

Arkansas Municipal League

Panhandling and Safety



May 2019

Panhandling and Safety ¹

For decades, cities have had ordinances that regulate panhandling and solicitation. However, across the nation ordinances like these are rapidly losing to constitutional challenges. This litigation has prompted two questions from municipal leaders and their communities:

1. Why is it so difficult to regulate in this area?
2. What can we do?

Why is it so difficult to regulate in this area?

The U.S. Supreme Court increased the scrutiny these ordinances face in its decision *Reed v. Town of Gilbert, Ariz.* (2015). While *Reed* dealt only with a municipality's sign regulations, the lower federal courts have applied it to solicitation ordinances, panhandling ordinances, and many other situations. *Reed* stands for the proposition that governments cannot apply different standards or regulations to different types of speech, unless the regulation can pass "strict scrutiny." Courts state these regulations cannot survive unless a compelling state interest is advanced by the statute (ordinance) and the statute (ordinance) is the least restrictive method available to carry out the interest. However, an ordinance that faces strict scrutiny faces an uphill battle with regard to constitutionality in our legal system.

Within the context of sign regulation, cities cannot have exemptions for political signs or charitable signs without giving the same exemptions to every other non-commercial sign, or else the regulation will face strict scrutiny judicial review. This standard applies to solicitation and panhandling ordinances as well. These ordinances generally prohibit or regulate requesting money from another individual. However, by singling out one type of speech (requesting money) cities may inadvertently run afoul of the First Amendment. This is particularly true where there has been no consideration and factual investigation into the strict scrutiny analysis prior to the passage of the ordinance.

In the following cases, municipalities lost in their defense of their solicitation and panhandling ordinances. They provide a good roadmap of things to avoid in this area of law. In *Norton v. City of Springfield* (2015), the court held that a ban on panhandling in downtown areas is content based discrimination, which violates the First Amendment. Importantly, the court held that a municipality's benign motive is irrelevant. In *Thayer v. City of Worcester* (2015), the court reached the same conclusion when a city's panhandling and solicitation ordinance was challenged. In *Thayer*, the court held that an aggressive panhandling ordinance was content based, and thus subject to strict scrutiny under the First Amendment. *Id.*²

Similar to panhandling, solicitation ordinances face the same strict scrutiny analysis. In *Working Am., Inc. v. City of Bloomington* (2015), Working America, an advocacy organization focusing on labor issues, challenged Bloomington's ordinance that requires certain door-to-door solicitors to obtain a "solicitor's license" prior to soliciting. The Bloomington ordinance only regulated certain types of solicitors—those seeking to raise funds—whereas it exempted many others. It therefore failed strict scrutiny analysis and was held unconstitutional.

As the case law clearly shows, panhandling and solicitation ordinances are under fire across the nation as a result of *Reed*. Thus, it's critical that cities and towns in Arkansas be vigilant in reviewing and amending ordinances dealing with panhandlers and solicitors. Moreover, city and town officials must equitably apply these ordinances once they are on the books.

¹ This informational document is provided to members of the Arkansas Municipal League and is in no way to be considered legal advice. This is an educational document only.

² In Arkansas, there are criminal laws which maybe applicable to those engaging in harassing or aggressive behavior. i.e. disorderly conduct, Ark. Code Ann. 5-71-207, criminal harassment Ark. Code Ann. 5-71-208, and assault Ark. Code Ann. 5-13-207. Each of these criminal charges requires probable cause before an arrest is effectuated.

What can we do?

While a good argument can be mounted that doing as little as possible is the safest route for cities and towns to take, that is not an adequate solution to the very real problems facing cities and towns regarding panhandling and solicitation.

Obviously, litigation is always expensive regardless of whether you win or lose. However, do not let fear of the courtroom and its attendant costs drive municipal policy. Good policy is critical for the safety of all parties involved in the acts of panhandling and solicitation. By enacting good policies, some municipalities have had success with passing ordinances for safety purposes. For example, your municipality may regulate how people enter streets, and prevent people from distributing items therein.

