



# ***Reed's Impact on Solicitation Ordinances: Regulating Content, Conduct or Communication?***

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**Bart W. Brizzee, Principal Assistant County Counsel, San Bernardino County Counsel  
Deborah J. Fox, Chair of First Amendment Practice Group and Trial and Litigation Practice  
Group, Meyers Nave**

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## *Reed's* Impact on Solicitation Ordinances: Regulating Content, Conduct or Communication?

Deborah J. Fox, Principal  
Margaret W. Rosequist, Of Counsel  
Meyers Nave  
707 Wilshire Blvd., Suite 2400  
Los Angeles, CA 90071  
213.626.2906  
dfox@meyersnave.com  
mrosequist@meyersnave.com



# **Reed's Impact on Solicitation Ordinances: Regulating Content, Conduct or Communication?"**

**Deborah J. Fox, Meyers Nave**  
**Margaret W. Rosequist, Meyers Nave**

## **Introduction**

Restrictions on panhandling and solicitation reach back to the origins of the Republic. Regulation of this activity is an intensely local issue, with policy objectives and goals often differing from jurisdiction to jurisdiction. Over the years, the Supreme Court has attempted to achieve a balance between First Amendment protections and the government's desire to achieve certain policy interests. Developments in the 1960s, which have continued through to the present, show the Court's jurisprudence tilting in favor of free speech rights over the authority of municipalities to regulate panhandling and solicitation. Most recently, the Supreme Court has articulated a very exacting approach to determining the content neutrality of regulations impacting speech. Specifically, in *Reed v. Town of Gilbert*, the Supreme Court states that "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed."<sup>1</sup> The content neutrality test presents a particularly daunting challenge when it comes to drafting constitutionally sound panhandling and solicitation regulations.

This paper will provide a history of the development of the legal jurisprudence governing panhandling and solicitation regulations. It will then evaluate the jurisprudence governing charitable solicitation, forum analysis, and the content neutrality determination. The final section of the paper will provide tips for practitioners to consider when faced with a request to draft a local law or policy regulating solicitation.

## **I. History<sup>2</sup>**

Historically, Americans addressed the problems associated with panhandling by simply prohibiting it. In fact, the Articles of Confederation specifically exempted "paupers, vagabonds, and fugitives from justice" from the privileges and immunities guaranteed to all citizens.<sup>3</sup> By the middle of the twentieth century, every state had laws in place regulating vagrancy and a common feature of these laws was prohibitions on begging.<sup>4</sup> These laws

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<sup>1</sup> *Reed v. Town of Gilbert, Ariz.*, 135 S.Ct. 2218, 2227 (2015)

<sup>2</sup> Special thanks goes to former associate David S. Warner for his contribution to the historical section of this paper.

<sup>3</sup> William Mitchell, II, Comment, "*Secondary Effects*" Analysis: A Balanced Approach to the Problem of Prohibitions on Aggressive Panhandling, 24 U. Balt. L. Rev. 291, 297-98 n.23 (1995).

<sup>4</sup> Robert Teir, Article, *Maintaining Safety and Civility in Public Spaces: A Constitutional Approach to Aggressive Begging*, 54 La. L. Rev. 285, 300 (1993). For example, until a recent series of judicial decisions

## Reed's Impact on Solicitation Ordinances: Regulating Content, Conduct or Communication?"

were implicitly supported by the United States Supreme Court in decisions such as *Cox v. New Hampshire*, which upheld a state law prohibiting parades or processions on public streets without a license.<sup>5</sup> According to the Court, laws assuring the safety and convenience of the people to use the public highways have “never been regarded as inconsistent with civil liberties, but rather as one of the means of safeguarding the good order upon which they ultimately depend.”<sup>6</sup> State courts were generally supportive of local vagrancy statutes as well.<sup>7</sup>

Judicial deference began to wither in the second half of the century, however, as petitioners successfully challenged the arbitrary nature of laws that made it a crime merely to be poor or a transient. In 1972, for example, the Supreme Court held a Jacksonville, Florida city ordinance unconstitutional due to its vagueness.<sup>8</sup> The ordinance punished acts of vagrancy including, among other things, “habitual loafers,” “dissolute persons who go about begging,” “common night walkers,” and “persons able to work but habitually living upon the earnings of their wives or minor children.”<sup>9</sup> According to the Court, no person of ordinary intelligence would contemplate that such conduct would be a crime. In addition, the law had such an expansive definition of vagrancy, the police had unfettered discretion to make arrests for behavior that, in many cases, may have been perfectly legal.<sup>10</sup>

In a series of decisions in the 1980s, the Supreme Court looked more specifically at the issue of solicitation and its interplay with the First Amendment. In *Village of Schaumburg v. Citizens for a Better Environment*, the Court struck down a local ordinance prohibiting door-to-door or on-street solicitation by charitable organizations that did not use at least 75 percent of their receipts for charitable purposes.<sup>11</sup> While acknowledging that soliciting financial support was subject to reasonable regulation, Justice Byron White opined for the majority that such regulation:

[M]ust be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic,

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declared the law unconstitutional, it had been unlawful in the State of Michigan since 1929 to be “found begging in a public place.” *Mich. Comp. Laws Ann.* § 750.167(1)(h).

