road not narrowly tailored); *Cutting v. City of Portland*, 802 F.3d 79, 89-92 (1st Cir. 2015) (content neutral ordinance prohibiting persons from standing, sitting, staying, driving or parking on medians not narrowly tailored). Similar to these ordinances, the County Ordinance is geographically overinclusive (applying to every public street and traffic median in the county); it bans roadside "interactions" that do not obstruct traffic or pose a safety risk; and the County has less speech-restrictive means available to address its concerns such as the enforcement of current traffic laws, which forbid motorists from obstructing the roadway or driving in a careless manner.

The County Ordinance is also likely unconstitutional because it unnecessarily infringes on free speech rights; it is too vague because a violation of the law is determined based on police discretion; and it punishes inherently innocent activities. The County Ordinance prohibits an "interaction" with a vehicle but does not define this term. A common dictionary definition of "interact" is to "act in such a way as to have an effect on each other" or to "communicate or be involved directly." The Ordinance doesn't merely restrict interactions, but also inviting interactions, which is the whole point of speech or other communicative expression.

A whole range of innocent, constitutionally protected activity is implicated by this sweeping definition: asking for directions; waving to a friend in a vehicle; hailing a taxi or an Uber; or holding signs asking vehicles to "honk for peace." As the Florida Supreme Court has found, ordinances such as this one are unconstitutionally vague, overbroad, and unconstitutionally punish innocent activity. *See Wyche v. State*, 619 So.2d 231, 237 (Fla. 1993) (striking down ordinance that "left to police the unguided task of differentiating between constitutionally protected street encounters and acts reflecting the state of mind needed to make an arrest").

For these reasons, among others, the Ordinance cannot pass constitutional muster. Further, unlawful ordinances such as Sec. 117.02 are costly to enforce and only exacerbate problems associated with homelessness and poverty.

In Central Florida, a study found that communities were spending more than $30,000 per year in jail and hospital costs alone for every chronically homeless person. The study projected that by investing in permanent supportive housing, the region would save hundreds of millions of dollars over the course of a decade. *See* THE COST OF LONG-TERM HOMELESSNESS IN CENTRAL FLORIDA (2014), https://www.cfchomelessness.org/wp-content/uploads/2018/04/Eco-Impact-Report-LOW-RES-2.pdf. Numerous communities have created alternatives that are more effective, and leave all involved—homeless and non-homeless residents, businesses, city agencies, and elected officials—happier in the long run. *See* National Law Center on Homelessness and Poverty, HOUSING NOT HANDCUFFS: THE

CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES (2016), https://www.nlchp.org/documents/Housing-Not-Handcuffs.

We can all agree that we would like to see an Alachua County where homeless people are not forced to beg on the streets. But whether examined from a legal, policy, or fiscal standpoint, criminalizing any aspect of panhandling is not the best way to get to this goal. We request that the County cease enforcement and repeal this ordinance. The County has made tremendous strides in its commitment to addressing issues of homelessness and we encourage the County to continue to develop constructive approaches that will lead to the best outcomes for all the residents of Alachua County, housed and unhoused alike.

We look forward to further discussing this matter with you, and we are hopeful to receive your response before October 1, 2018.

Sincerely,

/s/ Stacy A. Scott
Public Defender
Eighth Judicial Circuit

/s/ Kirsten Anderson
Director of Litigation
Southern Legal Counsel

/s/ Carey Haughwout
President
Florida Public Defender Association

/s/ Jacqueline Azis
Staff Attorney
ACLU of Florida

/s/ Eric Tars
Senior Attorney
National Law Center on Homelessness & Poverty

/s/ *Christopher Jones*
Executive Director
Florida Legal Services

/s/ Mara Shlackman
Vice President
National Lawyers Guild South Florida Chapter

/s/ *Natalie N. Maxwell*
Housing Umbrella Group Co-Chair
Florida Legal Services

/s/ Patrice Paldino
Housing Umbrella Group Co-Chair
Legal Aid Service of Broward County

Contact: Kirsten Anderson, Southern Legal Counsel, 1229 NW 12th Ave. Gainesville, FL 32601
(352) 271-8890 ♦ Kirsten.anderson@southernlegal.org