If you have not already done so, you should place a moratorium on the enforcement of your panhandling or solicitation ordinances until an in-depth analysis can occur. Your attorney, along with your public safety officials and other critical members of the administration, should review the ordinances to determine if they are constitutional. Those same officials should be gathering evidence supporting any public safety ordinance in these areas. This evidence must be direct and objective, and when coupled with proper legal analysis the drafting of your ordinances can begin. By way of example, ordinances dealing with flying flags, asking for money, posting election signs, door-to-door soliciting, or anything similar, must go through a complete factual and legal analysis.

If your municipality considers amending or passing safety ordinances³ you must perform exhaustive fact finding to support the ordinance. For example, find the answers to these questions:

1. Does your municipality have vehicle accidents caused by pedestrians entering the roadway? If so, gather police reports and other evidence of the location and cause of these accidents.
2. Are certain intersections more dangerous than others?
3. Will the community support safety ordinances once they are passed?⁴

Safety ordinances are not perfect and may also be subject to a strict scrutiny. In one such case a neutral traffic ordinance was struck down by a federal court because it was over-inclusive. The narrower you tailor the ordinance the stronger its chances of surviving a First Amendment lawsuit. For example, limiting safety ordinances to high-speed roads or the most dangerous intersections is a good example of how to narrow their scope. Narrow tailoring and evidence showing danger are necessary for your ordinance to survive judicial scrutiny.

On April 1, 2019 one federal court in Arkansas struck down a similar traffic ordinance in Hot Springs. See *Rodgers v. Hot Springs*, Case 6:17-cv-06054-RTD (2019). There the court found that an ordinance which regulated physical interaction between persons and vehicles in public roadways violated the First Amendment. The court ultimately applied “strict scrutiny” to this ordinance, which almost always means the ordinance will fail. While this case is still in litigation, and may represent an outlier, it highlights the uncertainty and risk in this area of law.

³ Please note the general title of “safety ordinances” as opposed to ordinances dealing with the acts of panhandling or solicitation. The purpose of a valid safety ordinance is to prevent conduct that results in a dangerous situation, not to regulate panhandling or solicitation.

⁴ This is in no way an exhaustive list of questions you should consider in passing a safety ordinance. These questions are only intended to start a discussion and give you guidance in in crafting your ordinances.

Sample Ordinances

The City of Arlington, Texas, successfully defended an ordinance that regulated traffic safety at stop lights. Its ordinance contains nearly five pages of factual findings and supporting evidence. The effort Arlington put into finding this information was critical to the court's decision declaring the ordinance constitutional.

We've included in this publication the Arlington ordinance along with the city's findings so you can see what kind of evidence, purpose, and facts courts look for in these types of ordinances.

Additionally, the League's traffic safety sample ordinance is also included (see page 8). It is intended to promote safety at crosswalks, medians, and intersections. However, it must be tailored to your municipality's specific needs for it to survive a constitutional challenge. You will need evidence that the ordinance is necessary and you will need to draft it much more narrowly than it is currently written. Please consult with all relevant city, county, and state officials as well as your city attorney before passing any traffic safety ordinance.⁵

City of Arlington – Findings of fact to support an ordinance.⁶

Ordinance No. _____

An ordinance amending the “Streets and Sidewalks” Chapter of the Code of the City of Arlington, Texas, 1987, through the amendment of Article XV, entitled Solicitation and Distribution, by the amendment of Section 15.01, Definitions, by the deletion of definitions for “Exchange”, “Improved shoulder”, “Merchandise”, “Park” or “Parked”, “Public right-of-way”, “Service”, “Shoulder”, and “Street or highway”, and the amendment of the definitions for “Median” and “Roadway”; by the amendment of Section 15.02, Prohibited Acts, in its entirety by the replacement of the existing language with new ordinance language identified in the court opinion *Houston Chronicle Publishing Co. v. City of League City*, 488 F.3d 613 (5th Cir. 2007); by the deletion of Section 15.03, Prohibited Areas, and the deletion of Section 15.04, Construction of Overlapping Areas; and containing findings and other provisions; providing for a fine of up to \$500 for each offense in violation of the ordinance; providing this ordinance be cumulative; providing for severability, governmental immunity, injunctions, publication and becoming effective ten days after first publication

WHEREAS, in the City of Arlington, Texas, police data shows that there were one hundred and one crashes involving pedestrians in 2009. Seven pedestrians were killed in these accidents. Ninety-one additional people were injured in these crashes. Ten of the crashes occurred at intersections, including injuries to nine pedestrians.