<sup>5</sup> *Cox v. State of New Hampshire*, 312 U.S. 569 (1941).

<sup>6</sup> *Id.* at 574.

<sup>7</sup> Mitchell, “Secondary Effects” at 298 n.27.

<sup>8</sup> *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

<sup>9</sup> *Id.* at 164.

<sup>10</sup> *Id.* at 162, 168.

<sup>11</sup> *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

## Reed's Impact on Solicitation Ordinances: Regulating Content, Conduct or Communication?"

political or social issues, and for the reality that without solicitation, the flow of such information and advocacy would likely cease.<sup>12</sup>

Subsequent Supreme Court decisions found solicitation by other types of organizations to be protected speech, and courts in several federal circuits have relied on the Court's analysis in *Schaumburg* and its progeny to conclude that solicitation and panhandling by individuals is subject to the same First Amendment protection given to solicitation by private charities.<sup>13</sup> Indeed, in the recent *Santopietro v. Howell*, case the Ninth Circuit noted that the solicitation of tips is entitled to the same constitutional protection as traditional speech.<sup>14</sup> In *Santopietro*, police officers arrested women dressed as "sexy cops" on the Las Vegas strip for engaging in commercial activity without a business license.<sup>15</sup> While the trial court granted the police officers summary judgment motion, the Ninth Circuit reversed, finding that there was a factual dispute as to whether the "sexy cops" were seeking tips for having a photograph taken with them or whether they were demanding a quid pro-quo payment that might have fallen outside protected noncommercial First Amendment activity and instead been subject to analysis as commercial speech.<sup>16</sup> As such, the Ninth Circuit remanded for a resolution of the factual issues at trial and a determination (based on the factual resolution) as to whether the business licensing requirement validly applied to the women.<sup>17</sup>

Given the evolution of modern jurisprudence, municipalities considering panhandling and solicitation regulations should draft such restrictions with the understanding that the speech associated with solicitation or panhandling activity is given full First Amendment protection.

## II. Charitable Solicitation

In *Schaumburg*, the Supreme Court laid the foundation for its modern jurisprudence regarding charitable solicitation. The Court applied an "overbreadth" analysis and found that an ordinance that banned solicitors from seeking door-to-door charitable contributions was

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<sup>12</sup> *Id.* at 632. White relied, in part, on several Supreme Court decisions (primarily from the 1940s and 1950s) involving canvassing and soliciting by religious and charitable organizations. See *Id.* at 628-32.

<sup>13</sup> *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988) (professional fundraisers); *United States v. Kokinda*, 497 U.S. 720 (1990) (political organizations); and *International Society for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (non-profit religious organizations); *Loper v. New York City Police Dep't*, 802 F.Supp. 1029 (S.D.N.Y. 1992), aff'd, 999 F.2d 699 (2d Cir. 1993); *Speet v. Schuette*, 726 F.3d 867 (6th Cir. 2013); *Gresham v. Peterson*, 225 F.3d 899 (7th Cir. 2000).

<sup>14</sup> *Santopietro v. Howell*, 857 F.3d 980, 988 (9th Cir. 2017)

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 986 & 989.

<sup>17</sup> *Id.* at 994.

## Reed's Impact on Solicitation Ordinances: Regulating Content, Conduct or Communication?"

not the least restrictive means of achieving a legitimate governmental interest.<sup>18</sup> Specifically, the ordinance prohibited solicitation by organizations that did not use at least 75 percent of their receipts for charitable purposes.<sup>19</sup> The Court explained that while the Village had a substantial interest in preventing fraud and maintaining residential privacy, the 75 percent requirement only peripherally promoted these interests.<sup>20</sup> For example, the Court said that there is a class of charitable organizations whose primary goal is to research and advocate, and that such organizations typically use more than 25 percent of their funds to pay their own staff.<sup>21</sup> These organizations could not be labeled fraudulent, said the Court, and thus the ordinance was overbroad.<sup>22</sup>

In order for a charitable solicitation regulation to pass muster under the standard set forth by the *Schaumburg* it must: (1) serve a sufficiently strong, subordinating interest that the government is entitled to protect (such as the prevention of fraud); and (2) be narrowly drawn to serve the interest without unnecessarily interfering with First Amendment freedoms.<sup>23</sup>

