

A Constitutional Critique on the Criminalization of Panhandling in Washington State

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INTRODUCTION

Justice, exercised through institutions, which are inevitable, must always be held in check by the initial interpersonal relation.¹

Individuals who have lost everything—their homes, jobs, and dignity—are often forced to live on the street. Those with no reasonable alternative can find themselves relying on the generosity of others just to survive. In response, citizens petition, legislatures enact, and officers enforce laws that criminalize signs of visible poverty. Municipalities have made considerable attempts to remove visible poverty from their cities by drafting legislation that disproportionately punishes people experiencing homelessness.² This Note focuses on a particular subset of such legislation, laws that criminalize panhandling.³

Panhandling is one individual asking another individual for help,⁴ an act which is a constitutionally protected form of speech.⁵ Courts have held panhandling is a fundamental act of expression, deserving the highest protections the First Amendment offers.⁶ Indeed, restrictions on panhandling put at stake “the right to engage fellow human beings with

1. EMMANUEL LEVINAS, *ETHICS AND INFINITY: CONVERSATIONS WITH PHILIPPE NEMO* 90 (Richard A. Cohen trans., 1995).

2. Nancy A. Millich, *Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?*, 27 U.C. DAVIS L. REV. 255, 259–61 (1994) (“Empathy in the United States is turning into intolerance as Americans seek to impose harsher restrictions on homeless people to reduce their visibility. If society cannot solve the problems of the homeless, at least the public can remove the homeless from sight.”).

3. The terms “panhandling” and “begging” are used interchangeably throughout this Note.

4. See Teresa Wiltz, *Anti-Panhandling Laws Spread, Face Legal Challenges*, PEW CHARITABLE TR. (Nov. 12, 2015), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/11/12/anti-panhandling-laws-spread-face-legal-challenges> [https://perma.cc/7P64-HJX2]. “The term ‘panhandle’ stems from the outstretched arm of a beggar resembling a pan handle and is defined as ‘to stop people on the street and ask for money, often telling a hard-luck story.’” Charles Mitchell, Note, *Aggressive Panhandling Legislation and Free Speech Claims: Begging for Trouble*, 39 N.Y.L. SCH. L. REV. 697, 708 n.117 (1994) (quoting WEBSTER’S THIRD NEW INTERNATIONAL UNABRIDGED DICTIONARY 1630 (1971)).

5. *United States v. Kokinda*, 497 U.S. 720, 725 (1990) (stating that “[s]olicitation is a recognized form of speech protected by the First Amendment”); *City of Lakewood v. Willis*, 375 P.3d 1056, 1059 (Wash. 2016) (emphasizing that “the First Amendment protects ‘charitable appeals for funds,’ including appeals in the form of begging or panhandling”) (quoting *Schaumburg v. Citizens for Better Env’t*, 444 U.S. 620, 632 (1980); see also *Gresham v. Peterson*, 225 F.3d 899, 904 (7th Cir. 2000); *Loper v. N.Y.C. Police Dep’t*, 999 F.2d 699, 704 (2d Cir. 1993); JUSTIN OLSON & SCOTT MACDONALD, SEATTLE UNIVERSITY HOMELESS RIGHTS ADVOCACY PROJECT, WASHINGTON’S WAR ON THE VISIBLY POOR: A SURVEY OF CRIMINALIZING ORDINANCES & THEIR ENFORCEMENT 17 (Sara Rankin ed., 2015); NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 21 (2014) [hereinafter NLCHP, CRIMINALIZATION OF HOMELESSNESS]).

6. See *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 184 (D. Mass. 2015) (emphasizing that “panhandling is not merely a minor, instrumental act of expression”).

the hope of receiving aid and compassion.”⁷ Despite these constitutional protections, some cities restrict panhandling outright, while other cities restrict where and how people can panhandle.⁸ For example, many cities have enacted legislation prohibiting the manner in which individuals may exercise their constitutional right to panhandle. These manner prohibitions are commonly placed under the umbrella category of “aggressive” or “coercive” panhandling. This categorization is misleading, however, because these laws are drafted in a way that allow them to be used against individuals engaged in peaceful, non-violent begging.⁹ As a result, aggressive begging laws raise serious constitutional and policy concerns.

Ultimately, the enactment and enforcement of anti-panhandling laws exacerbate homelessness, rather than solving the underlying cause. Once a person has been charged with panhandling, the climb out of homelessness becomes infinitely more difficult. With a criminal record, people experiencing homelessness are further hindered from accessing employment, housing, and public benefits.¹⁰ Furthermore, these laws are costly for taxpayers because people experiencing homelessness are constantly being cycled through the criminal justice system.¹¹ Finally, these laws violate the constitutional rights of people experiencing homelessness.¹²

Section I of this Note provides an overview of the First Amendment and the protection of free speech. Section II provides a brief history of panhandling laws generally and a description of the path to second-generation aggressive panhandling laws. Section III illustrates the language and structure of aggressive panhandling laws in Washington State, using Seattle and Tacoma’s panhandling ordinances as examples. Section IV provides a three-part critique of aggressive panhandling laws. In response to the critique, this Note concludes by proposing that legislatures either repeal or substantially modify their panhandling laws.

First, legislatures should repeal provisions that provide vague, perception-based components that criminalize panhandling in a manner that causes “reasonable fear” or “compulsion.” Such provisions fail to

7. *Benefit v. City of Cambridge*, 679 N.E.2d 184, 190 (Mass. 1997).

8. Wiltz, *supra* note 4 (noting a 25% increase in city-wide bans on begging in public and a 20% increase in bans in particular public places, such as near schools and banks, between 2011 and 2014); *see also* NLCHP, CRIMINALIZATION OF HOMELESSNESS, *supra* note 5, at 20.

9. *See, e.g.*, LACEY, WASH., MUN. CODE § 5.21.040(G) (1998) (criminalizing begging in a group of two or more people or “within fifty feet of any other panhandler”); *see also* NLCHP, CRIMINALIZATION OF HOMELESSNESS, *supra* note 5, at 20 (explaining how aggressive panhandling laws are “designed to be enforced against people who are engaging in harmless activities when requesting a donation”).

10. NLCHP, CRIMINALIZATION OF HOMELESSNESS, *supra* note 5, at 45.

11. *Id.*

12. *Id.*

provide reasonable notice of what conduct is prohibited and cater to established societal biases and prejudices about people experiencing homelessness and poverty. Second, legislatures should repeal time, place, and distance restrictions on panhandling that resemble provisions courts have already invalidated as unnecessary to serve a compelling public safety interest. Third, legislatures should repeal panhandling provisions that restrict conduct already prohibited by existing laws that cover the same conduct without restricting protected speech.

Panhandling laws are, at their very core, content-based discriminations on protected speech.¹³ Accordingly, legislatures and readers are encouraged to question whether these strategic, constitutionally suspect components of aggressive panhandling laws are justified.

I. THE FIRST AMENDMENT

Laws that prohibit or restrict panhandling often violate the right to freedom of speech guaranteed under the First Amendment.¹⁴ A brief overview of the First Amendment and how the Court engages the various levels of scrutiny is essential to understanding why legislatures should consider either modifying or repealing their anti-panhandling laws.

The First Amendment prohibits restricting speech “because of its message, its ideas, its subject matter, or its content.”¹⁵ A law is *content-based* if it regulates a particular viewpoint or speech made for a particular purpose.¹⁶ Content-based restrictions on speech in a public forum are presumptively unconstitutional and subject to strict scrutiny.¹⁷ To withstand strict scrutiny, the restriction must be necessary to serve a compelling government interest and the least restrictive means of achieving that end.¹⁸ In contrast, *content-neutral* restrictions regulate the time, place, and manner of speech, are justified without reference to the content of the regulated speech, and do not regulate speech made for one

13. For a definition and discussion of “content-based” restrictions under the First Amendment, see *infra* Section I.

14. NLCHP, CRIMINALIZATION OF HOMELESSNESS, *supra* note 5, at 9, 21, 26.

15. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

16. *Id.* at 2227. For example, a law that restricts solicitation made for the purpose of obtaining money or goods as charity, but not solicitation made for commercial purposes is a content-based discrimination on speech. See *City of Lakewood v. Willis*, 375 P.3d 1056, 1063 (Wash. 2016).

17. *Reed*, 135 S. Ct. at 2222.

