UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

WILLIE WHITE, Plaintiff, vs. CITY OF MIAMI, FLORIDA, a Florida municipal corporation, Defendant.	)	Case No. 23-CV-24783-FAM

MOTION FOR PRELIMINARY INJUNCTION AND SUPPORTING MEMORANDUM OF LAW

Plaintiff Willie White, by and through undersigned counsel, hereby moves for a preliminary injunction enjoining the Defendant, the City of Miami, from enforcing the City's Panhandling Prohibited in Certain Areas Ordinance, §37-8 of the Miami Municipal Code. In support of this motion, Plaintiff states the following.

INTRODUCTION

Under the City of Miami's Panhandling Prohibited in Certain Areas Ordinance, Section 37-8 of the City's Municipal Code (the Ordinance), standing on public property and soliciting donations from others—begging and panhandling—is banned in the Downtown Business District, a geographic area which includes the core of downtown Miami.

However, a person seeking to engage in other forms of speech may do so within the Downtown Business District, free from any restriction. For instance, candidates for public office can freely stand on a sidewalk or along the shoulder of a street in downtown Miami and ask people

in cars to vote for them. Likewise, members of a church can stand on the sidewalk or alongside a city street and ask people to join their congregation.

Thus, the Ordinance specifically singles out the solicitation of donations for differential treatment and is therefore a content-based restriction subject to strict scrutiny. Because it is not narrowly tailored to any compelling government interest, nor is it the least restrictive means of advancing any interest, it is an unconstitutional restriction of free speech in violation of the First Amendment.

Plaintiff Willie White is a homeless man who was arrested for violating the Ordinance for standing along the street and requesting money. He wants to continue to solicit donations and needs to do so to support his survival, but fears arrest if he does so. He therefore seeks preliminary injunctive relief enjoining enforcement of the Ordinance so that he can engage in constitutionally protected speech. Plaintiff also seeks a declaration that the Ordinance is facially unconstitutional, on behalf of others not before the Court who undoubtedly avoid exercising their free speech rights because they fear arrest and prosecution.

STATEMENT OF FACTS[1]

A. The Challenged Ordinance

Enacted into law by the city commission on November 18, 2010, the Panhandling Prohibited in Certain Areas Ordinance of the Miami City Code, Ordinance No. 13232, §2, later codified as § 37-8 of the Municipal Code of the City of Miami (the Ordinance), bans soliciting for donations in downtown Miami. Exhibit 1, Ordinance 37-8. Section (a) of the Ordinance states,

[1] Plaintiff hereby incorporates and adopts the Statement of Facts in Plaintiff's Verified Complaint, ECF 1.

"The purpose of this section is to regulate and punish acts of panhandling or solicitation that occur at locations specified herein." Miami Code of Ordinances, § 37-8(a). The Ordinance applies to the Downtown Business District, which is defined in Section (b) by the listing of forty (40) locations, all in downtown Miami. *Id*. § (b). The area includes virtually all of the business and commercial areas in downtown Miami. Section (c), Prohibitions, states, "Soliciting, begging, or panhandling is prohibited within the downtown business district." *Id*. § (c). A first violation of the Ordinance is punishable by a fine of not more than $100.00 and 30-days imprisonment; a second and subsequent violations shall be punishable by a fine of not more than $200.00 and 60-days imprisonment. *Id*. § (d).

In sum, the Ordinance singles out and bans the solicitation of donations, panhandling, and begging in downtown Miami.

B. Enforcement of the Ordinance

Upon passage of the Ordinance, the Miami police regularly enforced it by arresting and citing people in the Downtown Business District who were panhandling. On July 11, 2017, in a state court criminal case, the Appellate Division of the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County held in *State v. Toombs* that the Ordinance was unconstitutional as a content-based restriction of speech in violation of the First Amendment. 25 Fla. L. Weekly Supp. 505a, Case No. 15-220 AC (Fla. 11th Jud. Cir. Ct., July 11, 2017).[2] Exhibit 2, *State v. Toombs*. However, in blatant violation of the *Toombs* decision, the City has continued

[2] Toombs was prosecuted for the violation of the Miami municipal ordinance in the Miami-Dade County Court by the Miami-Dade County State Attorney's Office. He pled no contest to a violation of Section 37-8 and reserved his right to appeal. After Toombs filed his notice of appeal, the City of Miami intervened in the appeal. *State v. Toombs*, 25 Fla. Law Weekly Supp. at 505a.

to enforce the Ordinance. In 2023 alone, the Miami police made eleven arrests for a violation of the Ordinance. Exhibit 3, Arrest Reports.