The courts have used the charitable solicitation framework to analyze the relatively new issue of donation bins. Some courts initially found the bins to be a form of charitable solicitation subject to the higher standards set forth in *Schaumburg* rather than the more forgiving standard set forth under the Supreme Court's commercial speech doctrine. In *National Federation of the Blind of Texas v. Abbott*, the Fifth Circuit explained that the inclusion of a charity's name on donation bins communicated information about the beneficiaries and implicitly advocated for the charity's views, ideas and goals, thus making it more than mere commercial speech.<sup>24</sup> The Fifth Circuit thus applied the *Schaumburg* standard of review and found unconstitutional the requirement that donation bins include information as to any fee arrangement between the non-profit and a for-profit organization.<sup>25</sup> Similarly, in *Linc-Drop v. City of Lincoln*, a district court within the 8<sup>th</sup> District Court of Appeals rejected regulations restricting donation bins to those where 80 percent of the proceeds from the bins were used for charitable purposes.<sup>26</sup> And, in *Planet Aid v. City of St. Johns, MI*, the Sixth Circuit also rejected a regulation imposing a total ban on donation

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<sup>18</sup> *Village of Schaumburg*, 444 U.S. at 628.

<sup>19</sup> *Id.* at 622.

<sup>20</sup> *Id.* at 636.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 637.

<sup>23</sup> *Id.* at 636.

<sup>24</sup> *National Federation of the Blind of Texas v. Abbott*, 647 F.3d 202 (5th Cir. 2011).

<sup>25</sup> *Id.* at 214. The Fifth Circuit found that the other regulation at issue, which required the donation bins to disclose the name of any third party involved in the transaction, did pass constitutional muster. *Id.* at 215.

<sup>26</sup> *Linc-Drop v. City of Lincoln*, 996 F.Supp.2d 845 (D.Neb. 2014).

## Reed's Impact on Solicitation Ordinances: Regulating Content, Conduct or Communication?"

bins.<sup>27</sup> Instead of relying on *Schaumburg*, however, the Sixth Circuit turned to the Supreme Court's jurisprudence regarding time, place and manner restrictions on non-commercial speech in a public forum, and found that the regulation failed because it was content-based.<sup>28</sup> Specifically, the regulation only banned unattended outdoor receptacles with expressive messages regarding charitable giving, while receptacles with no messages such as dumpsters, collection bins, and trash cans, were allowed.<sup>29</sup>

By contrast, in the 2017 *Recycle for Change v. City of Oakland* case, the Ninth Circuit upheld regulations of unattended collection bins.<sup>30</sup> The regulations at issue required any property owner with a collection bin on its property to obtain an annual permit and imposed a 1000 feet separation requirement between collection bins.<sup>31</sup> The regulations were challenged on both First Amendment and Fourteenth Amendment grounds (which the district court rejected).<sup>32</sup> The case, however, was only appealed on First Amendment grounds.<sup>33</sup> On appeal, the plaintiff argued that the regulations were unconstitutionally content-based because they required the enforcing officer to read the information on the collection bin to determine if it was a charitable bin.<sup>34</sup> The Ninth Circuit assumed (without deciding) that regulations of these collection bins posed First Amendment concerns.<sup>35</sup> The Court reviewed the Sixth Circuit's *Planet Aid* decision and noted that the Sixth Circuit interpreted the regulations before it as applying to charitable donations alone which in turn required an enforcing officer to look at the content of the message on the collection bin to determine whether it was soliciting charitable donations.<sup>36</sup> By contrast, in *Recycle for Change*, the Ninth Circuit explained that the regulations at issue applied to all donation bins, regardless of whether they were dedicated for profit or charitable purposes.<sup>37</sup> Thus, the Ninth Circuit did not frame the issue as one relating to charitable donations but instead posited that the question was whether "the activity of collecting, distributing, or recycling personal items" constitutes "communicative content" against which any hint of discrimination should trigger

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<sup>27</sup> *Planet Aid v. City of St. Johns, MI*, 782 F.3d 318, 331 (6th Cir. 2015).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 328.

<sup>30</sup> *Recycle for Change v. City of Oakland*, 856 F.3d 666 (9th Cir. 2017)

<sup>31</sup> *Id.* at

<sup>32</sup> *Id.* at 669.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 670.

<sup>35</sup> *Id.* at 669.

<sup>36</sup> *Id.* at 671-72.

<sup>37</sup> *Id.* at 670.



## Reed's Impact on Solicitation Ordinances: Regulating Content, Conduct or Communication?"

strict scrutiny.<sup>38</sup> The Court answered this question in the negative. The Ninth Circuit cited to the *Reed* test but found the regulations to be content-neutral and thus applied the intermediate scrutiny test which the regulations passed.<sup>39</sup> The Ninth Circuit also explained that the regulations at issue were not rendered content-based merely because they may require an enforcing officer to determine if the collection bin was intended to collect, distribute, or recycle personal items.<sup>40</sup> Instead, the Court cited to the Supreme Court's *Hill v. Colorado* case and its own *Berger v. Seattle* decision to support a common sense approach to applying the "officer must read it" test.<sup>41</sup>

The evolving case law in this arena indicates that a critical issue for determining whether the regulation of collection bins will pass constitutional muster is the content neutrality analysis. Content-neutrality comes into play whether the collection bins are located on private property or government property.<sup>42</sup> While restrictions on collection bins may implicate either private property or government property, many other forms of solicitation restrictions are aimed at government property alone. Where regulations are aimed at government property the courts look to forum classification and the accompanying tests for each forum in applying the First Amendment analysis. The nuanced forum analysis is discussed below.

