



Panhandling Ordinances after *Reed* and *Norton*

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The First Amendment prohibits laws abridging the freedom of speech and is applicable to states through the Fourteenth Amendment.¹ When evaluating a regulation of protected speech, a court must determine the proper level of judicial scrutiny to be applied, depending on whether the regulation is aimed at the content of that speech.² “In a traditional or designated public forum, content-neutral restrictions on the time, place, and manner of expression must be narrowly tailored to serve some substantial governmental interest, and must leave open adequate alternative channels of communication” – also known as intermediate scrutiny.³ In contrast, when a regulation of protected speech is content-based, the highest level of scrutiny, strict scrutiny, applies and the regulation may only be justified by the government proving the regulation is narrowly tailored to serve a compelling governmental interest.⁴ Panhandling, often defined by ordinances as a verbal or written request for the immediate donation of money, is a form of speech protected by the First Amendment.⁵ Case law demonstrates that ordinances affecting or regulating panhandling can be either content-based or content-neutral.

In 2015, the United States Supreme Court decided *Reed v. Town of Gilbert*.⁶ The petitioners in *Reed* filed a claim against an Arizona town, arguing that certain provisions in the town’s sign code infringed on their right to freedom of speech. The sign code distinguished between categories of signs based on their communicative content and applied different restrictions depending on which category a sign fell in to. The category at issue in *Reed* pertained to “Temporary Directional Signs Relating to a Qualifying Event,” which received the strictest treatment under the code in terms of permitted size and placement duration.⁷ The code defined “qualifying event” as “any assembly, gathering, activity, or meeting sponsored, arranged, or promoted by a religious, charitable, community service, educational, or other similar non-profit organization.”⁸

Ultimately, the Court held the sign code provisions were unconstitutional as content-based regulations of speech that did not survive a strict scrutiny analysis. *Reed* clarified that a law is content based on its face if it addresses a specific topic or subject matter, even if it does not discriminate among viewpoints within that topic or subject matter.⁹ The Court

in *Reed* also made it very clear that a content-based law will be subject to strict scrutiny regardless of how benign or well-intentioned the government’s purpose behind the law is.¹⁰ Although *Reed* contemplated sign code provisions, its holding carries First Amendment implications that reach beyond the realm of sign codes.

Ordinances prohibiting or regulating panhandling are an example, as illustrated by the Seventh Circuit Court of Appeals’ decision in *Norton v. City of Springfield*.¹¹ In *Norton*, the court considered the constitutionality of a city ordinance that prohibited panhandling in the city’s “downtown historic district.”¹² The ordinance defined “panhandling” as “an oral request for an immediate donation of money.”¹³ Signs requesting immediate donations and oral requests for donations at a later time were permitted.¹⁴ The Seventh Circuit first decided *Norton* in 2014 in favor of the City of Springfield, Illinois, upholding the ordinance as a content neutral regulation of speech that did not restrict speech because of the message conveyed or because of a governmental disapproval of that message.¹⁵ Upon a petition for rehearing, the court deferred reconsideration of

1. *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 232-33 (D. Mass. 2015).

2. *Id.* at 232.

3. *Id.*

4. *Id.* at 233.

5. *United States v. Kokinda*, 497 U.S. 720, 725 (1990).

6. For a more in-depth discussion of *Reed v. Town of Gilbert*, see Licensing and Regulation 397.

7. *Reed*, 135 S. Ct. 2218, 2225.

8. *Id.*

9. *Id.* at 2230.

10. *Id.* at 2228.

11. *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015).

12. *Id.* at 412.

13. *Id.*

14. *Id.*

15. See *Norton v. City of Springfield*, 768 F.3d 713, 717 (7th Cir. 2014) rev’d 806 F.3d 411 (7th Cir. 2015).

the case until the Supreme Court decided *Reed*.¹⁶ After the *Reed* decision, the Seventh Circuit reversed its opinion in *Norton*, finding the city ordinance was unconstitutional.¹⁷ The court noted that *Reed* altered its understanding of content discrimination – an ordinance that regulates because of the topic or subject matter it discusses, even if it is neutral towards viewpoints within the topic area or subject matter, is content based and subject to strict scrutiny.¹⁸ “Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification.”¹⁹

It’s worth noting that the Seventh Circuit did not decide whether the Springfield ordinance would pass muster under a strict scrutiny analysis, only that it was subject to strict scrutiny as a content-based regulation of speech. This was due to the parties’ agreement that the ordinance would “stand or [fall] on the answer to the question whether it is a form of content discrimination.”²⁰ The court made it explicitly clear that, under *Reed*, a panhandling ordinance regulating the topic of “requesting immediate donations of money” is a content-based regulation of speech and must survive strict scrutiny to be constitutional. Seventh Circuit precedents are binding on Wisconsin. Accordingly, Wisconsin municipalities should proceed with caution where panhandling ordinances are concerned as strict scrutiny most often signals a law will fail.