C. Arrest of Plaintiff Willie White

Plaintiff Willie White is sixty-five years old and is currently homeless. He is a long-time resident of Miami. To support himself, Mr. White engages in peaceful panhandling in downtown Miami. He stands on the sidewalk or shoulder of a city street and asks people in cars who are parked at a stoplight for money. *See* Complaint, ¶¶ 21-22.

On May 3, 2023, at approximately 4:44 p.m., Mr. White was panhandling on the shoulder of the street at N.E. 11th Terrace and N.E. 2nd Avenue in downtown Miami. Officer Bello of the Miami Police Department stopped Mr. White at that location, placed him under arrest, and charged Mr. White with a violation of the Ordinance. Exhibit 4, May 3, 2023 Arrest Report. On June 29, 2023, in Miami-Dade County Court, the prosecuting attorney filed a nolle prose and the charge against Mr. White was dismissed.

On June 7, 2023, at approximately 9:30 a.m., Mr. White was panhandling on the shoulder of the street at N.E. 11th Terrace and N.E. 2nd Avenue in downtown Miami. Officer Brown of the Miami Police Department stopped Mr. White at that location, placed him under arrest, and charged Mr. White with a violation of the Ordinance. Exhibit 5, June 7, 2023 Arrest Report. On July 25, 2023, in Miami-Dade County Court, the prosecuting attorney filed a nolle prose and the charge against Mr. White was dismissed.

Mr. White remains homeless and poor and wants to continue to solicit donations in downtown Miami in order to help with his survival, but he fears being arrested for a violation of

the Ordinance. Consequently, Mr. White seeks injunctive relief to permit him to exercise his First Amendment rights.

ARGUMENT

Mr. White is entitled to a preliminary injunction enjoining the enforcement of § 37-8. A district court may issue preliminary injunctive relief when the plaintiff demonstrates that: (1) there is "a substantial likelihood that [the plaintiff] will succeed later on the merits"; (2) the plaintiff "will suffer an irreparable injury absent preliminary relief"; (3) the plaintiff's injury likely "outweighs any harm that its opponent will suffer as a result of an injunction"; and (4) preliminary relief would not "disserve the public interest." *Scott v. Roberts*, 612 F.2d 1279, 1290 (11th Cir. 2010).

I. Plaintiff is Likely to Succeed on the Merits of His First Amendment Claim

Plaintiff is likely to succeed in showing that Miami's Panhandling in Certain Areas Ordinance is an unconstitutional speech restriction, both on its face and as applied to Mr. White. Content-based speech restrictions are presumptively unconstitutional and subject to strict scrutiny; to survive, the government bears the burden of proving that the law is narrowly tailored to a compelling government interest and is the least restrictive means of advancing it. The Ordinance fails this test.

As a preliminary matter, Plaintiff notes that the "solicitation of charitable contributions is protected speech" under the First Amendment. *Riley v. National Federation of the Blind*, 487 U.S. 781, 789 (1988). *See also Smith v. City of Fort Lauderdale*, 177 F.3d 954, 956 (11th Cir. 1999) ("Like other charitable solicitation, begging is speech entitled to First Amendment protection."). Moreover, streets, sidewalks, and public places are considered the "archetype of a traditional

public forum." *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). "Traditional public fora are public areas such as streets and parks that, since 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Bloedorn v. Grube*, 631 F.3d 1218, 1231 (11th Cir. 2011) (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 54 (1983)). The government's ability to restrict speech in these areas is "very limited." *McCullen v. Coakley*, 573 U.S. 464, 477 (2014).

A. The Ordinance is a Content-Based Restriction of Protected Speech Under the Supreme Court's Decision in *Reed v. Town of Gilbert*.

The Appellate Division of the Miami-Dade County Circuit Court in *State v. Toombs*, *supra*, Ex. 2, got it right in 2017. Because the Ordinance singles out the solicitation of contributions by banning it in the Downtown Business District, while permitting other speech to occur, the Ordinance is content-based and therefore subject to strict scrutiny.