### III. Forum Analysis

The most common approach of the lower federal courts when analyzing solicitation or panhandling regulations is to utilize the test applicable to the forum at issue. Regulations for a nonpublic forum are subject to a more deferential review standard than regulations for a public forum. Accordingly, forum classification of the property being regulated can be determinative as to whether the restrictions at issue are constitutionally sound based on the First Amendment.

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<sup>38</sup> *Id.* at 671.

<sup>39</sup> *Id.* at 669-70.

<sup>40</sup> *Id.* at 671-72.

<sup>41</sup> *Id.* at 671.

<sup>42</sup> In the *Recycle for Change* case, the Ninth Circuit used neither the *Schaumburg* framework nor the forum analysis tests but instead looked to the intermediate scrutiny test outlined by the Supreme Court in *United States v. O'Brien*, 391 U.S. 367, 377 (1968.) See *Recycle for Change*, 356 F.3d at 674. Presumably the Ninth Circuit looked to the *O'Brien* test because the regulations were not limited to charitable donations nor were the regulations directed at conduct on government property (which would have triggered the tests under forum analysis). The choice to use the *O'Brien* intermediate scrutiny test over the forum analysis intermediate scrutiny test is unlikely to have impacted the outcome of the case. Rather, the critical issue was the Ninth Circuit's determination that the regulations were content-neutral which thus avoided the application of a strict scrutiny standard of review.

## Reed's Impact on Solicitation Ordinances: Regulating Content, Conduct or Communication?"

In *Perry Education Association v. Perry Local Educators' Association*, the Supreme Court set forth the standard for the traditional public forum explaining that in places, which by long tradition or government fiat, have been devoted to assembly and debate (e.g., streets, sidewalks, public parks), the rights of the state to limit expressive activity are sharply circumscribed.<sup>43</sup> Thus, a restriction on speech in a public forum will pass constitutional muster if: (1) it is content-neutral; (2) it is narrowly tailored to serve a significant governmental interest; and (3) it leaves open ample alternative channels for communication of the information (this is known as the time, place and manner test).<sup>44</sup> In a traditional public forum, First Amendment activities generally may not be prohibited completely, and complete bans are only allowed when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.<sup>45</sup> Thus, courts routinely strike down wide-ranging bans that prohibit solicitation from an occupant of motor vehicles or ban solicitation from all traffic median strips as these are not deemed to meet the narrow tailoring requirement.<sup>46</sup> Additionally, content-based regulations (*i.e.* rules that either allow or exclude speech based on the subject matter being expressed) are deemed presumptively unconstitutional for a public forum, and only pass muster if they are the least restrictive means to further a compelling governmental interest.<sup>47</sup> Thus, a content-based restriction that prohibits panhandlers from knowingly touching or grabbing could pass strict scrutiny while restrictions that ban fighting words uttered in connection with panhandling, ban repeated requests for money or ban panhandling in a group of two or more in an intimidating manner have been found to fail the strict scrutiny test.<sup>48</sup>

In contrast to the public forum, a nonpublic forum is government property that has traditionally not been open to the free exchange of ideas, such as a courthouse lobby, a prison or a military base. The government may also establish a limited public forum by opening a nonpublic forum for a limited purpose or for the discussion of certain subjects.<sup>49</sup> A limited public forum is governed by the same rules that govern a nonpublic forum.<sup>50</sup> In a nonpublic

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<sup>43</sup> *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983).

<sup>44</sup> *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

<sup>45</sup> *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 800 (1985).

<sup>46</sup> See *Comite de Jornaleros v. City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011); see also *Cutting v. City of Portland*, 802 F.3d 79 (1st Cir. 2015).

<sup>47</sup> *Foti v. City of Menlo Park*, 146 F.3d 629, 637 (9th Cir. 1998); *Sable Communications of California v. FCC*, 492 U.S. 115, 126 (1989).

<sup>48</sup> See *McLaughlin v. City of Lowell*, 140 F.Supp.3d 177 (D. Mass. 2015).

<sup>49</sup> *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1049 (9th Cir. 2003).

<sup>50</sup> See *id.* Note that the government may also create a designated public forum by opening nonpublic forum property for general First Amendment activities (as opposed to limiting the activity) and that the designated public forum (as opposed to the limited public forum) is governed by the same rules that apply to a public forum. *Hopper v. City of Pasco*, 241 F.3d 1067, 1074-1075 (9th Cir. 2001); *United Food & Commer. Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341 (6th Cir. 1998).