The Supreme Court has not decided a panhandling case since *Reed*, although other courts have addressed panhandling ordinances in its wake. In *McLaughlin v. City of Lowell*, the U.S. District Court for Massachusetts examined an ordinance aimed to prohibit panhandling in certain downtown locations as well as “aggressive” panhandling techniques.²¹ Like the Seventh Circuit in *Norton*, the district court found the ordinance prohibiting panhandling in downtown areas to be content-based.²² The ordinance failed the court’s subsequent strict scrutiny analysis. The preamble to Lowell’s ordinance laid out the city’s purpose for enactment: protecting tourism and its “compelling interest in providing a safe, pleasant environment. . . .”²³ However, the court found the purpose, while important, did not rise to the level of a compelling government interest.²⁴

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16. *Norton*, 806 F.3d at 411.

17. *Id.* at 413.

18. *Id.* at 412.

19. *Id.* at 413.

20. *Id.*

21. *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 181-82 (D. Mass. 2015).

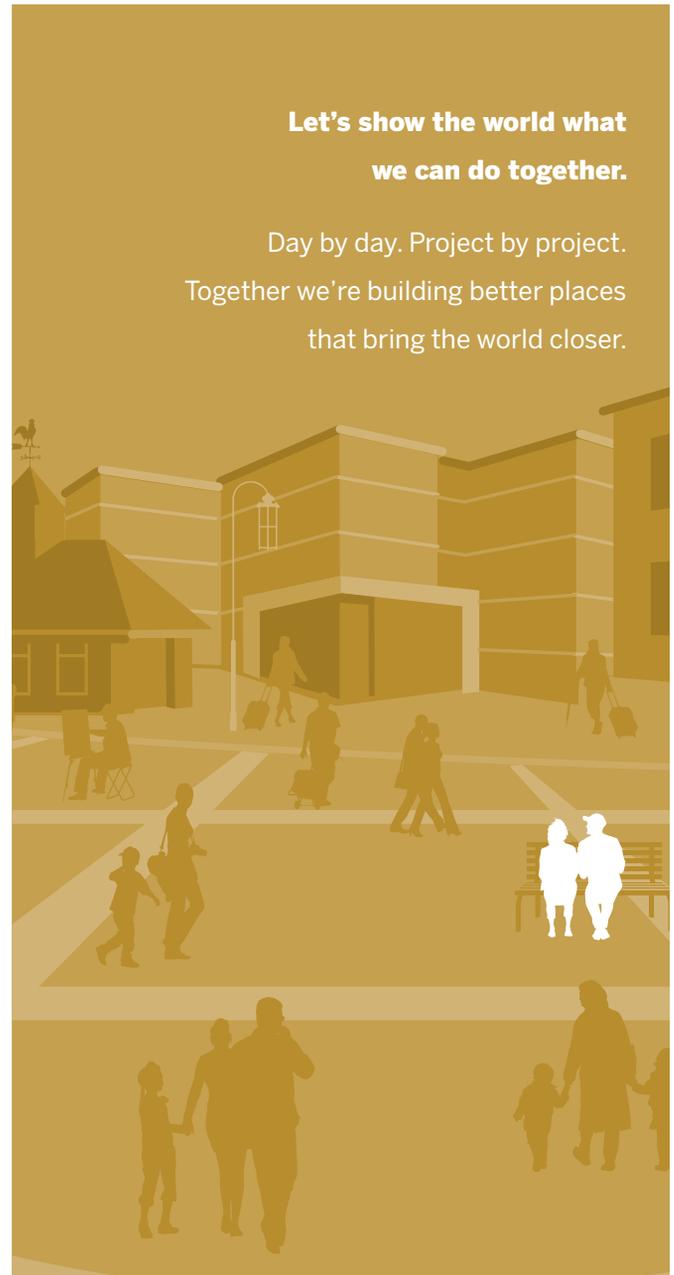
22. *Id.* at 185.

23. *Id.* at 188.

24. *Id.* at 188-190.