The Supreme Court clarified this area of the law by holding that a law is "content-based" if it "applies to particular speech because of the topic discussed or the idea or message expresses." *Reed v. Town of Gilbert*, 576 U.S 155, 164 (2015). When deciding whether a challenged law is "content-based," a court must "consider whether a regulation of speech 'on its face' draws distinctions based on the message of the speaker." *Id*. This is so *even if* the law does not favor one viewpoint over another. Although viewpoint discrimination is more "egregious," the Court made clear that "a speech regulation targeted at specific subject matter is content-based *even if it does not discriminate among viewpoints within that subject matter*." *Id*. at 169 (emphasis added). In other words, treating different categories of speech differently renders a law content-based, even if the law permits all viewpoints within that category.

The Ordinance at issue here falls squarely into the category of content-based regulations. It bans "soliciting, begging or panhandling" in the Downtown Business District. But the ban applies *only* to those soliciting, begging or panhandling. No other type of speech is subject to the ban. Thus, whether the criminal penalties apply depends entirely on the content of the message (i.e., a solicitation for a donation or other request for money).

To illustrate the point: The Ordinance imposes no regulation on the church member in downtown Miami soliciting support for a religious cause, a candidate for public office asking for votes in an upcoming election, the political activist seeking support for a different climate change policy, or the tourist asking for directions. But if a person asks for a donation in the Downtown Business District, that person is prohibited from doing so. Failure to comply is punishable by arrest, fines, and imprisonment. The Ordinance falls squarely into the content-based camp, as defined by *Reed*: It "singles out specific subject matter for differential treatment." *Reed*, 576 U.S. at 169. As such, it is content-based and must survive strict scrutiny.

The City can no longer ignore *Toombs* and the staggering weight of authority demonstrating that its "Panhandling Prohibited in Certain Areas" Ordinance is unconstitutional. In recent years, "substantially all" federal courts in the country considering this issue have agreed, striking down panhandling regulations as unconstitutional content-based restrictions on speech. *See Thayer v. City of Worcester*, 144 F.Supp.3d 218, 233 (D. Mass. 2015) (recognizing that "a protracted discussion of the issue is not warranted as substantially all of the Courts which have addressed similar laws since *Reed* have found them to be content-based and therefore, subject to strict scrutiny"). *See also Messina v. City of Ft. Lauderdale*, 546 F. Supp. 3d 1227, 1242 (S.D. Fla. 2021) (following "the very heavy weight of authority" in concluding that a panhandling

ordinance was content based); *Homeless Helping Homeless v. City of Tampa*, No. 8:15-CV-1219-T-23AAS, 2016 WL 4162882 *2 (M.D. Fla. Aug. 5, 2016) (finding Tampa ordinance banning panhandling in "Downtown/Ybor Area Prohibited Zone" was content-based restriction of speech); *Vigue v. Shoar*, 494 F. Supp. 3d 1204, 1224 (494 F. Supp. 3d 1204 (N.D. Fla. 2020)), (Florida statutes which prohibited individuals from soliciting charity on roadways without obtaining a permit, but which exempted 501(c)(3) organizations, "impermissibly favor[ed] organizational, campaign and other group speech over other types of speech, like individual charitable contributions," held to be unlawful content-based restrictions on speech); *Indiana Civil Liberties Union Found., Inc. v. Superintendent, Indiana State Police*, 470 F. Supp. 3d 888, 903 (S.D. Ind. 2020) ("The statute's plain text establishes its content-based nature, because it defines the prohibited conduct by referring to the content of the speech—a request for an immediate donation of money or something else of value."); *Rodgers v. Bryant*, 942 F.3d 451, 456 (8th Cir. 2019) (Arkansas ban on begging that is harassing, causes alarm, or impedes traffic was content based because it applied "only to those asking for charity or gifts, not those who are, for example, soliciting votes, seeking signatures for a petition, or selling something."); *McLaughlin v. City of Lowell*, 140 F.Supp.3d 177, 185–86 (D. Mass. 2015) (finding a city ordinance banning aggressive panhandling was a content-based restriction on speech); *Browne v. City of Grand Junction*, 136 F.Supp.3d 1276, 1290–91 (D. Colo. 2015) (finding a city's provision that prevented solicitation at specified times was content-based and failed to survive strict scrutiny); *Clatterbuck v. City of Charlottesville*, 92 F.Supp.3d 478 (W.D. Va. 2015) (solicitation ordinance unconstitutional because its application turned entirely on content of speech).