## Reed's Impact on Solicitation Ordinances: Regulating Content, Conduct or Communication?"

forum or limited public forum, the government is given more latitude to restrict speech. A restriction for a nonpublic (or limited public) forum will pass muster if it is: (1) reasonable; and (2) viewpoint neutral (*i.e.* not an effort to suppress expression merely because the public officials oppose the speaker's view).<sup>51</sup>

In *United States v. Kokinda*, the Supreme Court considered regulations for a postal sidewalk that provided "soliciting alms and contributions, campaigning for election to any public office, collecting private debts, commercial soliciting and vending, and displaying or distributing commercial advertising on postal premises are prohibited."<sup>52</sup> In a 5-4 decision, the Court upheld the regulation. The majority opinion explained that the postal sidewalk was not a traditional public forum and that the regulation passed muster as reasonable and viewpoint neutral.<sup>53</sup> Critical to the nonpublic forum classification was the fact that the sidewalk was constructed solely to provide for the passage of individuals engaged in postal business, not as a public passageway.<sup>54</sup>

Similarly, the Supreme Court has found airport terminals to be a nonpublic forum. In *International Society for Krishna Consciousness v. Lee*, the Supreme Court considered a regulation prohibiting solicitation and the receipt of funds inside an airport terminal.<sup>55</sup> A divided Court held that the Port Authority could prohibit the solicitation and receipt of funds because the terminal had not historically been made available for speech activity.<sup>56</sup> This made the terminal a "nonpublic forum" where the regulation needed to be only reasonable and viewpoint neutral to pass muster.<sup>57</sup> The Court found the restriction met this test explaining that the Port Authority's need to restrict speech to reduce passenger congestion was reasonable and unrelated to any particular speaker's viewpoint.<sup>58</sup> The Court noted that the government's interest in preventing congestion and fraud were heightened at an airport terminal where people travel on tight time schedules.<sup>59</sup> Likewise, in *International Society for Krishna v. City of Los Angeles*, the Ninth Circuit used the nonpublic forum test and upheld a ban at LAX on the

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<sup>51</sup> *Perry*, 460 U.S. at 46.

<sup>52</sup> *United States v. Kokinda*, 497 U.S. 720, 724 (1990). The Court only considered the prohibition on soliciting funds and did not examine the remainder of the prohibition. *See id.* at 723-724.

<sup>53</sup> *Id.* at 724. Only four Justices found that the postal sidewalk was a nonpublic forum. Justice Kennedy concurred in the judgment that the regulations were constitutional but took issue with classifying the sidewalk as a nonpublic forum. *Id.* at 721. Rather, he found that the regulations passed muster under the time, place and manner test for a public forum. *Id.* The four dissenting Justices found that the sidewalk was a public forum and that the regulations did not pass muster. *Id.* at 740.

<sup>54</sup> *Id.* at 743.

<sup>55</sup> *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992).

<sup>56</sup> *Id.* at 680.

<sup>57</sup> *Id.* at 683.

<sup>58</sup> *Id.* at 680-81.

<sup>59</sup> *Id.* at 684.

## Reed's Impact on Solicitation Ordinances: Regulating Content, Conduct or Communication?"

solicitation for the immediate receipt of funds when done in a continuous and repetitive manner.<sup>60</sup>

The post office and airport cases illustrate that with certain property the government can regulate solicitation and panhandling under the reasonableness standard applicable to a nonpublic forum. However, the vast majority of solicitation and panhandling regulations are directed at a public forum (such as sidewalks, streets, and parks) where less deferential tests apply. For instance, in *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, the Ninth Circuit ruled that Redondo Beach's city-wide ban on soliciting for employment, business or contributions from the occupants of any vehicle was unconstitutional.<sup>61</sup> The Ninth Circuit found the ordinance invalid because it was not narrowly tailored to achieve the City's goals.<sup>62</sup> The City enforced the ordinance as part of its "Day Laborer Enforcement Project" and a pair of day-laborer organizations sued. The Court found that Redondo Beach had a legitimate interest in keeping the streets open and available for movement but that the ordinance was not narrowly drawn because it applied everywhere in the City, while the City only provided evidence of traffic problems at a small number of major streets and medians.<sup>63</sup> Furthermore, the ordinance swept within its coverage school children shouting "car wash" at motorists, girl scouts selling cookies on the sidewalk, and even a motorist stopping on the side of the street to ask if a neighbor's teenager was available to babysit.<sup>64</sup> The City also had numerous alternative state law provisions at its disposal to achieve its goals while burdening little or no speech.<sup>65</sup>

Likewise, the First Circuit in *Cutting v. City of Portland* also rejected a city-wide ban that prohibited people from standing, sitting, staying, driving, or parking on median traffic strips.<sup>66</sup> While the ordinance was content-neutral, the First Circuit found that it was not narrowly tailored, but instead was geographically over-inclusive.<sup>67</sup> The First Circuit suggested that an ordinance that prohibits the activity on only the smallest or most dangerous of medians and intersections could potentially meet the narrow tailoring requirement.<sup>68</sup> Indeed, in

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<sup>60</sup> *International Society for Krishna v. City of Los Angeles*, 764 F.3d 1044 (9th Cir. 2014).