18. See *id.* at 2226. Compare *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245–46 (2002) (stating that “the freedom of speech . . . does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children”) with *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 189 (D. Mass. 2015) (noting that “the promotion of tourism and business has never been found to be a compelling government interest for the purposes of the First Amendment”).

purpose over others.¹⁹ Content-neutral time, place, and manner regulations are subject to intermediate scrutiny.²⁰ To withstand intermediate scrutiny, the regulation must be narrowly tailored to serve a significant government interest and leave open ample alternative channels for individuals to communicate their information.²¹

The U.S. Supreme Court recently clarified the analytical framework courts must use to determine whether a law is content-based or content-neutral.²² To determine whether strict scrutiny applies, courts must first determine whether a law is content-based “on its face” *before* determining whether the legislature’s purported “purpose and justifications for the law are content based.”²³ If the court concludes that a law is content-based on its face, the law is “subject to strict scrutiny regardless of the government’s benign motive, content-neutral justification, or lack of ‘animus toward the idea contained’ in the regulated speech.”²⁴ As such, the government’s motives or justifications are irrelevant to the content-based analysis.²⁵ Innocuous “justifications cannot transform a facially content-based law into one that is content neutral.”²⁶ Therefore, the city bears the burden of demonstrating that its justification for regulating panhandling is not mere pretext, that the harms it seeks to mitigate are real, and that the regulation will alleviate these harms in a material way.²⁷ In other words, justification must be genuine and supported by a strong basis of actual evidence, rather than “shoddy data”²⁸ or “hypothesized or invented”²⁹ responses.

Based on the Supreme Court’s clarification and subsequent federal and state court jurisprudence, it is clear that anti-panhandling laws are content-based restrictions on speech. Indeed, when people experiencing

19. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

20. *See Reed*, 135 S. Ct. at 2239; *Ward*, 491 U.S. at 791.

21. *Ward*, 491 U.S. at 791.

22. *See Reed*, 135 S. Ct. at 2228; *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276, 1289 (D. Colo. 2015) (noting that the Supreme Court in *Reed* provided needed “clarification as to how lower courts should go about determining whether a restriction on protected speech is content-based or content-neutral”).

23. *Reed*, 135 S. Ct. at 2228 (clarifying that “strict scrutiny applies either when a law is content based on its face *or* when the purpose and justification for the law are content based,” and mandating that courts “evaluate each question before” concluding “the law is content neutral and thus subject to a lower level of scrutiny”) (emphasis added).

24. *Browne*, 136 F. Supp. 3d at 1287–88 (quoting *Reed*, 135 S. Ct. at 2228).

25. *Reed*, 135 S. Ct. at 2228.

26. *Id.*

27. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 624 (1994); *see also McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 189–90 (D. Mass. 2015) (noting that protecting public safety and preventing coercion may constitute compelling governmental interests insofar as “the legislature has a strong basis in evidence to support that justification”).

28. *McLaughlin*, 140 F. Supp. 3d at 187 (quoting *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 426 (2002)).

29. *Id.* at 190 (quoting *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

poverty approach their fellow citizens with a plea for monetary assistance, they implicitly and explicitly convey “conditions of poverty, homelessness, and unemployment, as well as a lack of access to medical care, reentry services for persons convicted of crimes, and mental health support for veterans.”³⁰ Attempts to regulate this message restrain an individual’s ability to express the conditions of their poverty, as well as the homeless crisis in general, to their fellow citizens.³¹ Aside from the policy concerns surrounding such legislation, content-based restrictions on speech ultimately fail to survive constitutional muster.

II. BACKGROUND AND THE PATH TO AGGRESSIVE PANHANDLING LAWS

Although anti-vagrancy laws have existed since Colonial times, the enactment of anti-panhandling legislation in particular has increased in recent years.³² While public safety and health concerns typically serve as the purported basis for aggressive panhandling laws,³³ less compelling reasons often motivate the enactment of these laws. First, legislatures have expressed concern that visible poverty is an eyesore and has a negative effect on tourism.³⁴ Second, requests for money from a visibly poor person can be unpleasant and uncomfortable for the solicited party.³⁵ Third, it is commonly believed that money given to a person experiencing homelessness will go towards the purchase of drugs or alcohol instead of

30. *Browne v. City of Grand Junction*, No. 14-cv-00809-CMA-KLM, 2015 WL 3568313, at *5 (D. Colo. June 8, 2015).

31. *Id.* (emphasizing that attempts “to regulate this message is an attempt to restrain the expression of conditions of poverty to other citizens”).

32. *See* Wiltz, *supra* note 4.

33. NLCHP, CRIMINALIZATION OF HOMELESSNESS, *supra* note 5, at 12 (explaining that although laws that criminalize homelessness are “often justified as necessary public health and public safety measures,” the real motivation is to “move visibly homeless people out of commercial and tourist districts or . . . out of entire cities”); *see also* OLSON & MACDONALD, *supra* note 5, at 5 (noting “health safety, or general public order” as the purported justification for laws criminalizing homelessness). *See generally* Robert Teir, *Maintaining Safety and Civility in Public Spaces: A Constitutional Approach to Aggressive Begging*, 54 LA. L. REV. 285 (1993).

34. For example, many begging laws explicitly provide that promoting tourism and business, and preserving the quality of urban life is one of the purposes for the law. *See, e.g.*, CENTRALIA, WASH., MUN. CODE § 10.37.010 (2014); PUYALLUP, WASH., MUN. CODE § 9A.08.010 (2009); TACOMA, WASH., MUN. CODE § 8.13A.010 (2007). *But see* *McLaughlin*, 140 F. Supp. 3d at 190 (emphasizing that the promotion of visitors and tourism “has never been . . . a compelling government interest,” nor has it ever been sufficient “to allow content-based restrictions on speech . . . to survive strict scrutiny”).

35. *But see* *McLaughlin*, 140 F. Supp. 3d at 189 (“[I]t is core First Amendment teaching that on streets and sidewalks a person might be ‘confronted with an uncomfortable message’ that they cannot avoid; this ‘is a virtue, not a vice.’” (quoting *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014))).

food or other necessities.³⁶ Finally, it is believed that allowing individuals to beg will discourage people experiencing homelessness from getting a job.³⁷

The Path to Aggressive Panhandling Laws

A sharp increase in anti-panhandling ordinances occurred between 1976 and 1980, a period which coincided with a national decline in affordable housing.³⁸ Although a slight drop in the enactment of these ordinances occurred between 1981 and 1990, cities have been consistently enacting panhandling restrictions in increasing numbers since 1991.³⁹ A likely reason for the increase is the relatively recent upsurge of aggressive panhandling laws. During the 1990s, courts began to strike down outright bans on panhandling as unconstitutional.⁴⁰ In response, “cities . . . tried to get around those decisions by enacting what they called ‘aggressive’ panhandling laws.”⁴¹

First-generation anti-panhandling laws that prohibited panhandling outright failed to survive constitutional muster because they were content-based restrictions on speech and not the least restrictive means of achieving a compelling government interest.⁴² In response, cities began

36. Wiltz, *supra* note 4 (explaining that proponents of anti-panhandling laws argue that “giving money to panhandlers enables addicts and prevents them from getting the help they need”); *see also* Aaron Burkhalter, *Signs of The Times*, REAL CHANGE (Dec. 19, 2013), <http://realchangenews.org/2013/12/19/signs-times> [<https://perma.cc/R6RQ-UTUF>] (reporting how cities discourage people from giving donations to panhandlers by erecting signs that display “Keep the change. Don’t support panhandling. The majority of your change goes to Drugs & Alcohol. Help more by giving to charity.”). *But see* JOEL BLAU, THE VISIBLE POOR: HOMELESSNESS IN THE UNITED STATES x (1993) (quashing persistent “myths” that homeless people are “somehow responsible for their own poverty” by explaining that “[once] we acknowledge . . . drugs, alcoholism, or mental illness . . . are not sufficient explanations of homelessness, we can begin to explore the real causes”).

37. *But see* NLCHP, CRIMINALIZATION OF HOMELESSNESS, *supra* note 5, at 32 (estimating that “44% of all homeless people are employed on a temporary or full-time basis”).

38. *Id.* at 14, 35 (reporting a loss of ten thousand units of federally subsidized housing within the United States each year since the 1970s).

39. SEATTLE UNIVERSITY HOMELESS RIGHTS ADVOCACY PROJECT, BEGGING FOR CHANGE: BEGGING RESTRICTIONS THROUGHOUT WASHINGTON (Sara Rankin & Justin Olson eds., forthcoming 2018) (on file with the Seattle University Homeless Rights Advocacy Project).