Moreover, even appellate decisions which initially upheld panhandling restrictions have been vacated in light of *Reed,* leading to final judgments declaring that the ordinances were content-based and unconstitutional. *See, e.g., Norton v. City of Springfield*, 768 F.3d 713 (7th Cir. 2014), *rev'd*, 806 F.3d 411, 412–13 (7th Cir. 2015); *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014), *vacated*, 135 S. Ct. 2887 (2015), *on remand*, 144 F.Supp.3d 218 (D. Mass. 2015).[3]

The challenged Ordinance is content-based and must survive strict scrutiny.

B. The Ordinance Cannot Withstand Strict Scrutiny Because the City Cannot Prove that it is Narrowly Tailored to, and the Least Restrictive Means to Achieving, a Compelling Government Interest.

To withstand strict scrutiny, the City of Miami must prove that the Ordinance "furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 576 U.S. at 171. The City must also show that the law is the "least restrictive means" of accomplishing that vital interest. *McCullen*, 573 U.S. at 478. *See also United States v. Playboy Entm't Grp., Inc.,* 529 U.S. 803, 813 (2000) ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."). Moreover, "'content-based regulations are presumptively invalid,' and the Government bears the burden to rebut that presumption." *Playboy Entm't Grp*., 529 U.S. at 817 (quotation omitted).

The City cannot meet its burden because the Ordinance does not serve a compelling government interest. Here, the interests the City of Miami has asserted for enactment of the

[3] Further, a content-based 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." *Reed*, 135 S. Ct. at 2228. *See also Homeless Helping Homeless*, 2016 WL 4162882, *5 ("the Tampa City Council's solicitude toward the interests of the homeless and the City Council's amiable reception of advocates for the homeless are, especially after *Reed*, unresponsive to a constitutional attack on Section 14-46(b) as impermissibly content-based.").

Ordinance include tourism and the economic vitality of the downtown area.[4] These interests do not rise to the level of compelling government interests, and therefore the Panhandling Ordinance does not survive strict scrutiny. *See Messina*, 546 F. Supp. 3d at 1243–44 ("economic interests" and preventing discomfort are not compelling interets); *Pottinger* v. *City of Miami*, 810 F.Supp. 1551, 1581 (S.D.Fla.1992) ("the City's interest in promoting tourism and business and in developing the downtown area are at most substantial, rather than compelling, interests"); *McLaughlin*, 140 F.Supp.3d at 188-189 (promotion of business is at most a significant and substantial governmental interest, but not a compelling governmental interest). *See also Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 509 (1969) (speech cannot be restricted based on "mere desire to avoid ... discomfort and unpleasantness"); *Boos v. Barry*, 485.U.S. 312, 321 (1988) (protecting people from uncomfortable speech is not a compelling state interest); *McCullen*, 573 U.S. at 476 (fact that individual using the public streets and sidewalks may encounter an "uncomfortable message" is a "virtue, not a vice" of such traditional public fora). The *Toombs* court reached this same conclusion while striking down the very same ordinance at issue here. *Toombs* at 5. The Ordinance fails strict scrutiny for this reason alone.

But even if the City has asserted compelling government interests, the Ordinance is not

[4] Section 37-8 (a) of the Ordinance states: "The purpose of this section is not to punish the status or condition of any person. Regulation is required because panhandling in certain areas threatens the economic vitality of those areas, impairing the city's long term goals of attracting citizens, businesses and tourist to these certain areas and, consequently, the city overall. The city has substantial interests in protecting the city's investment in certain areas, protecting tourism, encouraging expansion of the city's economic base, and protecting the city's economy. The regulations in this section further these substantial interests: This section is not intended to proscribe any demand for payment for services rendered or goods delivered. Nor is this section intended to prohibit acts authorized as an exercise of a person's constitutional right to legally picket, protest or speak."

narrowly tailored and is not the least restrictive means of serving them. Laws may fail the narrow tailoring requirement where they "burden substantially more speech than is necessary to further the government's legitimate interests[,]" and are therefore fatally overinclusive. *McCullen*, 573 U.S. at 486 (under intermediate scrutiny, striking down law imposing speech buffer zones around abortion clinics in part because the law applied statewide instead of targeting the one problematic clinic). *See also Cutting v. City of Portland, Maine*, 802 F.3d 79, 82, 90 (1st Cir. 2015) (ordinance prohibiting standing on a median, which city enforced against panhandlers, was not narrowly tailored because it was "geographically overinclusive"); *Reynolds v. Middleton*, 779 F.3d 222, 231-232 (4th Cir. 2015) (under intermediate scrutiny, holding that ordinance prohibiting roadway solicitation was not narrowly tailored when it applied to all roads regardless of location and traffic volume).

