

**IN THE DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

GLYNN DILBECK

PLAINTIFF

vs

CASE No. 5:17-cv-05116-TLB

**NATHANIEL CLARK, IN HIS OFFICIAL CAPACITY
AS CHIEF OF THE FORT SMITH, ARKANSAS POLICE
DEPARTMENT, and HAYES MINOR, IN HIS OFFICIAL
CAPACITY AS CHIEF OF THE ROGERS,
ARKANSAS POLICE DEPARTMENT**

DEFENDANTS

AMENDED AND SUBSTITUTED COMPLAINT

Introduction

1. This is an action brought to safeguard the most fundamental rights of speech and expression under the First and Fourteenth Amendments to the United States Constitution and to protect Plaintiff and others from unjustified government intrusion. Plaintiff Dilbeck has been harassed and cited in Fort Smith and Rogers, Arkansas for begging. He is not alone. Others also suffer this same government persecution for their speech. Predictably, the threat of citation, arrest, detention, prosecution, conviction and penalties under the Fort Smith and Rogers's anti-solicitation ordinance has chilled Plaintiff and others from exercising their constitutionally-protected rights to peacefully ask others for money, food, or other charity within the Fort Smith and Rogers city limits.

2. On February 21, 2017, Fort Smith passed municipal ordinance Section 6-17, which severely restricts panhandling within the city limits and violates Plaintiff's First Amendment

rights. This law chills Plaintiff and others from exercising their constitutionally-protected rights to peacefully ask others for money, food, or other charity within the Fort Smith city limits. Plaintiff needs the intervention of this Court to invalidate this ordinance and to enjoin its enforcement by Defendant Clark. *See* Exhibit 1 to the Complaint.

3. Fort Smith Ordinance Section 6-17 makes it a crime if a person panhandles after sunset or before sunrise, in any public transportation vehicle or facility; at any bus stop; in any vehicle on the street; on private property without permission; in proximity to a bank entrance or check-cashing business; or automated teller; or 150 feet from any street corner; street intersection or highway interchange. In addition, a panhandler cannot come within three feet of the person solicited, unless that person has indicated he wishes to make a donation; cannot block the path of the person along a sidewalk or street; cannot follow a person who walks away from a panhandler; use profane or abusive language, panhandle in a group of two or more persons; or by any statement, gesture or other communication which a reasonable person would perceive to be a threat. It is further unlawful under the ordinance for a panhandler to make a misleading representation of his or her need, state that he or she is out of town and stranded, wear a uniform of military service when neither a present or former member of the military, or display an indication of physical disability when not so disabled. The ordinance fails all relevant tests applied by the United States Supreme Court and other federal and state courts. It is a content-based restriction on freedom of speech and cannot withstand strict scrutiny. It should be invalidated on its face.

4. Fort Smith Ordinance Section 18-72, which bans panhandling in public parks, is also a content-based restriction of free speech in traditional public fora. *See* Exhibit 2 to the Complaint. It cannot withstand strict scrutiny and should be invalidated on its face.

5. Another Fort Smith ordinance, Section 18-72 of the municipal code, prohibits begging in all parks. Plaintiff is thus afraid to exercise his constitutional rights in Fort Smith parks, as well as in the areas targeted by 6-17.

6. The Rogers City Council has enacted section 38-24 of its municipal code, which is entitled, "Solicitation from persons driving motor vehicles prohibited." The ordinance prohibits anyone from soliciting money or contributions from motor vehicles by pedestrians without a permit issued by the city within the city limits. Sec. 38-24(a). A violation of the law is punishable by a fine of \$1000.00. *See*, Exhibit 3 to the Complaint. The ordinance fails all relevant tests mandated by the United States Supreme Court and applied by the federal circuit and district courts. It is a content-based restriction on freedom of speech, which required application of strict scrutiny. It cannot withstand this test and should be invalidated on its face.