<sup>61</sup> *Comite de Jornaleros*, 657 F.3d 936. Of note, while the Ninth Circuit found the regulation unconstitutional, it assumed without discussion that the regulation was content-neutral. *Id.* at 940. In light of the Supreme Court's recent ruling in *Reed*, it is unlikely that this assumption remains valid. The content neutrality issue is discussed in detail in Section IV *infra*.

<sup>62</sup> *Id.* at 940.

<sup>63</sup> *Id.* at 948-949.

<sup>64</sup> *Id.* at 959.

<sup>65</sup> *Id.* at 947-51.

<sup>66</sup> *Cutting*, 802 F.3d 79.

<sup>67</sup> *Id.* at 89.

<sup>68</sup> *Id.* at 92.

## Reed's Impact on Solicitation Ordinances: Regulating Content, Conduct or Communication?"

*Houston Chronicle v. City of League City, Texas*, the Fifth Circuit found that the narrow tailoring requirement was met where the regulation at issue only prohibits soliciting, selling, or distributing material to the occupants of cars stopped in obedience to a traffic control signal or light.<sup>69</sup> The Fifth Circuit rejected the argument that the ordinance was under-inclusive and instead found that intersections with traffic lights are generally the most heavily trafficked and dangerous, and thus the ordinance was appropriately tailored to meet the city's interests.<sup>70</sup>

### IV. Content Neutrality

As noted above, content-neutral regulations of a public forum (such as for sidewalks, streets, and parks) are subject to intermediate scrutiny under the time, place and manner test, whereas content-based regulations are presumptively invalid and subject to strict scrutiny. Thus, drafting a content-neutral ordinance is critical to the success of implementing valid regulations for a public forum.

In the past, the courts and parties would often either assume without any analysis that solicitation and panhandling regulations were content-neutral, or would look to the Supreme Court's ruling in *Ward v. Rock Against Racism* for guidance. The *Ward* decision stated that "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."<sup>71</sup> This approach, however, is no longer valid.<sup>72</sup> The Supreme Court's recent decision in *Reed* has put the content neutrality issue in the spotlight and makes clear that a more exacting approach is mandated.<sup>73</sup> Specifically, as noted in the introduction to this paper, *Reed* states that "[g]overnment regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed."<sup>74</sup> Many solicitation ordinances fall within *Reed*'s definition of "content-based," and are now potentially vulnerable to a constitutional challenge.

In a forewarning of things to come, the Ninth Circuit used an exacting understanding of content neutrality when it analyzed an ordinance regulating solicitation at the 80 acre Seattle Center (a public park and entertainment complex) prior to the *Reed* case.<sup>75</sup> Specifically, in *Berger v. City of Seattle*, the Ninth Circuit found the ordinance to be an impermissible content-based restriction because it prohibited street performers from actively

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<sup>69</sup> *Houston Chronicle v. City of League City, Texas*, 488 F.3d 613 (5th Cir. 2007).

<sup>70</sup> *Id.* at 622.

<sup>71</sup> *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

<sup>72</sup> *See Reed*., 135 S.Ct. 2218.

<sup>73</sup> *See id.*

<sup>74</sup> *Id.* at 2227.

<sup>75</sup> *See Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009).

## Reed's Impact on Solicitation Ordinances: Regulating Content, Conduct or Communication?"

soliciting donations.<sup>76</sup> The Ninth Circuit found the very terms of the ordinance to be content-based because they prohibited performers from verbally communicating a particular set of messages – requests for donations – based on the idea expressed.<sup>77</sup> The Court then declared the ordinance unconstitutional even though the City may have had a legitimate interest in reducing the “aggressive solicitation” of street performers since it banned all active solicitation and not just aggressive behavior.<sup>78</sup>