40. Telephone Interview with Sarah Wunsch, Deputy Legal Dir., ACLU of Mass. (Feb. 26, 2016); *see, e.g.*, *Loper v. N.Y.C. Police Dep’t*, 999 F.2d 699, 705 (2d Cir. 1993); *Benefit v. City of Cambridge*, 679 N.E.2d 184, 189–90 (Mass. 1997).

41. Telephone Interview with Sarah Wunsch, *supra* note 40.

42. *See, e.g.*, *Benefit*, 679 N.E.2d at 189–90; *Loper*, 999 F.2d at 705. Courts also became more inclined to strike down laws even if the city showed a compelling governmental safety interest. *See McCullen*, 134 S. Ct. at 2537–38 (invalidating an abortion clinic buffer zone statute as insufficiently narrow because it directly burdened protected speech to achieve the same significant government purpose as laws that did not directly burden speech); *see also* Cynthia Barmore, *Panhandling After McCullen v. Coakley*, 16 NEV. L.J. 585 (2016) (arguing, after *McCullen*, the majority of solicitation laws now fail when applied in a traditional public forum).

drafting second-generation, “aggressive panhandling” laws⁴³ in an attempt to circumvent the content-based analysis by adding aggressive conduct provisions to pre-existing panhandling ordinances.⁴⁴ The technique was to create a constitutional, content-neutral law that the city could argue regulates the manner in which people ask for donations, not what they say when asking for it.⁴⁵ Thus, if a challenge is brought against the city’s aggressive panhandling law, the city may defend its position by arguing that (1) the law is a content-neutral, “manner” restriction regulating “activity, not speech” and (2) even if content-based, it has been narrowly tailored to serve a compelling public safety interest.⁴⁶

Despite these efforts, courts have held that variants of these second-generation aggressive panhandling laws are content-based restrictions and subject to strict scrutiny when the prohibited conduct is couched within a regulatory scheme that discriminates against a particular form of expression.⁴⁷ For example, after the Seventh Circuit held a city’s ordinance prohibiting requests for money was a form of content discrimination, and thus subject to strict scrutiny,⁴⁸ the city modified the ordinance by adding

43. See Teir, *supra* note 33, at 326.

The best way to confront the content-neutrality issue is head-on. That is, assert that, because a beggar’s speech is not prohibited, the community can regulate his or her method of presentation. This approach . . . calls for a focus on the conduct even though the neutral regulation only applies to people who make a certain kind of utterance. While the issue is a close one, it appears that laws aimed at aggressive begging (but not sweeping begging prohibitions) pass the content-neutrality test.

Id.

44. See *infra* Section III for common examples of such conduct.

45. Wiltz, *supra* note 4.

46. See, e.g., LACEY, WASH., MUN. CODE § 5.21.010 (1998) (stating that its panhandling regulations serve the purpose of promoting “the health, safety, peace, and general welfare” of its citizens and visitors); ARLINGTON, WASH., MUN. CODE § 9.56.010(1) (2015) (stating that its solicitation and camping regulations serve to “protect and preserve the public safety of pedestrians and to insure the safe and efficient movement of pedestrian and vehicular traffic in public places”).

47. See, e.g., *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 185 (D. Mass. 2015) (emphasizing that when a law “targets a particular form of expressive speech—the solicitation of immediate charitable donations—and applies its regulatory scheme only to that subject matter” it is subject to strict scrutiny even if challenged provisions regulates conduct accompanying such expression); *id.* (illustrating that targeting immediate donations allows for a “passerby to sign a petition, but not a check” or to “vocally request that a passerby . . . make a donation tomorrow, but not today (a distinction that may be of great import to someone seeking a meal and a bed tonight)”); *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 228, 238 (D. Mass. 2015) (holding a prohibition that made it “unlawful for any person to beg, panhandle or solicit in an aggressive manner” content-based and “unconstitutional in its entirety”); *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276, 1288, 1292 (D. Colo. 2015) (holding that strict scrutiny applied to city’s aggressive begging ordinance despite the city’s argument that it was a “content-neutral time, place, and manner restriction” on speech).

48. *Norton v. City of Springfield*, 806 F.3d 411, 413 (7th Cir. 2015), *cert. denied*, 136 S. Ct. 1173 (2016).

a conduct-based element. The modified ordinance prohibited individuals from approaching others and asking for immediate monetary or gratuitous donations.⁴⁹ After another constitutional challenge, the city contended that the ordinance “regulates activity, not speech.”⁵⁰ Nevertheless, the court held that the ordinance was a content-based limitation on speech that restricted individuals from approaching others for a donation, but allowed individuals engaging in other types of speech to approach others.⁵¹ Courts continue to follow this trend of invalidating aggressive panhandling laws.⁵²

III. THE LANGUAGE AND STRUCTURE OF AGGRESSIVE PANHANDLING LAWS IN WASHINGTON STATE

Aggressive panhandling prohibitions create vague, subjective guidelines on how individuals can request donations. Generally, cities with aggressive panhandling laws define “aggressive panhandling” as begging “with the intent to intimidate⁵³ another person into giving money or goods.”⁵⁴ Although the definition provides an element of intent, the

49. *Norton v. City of Springfield*, No. 15-3276, 2015 WL 8023461, at *1 (C.D. Ill. Dec. 4, 2015) (internal quotation marks omitted).

50. *Id.* at *2.

51. *Id.* at *2–3.

Although the language of the current ordinance has been modified, it still addresses the content of the Plaintiffs’ speech. The Plaintiffs can ask for the time, talk about the weather, ask someone to sign a petition, or even solicit support (either nonmonetary support or for a future contribution) for causes or organizations while approaching within five feet of the person being addressed. However, the Plaintiffs are not permitted to ask pedestrians for ‘an immediate donation of money or other gratuity’ while ‘knowingly approaching within five feet’ of the individual. The ordinance subjects the Plaintiffs to criminal penalties for asking for immediate donations of money in those circumstances. . . . Because the . . . ordinance prohibits this type of speech in the designated area while allowing other types, the Court must conclude it is content-based.

Id. at *2

52. *See, e.g., Norton*, 806 F.3d at 413 (invalidating an aggressive begging ordinance because it was a content-based restriction on speech); *McLaughlin*, 140 F. Supp. 3d at 197 (holding a panhandling provision and an aggressive panhandling provision violated the First Amendment); *Thayer*, 144 F. Supp. 3d at 237 (invalidating an aggressive begging ordinance on First Amendment grounds); *Browne*, 136 F. Supp. 3d at 1294 (same); *City of Lakewood v. Willis*, 375 P.3d 1056, 1059 (Wash. 2016) (invalidation two provisions of an aggressive begging ordinance).

53. Some ordinances use “intimidate or coerce.” *See infra* note 53.

54. ANACORTES, WASH., MUN. CODE § 9.24.050(A) (1999); ARLINGTON, WASH., MUN. CODE § 9.56.020(1) (2015) (“with the intent to intimidate *or coerce* . . .”) (emphasis added); AUBURN, WASH., MUN. CODE § 9.08.010(B)(1) (2002); BELLEVUE, WASH., MUN. CODE § 10.06.010(B)(1) (2005); BONNEY LAKE, WASH., MUN. CODE § 9.11.060(A) (2016) (“‘Aggressive solicitation’ means behavior that is intended to harass or intimidate . . .”); BREMERTON, WASH., MUN. CODE § 9A.44.110(b) (2014); DES MOINES, WASH., MUN. CODE §§ 9.68.030(2), (1)(a) & (c) (1993); EVERETT, WASH., MUN. CODE § 9.52.010(A)(2) (1987); FEDERAL WAY, WASH., MUN. CODE §§ 6.35.030(1)(a), (2) (2001); LAKE STEVENS, WASH., MUN. CODE § 9.08.030(b)(1) (2012); MARYSVILLE, WASH., MUN. CODE § 6.37.020(1) (2012) (“with the intent to intimidate *or coerce* . . .”) (emphasis added); MOSES LAKE, WASH., MUN. CODE § 9.22.010 (2011); MOUNT VERNON, WASH.,

solicitor's conduct is more often restricted by the reaction of the person being solicited. For example, most cities using this definition of aggressive panhandling define the word "intimidate" to mean: "to engage in conduct which would make a reasonable person feel fearful or compelled."⁵⁵ Several of the cities define intimidate as "to coerce or frighten into submission or obedience."⁵⁶ Finally, a handful of the cities use a combination of both definitions: "to coerce or frighten into submission or obedience, *or* to engage in conduct which would make a reasonable person fearful or feel compelled."⁵⁷