Jurisdiction and Venue

8. This Court has subject-matter jurisdiction pursuant to 42 U.S.C. §§ 1983 and 1988 and 28 U.S.C. §§ 1331 and 1343. The Court can grant declaratory relief pursuant to 28 U.S.C. §§ 2201(a) and 2202.

9. Venue is proper under 28 U.S.C. § 1391(b) as Defendant's headquarters is located in Washington County, Arkansas.

The Parties

10. Plaintiff Glynn Dibeck has begged in Fort Smith and Rogers, Arkansas. Because he is afraid of enforcement of Section 38-24 of the Rogers Municipal Code and Sections 16-17 and 18-72 of the Fort Smith Municipal Code, he is chilled from doing so.

11. Defendant Nathaniel Clark is the Chief of Police for the City of Fort Smith. He is sued in his official capacity. Members of the Fort Smith Police Department are under the

supervision of Chief Clark. They routinely issued warnings and citations under the predecessor ordinance to 6-17 and will do the same under 6-17. They also enforce 18-72.

12. Defendant Hayes Minor is the Chief of Police for the City of Rogers. He is sued in his official capacity. Members of the Rogers Police Department are under the supervision of Chief Minor. They enforce the anti-solicitation ordinance.

13. At all times described herein Defendant Clark and the police officers under his supervision are acting under color of state law.

14. At all times described herein Defendant Minor and the police officers under his supervision are acting under color of state law.

The Challenged Laws

15. Sections 6-17 and 18-72 of the Fort Smith Municipal Code are the bases for citing, arresting and prosecuting persons in that city for panhandling.

16. Sections 6-17 and 18-72 are content-based, as they single out panhandling for the restrictions in the former and for a ban in the later. Section 18-72 is an outright ban on protected speech in a traditional public forum and thus, on its face, criminalizes constitutionally-protected speech. Section 6-17's restrictions are not narrowly-tailored to further any compelling governmental interest.

17. Ordinance No. 38-24 of the Rogers municipal code is content-based in that it singles out soliciting from among other types of speech and includes a ban on soliciting in traditional public forums. It is not narrowly-tailored to further any compelling governmental interest. It is the basis for citing, arresting, and prosecuting persons in that city for panhandling.

18. Plaintiff and other individuals are concerned about being cited, arrested, jailed, prosecuted, found guilty and penalized by fines and court fees under the anti-begging laws. They

are chilled from exercising their constitutional rights to free speech and are refraining and will continue to refrain from panhandling in Fort Smith and Hot Springs unless the laws are invalidated.

Facts

19. Plaintiff Dilbeck has, under color of law, been harassed and cited for panhandling in Fort Smith.

20. Plaintiff Dilbeck has also, under color of law, been harassed and cited for panhandling in Rogers.

21. Plaintiff Dilbeck does not have any criminal charges pending in either Fort Smith or Rogers.

COUNT I

(Facial Violation Right to Freedom of Speech)

22. Plaintiff restates and incorporates by reference as if fully set forth here the allegations of the preceding paragraphs.

23. The First Amendment to the United States Constitution prohibits the abridgement and chilling of free speech. The First Amendment is applicable to the states through the Fourteenth Amendment. Persons violating the First Amendment under color of state law are liable at law and in equity under 42 U.S.C. § 1983.

24. Sections 6-17 and 18-72 of the Fort Smith municipal code are facially invalid under the First Amendment because they criminalize protected speech, prohibit a substantial amount of protected speech and generally chill protected speech. They also are invalid because they are content-based restrictions on protected speech and are not narrowly tailored to serve any compelling state interest.

25. Section 38-24 the Rogers municipal code is facially invalid under the First Amendment because it is a content-based prior restraint on protected speech and generally chills protected speech. It is not narrowly tailored to serve any compelling state interest.