The Seventh Circuit also considered the content neutrality of panhandling regulations in a decision that pre-dated *Reed*. Unlike the Ninth Circuit decision in *Berger*, the Seventh Circuit’s decision in *Norton v. City of Springfield*, originally found the regulation at issue to be content-neutral, a decision it later reversed in light of *Reed*.<sup>79</sup> The Springfield ordinance defined panhandling as an oral request for an immediate donation of money.<sup>80</sup> Signs requesting money were allowed as were oral requests to send money later.<sup>81</sup> Initially, the Seventh Circuit rejected the argument that the ordinance was content-based explaining that the ordinance did not interfere with the marketplace of ideas, that it did not practice viewpoint discrimination, and that the distinctions were an effort to make the ordinance less restrictive.<sup>82</sup> The Seventh Circuit relied on the Supreme Court jurisprudence to classify two types of regulations as content-based: those that restrict speech because of the ideas they convey, and those that restrict speech because the government disapproves of the message.<sup>83</sup> It found that the panhandling restriction did not encompass either type of discrimination and was an ordinance regulating subject matter rather than content or viewpoint.<sup>84</sup>

After the Supreme Court’s *Reed* ruling, however, the Seventh Circuit reconsidered its decision and, in light of *Reed*, found the Springfield ordinance to be unconstitutionally content-based.<sup>85</sup> Specifically, the Seventh Circuit found that Springfield’s ordinance regulated speech based on the topic discussed and, therefore, was content-based under *Reed*.<sup>86</sup> Following this ruling, Springfield adopted a new ordinance that prohibited panhandling at any time before, during, or after the panhandler knowingly approaches within

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<sup>76</sup> *Id.* at 1051.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1053.

<sup>79</sup> *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015).

<sup>80</sup> *Id.* at 412.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 412-413.

<sup>86</sup> *Id.* at 413.

## Reed's Impact on Solicitation Ordinances: Regulating Content, Conduct or Communication?"

five feet of the solicited person.<sup>87</sup> The new ordinance defined panhandling as a vocal appeal for an immediate donation of money or other gratuity.<sup>88</sup> The district court found that although the language of the ordinance had been modified, it was still content-based since it prohibited making a vocal appeal for donations while it allowed other topics of speech such as asking about the weather, requesting someone to sign a petition, or asking for future donations.<sup>89</sup> Accordingly, the City's panhandling regulation was once again found invalid.<sup>90</sup>

Similarly, in *Thayer v. City of Worcester*, the First Circuit initially upheld a panhandling restriction as a content-neutral regulation.<sup>91</sup> This decision was later reversed in light of *Reed*.<sup>92</sup> Retired Supreme Court Justice Souter, sitting by designation, found that regulations prohibiting aggressive panhandling and restricting the use of traffic medians and roadways to be content-neutral.<sup>93</sup> Souter noted that for decades, the City "had been pushed and pulled by concerns about panhandling on its streets."<sup>94</sup> Among other things, the City was concerned about public safety from individuals walking in and out of traffic to collect money in intersections, traffic islands, and roadways.<sup>95</sup> To address this problem, the City adopted two ordinances. The Aggressive Panhandling Ordinance made it unlawful to beg, panhandle, or solicit any person in an aggressive manner.<sup>96</sup> It applied to speech attempting to obtain an immediate donation of money or other things of value.<sup>97</sup> The second ordinance regulated activity on traffic islands and the roadway.<sup>98</sup> Plaintiffs, two homeless people and a political activist on the City's school committee, challenged the constitutionality of the ordinances.<sup>99</sup> The First Circuit looked to the test set forth in *Ward* and determined that the ordinances were content-neutral.<sup>100</sup> Souter explained that while panhandling and solicitation of immediate donations may convey a message of need, and waving placards at traffic islands may often be a political expression, the regulations were not directed at suppressing

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<sup>87</sup> *Norton v. City of Springfield*, 2015 WL 8023461, 1 (C.D. Ill. 2015).

<sup>88</sup> *Id.* at 1.

<sup>89</sup> *Id.* at 2.

<sup>90</sup> *Id.* at 2-3.

<sup>91</sup> *Thayer v. City of Worcester*, 755 F.3d 60 (2014) (vacated and remanded).

<sup>92</sup> *Thayer v. City of Worcester*, 135 S.Ct 2887 (2015).

<sup>93</sup> *Thayer*, 755 F.3d 60 (2014).

<sup>94</sup> *Id.* at 63.

<sup>95</sup> *Id.* at 64.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 65.

<sup>99</sup> *Id.* at 65-66.

<sup>100</sup> *Id.* at 67.

## Reed's Impact on Solicitation Ordinances: Regulating Content, Conduct or Communication?"

speech because the government disapproved of the message and, therefore, did not run afoul of the content neutrality standard.<sup>101</sup>

The Supreme Court remanded the *Thayer* case for further consideration in light of *Reed*.<sup>102</sup> The First Circuit vacated its original opinion and remanded to the district court for consideration.<sup>103</sup> In light of *Reed*, the district court found the Aggressive Panhandling Ordinance to be a content-based restriction on speech. It found the ordinance regulating the use of traffic islands and roadways failed as well because, although it was content-neutral, it was not sufficiently tailored to meet the government's interest in public safety.<sup>104</sup> The court noted that post-*Reed*, "municipalities must go back to the drafting board" and, in doing so, "define with particularity the threat to the public safety they seek to address, and then enact laws that precisely and narrowly restrict *only* that conduct which would constitute such a threat."<sup>105</sup>

A survey of post-*Reed* decisions shows the challenge of drafting content-neutral regulations since courts have routinely been striking down panhandling and solicitation regulations as content-based restrictions on speech.<sup>106</sup> The regulations that have survived the content neutrality test of *Reed* focus on defining the conduct being regulated, such as prohibiting the distribution of anything to the occupant of vehicles.<sup>107</sup> While *Reed* was not a solicitation case, its impact on the constitutionality of solicitation and panhandling regulations has been profound.