After providing a general definition of aggressive panhandling and intimidation, cities often list prohibited conduct that qualifies as "aggressive" and "intimidating." However, some cities fail to provide objective conduct entirely.⁵⁸ For the cities that list objective conduct, these enumerations are frequently prefaced by language such as "evidence of intimidation includes, but is not limited to . . . [,]" thus leaving additional forms of conduct that could potentially qualify as "aggressive" and

MUN. CODE § 9.21.060(A) (2011); OAK HARBOR, WASH., MUN. CODE § 6.95.020(1) (2014) ("with the intent to intimidate *or* coerce . . .") (emphasis added); PORT ANGELES, WASH., MUN. CODE § 11.18.020(A) (2009); RENTON, WASH., MUN. CODE § 6-25-1(2011); SAMMAMISH, WASH., MUN. CODE § 22.05.110(1)(a) (2017); SEATAC, WASH., MUN. CODE § 8.05.740(B)(1)(a) (1995); SEATTLE, WASH., MUN. CODE § 12A.12.015(A)(1) (1994); SHORELINE, WASH., MUN. CODE § 9.10.140(B)(1) (1996); SPOKANE VALLEY, WASH., MUN. CODE § 8.25.020 (2016); TUMWATER, WASH., MUN. CODE § 9.08.010 (2010); UNIVERSITY PLACE, WASH., MUN. CODE §§ 9.55.020 (A)(2), .010(1) (2017); WENATCHEE, WASH., MUN. CODE §§ 6A.13.010(1), 6A.13.020(2) (1989) (leaving "intimidate" undefined); MOUNTLAKE TERRACE, WASH., MUN. CODE § 9.40.030(B)(1) (2015); VANCOUVER, WASH., MUN. CODE § 7.04.030(1) (2003).

55. *See, e.g.*, ARLINGTON, WASH., MUN. CODE § 9.56.020(7) (2015); BONNEY LAKE, WASH., MUN. CODE § 9.11.060(C) (2016) (Intimidate "means to coerce or frighten into submission or obedience or to engage in conduct which would make a reasonable person fearful or feel compelled to give the person money or goods."); BREMERTON, WASH., MUN. CODE § 9A.44.110(a)(1) (2014); EVERETT, WASH., MUN. CODE § 9.52.020(D) (1987); FEDERAL WAY, WASH., MUN. CODE § 6.35.030(1)(e) (2001) (Intimidate "means to engage in words or conduct which would make a reasonable person feel compelled to give money to a person."); MARYSVILLE, WASH., MUN. CODE § 6.37.020(3) (2012); MOUNT VERNON, WASH., MUN. CODE § 9.21.050(E) (2011); PORT ANGELES, WASH., MUN. CODE § 11.18.020(B) (2009); RENTON, WASH., MUN. CODE § 6-25-1 (2011) (Intimidate "means to use words or engage in conduct that would likely cause a reasonable person to fear bodily harm, fear damage to or loss of property, or otherwise be compelled into giving money or other things of value."); SAMMAMISH, WASH., MUN. CODE § 22.05.110(b) (2017); SEATTLE, WASH., MUN. CODE § 12A.12.015(A)(2) (1994); UNIVERSITY PLACE, WASH., MUN. CODE § 9.55.010 (2)(A)(2) (2017); VANCOUVER, WASH., MUN. CODE § 7.04.030(3) (2003).

56. ANACORTES, WASH., MUN. CODE § 9.24.050(B)(3) (1999); BELLEVUE, WASH., CITY CODE 10.06.010(B)(3) (2005); BURIEN WASH., MUN. CODE §§ 9.80.400(1) & (2)(a), (c) (1993); DES MOINES, WASH., MUN. CODE §§ 9.68.030(2), (1)(a) & (c) (1993); LAKE STEVENS, WASH., MUN. CODE § 9.08.030(c) (2012); MOSES LAKE, WASH., MUN. CODE § 9.22.010 (2011); MOUNTLAKE TERRACE, WASH., MUN. CODE § 9.40.030(B)(1) (2015); SHORELINE, WASH., MUN. CODE § 9.10.140(B)(3) (1996); SPOKANE VALLEY, WASH., MUN. CODE § 8.25.020 (2016); TUMWATER, WASH., MUN. CODE § 9.08.010 (2010).

57. *See, e.g.*, AUBURN, WASH., MUN. CODE § 9.08.010(B)(3) (2002) (emphasis added).

58. *See, e.g.*, SEATTLE, WASH., MUN. CODE § 12A.12.015 (2016).

“intimidating.”⁵⁹ These drafting practices are likely to cause confusion among individuals who wish to peacefully beg while remaining compliant with the law.

Further, the lengthy list of prohibited conduct in many aggressive panhandling ordinances (if conduct is provided at all) illustrates how these ordinances are, arguably, not the least restrictive means of achieving a compelling governmental interest. Some common prohibitions include:⁶⁰ (1) approaching within a certain distance of a person for the purpose of requesting a donation without that person’s consent to solicitation;⁶¹ (2) persisting in begging or following a person after being given a negative response;⁶² (3) begging in a group of two or more people;⁶³ (4) begging in a manner that exploits minors;⁶⁴ (5) begging from anyone under the age of

59. *See, e.g.*, FEDERAL WAY, WASH., MUN. CODE §§ 6.35.030(2)(a), (1)(e)(i)–(ii) (2001) (“evidence of intimidation includes, but is not limited to . . .”); KENNEWICK, WASH., MUN. CODE § 10.08.120 (repealed by Kennewick City Council on May 7, 2017 in light of *City of Lakewood v. Willis*, 375 P.3d 1056 (Wash. 2016)); RENTON, WASH., MUN. CODE § 6.25.1(2011); SPOKANE, WASH., MUN. CODE § 10.10.025 (B)(1) (2015) (criminalizing begging while intentionally engaging “in conduct that would likely intimidate a reasonable person, including, but not limited to . . .”).

60. *See generally* BEGGING FOR CHANGE, *supra* note 39.

61. *See, e.g.*, ARLINGTON, WASH., MUN. CODE § 9.56.020(6)(B) (2015); CENTRALIA, WASH., MUN. CODE §§ 10.37.030, .020(B) (2014); COVINGTON, WASH., MUN. CODE § 9.190.020(1)(b) (2010); ISSAQUAH, WASH., MUN. CODE § 9.45.020(A)(2) (2008); LACEY, WASH., MUN. CODE § 5.21.040(A) (1998); LONGVIEW, WASH., MUN. CODE § 9.23.040(1) (2008); MARYSVILLE, WASH., MUN. CODE § 6.37.020(2)(b) (2012); MONROE, WASH., MUN. CODE § 9.35.020(A)(2) (2008); Oak Harbor, WASH., MUN. CODE § 6.95.020(2)(b) (2014).

62. *See, e.g.*, ARLINGTON, WASH., MUN. CODE § 9.56.020(6)(C) (2015) (persisting provision); BONNEY LAKE, WASH., MUN. CODE § 9.11.060(A)(a) (2016) (persisting provision); BONNEY LAKE, WASH., MUN. CODE § 9.11.060(A)(c) (2016) (following provision); COVINGTON, WASH., MUN. CODE § 9.190.020(1)(c) (2010) (persisting provision); FEDERAL WAY, WASH., MUN. CODE §§ 6.35.030(2)(a), .030(1)(e)(i)–(ii) (2001) (persisting and following provision); ISSAQUAH, WASH., MUN. CODE § 9.45.020(A)(2) (2008) (persisting provision); KENNEWICK, WASH., MUN. CODE § 10.08.120(2)(a) (repealed 2017) (persisting and following provision); KENT, WASH., MUN. CODE 9.02.640(A)(4), (B)(1) (2015) (persisting and following provision); MARYSVILLE, WASH., MUN. CODE § 6.37.020(2)(c) (2012) (persisting provision); MONROE, WASH., MUN. CODE § 9.35.020(A)(3) (2008) (persisting provision); OAK HARBOR, WASH., MUN. CODE § 6.95.020(2)(c) (2014) (persisting provision); LACEY, WASH., MUN. CODE § 5.21.040(E) (1998) (following provision); LONGVIEW, WASH., MUN. CODE § 9.23.040(5) (2008) (following provision); PUYALLUP, WASH., MUN. CODE § 9A.08.020(2)(b) (2009) (persisting provision); TACOMA, WASH., MUN. CODE § 8.13.A.020(B)(2) (2007) (persisting provision); SPOKANE, WASH., MUN. CODE § 10.10.025 (B)(1) (2015) (persisting and following provision); SUNNYSIDE, WASH., MUN. CODE § 9.86.050(D) (1985) (persisting provision).