Relief Requested

WHEREFORE, Plaintiff respectfully requests that this Court:

1. Issue a preliminary and permanent injunction restraining Defendant Clark and his employees, agents and successors from enforcing the City of For Smith Ordinances No. 16-17 and 18-72.
2. Enter a judgment declaring that these Fort Smith ordinances on their face violate the United States Constitution and permanently enjoin their enforcement by Defendant Clark;
3. Issue a preliminary and permanent injunction restraining Defendant Minor and his employees, agents and successors from enforcing City of Rogers Ordinance No. 38-24.
3. Enter a judgment declaring that the Rogers ordinance on its face violates the United States Constitution and permanently enjoin its enforcement by Defendant Minor.
4. Enter a judgment declaring that these Fort Smith ordinances on their face violate the United States Constitution and permanently enjoin their enforcement by Defendant;
4. Award Plaintiff's costs and attorneys' fees pursuant to 42 U.S.C. §1988; and
5. Grant such other and further relief as the Court deems just and proper.

Dated: 06/28/17

Respectfully Submitted,

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Attorneys for Plaintiffs

On behalf of the Arkansas Civil Liberties Union
Foundation, Inc.

1.

ORDINANCE NO. 6-17

**AN ORDINANCE REPEALING SECTION 13-253 AND ADDING SECTION 13-255 TO
THE FORT SMITH CODE OF ORDINANCES TO REGULATE PANHANDLING**

WHEREAS, This Ordinance is adopted in order to protect persons from threatening, intimidating or harassing behavior, to keep public places safe and attractive for use by all members of the community and to maintain and preserve public places where all of the community can interact in a peaceful manner. This Ordinance is also intended to provide for the free flow of pedestrian and vehicular traffic on streets and sidewalks in the City, to promote tourism and business and preserve the quality of urban life. The Board of Directors finds that aggressive acts associated with solicitation tend to interfere with the free flow of pedestrian and vehicular traffic and intimidate persons in public places, and can lead to disruption and disorder in public places. Aggressive acts can also cause persons to avoid public places and lead to declining patronage of commercial establishments and tourism. The Board of Directors further finds that solicitation in certain public places is inconsistent with the use of those places, is inherently intimidating, targets persons who are captive audiences or constitutes an invasion of privacy as persons are not able to simply move on if they do not wish to speak to the person soliciting. Solicitation in proximity to bank entrances or check-cashing businesses or automated teller machines is inherently intimidating and should be restricted. By this Ordinance, the Board of Directors do not intend to limit any persons from exercising their constitutional right to solicit funds, picket, protest or engage in other constitutionally protected activity; rather, the intent is to protect citizens and visitors to the City from the fear and apprehension accompanying certain kinds of aggressive solicitation that have become an unwelcome presence in the City.

**NOW, THEREFORE, BE IT ORDAINED AND ENACTED BY THE BOARD OF
DIRECTORS OF THE CITY OF FORT SMITH, ARKANSAS, THAT:**



SECTION 1: Definitions. "Panhandling," for the purpose of this Article, is any solicitation made in person requesting an immediate donation of money. Solicitation shall include, without limitation, the spoken, written, or printed word or such other acts or bodily gestures as are conducted in furtherance of the purposes of immediately obtaining money or other things of value. Purchase of an item for an amount far exceeding its value, under circumstances where a reasonable person would understand that the purchase is in substance a donation, is a donation for the purpose of this Article. Panhandling does not include passively standing or sitting with a sign or other indication that one is seeking donations, without addressing any solicitation to any specific person other than in response to an inquiry by that person.

SECTION 2: Time of Panhandling. It shall be unlawful for any person to panhandle after sunset or before sunrise.

SECTION 3: Place of Panhandling. It shall be unlawful for any person to panhandle when the person solicited is in any of the following places:

- a) At any bus stop;
- b) In any public transportation vehicle or facility;
- c) In any vehicle on the street;
- d) On private property, unless the panhandler has permission from the owner or occupant;
- e) In proximity to a bank entrance or check-cashing business or automated teller; or
- f) Within one hundred fifty feet (150') of any street corner, street intersection, or highway interchange. For the purposes of this subsection, distance shall be measured from any extension of the solicitor's body, including without limitation any sign or other object being used or carried by the solicitor, to any part of the street corner, street intersection, or highway interchange.

