

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION**

**MICHAEL ANDREW RODGERS and
GLYNN DILBECK**

PLAINTIFFS

VS.

4:16-CV-00775-BRW

**COLONEL BILL BRYANT,
in his official capacity as
Director of the Arkansas State Police**

DEFENDANT

ORDER

Pending is Plaintiffs' Motion for Preliminary Injunction (Doc. No. 2). Defendant has responded and Plaintiffs have replied.¹ Also pending is Defendant's Motion to Dismiss (Doc. No. 7). Plaintiff has responded.² As set out below, Plaintiffs' Motion is GRANTED and Defendant's Motion is DENIED.

I. BACKGROUND³

Both Plaintiffs have been charged with violating Arkansas's anti-begging law,⁴ and both say they would continue to beg but for fear of being charged again with violating the law. Under the anti-begging law, a person commits the offense of loitering if she or he "[l]ingers or remains in a public place or on the premises of another for the purpose of begging."⁵

¹ Doc. Nos. 9, 16.

² Doc. No. 16.

³ Unless otherwise noted, the facts in the background section are undisputed, and are taken from Plaintiffs' Complaint (Doc. No. 2) and Plaintiffs' Motion for Preliminary Injunction (Doc. No. 8).

⁴ Arkansas Code Annotated § 5-71-213(a)(3).

⁵ *Id.*

Mr. Rodgers was arrested in Garland County, Arkansas and charged with violating the anti-begging law. He was jailed and later charged with four more counts of violating the anti-begging law. After his release on bond, the prosecuting attorney dismissed one charge, then the District Court of Garland County, Arkansas found Mr. Rodgers guilty on the other four charges. He appealed that conviction to the Circuit Court of Garland County, Arkansas, which acquitted him of the charges, and ruled that the anti-begging law is unconstitutional.⁶

Mr. Dilbeck, was cited by the Arkansas State Police for holding up a sign asking for money. He never stood trial for that charge, however, because the prosecuting attorney voluntarily dismissed the charge.

In their Complaint for Declaratory Judgment and Motion for Preliminary Injunction, Plaintiffs assert that the anti-begging law is unconstitutionally vague and overbroad. Although the parties disagree on several points, they agree that this order should be the final order, and that, if the anti-begging law is unconstitutional, it should be severed from the rest of the statute.

II. STANDING

To have standing to challenge the constitutionality of a criminal statute, a plaintiff must be facing prosecution or threat of prosecution, or must otherwise present an actual, ongoing, case or controversy within the meaning of the federal constitution.⁷ In the context of a First Amendment claim, however, a plaintiff has standing to attack overly-broad statutes when the

⁶ Doc. No. 2, at 79.

⁷ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

statute's very existence may chill constitutionally-protected speech.⁸ Begging is constitutionally-protected speech.⁹

Defendant contends that this exception does not apply because a person charged under the anti-begging law could raise the constitutional argument when appealing the conviction. Even so, this argument overlooks the chilling effect on the constitutionally-protected speech being regulated (begging). As Plaintiffs' experiences have shown, the threat of being charged under the anti-begging law – even if later dismissed or acquitted – is real and substantially chills speech. Accordingly, I find that Plaintiffs have standing.

III. ABSTENTION

Defendant argues that I should abstain from deciding this case because the Arkansas Supreme Court might someday interpret the anti-begging law “in a narrow way that avoids constitutional concerns in the statute’s application.”¹⁰ It is true that federal courts should abstain and defer to the authority of state courts to interpret state law **if** narrow construction by state courts may avoid constitutional concerns.¹¹ Here, however, even assuming the Arkansas

⁸ See, *Broadrick v. Oklahoma*, 413 U.S. 601, 611-612 (1973).

⁹ See, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Bates v. State Bar of Arizona*, 433 U.S. 350, 363 (1977); *Village of Schaumburg v. Citizens for a Better Env.*, 444 U.S. 620, 633 (1980); *Gresham v. Peterson*, 225 F.3d 899, 904 (7th Cir. 2000); *Smith v. City of Fort Lauderdale*, 177 F.3d 954 (11th Cir. 1999); *Loper v. New York City Police Dep’t*, 999 F.2d 699 (2d Cir. 1993); *Speet v. Schuette*, 726 F.3d 867, 874 (6th Cir. 2013); *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 557 (4th Cir. 2013) (abrogated on other grounds by *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015)).

¹⁰ Doc. No. 8.

¹¹ *Broadrick*, 413 U.S. at 613 (“Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute.”).

Supreme Court might someday be presented an opportunity to interpret this statute,¹² I can imagine no interpretation shy of metaphysical contortions that would save the anti-begging law from constitutional concerns. Accordingly, I decline to abstain.

IV. VAGUENESS

Plaintiffs assert that the anti-begging law is unconstitutionally vague because it prohibits, but does not define, begging. “It is a basic principle of due process that [a law] is void for vagueness if its prohibitions are not clearly defined.”¹³ A little uncertainty is inherent in all language, and “uncertainty alone does not mean that a statute is unconstitutional [when] additional sources like dictionaries or judicial opinions may provide sufficient warning.”¹⁴

Courts have previously grappled with whether “begging” is too vague a word for folks of ordinary intelligence to understand what behavior is prohibited. Those courts have defined begging as soliciting alms.¹⁵ A person of ordinary intelligence would understand begging to mean asking for money or soliciting alms. Accordingly, the statute is not unconstitutionally vague. As to the vagueness challenge, Defendant’s Motion to Dismiss is GRANTED. Plaintiffs’ claim on this point is DISMISSED with prejudice.

¹² According to Defendant the prosecuting attorney who prosecuted Mr. Rodgers’s previous acquittal did not request that the Attorney General’s Office appeal it, so it didn’t.

¹³ *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

¹⁴ *Neely v. McDaniel*, 677 F.3d 346, 350 (8th Cir. 2012).

¹⁵ See, e.g., *Speet*, 726 F.3d at 874 (citing the New American Heritage Dictionary 119 (5th ed.1976) and accepting “soliciting alms” as the commonsense definition of begging).

V. FACIAL CHALLENGE (OVERBROAD)

A statute that regulates speech based on its content, must be narrowly tailored to promote a compelling government interest.¹⁶ Banning begging in all places, at all times, by all people, in all ways does not come close to chinning this bar. Arkansas's anti-begging law infringes on the freedom of speech guaranteed under the First Amendment to the Federal Constitution.

Accordingly, as to the facial challenge, Plaintiffs' Motion for Injunction is GRANTED, Defendant's Motion to Dismiss is DENIED with prejudice, and Defendant is permanently enjoined from enforcing Arkansas Code Annotated § 5-71-213(a)(3). This Order does not affect the other subsections of Section 5-71-213.¹⁷

CONCLUSION

As set out above, Defendant is permanently enjoined from enforcing Arkansas Code Annotated § 5-71-213(a)(3); Plaintiffs' Motion for Preliminary Injunction is GRANTED in part and DENIED in part; and Defendant's Motion to Dismiss is DENIED in part and GRANTED in part.

IT IS SO ORDERED this 22nd day of November, 2016.

/s/Billy Roy Wilson
UNITED STATES DISTRICT JUDGE

¹⁶ *U.S. v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 813 (2000).

¹⁷ See, *Ex parte Levy*, 204 Ark. 657, 657, 163 S.W.2d 529, 531 (1942) ("If, when the unconstitutional portion is stricken out, that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which was rejected, it must be sustained.").