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SENIOR STAFF ATTORNEY

October 31, 2013

VIA FACSIMILE, E-MAIL, AND U.S. MAIL

Honorable President and Members
of the City Council
Room 409 City Hall
100 N. Holliday St.
Baltimore, MD 21202

Attn: Karen Randle, Executive Secretary

Re: Bill No. 13-0186 – Soliciting – Prohibited Places

AMERICAN CIVIL
LIBERTIES UNION OF
MARYLAND

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Dear President Young and Members of the City Council,

We write to express the ACLU's and Homeless Person's Representation Project's (HPRP's) opposition to, and deep concern about, City Council Bill No. 13-0186, which seeks to amend Balt. Code, Art. 19, § 47-4 to impose additional restrictions on the First Amendment right to solicit assistance in Baltimore. Because the bill has had several very different iterations, we comment on each separately below.

The Original Bill

As originally drafted, Bill No. 13-0186 would have added an additional provision to § 47-4 prohibiting soliciting "while the person is occupying or standing in or on any roadway, lane divider, or shoulder." The Law Department has expressed the view, in its March 8, 2013 letter, that the proposed addition would be constitutional, though unnecessarily duplicative of existing law. We agree that the prohibition on soliciting while the person is standing in or on any roadway or lane divider would be duplicative, because § 47-4 already prohibits soliciting from "from any operator or occupant of a motor vehicle that is in traffic on a public street." However we cannot agree that a prohibition on soliciting from the shoulder would be duplicative, because the cars a person would be soliciting would not necessarily (or even normally) be "in traffic," and might be parked, for example. A prohibition on soliciting donations from the occupants of such vehicles would violate the First Amendment, because there is no legitimate public safety rationale. As the Law Department notes, the United States Court of Appeals for the Ninth Circuit recently struck down a similar prohibition on soliciting business or contributions from occupants of a motor vehicle from sidewalks and curbs, among other places. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011). The Court held that the First Amendment protected such solicitations, and that the prohibition was unconstitutionally overbroad, reaching situations that posed no legitimate traffic or safety concern. The Maryland Attorney General reached a similar conclusion, agreeing with the ACLU that a solicitation ordinance in Gaithersburg that similarly prohibited solicitations from the shoulder that posed no traffic or safety concerns violated the First Amendment. 93 Op. Atty. Gen. 31 (Feb. 27, 2008) (available at http://www.oag.state.md.us/Opinions/2008/93oag31.pdf).

Further, while the existing prohibition on soliciting from occupants of vehicles "in traffic" might be facially constitutional, and while the proposed duplicative prohibition on soliciting while standing in a roadway might also be facially constitutional, any such prohibitions must also be enforced in a evenhanded way, which is not the current practice. As a resident of Baltimore, we know from personal experience that the current prohibitions are not enforced against City firefighters who routinely walk in the roadway at intersections to pass the boot collecting donations, or the many marching bands, school groups, and youth groups that similarly routinely solicit all over the City. The First Amendment prohibits requiring destitute and homeless persons to live by one set of rules, while formally or informally permitting the same speech by more favored speakers, which is the current practice.

This disparate enforcement has served to insulate the Council from the political consequences of these laws, which would be tolerated far less if uniformly enforced, and also opens the City and police to liability for violating the free speech rights of less favored speakers. The lax and uneven enforcement also calls into the question the asserted public safety rationale for the prohibition, which raises doubts about its facial constitutional validity.

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The Judiciary Committee Amendments

As amended by the Judiciary Committee on October 22, the bill now adopts changes suggested by the Law Department in conjunction with the Downtown Partnership. Those changes eliminate the new prohibitions on soliciting vehicles, discussed above, and instead prohibit soliciting "within 10 feet of any place where a person pays for goods or services with cash or credit cards," soliciting from "persons who are standing within 5 feet of a parking kiosk machine or parking meter," or soliciting "on pedestrian bridges" or the entrances to such bridges.

If implemented, these restrictions will effectively prohibit solicitations in all commercial areas of the city, where virtually every building is one in which "a person pays for goods or services with cash or credit cards" and lead to police having the absurd and impossible task of seeking to relocate destitute persons to the possible tiny corridor between buildings where they may safely beg without running afoul of the law (will police really walk around with tape measures to measure where homeless people may stand?). Given the Law Department's necessary acknowledgment that "begging on [a public sidewalk] constitutes expressive activity in a traditional public forum, which garners the full protective force of the First Amendment." *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 555 (4th Cir. 2013); *see* also *Speet v. Schuette*, 726 F.3d 827, 873-876 (6th Cir. 2013) (same); *Gresham v. Peterson*, 225 F.3d 899, 903-904 (7th Cir. 2000) (same); *Smith v. City of Fort Lauderdale, Fla.,* 177 F.3d 954, 956 (11th Cir. 1999) (same); *Loper v. New York City Police Department*, 999 F.2d 699, 704 (2d Cir. 1993) (same), its conclusion that such a broad prohibition is constitutional is simply incomprehensible. Moreover, these prohibitions are even broader and even more constitutionally infirm than the ones originally suggested by the Downtown Partnership in its letter of March 1, 2013, which the Law Department correctly concluded on April 8 were unconstitutional.