The Ordinance fails strict scrutiny because the City cannot show that banning all requests for donations in large swaths of the city—including the entire downtown area—is the least restrictive means of achieving any interest. Whatever the City's goal in passing the ordinance, such a widespread and total ban is not a narrowly tailored solution. *See Messina*, 546 F. Supp. 3d at 1245 (granting preliminary injunction against Fort Lauderdale ordinance prohibiting panhandling within proximity of certain areas, and finding it was not narrowly tailored); *Homeless Helping Homeless*, 2016 WL 4162882, at *5 (striking down Tampa ordinance banning panhandling in downtown/Ybor area after city admitted no compelling interest supported it); *McLaughlin*, 140 F.Supp.3d at 194, 195 (holding that restrictions on panhandling near bus stops and ATMs were not narrowly tailored); *Browne*, 136 F.Supp.3d at 1280-1282, 1287-1288 (striking down ordinance that prohibited panhandling in or near certain locations).

The Ordinance is also fatally underinclusive because it does not prohibit forms of speech that may be equally injurious to the City's interests. *See Rodgers*, 942 F.3d at 457 (since state provided "no justification for its decision to single out charitable solicitation from other types of solicitation, the anti-loitering law is underinclusive and, consequently, not narrowly tailored"); *Clatterbuck*, 92 F. Supp. 3d at 487 ("The same public safety issue is presented whether the person stopping (or attempting to stop) the vehicle is seeking an immediate donation of something of value; or a signature on a petition; or a pledge of future donations; or directional information …"); *Kelly*, 978 F.Supp.2d at 630 (in pre-*Reed* case, holding anti-panhandling law unconstitutional in part because "[a] solicitor of votes presumably presents the same traffic safety concerns as a solicitor of money or contributions. Yet only solicitors requesting money or contributions are regulated by the Ordinance.").

For all these reasons, the Ordinance is a content-based restriction on protected speech that cannot withstand strict scrutiny because it is not narrowly tailored to a compelling state interest, nor is it the least restrictive means of furthering that interest. Plaintiff is likely to succeed on the merits of his First Amendment claim.

II. Plaintiff Has Established the Remaining Criteria for a Preliminary Injunction

A. Irreparable Injury

"[I]t is well settled that the 'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitute irreparable injury.'" *KH Outdoor, LLC v. City of Titusville*, 458, F.3d 1261, 1271-72 (11th Cir. 2006) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The penalization of Plaintiff's First Amendment rights cannot be "cured by the award of monetary damages." *KH Outdoor,* 458 F.3d at 1272. *See also Scott,* 612 F.3d at 1295. Every day, Plaintiff's

rights are chilled, and he restricts his panhandling because he fears arrest. Every day that passes inflicts further irreparable harm.

B. Balance of Harms and Public Interest

The third and fourth preliminary injunction criteria are also satisfied. With respect to the balance of harms, "even a temporary infringement of First Amendment rights constitutes a serious and substantial injury." *Scott*, 612 F.3d at 1297. On the other side of the ledger, "the public when the state is a party asserting harm, has no interest in enforcing an unconstitutional law." *Id*. Enforcing unconstitutional laws also wastes valuable public resources. Finally, because the public has no interest in enforcing an unconstitutional speech restriction, an injunction against enforcement cannot "disserve" the public interest. *Id*. at 1290, 1297.

CONCLUSION

Over six years ago, a state court declared this very ordinance unconstitutional. The City has simply ignored this ruling and has continued to needlessly arrest and jail homeless people, in blatant disregard of that decision. Plaintiff White respectfully requests that this Court reaffirm that ruling and declare that the City's Panhandling in Certain Areas Ordinance is unconstitutional, both facially and as applied to Plaintiff, and immediately enjoin the City and its agents from enforcing it.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed today, December 18, 2023, the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all persons registered to receive electronic notifications for this case, including all opposing counsel. Also, on today's date, I sent a copy of this Motion and its attachments via email to:

Victoria Mendez, City Attorney
VMendez@Miamigov.com

By: *s/Ray Taseff*
Ray Taseff