WHEREAS, in the City of Arlington, Texas, police data shows that there were one hundred and thirteen crashes involving pedestrians in 2010. Two pedestrians and one person in a vehicle were killed in these accidents. One-hundred and fifteen additional people were injured in these crashes. Fourteen of the crashes occurred at intersections, including injuries to thirteen pedestrians.

⁵ All branches of government, including the federal government, may have valuable information and relevant studies or findings regarding traffic safety issues in your community.

⁶ These findings were adequate to support an ordinance similar to the League's sample ordinance. However, do not simply copy these findings for your ordinance. Any findings you use need to come from your municipality and must show with specifics why your municipality is passing this ordinance.

WHEREAS, in the City of Arlington, Texas, police data shows that there were one hundred and sixteen crashes involving pedestrians in 2011. Six pedestrians were killed in these accidents. One-hundred and three additional people were injured in these crashes. Nineteen of the crashes occurred at intersections, including the death of one pedestrian and injuries to sixteen other pedestrians.

WHEREAS, in the City of Arlington, Texas, police data shows that there were one hundred and twenty-two crashes involving pedestrians in 2012. Eight pedestrians were killed in these accidents. One-hundred and fourteen additional people were injured in these crashes. Sixteen of the crashes occurred at intersections, including the death of one pedestrian and injuries to fourteen other pedestrians.

WHEREAS, in the City of Arlington, Texas, police data shows that there were one hundred and nine crashes involving pedestrians in 2013. Five pedestrians were killed in these accidents. One-hundred and three additional people were injured in these crashes. Twenty of the crashes occurred at intersections, including the death of one pedestrian and injuries to eighteen other pedestrians.

WHEREAS, in the City of Arlington, Texas, police data shows that there were sixty four crashes involving pedestrians in 2014 through the end of July 2014. Four pedestrians were killed in these accidents. Sixty-five additional people were injured in these crashes. Fifteen of the crashes occurred at intersections, including the death of one pedestrian and injuries to fourteen other pedestrians.

WHEREAS, in the City of Arlington, Texas, police data shows that there were six hundred and twenty-five crashes involving pedestrians from January 1, 2009 through July 31, 2014. Thirty-two pedestrians and one person in a vehicle were killed in these accidents. Five-hundred and ninety-one other pedestrians were injured. Ninety-four of the crashes occurred at intersections, including the death of four pedestrians and injuries to eighty-four other pedestrians.

WHEREAS, in the City of Arlington, Texas, police data shows that injuries to pedestrians by crashes with automobiles are caused by a variety of factors, including: driver inattention, failure to yield right of way by drivers, failure to yield right of way by pedestrians, distraction in the vehicle, improper start from parked position, under the influence of alcohol, impaired visibility, faulty evasive action, speeding, disregard of stop sign or light, failure to pass to left safely, cell/mobile phone use, unsafe speed, failure to control speed, unsafe backing, parked and failed to set brake, and turned improperly- cut corner.

WHEREAS, in the City of Arlington, Texas, driver distraction is a factor that causes collisions, including collisions with pedestrians.

WHEREAS, a safety hazard has been identified with pedestrians attempting to interact with the drivers and passengers of vehicles at busy intersections within Arlington, Texas. This activity has included pedestrians leaving the edge of the curb and actively entering the roadway.

WHEREAS, the practice of pedestrians interacting with the drivers and passengers of vehicles while the pedestrian is in the roadway has been identified as being unsafe for both the pedestrians and for traffic in general.

WHEREAS, the practice of pedestrians interacting with the drivers and passengers of vehicles while the pedestrian is in the roadway constitutes an impediment to the normal and safe flow of traffic in the City of Arlington, Texas.

WHEREAS, in *International Society for Krishna Consciousness of New Orleans, Inc. v. City of Baton Rouge*, 876 F.2d 494 (5th Cir. 1989), the Fifth Circuit of the United States Court of Appeals addressed an ordinance that prohibited individuals from soliciting the occupants of vehicles while the individual was in the street or roadway, street or roadway shoulder, or neutral ground of any street or roadway. The Court discussed evidence of a “traffic death in which a news vendor was fatally injured while soliciting sales in a Baton Rouge street.” The Fifth Circuit further discussed evidence from an “expert in traffic engineering” that “established that the purpose of streets, highways, and roads was to move people and goods both safely and efficiently.” The expert further testified that “streets, highways, and roads are not designed for the purpose of soliciting funds.” The Fifth Circuit concluded that “[t]he direct personal solicitation from drivers distracts them from their primary duty to watch the traffic and potential hazards in the road, observe all traffic control signals or warnings, and prepare to move through the intersection.” The Fifth Circuit concluded the ordinance was “narrowly tailored to serve the government’s significant interest in regulating traffic flow and promoting roadway safety.” See Exhibit 7.