SECTION 4: Manner of Panhandling. It shall be unlawful for any person to panhandle in any of the following manners:

- a) By coming within three feet of the person solicited, until that person has indicated that he does wish to make a donation;
- b) By blocking the path of the person solicited along a sidewalk or street;
- c) By following a person who walks away from the panhandler;
- d) By using profane or abusive language, either during the solicitation or following a refusal;
- e) By panhandling in a group of two or more persons; or
- f) By any statement, gesture, or other communication which a reasonable person in the situation of the person solicited would perceive to be a threat.

SECTION 5: False or misleading solicitation.

a) It shall be unlawful for any person to knowingly make any false or misleading representation in the course of soliciting a donation. False or misleading representations include, but are not limited to, the following:

- 1) Stating that the donation is needed to meet a specific need, when the solicitor already has sufficient funds to meet that need and does not disclose that fact;
- 2) Stating that the donation is needed to meet a need which does not exist;
- 3) Stating that the solicitor is from out of town and stranded, when that is not true;
- 4) *Wearing a military uniform or other indication of military service*, when the solicitor is neither a present nor former member of the service indicated;
- 5) Wearing or displaying an indication of physical disability, when the solicitor does not suffer the disability indicated;

6) Use of any makeup or device to simulate any deformity; or

7) Stating that the solicitor is homeless, when he or she is not.

b) It shall be unlawful for any person to solicit a donation stating that the funds are needed for a specific purpose and then spends the funds received for a different purpose.

c) This section establishes a single offense. Evidence which establishes beyond a reasonable doubt that the defendant violated the section is sufficient for conviction and need not establish which subdivision was violated.


SECTION 6: Section 13-253 of the Fort Smith Municipal Code is hereby repealed in its entirety.

SECTION 7: Any person convicted of violating any provision of this Ordinance shall be deemed guilty of a misdemeanor and subject to penalty as set forth in Section 1-9 of the Fort Smith Code of Ordinances.


SECTION 8: Severability. If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held to be invalid, such decision shall not affect the validity of the remaining portions of this Ordinance.

THIS ORDINANCE ADOPTED this 21st day of February, 2017.

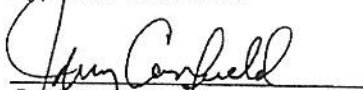
APPROVED:


MAYOR

ATTEST:


CITY CLERK

Approved as to form:


Publish one time

Sec. 18-72. - Unlawful activity.

;

No loitering, begging, gambling or games of chance will be permitted in any park area.

(Code 1976, § 20-18)



Sec. 38-24. - Solicitation from persons driving motor vehicles prohibited. :

- (a) The practice of soliciting money or contributions from motor vehicles by pedestrians without a permit issued by the city is hereby prohibited within the city limits.
- (b) A violation of this article is punishable as set forth in section 1-5 of the Rogers City Code.
- (c) Any organization or individual desiring to obtain a permit as required in this article shall make written application to the clerk-treasurer, or their designee. Said application shall be made at least 14 days prior to the intended date of solicitation and shall contain the following information:
 - (1) Name of applicant or organization;
 - (2) Address of applicant or organization;
 - (3) Telephone number of applicant or organization;
 - (4) Date and time of intended solicitation;
 - (5) Location of intended solicitation.
- (d) The application shall be reviewed by the chief of police or his designate for approval prior to any permit being issued by the clerk-treasurer, or their designee; provided, however, that said approval shall not be unreasonably withheld and shall be based upon public safety considerations only. If the application is approved, the clerk-treasurer, or their designee, shall issue a solicitation permit which shall be valid for a period of 24 hours. Said permit shall be clearly displayed by the individual or organization to which it is issued at all times during the period of solicitation.

(Code 1997, § 86-6; Ord. No. 07-73, §§ 1—4, 5-22-2007; Ord. No. 08-108, §§ 2—5, 8-26-2008; Ord. No. 15-120, § 1(Exh. A), 8-11-2015; Ord. No. 16-40, § 2(Exh. A), 5-10-2016)