63. *See, e.g.*, LACEY, WASH., MUN. CODE § 5.21.040(G) (1998) (group of two or more people).

64. *See, e.g.*, ARLINGTON, WASH., MUN. CODE § 9.56.070 (2015); AUBURN, WASH., MUN. CODE § 9.08.010(B)(1)(d) (2002); BONNEY LAKE, WASH., MUN. CODE § 9.11.050(B) (2016); COVINGTON, WASH., MUN. CODE § 9.190.020(1)(h) (2010); SEATAC, WASH., MUN. CODE § 8.05.740(B)(1)(d) (1995); RENTON, WASH., MUN. CODE § 6.25.1 (2011). *But see* *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 195 (D. Mass. 2015) (noting that such laws will not survive strict scrutiny “in the absence of record evidence . . . that ‘intimidating’ group panhandling is more dangerous than ‘intimidating’ solo panhandling”).

sixteen;⁶⁵ (6) making a false or misleading representation while begging;⁶⁶ (7) delivering or attempting to deliver products or services and pressuring payment in return;⁶⁷ (8) engaging with the driver of a parked car while begging;⁶⁸ (9) blocking or impeding pedestrian traffic while begging;⁶⁹ (10) blocking, impeding, or distracting vehicular traffic while begging; and (11) begging while intoxicated.⁷⁰

Although begging may not be desirable behavior, should it be criminalized? Notably, both state and municipal codes have provisions that address the same public safety concerns purported in aggressive panhandling laws without restricting protected speech. Considering that content neutral laws already criminalize such behavior without restricting speech and without targeting a particular class of individuals, are these conduct-based aggressive begging provisions necessary?

The following Subsection provides an illustration of (1) a perception-based panhandling ordinance that lacks any objective conduct⁷¹ and (2) an overly broad conduct-based panhandling ordinance with perception-based components.⁷²

65. *See, e.g.*, LACEY, WASH., MUN. CODE § 5.21.040(D) (2008); LONGVIEW, WASH., MUN. CODE §§ 9.23.040(4) (2008).

66. *See, e.g.*, AUBURN, WASH., MUN. CODE § 9.08.010(B)(1)(b) (2002); CENTRALIA, WASH., MUN. CODE §§ 10.37.030, .020(B)(7) (2014); COVINGTON, WASH., MUN. CODE § 9.190.020(1)(g) (2010); GOLD BAR, WASH., MUN. CODE § 9.15.020(2)(b) (2010); ISSAQUAH, WASH., MUN. CODE § 9.45.020(A)(6) (2008); MARYSVILLE, WASH., MUN. CODE § 6.37.020(2)(f) (2012); MONROE, WASH., MUN. CODE § 9.35.020(A)(6) (2008); OAK HARBOR, WASH., MUN. CODE § 6.95.020(2)(f) (2014); SEATAC, WASH., MUN. CODE 8.05.740(B)(1)(b) (1995).

67. *See, e.g.*, AUBURN, WASH., MUN. CODE § 9.08.010(B)(1)(e) (2002); PUYALLUP, WASH., MUN. CODE § 9A.08.020(2)(f) (2009); SEATAC, WASH., MUN. CODE § 8.05.740(B)(1)(e) (1995); TACOMA, WASH., MUN. CODE § 8.13.A.020(B)(6) (2007).

68. *See, e.g.*, MOUNT VERNON, WASH., MUN. CODE § 9.21.050(E) (2011); LACEY, WASH., MUN. CODE § 5.21.030(C) (1998) (amended 2008); TACOMA, WASH., MUN. CODE § 13.A.030(A)(1)(g) (2007).

69. *See, e.g.*, ARLINGTON, WASH., MUN. CODE § 9.56.020(6)(D) (2015); AUBURN, WASH., MUN. CODE § 9.08.010(B)(1)(c) & (6) (2002); BONNEY LAKE, WASH., MUN. CODE § 9.11.060(A)(b) (2016); CENTRALIA, WASH., MUN. CODE § 10.37.030, .020(B)(4); COVINGTON, WASH., MUN. CODE § 9.190.020(1)(d) (2010); EVERETT, WASH., MUN. CODE §§ 9.52.010(A)(1), 9.52.020(A) (1987); FEDERAL WAY, WASH., MUN. CODE §§ 6.35.030(1)(b), (2)(b) (2001); ISSAQUAH, WASH., MUN. CODE § 9.45.020(A)(4) (2008); LACEY, WASH., MUN. CODE § 5.21.040(B) (1998); LONGVIEW, WASH., CITY CODE § 9.23.040(2) (2008); MARYSVILLE, WASH., MUN. CODE § 6.37.020(2)(d) (2012); MONROE, WASH., MUN. CODE § 9.35.020(A)(4) (2008); PUYALLUP, WASH., MUN. CODE § 9A.08.020(2)(c) (2009); SUNNYSIDE, WASH., MUN. CODE § 5.22.050(C) (2010); TACOMA, WASH., MUN. CODE § 8.13.A.020(B)(3) (2007); WENATCHEE, WASH., MUN. CODE § 6A.13.020(1).

70. *See, e.g.*, ARLINGTON, WASH., MUN. CODE § 9.56.060 (2015); LAKEWOOD, WASH., MUN. CODE § 9A.04.020A (2011) (amended 2017).

71. SEATTLE, WASH., MUN. CODE ch. 12A.12 (2016).

72. TACOMA, WASH., MUN. CODE ch. 8.13A (2007).

Seattle's and Tacoma's Panhandling Ordinances as Illustrations

Seattle's pedestrian interference ordinance is an example of an aggressive panhandling law that fails to provide examples of objective conduct. Under this ordinance, it is a misdemeanor to aggressively beg in a public place.⁷³ Penalties include a fine up to \$1,000 or imprisonment for a term not to exceed ninety days, or both.⁷⁴ Other than the following general definitions, the ordinance provides no guidance or details on how this law should be enforced:

1. "Aggressively beg" means to beg with the intent to intimidate another person into giving money or goods.
2. "Intimidate" means to engage in conduct which would make a reasonable person fearful or feel compelled.
3. "Beg" means to ask for money or goods as a charity, whether by words, bodily gestures, signs, or other means.
- ...
5. "Public place" means an area generally visible to public view and includes alleys, bridges, buildings, driveways, parking lots, parks, plazas, sidewalks and streets open to the general public, including those that serve food or drink or provide entertainment, and the doorways and entrances to buildings or dwellings and the grounds enclosing them.⁷⁵

In contrast, Tacoma's panhandling ordinance provides a sweeping list of prohibited conduct.⁷⁶ The ordinance purports "to protect citizens from the fear and intimidation accompanying certain kinds of solicitation, to promote tourism and business, and to preserve the quality of urban life while providing safe and appropriate venues for constitutionally protected activity."⁷⁷ Under this ordinance, it is a gross misdemeanor to solicit⁷⁸ "by coercion."⁷⁹ Individuals violating this ordinance may be penalized with a

73. SEATTLE, WASH., MUN. CODE § 12A.12.015 (2016) ("A person is guilty of pedestrian interference if, in a public place, he or she intentionally. . . [a]ggressively begs."). Bellevue and Anacortes also use similar language in their aggressive begging ordinances. *See* BELLEVUE, WASH., CITY CODE § 10.06.010 (2005) (defining intimidate as "to coerce or frighten into submission or obedience"); ANACORTES WASH., MUN. CODE § 9.24.050 (1999).

74. SEATTLE, WASH., MUN. CODE §§ 12A.12.015(C), 12A.02.070 (2016).

75. *Id.* § 12A.12.015 (2016).

76. TACOMA, WASH., MUN. CODE ch. 8.13A (2007).

77. *Id.* § 8.13A.010 (2007).

78. *Id.* § 8.13A.020(I) (2007) ("Solicit and all derivative forms of solicit means to ask, beg, solicit, or plead, whether orally or in a written or printed manner, for the purpose of immediately receiving contributions, alms, charity, or gifts of items of value for oneself or another person.").