The basic legal rules at issue here do not appear to be in dispute, as least as between the ACLU, HPRP, and the City's Law Department, though their application to the particular proposals is. As noted above, we agree with the Law Department that soliciting personal assistance ("begging" or "panhandling") is speech fully protected by the First Amendment. And we agree with the Law Department's view in its April 8 letter that a "captive audience" theory cannot constitutionally justify restrictions on soliciting outdoor diners, or persons paying for parking, from public sidewalks. As the Law Department noted, the Supreme Court has allowed reliance on a "captive audience" theory to justify restrictions on speech only in very limited contexts where "substantial privacy interests are being invaded in an essentially intolerable

manner," *Berger v. City of Seattle*, 569 F.3d 1029, 1054 (9th Cir. 2009) (holding invalid an ordinance that prohibited soliciting within 30 feet of persons waiting in outdoor lines our dining outside). And we agree with the Law Department that public safety concerns independent of any communicative content can justify incidental restrictions on speech (such as a prohibition on soliciting in the middle of the street).

However we strongly disagree with the Law Department's assertion that the October 22 amendments are constitutional. The Law Department contends that adding a preamble to the legislation asserting that "persons in these locations [the three new locations where soliciting is prohibited] are vulnerable to a greater degree to intimidation and endangerment of their safety from solicitation activities," means that they can be sustained as reasonable public safety measures. But asserting a public safety rationale is not the same thing as actually proving that one really exists, and the public safety claim here is simply not even plausible, much less credible.

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Regarding the prohibition on soliciting "within 10 feet of any place where a person pays for goods or services with cash or credit cards," the claim seems to be, according to the new preamble, that because money or credit is being used inside those locations, persons are more vulnerable when entering or exiting. This strains credulity on a number of levels. First, people do not typically enter or exit businesses with their cash or credit cards in hand. So they are no more "vulnerable" entering or exiting businesses than they are anywhere else in public in commercial areas (or anywhere else in the City). Moreover, we are not aware of any study or statistics, in Baltimore or elsewhere, that shows that people are, in fact, "more vulnerable" to becoming crime victims in such locations, much less becoming crime victims from persons asking them for help. And no such studies or facts were presented to the Council.

The same is true of the prohibition on solicitng from "persons who are standing within 5 feet of a parking kiosk machine or parking meter." While such persons may, in fact, momentarily have coins, bills, or a credit card out to pay for parking, we are again unaware of any study or statistics that support the notion that persons paying for parking are any more likely to be victims of crime than any other person on the street in Baltimore, much less being victimized by persons seeking their help. Again, no such studies or facts were presented to the Council.

Finally, the prohibition on soliciting in pedestrian bridges or their entrances, while perhaps of lesser importance given the incredibly small number of such bridges in the City, seems to be justified only by the claim that persons in such areas "are confined in an enclosed and/or elevated walkway[]." But this is simply another way of stating the "captive audience" theory that the Law Department correctly recognized cannot have general application in public fora (such as the public elevated sidewalks at issue), and applies only in limited contexts where there is some recognized right to privacy and tranquility, such as a person's home or medical clinics.

Apart from the constitutional problems noted above, the proposals are also a violation of an existing Settlement Agreement to which the City is a party. In September 1994, the City of Baltimore signed a Settlement Agreement in *Patton v. Baltimore City*, No. S-93-2389, a federal court action filed by the ACLU of Maryland on behalf of several homeless residents of Baltimore. The suit challenged the constitutionality of the City's "Aggressive Panhandling" ordinance, and the police harassment of homeless persons in Downtown Baltimore. Following the U.S. District Court's decision that Baltimore's ordinance was facially unconstitutional, *Patton v. Baltimore*, No. S-93-2389 (Memorandum Opinion dated August 19, 1994) at 54-69, the City entered into settlement talks. In the Settlement Agreement, the City agreed that "panhandling is a form of solicitation which is speech-related and is entitled to the full protection of the First Amendment of the United States Constitution." The City also agreed that "panhandling should not be

interfered with in any way, including asking or otherwise directing that panhandlers "move along" or otherwise change their location, unless the panhandling is accompanied by some other conduct that is itself illegal." Finally, the City agreed that "all citizens in Downtown Baltimore, including citizens who are homeless or appear to be homeless, have a Constitutional right to be in public places for an unlimited amount of time, so long as they are not obstructing pedestrian or vehicular traffic, breaching the peace, or otherwise violating any law or applicable regulations."

Adopting and enforcing CB 13-0186 would violate these provisions because it would deny homeless persons the right recognized in the agreement to beg without "interference," and their right not to be ordered to move along unless they are violating some other law. The Settlement Agreement further obligates the City and Police Commissioner to "maintain policies, procedures and practices regarding the homeless and panhandlers that are consistent with the terms of this Agreement." The Agreement provides that it "shall be enforceable in the United States District Court for the District of Maryland and that court shall retain jurisdiction in this case for the purpose of enforcing this Agreement."

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Being personally confronted by our community's inability to meaningfully assist some of our most troubled and destitute neighbors, when they directly ask us for help, may be upsetting and disturbing to many people. But the solution is not to make their pleas for help into crimes. We urge the Council to reject this mean-spirited and deeply misguided legislation, and channel its efforts to more productive solutions.

Sincerely,

David Rocah
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Antonia K. Fasanelli
Executive Director
Homeless Persons Representation Project