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The court likewise found the aggressive panhandling ordinance to be content-based, noting that the ordinance distinguished between conduct deemed aggressive based on the actor's accompanying speech, illustrating that a person following another while asking for a donation would be considered illegal panhandling, but that a person following another while asking for a petition signature would be permissible.²⁵ The aggressive panhandling ordinance passed the first prong of the strict scrutiny analysis – it was enacted to further the city's compelling interest in public safety – and the court next turned to whether it used the least restrictive means to achieve that interest.²⁶ The ordinance identified 10 actions as "aggressive panhandling,"

which the court separated into three categories: duplicative provisions, coercive behaviors, and location-based prohibitions.²⁷ Evaluating the first category, the court focused on the ordinance's prohibition of panhandling while using fighting words. The court noted that certain behavior prohibited under the ordinance could already be prosecuted using other existing ordinances – e.g., panhandling behavior that also constitutes assault and battery – and that the City had not demonstrated that public safety required harsher punishments for panhandlers engaging in assault and battery than others committing the same crime.²⁸ Moreover, the court stated that an ordinance should

not increase liability for criminal activity that is connected with protected speech.²⁹

Next the court turned to the second category of actions, those that, while not criminal, constituted coercive behavior. Examples included continuing to panhandle from an individual who gave a negative response and following a person while intending to ask them for money.³⁰ The court concluded prohibiting these actions was more restrictive than necessary.³¹ There may be benign reasons a panhandler might follow another individual – e.g., providing a longer explanation for his or her request for donation and walking alongside a person while doing so. The court stated that "giving panhandlers only one chance to convey their message was more

25. *Id.* at 191.
 26. *Id.*
 27. *Id.* at 192-96.
 28. *Id.* at 192-93.
 29. *Id.* at 193.
 30. *Id.*
 31. *Id.* at 193-94.



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restrictive than necessary.”³² The third category was also more restrictive than necessary in prohibiting panhandling in certain locations.³³ Certain locations, like bus stops, were not tailored towards public safety while other locations, such as public restrooms, were aimed at public safety but were over-restrictive because they could have allowed passive panhandling through signs without a significant cost to public safety.³⁴ Ultimately, both the location-based and aggressive panhandling ordinances failed.

Another post-Reed panhandling case is *Cutting v. City of Portland* out of the First Circuit Court of Appeals.³⁵ In

Cutting, the First Circuit considered an ordinance prohibiting standing (or sitting) in traffic medians unless doing so to cross a street.³⁶ Noting that other circuit courts have considered medians to be public fora and finding the ordinance content-neutral, the court examined the ordinance to determine whether it was narrowly tailored to serve a significant government interest, while leaving open ample alternative channels for communication.³⁷ In other words, to be constitutional, the ordinance must not burden more speech than necessary to further the city’s interest.³⁸ Citing several reasons for its conclusion, the court

found the ordinance to be geographically overinclusive and banning more speech than necessary to accomplish the city’s interest in promoting public safety.³⁹ The ordinance banned standing in all city medians, despite evidence that suggested only a handful of medians presented a significant safety concern.⁴⁰ It banned expressive activity that would not necessarily pose a safety risk – e.g., individuals holding campaign signs while standing in medians.⁴¹ Moreover, the city did not demonstrate that less restrictive means would not have achieved its purpose.⁴² The court pointed out, among other things, that the city might

32. *Id.* at 194.

33. *Id.* at 195.

34. *Id.* at 195-96.

35. *Cutting v. City of Portland*, 802 F.3d 79 (1st Cir. 2015).

36. *Id.* at 83.

37. *Id.* at 84.

38. *Id.* at 86.

39. *Id.* at 89-91.

40. *Id.* at 89-90.

41. *Id.* at 90.

42. *Id.* at 91.

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have restricted the ban to only those dangerous medians or limited activity on medians at night or in inclement weather.⁴³

These cases highlight several issues municipalities should be aware of when contemplating a panhandling ordinance or other ordinance that may have an effect of speech, such as a ban on standing in certain locations.⁴⁴ In light of *Reed* and *Norton*, an ordinance directly prohibiting panhandling – i.e., content based – is likely to fail under a strict scrutiny analysis. *McLaughlin* and *Cutting*, while not binding in Wisconsin, indicate it may be possible for a municipality to demonstrate a compelling

interest in public safety as the purpose for an aggressive panhandling ordinance. However, such an ordinance must pass a strict scrutiny analysis to survive, which is no easy feat. Additionally, *Cutting* implies that a municipality wishing to prohibit standing in medians should carefully establish its purpose in the ordinance, narrowly tailor the effect of the ordinance to that purpose, and ensure that alternate channels of communication remain open. An ordinance failing to do so may very likely be held unconstitutional.

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43. *Id.* at 92.

44. For members of the International Municipal Lawyers Association, a Model Panhandling Ordinance is available in the IMLA's resource library.



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