79. *Id.* §§ 8.13A.020(I), 8.13A.040 (2007) (providing that "[i]t is unlawful for a person to solicit by coercion").

\$5,000 fine, incarceration of no more than one year, or both.⁸⁰ The ordinance defines “coercion” to mean the following:

1. to approach or speak to a person in such a manner as would cause a reasonable person to believe that the person is being threatened with either imminent bodily injury or the commission of a criminal act upon the person or another person or upon property in the person’s immediate possession;
2. to persist in a solicitation after the person solicited has given a negative response;
3. to block, either individually or as part of a group of persons, the passage of a solicited person;
4. to engage in conduct that would reasonably be construed as intended to compel or force a solicited person to accede to demands;
5. to use violent or threatening gestures toward a person;
6. willfully providing or delivering, or attempting to provide or deliver, unrequested or unsolicited services or products with a demand or exertion of pressure for payment in return; or
7. to use profane, offensive, or abusive language, which is inherently likely to provoke an immediate violent reaction.⁸¹

Additionally, the ordinance prohibits begging near an extensive list of designated locations and facilities. Individuals who violate these “place of solicitation” restrictions are guilty of a misdemeanor “subject to a penalty of \$1,000, incarceration for up to 90 days, or both a fine and a penalty.”⁸² Specifically, the ordinance criminalizes begging within fifteen feet of:

- a. an automated teller machine;
- b. the entrance of a building, unless the solicitor has permission from the owner or occupant;
- c. an exterior public pay telephone;
- d. a self-service car wash;
- e. a self-service fuel pump;
- f. a public transportation stop; or

80. *Id.* § 8.13A.060 (2007).

81. TACOMA, WASH., MUN. CODE § 8.13A.020 (2007).

82. *Id.* § 8.13A.060 (2007).

g. any parked vehicle as occupants of such vehicle enter or exit such vehicle.⁸³

For the purposes of these distance restrictions, measurement is “made in a straight line, without regard to intervening structures or objects, from the nearest point at which a solicitation is being conducted to whichever is applicable of the following:”

1. the nearest entrance or exit of a facility in which an automated teller machine is enclosed or, if the machine is not enclosed in a facility, to the nearest part of the automated teller machine;
2. the nearest entrance or exit of a building;
3. the nearest part of an exterior public pay telephone;
4. the nearest part of the structure of a self-service car wash;
5. the nearest part of a self-service fuel pump;
6. the nearest point of any sign or marking designating an area as a public transportation stop; or
7. any door of a parked vehicle that is being used by an occupant of such vehicle to enter or exit such vehicle.⁸⁴

Finally, the ordinance prohibits begging “after sunset or before sunrise” and “in any public transportation facility or vehicle.”⁸⁵

Seattle and Tacoma’s ordinances illustrate how aggressive begging laws can be both vague and overly broad. Both legislative schemes are not the least restrictive means of achieving a compelling governmental interest and both allow for the criminalization of peaceful messages of need and assistance.

IV. ARGUMENTS AGAINST AGGRESSIVE PANHANDLING LAWS

Even ‘the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance.’⁸⁶

This Section provides a three-part critique of aggressive panhandling laws. First, the majority of aggressive panhandling laws include a perception-based provision that allows officers to base culpability on the

^{83.} *Id.* § 8.13A.060 (2007).

^{84.} *Id.* § 8.13A.030 (2007).

^{85.} *Id.* § 8.13A.030(A)(2) (2007). *But see* Thayer v. City of Worcester, 144 F. Supp. 3d 218, 235 (D. Mass. 2015) (holding that a blanket prohibition on soliciting from thirty minutes after sunset to thirty minutes after sunrise was unconstitutionally overbroad).

^{86.} McLaughlin v. Lowell, 140 F. Supp. 3d 177, 184 (D. Mass. 2015) (quoting Loper v. N.Y.C. Police Dep’t, 999 F.2d 699, 704 (2d Cir. 1993)).

perception of the bystander rather than on the specific, objective conduct of the individual asking for aid.⁸⁷ When little or no guidance is provided by the legislature regarding what objective conduct is prohibited, law enforcement is left to rely on subjective perceptions. These subjective perceptions may include what a reasonable person would perceive as intent to intimidate—whether that perception is judged as a reasonable person feeling fearful or compelled or some perceived manifestation of intent to intimidate.⁸⁸ The implicit and explicit bias towards the homeless population coupled with the prejudice that this population typically experiences can produce feelings of discomfort, repulsion, and even fear.⁸⁹ Thus, these laws can potentially lead to arbitrary and discriminatory enforcement and disproportionately criminalize people experiencing homelessness.

Second, even when evidence of aggressive panhandling is based on objective conduct as well as time and place restrictions, these restrictions are overbroad because they have the potential of chilling constitutionally protected forms of peaceful begging.⁹⁰ As will be discussed, both federal and state courts have already invalidated some of the most common conduct, time, and place provisions that accompany aggressive panhandling laws for these reasons.

Third, even when aggressive panhandling laws provide provisions that prohibit truly harmful or threatening behavior, the prohibited conduct is often duplicative of existing, content-neutral laws that do not single out constitutionally protected speech; thus undermining claims that the law targets aggressive conduct rather than speech.⁹¹

*A. Perception-Based Panhandling Laws Lead to
Discriminatory and Arbitrary Enforcement*

Vague, perception-based panhandling laws raise several constitutional concerns. First, perception-based laws make it challenging to know whether a reasonable person feels fearful or compelled because of the panhandler's actions, or because the mere presence of a visibly poor

87. See, e.g., SEATTLE, WASH., MUN. CODE § 12A.12.015 (2016).

88. BEGGING FOR CHANGE, *supra* note 39.

89. See Sara K. Rankin, *A Homeless Bill of Rights (Revolution)*, 45 SETON HALL L. REV. 383, 390 (2015) (citing Lasana T. Harris & Susan T. Fiske, *Dehumanizing the Lowest of the Low: Neuroimaging Responses to Extreme Out-Groups*, 17 PSYCHOL. SCI. 847, 848 (2006)); see also Steven J. Ballew, *Panhandling and the First Amendment How Spider-Man Is Reducing the Quality of Life in New York City*, 81 BROOK. L. REV. 1167 (2016).

90. See, e.g., TACOMA, WASH., MUN. CODE ch. 8.13A (2007).

91. See, e.g., *id.* (prohibiting begging in “a manner as would cause a reasonable person to believe that the person is being threatened with either imminent bodily injury or the commission of a criminal act upon the person or another person or upon property in the person’s immediate possession”).

person elicits feelings of repulsion or even sympathy.⁹² For example, without providing any kind of objective conduct standard,⁹³ Seattle's ordinance criminalizes individuals who beg while engaging in conduct that would make a "reasonable person fearful or compelled" to give money or goods.⁹⁴

At first glance, this law may appear sensible, perhaps even preferable. No one would sanction the act of forcing another person into giving money or goods by use of coercion, fear, or intimidation. However, because this law provides no objective conduct standard, the individual is not on notice as to what conduct is prohibited. This is especially problematic due to the existence of a "persistent and deeply-held prejudice against poor and homeless people."⁹⁵ Studies show that people experiencing homelessness can "elicit the worst kind of prejudice—disgust and contempt—based on moral violations and subsequent negative outcomes that these groups allegedly caused themselves."⁹⁶ This means that the "reasonable person" standard on which many of these ordinances are based could hold implicit prejudices against the panhandler.⁹⁷ As a result, it is difficult to determine whether a reasonable person feels fearful or compelled because of the panhandler's actions, or because of their mere presence.⁹⁸

Providing an exhaustive list of what conduct is prohibited may solve this problem. However, legislatures should avoid listing conduct that has the potential of reaching peaceful forms of begging. As the following Section explains, aggressive panhandling laws that list objective conduct

92. See Rankin, *A Homeless Bill of Rights*, *supra* note 89, at 390 (noting a "persistent and deeply-held prejudice against poor and homeless people").

93. See *supra* notes 73–75 and accompanying text.

94. SEATTLE, WASH., MUN. CODE § 12A.12.015 (2016); see also ANACORTES WASH., MUN. CODE § 9.24.050 (1999); ARLINGTON, WASH., MUN. CODE § 9.56.020(1) (2015); BELLEVUE, WASH., CITY CODE § 10.06.010 (2005) (defining intimidate as "to coerce or frighten into submission or obedience"); MARYSVILLE, WASH., MUN. CODE § 6.37.020(1) (2012); OAK HARBOR, WASH., MUN. CODE §§ 6.95.040, .020(1), .020(3) (2014).