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<sup>101</sup> *Id.* at 68.

<sup>102</sup> *Thayer*, 135 S.Ct 2887.

<sup>103</sup> *See Thayer v. City of Worcester*, 144 F.Supp.3d 218, 221 (D. Mass. 2015).

<sup>104</sup> *Id.* at 233-234 and 237.

<sup>105</sup> *Id.* at 237.

<sup>106</sup> *McLaughlin v. City of Lowell*, 140 F.Supp.3d 177 (D. Mass. 2015) (finding that regulations of solicitation that single out the solicitation of the immediate transfer of funds for charitable purposes are content-based); *Browne v. City of Grand Junction*, 136 F.Supp.3d 1276 (D. Colo. 2015) (observing that any law prohibiting all solicitation in a public forum constitutes content discrimination under *Reed*); *Working America v. City of Bloomington*, 142 F.Supp.3d 823 (D. Minn. 2015) (finding that a regulation of door-to-door solicitors was content-based since, by definition in the ordinance, it applied to speech that had the purpose of generating money or property on behalf of a person, organization or cause); *Norton*, 806 F.3d 411 (2015) (reversing after *Reed* and finding that an ordinance targeting oral requests for money now, but not requests for money later, constitutes content discrimination); *Homeless Helping Homeless v. City of Tampa*, 2016 WL 4162882 (M.D. Fla. 2016) (finding the City's ordinance regulating the solicitation of donations or payments was unconstitutionally content-based under *Reed*, but noting strong disagreement with *Reed* in the context of solicitation and belief that *Reed* was likely a "transient reign.")

<sup>107</sup> *Traditionalist American Knights of the Ku Klux Klan v. City of Desloge, Missouri*, 2016 WL 705128 (E.D. Mo. 2016); *Watkins v. City of Arlington*, 123 F.Supp.3d 856 (N.D. Tex. 2015).



## **Reed's Impact on Solicitation Ordinances: Regulating Content, Conduct or Communication?"**

### **V. Tips for Practitioners**

In drafting or analyzing the legal adequacy of a solicitation ordinance, attorneys should begin with the assumption that this activity implicates the full protection of the First Amendment. From there, the analysis should focus on the forum being regulated. If the forum is a public one (as it will be in the majority of situations), the critical point is to tailor the ordinance to the specific conduct and government interest(s) the regulation is addressing. For a public forum, municipalities will also need to draft content-neutral regulations except in the rare instances where the regulation is supported by a compelling governmental interest.

While not exhaustive, the following is a list of tips a practitioner should consider for assessing the legal soundness of a solicitation regulation:

1. Consider doing a wholesale review of your solicitation and/or panhandling regulations to identify any content-based concerns under the *Reed* test.
2. Identify the forum at issue.
3. For a public forum, draft content-neutral regulations aimed at conduct, and not speech.
4. Identify the governmental interests at play and examine how the ordinance serves those interests. The courts have deemed legitimate such interests as protecting citizens from fraud and crime, promoting traffic safety, and ensuring citizens feel secure in their surroundings. Be aware that legitimate interests are not the same as compelling interests needed to justify a content-based regulation of a public forum.
5. Build the factual basis to support the identified City interests called out. Use your in-house knowledge including traffic reports, traffic counts, police calls for service, etc.
6. Review and tightly define the scope of activity you are regulating. For example, if traffic problems only exist in certain areas of the city, narrowly tailor the ordinance to address the specific problem areas rather than banning solicitation on all streets.
7. Treat all forms of solicitation the same way whether by individuals, churches, community organizations, professional fundraisers, etc. Do not exempt favored organizations such as Girl Scouts or Little League Teams from the ambit of the ordinance.
8. Be aware that entire city-wide bans are almost certainly impermissible.
9. Consider whether solicitation concerns involve commercial activity alone, and whether regulations can be drafted to address such.

**Reed's Impact on Solicitation Ordinances: Regulating Content, Conduct or Communication?"**

10. Consider whether there are non-regulatory, alternative approaches to addressing panhandling concerns such as housing, substance abuse and/or mental health services.
11. Build an extensive staff report and findings for a new ordinance or consider adopting added findings for an existing ordinance.
12. Constitutional challenges are costly so an ounce of prevention goes a long way.

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