95. See Rankin, *A Homeless Bill of Rights*, *supra* note 89, at 390 (citing Lasana T. Harris & Susan T. Fiske, *Dehumanizing the Lowest of the Low: Neuroimaging Responses to Extreme Out-Groups*, 17 PSYCHOL. SCI. 847, 848 (2006)).

96. Lasana T. Harris & Susan T. Fiske, *Dehumanizing the Lowest of the Low: Neuroimaging Responses to Extreme Out-Groups*, 17 PSYCHOL. SCI. 847, 848 (2006).

97. See Rankin, *A Homeless Bill of Rights*, *supra* note 89, at 390; see also Ballew, *supra* note 89 ("Empirical evidence supports their theory and shows that individuals feel intimidated when they are approached by panhandlers and even avoid certain areas out of fear of being approached for money. In a Department of Justice (DOJ) Survey of San Francisco residents, 33% of those surveyed admitted to giving money to panhandlers out of intimidation, and 40% said they feared for their safety around panhandlers." (citing MICHAEL S. SCOTT, U.S. DEP'T OF JUSTICE, PANHANDLING 4 (2003))).

98. See *City of Seattle v. Webster*, 802 P.2d 1333, 1338 (Wash. 1990) (explaining that satisfying due process requires, at a minimum, members of the public and law enforcement be provided with notice of the prohibited conduct in order to avoid arbitrary and disparate enforcement).

are still susceptible to First Amendment challenges when they prohibit an overly broad amount of conduct.

B. Conduct-Specific Aggressive Panhandling Laws Violate the Overbreadth Doctrine

Panhandling prohibitions are content-based restrictions on speech that are presumed unconstitutional unless justified by a compelling state interest.⁹⁹ Even if the law purports to prohibit aggressive conduct that may accompany begging, the law is subject to strict scrutiny if it does not prohibit solicitation generally, but only targets speech made for the particular purpose of obtaining money or goods as a charity.¹⁰⁰ Accordingly, conduct and behavior restrictions on panhandling still must be the least restrictive means of achieving a necessary governmental interest. Nevertheless, cities have adopted anti-panhandling ordinances with extensive prohibitions on how, where, and when individuals can panhandle. These extensive conduct and behavior restrictions on panhandling, illustrated in Tacoma's Panhandling ordinance,¹⁰¹ are problematic for several reasons.

First, they are unconstitutionally overbroad because they can be enforced against people engaging in harmless activities when requesting a donation; thus creating a substantial chilling effect on constitutionally-protected peaceful begging.¹⁰² A law is overbroad if it sweeps within its prohibitions constitutionally-protected free speech activities.¹⁰³ For example, Tacoma's ordinance has the potential of criminalizing the actions of a person who silently holds a sign requesting aid fifteen feet from the entrance or exit of a building, bus stop, gas station, or ATM.¹⁰⁴ Tacoma also includes a blanket ban on begging at night.¹⁰⁵ Although these

99. See *Reed v. Town of Gilbert* 135 S.Ct. 2218 (2015) (content-based limitations on speech subject to strict scrutiny under First Amendment analysis); see also *Thayer v. City of Worcester*, 135 S.Ct. 2887 (2015) (remanding a decision upholding an anti-panhandling ordinance in light of *Reed*).

100. See *Id.* at 2227; *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 185 (D. Mass. 2015). *City of Lakewood v. Willis*, 375 P.3d 1056, 1063 (Wash. 2016).

101. TACOMA, WASH., MUN. CODE § 8.13A (2007).

102. See *supra* notes 58–70 and accompanying text.

103. *Houston v. Hill*, 482 U.S. 451, 458 (1987).

104. TACOMA, WASH., MUN. CODE § 8.13A.030 (2007). *But cf.* *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 235–37 (D. Mass. 2015) (invalidating similar distance restrictions because they were “not the least restrictive means available to protect the public and therefore, [failed to] satisfy strict scrutiny”).

105. TACOMA, WASH., MUN. CODE § 8.13A.030(A)(2)(b) (2007) (prohibiting solicitation “after sunset or before sunrise”). *But cf. Thayer*, 144 F. Supp. 3d at 235 (invalidating city ordinance that prohibited “soliciting any person in public after dark, which shall mean the time from one-half hour before sunset to one-half hour after sunrise” because it was not the least restrictive means of achieving a compelling government interest).

provisions are aimed at targeting aggressive behavior, they have the potential of barring constitutionally-protected forms of peaceful begging.

Second, extensive conduct and behavior restrictions on panhandling are frequently both overinclusive and underinclusive. For example, “between sunset and sunrise, a hungry, indigent person with no shelter who vocally requests a passerby for spare change, food, a blanket, or any other form of donated assistance is subject to criminal penalties.”¹⁰⁶ A person who silently holds a sign noting a request for monetary help while standing fifteen feet away from the entrance of any building, a gas station, or a bus stop risks a misdemeanor conviction, ninety days of incarceration, and a \$1,000 fine.¹⁰⁷ At the same time a person can sell the daily news or solicit votes without penalty under the ordinance. Accordingly, extensive conduct and behavior restrictions on panhandling are overinclusive because they restrict more speech than is necessary to serve a compelling public safety interest. They are also underinclusive because they criminalize speech when it is made for the purpose of obtaining an immediate donation while permitting speech made for the purpose of selling goods, soliciting customers, or obtaining votes.

Third, the listed conduct is frequently illustrative rather than exclusive. For example, many aggressive panhandling provisions prohibit unlawful conduct that may accompany panhandling, but introduce the list of prohibited conduct with “including but not limited to” language. This raises due process concerns because it leaves open the possibility that other unspecified actions might also be considered illegal.¹⁰⁸ Moreover, even in situations where the prohibited conduct is sufficient evidence of aggressive begging, the “intent to intimidate” element is effectively read out of the ordinance.¹⁰⁹ For example, if begging within fifteen feet of a bus stop is *prima facie* evidence of the intent to intimidate, there is again an unacceptable danger of chilling or criminalizing protected forms of peaceful begging.¹¹⁰

106. BEGGING FOR CHANGE, *supra* note 39; TACOMA, WASH., MUN. CODE § 8.13A.030(A)(2)(b) (2007).

107. *Id.* §§ 8.13A.030(A), .030(B), .060.

108. See *Gresham v. Peterson*, 225 F.3d 899, 908 (7th Cir. 2000) (construing a list of prohibited conduct in an Indianapolis panhandling ordinance to be exclusive rather than illustrative to save it from a vagueness challenge, but noting that an incomplete list of prohibited behavior would raise “serious due process concerns” because it would leave open the possibility that other unspecified actions might also be considered illegal).

109. See *Virginia v. Black*, 538 U.S. 343, 365 (2003) (explaining how a cross burning statute that “permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself” strips away “the very reason why a State may ban cross burning with intent to intimidate”).

110. See, e.g., MOUNT VERNON, WASH., MUN. CODE § 9.21.050(E) (2011) (“[There is a] *presumption* that begging in the following circumstances would make a reasonable person fearful or feel compelled if begging occurs within 15 feet of: [an] ATM, [an] entrance of building . . . [an]

In addition to prohibiting conduct that substantially chills peaceful forms of begging, many aggressive begging laws also include provisions that prohibit truly harmful and threatening behavior. However, as the following section explains, these provisions are not the least restrictive means of achieving a compelling public safety interest when the prohibited conduct is duplicative of existing laws that target the same behavior without restricting protected speech or targeting a particularly vulnerable class of individuals. Not only do these provisions illuminate societal notions that all people experiencing homelessness are criminals who are prone to violence and drugs, they appear to be strategic methods of circumventing constitutional challenges.

C. Aggressive Panhandling Laws are Not Narrowly Tailored Because They Are Duplicative of Existing Content-Neutral Laws that Do Not Target Constitutionally Protected Speech

Although no one would sanction truly aggressive and threatening behavior, readers are encouraged to question why drafting an entire subset of laws that target begging are necessary to serve a compelling public safety interest. This is especially the case when existing laws already prohibit aggressive behavior without targeting an extremely vulnerable population and a specific form of constitutionally-protected speech. Because content-neutral laws already fully empower police officers to cite or arrest those whose conduct poses a genuine risk of harm to others, such ordinances are, arguably, not narrowly tailored to serve a compelling government interest.

Nearly all state and municipal codes have provisions that address public safety concerns without restricting protected speech. For example, after the Washington State Supreme Court determined provisions within the City of Lakewood's begging ordinance violated free speech,¹¹¹ the City of Kennewick repealed its aggressive begging ordinance.¹¹² Importantly,

exterior public pay telephone, [a] self-service car wash or fuel pump, [a] public transportation stop, or any parked vehicle as occupants . . . enter or exit such vehicle" (emphasis added)). *But see* *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276, 1293 (D. Colo. 2015) (holding a ban on panhandling within twenty feet of an ATM or bus stop was not necessary to serve a compelling governmental interest); *Thayer*, 144 F. Supp. 3d at 235; *McLaughlin*, 140 F. Supp. 3d at 195 (reasoning, "while it may be more bothersome, and even in some sense more coercive, for a person to be panhandled when they cannot, or find it difficult to leave, it is not demonstrably more dangerous").

111. *Lakewood v. Willis*, 375 P.3d 1056 (Wash. 2016).

112. *Kennewick*, Wash., Mun. Code § 10.08.120 (repealed 2017); *City of Kennewick*, Washington, City Council Meeting, Agenda Item No. 5a (Mar. 7, 2017) [hereinafter *Kennewick City Council Meeting*], https://www.go2kennewick.com/AgendaCenter/ViewFile/Agenda/_03072017-808 [<https://perma.cc/9FRK-FR5M>] (recommending that Kennewick City Council repeal its begging ordinance in its entirety). Like Lakewood's unconstitutional begging ordinance in *Willis*, Kennewick's ordinance regulated speech based upon the speaker's purpose (i.e., begging). *Id.*

Kennewick City Council staff noted that its municipal code already “contains other provisions which address public safety concerns but do not restrict protected speech such as, disorderly conduct, harassment and assault.”¹¹³ Accordingly, absent repealing the ordinance, staff provided no alternative recommendations.¹¹⁴

A critical comparison between existing criminal laws and anti-begging laws illuminates the underlying purpose behind “aggressive begging” legislation. In short, municipalities have effectively created laws that target the visibly poor and an unpopular form of speech. Aggressive panhandling ordinances “hold homeless individuals to a higher standard than existing assault or harassment laws, which often prohibit the same conduct but are facially neutral.”¹¹⁵ In an attempt to get around overbreadth challenges and to survive strict scrutiny, legislatures have drafted provisions into their aggressive panhandling laws that are substantially similar to existing assault,¹¹⁶ battery,¹¹⁷ and harassment laws,¹¹⁸ but within the context of a person asking for help.

113. Kennewick City Council Meeting, *supra* note 112.

114. *Id.*

115. For example, as described above, both Seattle and Tacoma include provisions that prohibit conduct already covered by content-neutral laws. OLSON & MACDONALD, *supra* note 5, at 4, 17–18 (a comparison between Seattle’s Pedestrian Interference ordinance and its Harassment ordinance reveals that aggressive panhandling “is nothing more than harassment in the context of a poor person asking for money”).

116. “To approach, speak or gesture to a person in such a manner as would cause a reasonable person to feel fearful of safety to their person, another person or property in the person’s possession.” COVINGTON, WASH., MUN. CODE § 9.190.020(1)(a) (2010). “To approach or speak to a person in such a manner as would cause a reasonable person to believe that the person is being threatened with either imminent bodily injury or the commission of a criminal act upon the person or another person or upon property in the person’s immediate possession.” TACOMA, WASH., MUN. CODE § 8.13.A.020(B)(1) (2007); PUYALLUP, WASH., MUN. CODE § 9A.08.040, 020(2) (2009). To “approach, speak or gesture to a person in such a manner as would cause a reasonable person to believe that the person is being threatened with a commission of a criminal act upon the person, another person or property in the person’s possession.” ARLINGTON, WASH., MUN. CODE § 9.56.020(6)(A) (2015); CENTRALIA, WASH., MUN. CODE §§ 10.37.030, .020(B)(1) (2014); ISSAQUAH, WASH., MUN. CODE § 9.45.020(A)(1) (2008); MARYSVILLE, WASH., MUN. CODE § 6.37.020(a) (2012); MONROE, WASH., MUN. CODE § 9.35.020(A)(1) (2008); OAK HARBOR, WASH., MUN. CODE §§ 6.95.020(2), (2)(a) (2014). To make “any statement, gesture, or other communication that a *reasonable person* in the position of the person solicited would *perceive* to be a threat or offensive.” LACEY, WASH., MUN. CODE § 5.21.040(1) (1998) (emphasis added).

117. *See, e.g.*, FEDERAL WAY, WASH., MUN. CODE §§ 6.35.030(2)(a), (1)(e)(v) (2001) (“evidence of intimidation includes . . . intentionally touching or causing physical contact with another person without that person’s consent while begging”); KENNEWICK, WASH., MUN. CODE § 10.08.120(2)(a) (repealed 2017); KENT, WASH., MUN. CODE §§ 9.02.640(A)(4), (B)(1) (2015); RENTON, WASH., MUN. CODE § 6.25.1 (2011) (evidence of aggressive begging includes “intentionally touching or causing physical contact with another person without that person’s consent”).

118. “Behavior that is intended to harass,” where harass is defined as “to create a hostile situation by uninvited and unwelcome verbal or physical conduct.” BONNEY LAKE, WASH., MUN. CODE § 9.11.060(A), (D) (2016). “No person or entity may, when contacting a donor or potential donor for the purpose of charitable solicitation, engage in any conduct the natural consequence of which is to

Tailored to reach truly aggressive behavior, these aggressive begging provisions may be more likely to survive a constitutional challenge. However, with duplicative criminal laws that cover the same behavior, it is important to consider whether municipalities are in fact pursuing the compelling public safety interest they invoke, rather than disfavoring a particular message communicated by a particular class of individuals.¹¹⁹

CONCLUSION: THE ETHICAL RESPONSE TO POVERTY AND HOMELESSNESS

Despite these constitutional and policy concerns, a considerable amount of anti-panhandling legislation remains on the books. When tested, vague perception-based laws are unlikely to survive First Amendment and due process challenges. Sweepingly overbroad time, manner, and distance restrictions are unlikely to survive strict scrutiny and First Amendment overbreadth challenges. From a purely legal perspective, the only aggressive panhandling provisions that might survive constitutional muster are duplicative of existing, content-neutral laws; such as assault, battery, and fraud. This is because, although content-based, cities can argue that the law targets truly harmful behavior, which serves a compelling public safety interest. However, as noted above, the only difference from existing content-neutral laws and many of these provisions is that the panhandling provisions target a particular form of speech coming from an already vulnerable population.

The logical conclusion is that municipalities have an interest in removing visible poverty from their cities and people have an interest in removing the uncomfortable situation of coming face-to-face with a stranger asking for help. However, in an attempt to solve the underlying problem of homelessness, it is important to question whether this is the proper response.

No matter how unsightly and uncomfortable, the ethical, humane response to poverty and homelessness is to give society a chance to respond. Hearing and seeing are the tools for change. Listening to the plea of those who struggle and seeing their plight brings about awareness. The unethical response is drafting legislation that removes the problem from sight and earshot by cycling people experiencing homelessness through the criminal justice system and by enabling discriminatory enforcement.

harass, intimidate, or torment any person in connection with the contact.” SUNNYSIDE, WASH., MUN. CODE § 5.22.050(E) (2010).

119. See *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 193 (D. Mass. 2015) (“The City may not deem criminal activity worse because it is conducted in combination with protected speech, and it certainly may not do so in order to send a message of public disapproval of that speech on content based grounds.”).

In response to the above constitutional and policy issues, legislatures are encouraged to repeal their aggressive begging laws in their entirety. At minimum, legislatures should modify their aggressive begging laws by (1) repealing provisions that provide vague, perception-based components “of reasonable fear” and “compulsion” that cater to well-established societal biases and prejudices about the homeless and visibly poor; (2) repealing any conduct, time, and place provisions that are substantially similar to provisions that courts have already invalidated as insufficiently tailored to serve a compelling public safety interest; and (3) repealing any provisions that restrict conduct already prohibited by existing content-neutral laws. Because aggressive begging laws are, at their very core, content-based discriminations on speech, these provisions are unconstitutional restrictions on speech.