WHEREAS, Keith Melton, Director of Public Works for the City of Arlington, Texas, agrees that the purpose of modern streets, highways, and roads is to move people and goods safely and efficiently. The Director further agrees that modern streets, highways, and roads are not designed for pedestrians to interact with the occupants of vehicles on the roadways. Further, the City of Arlington, Texas uses traffic signal warrants to evaluate when traffic signals are installed. Factors considered for installing traffic signals include flows and number of accidents. Traffic signals are installed in the City of Arlington, Texas when warranted by traffic conditions.

WHEREAS, in *Houston Chronicle Publishing Co. v. City of League City, Texas*, 488 F.3d 613 (5th Cir. 2007), the Fifth Circuit of the United States Court of Appeals discussed evidence offered by the City of League City, Texas demonstrating that newspaper street-vendors in cities near the City of League City had been seriously injured at intersections. The Court held that the City of League City ordinance that applied only at intersections controlled by traffic-signal lights “is a reasonable means to narrowly tailor” the reach of the ordinance. The Court explained: “Such intersections (those requiring traffic-signal lights) are generally the most heavily trafficked.” The Court then said: “Therefore, they are the most dangerous.” The Court concluded that the proscription of the ordinance “serves a compelling interest at the heart of the government’s function: public safety.”

WHEREAS, in *Houston Chronicle Publishing Co. v. City of League City, Texas*, 488 F.3d 613 (5th Cir. 2007), the Fifth Circuit of the United States Court of Appeals held that the plain language of the ordinance, quoted below, was “non-discriminatory and content-neutral”:

No person who is within a public roadway may solicit or sell or distribute any material to the occupant of any motor vehicle stopped on a public roadway in obedience to a traffic control signal light. It is specifically provided, however, that a person, other than a person twelve years of age or younger, may solicit or sell or distribute material to the occupant of a motor vehicle on a public roadway so long as he or she remains on the surrounding sidewalks and unpaved shoulders, and not in or on the roadway itself, including the medians and islands.

WHEREAS, within two weeks of the District Court opinion filed on July 14, 2014 preliminarily enjoining the City of Arlington from taking any action to enforce Section 15.02 of the Streets and Sidewalk Chapter of the Code of the City of Arlington until a final trial on the merits, the City received a request from a little league baseball team seeking to hand out bottled water to solicit donations on Cooper Street in Arlington, Texas.

WHEREAS, videos and photos posted publicly show individuals passing out literature in the roadways in intersections in Arlington and in other cities in the North Texas area. These videos and photos include depictions of individuals stepping into roadways and, in some instances, into interior lanes of roadways. The videos and photos show individuals engaging in conduct which distracts motorists while individuals are in roadways outside of crosswalks.

WHEREAS, according to the National Highway Traffic Safety Administration (NHTSA), 4,432 pedestrians died in traffic crashes in the United States in 2011, an increase over 2010. During 2011, 69,000 pedestrians were injured in traffic accidents; 11,000 of the injuries occurred to people fourteen and younger. In 2010, 4,280 pedestrians died in traffic crashes, a four percent increase from the number reported in 2009.

WHEREAS, according to the National Highway Traffic Safety Administration (NHTSA), 4,473 pedestrians died in traffic crashes in the United States in 2012, an increase of six percent from 2011. On average, a pedestrian was killed in a traffic crash every two hours and injured every seven minutes in the United States in 2012. In 2012, pedestrian deaths accounted for fourteen percent of all traffic fatalities, and accounted for three percent of all people injured in traffic crashes. In 2012, more than one-fifth (22%) of the children ages five to fifteen who were killed in traffic crashes were pedestrians. People age fifteen and younger accounted for six percent of all pedestrian fatalities in 2012 and eighteen percent of all pedestrians injured in crashes. During 2012, almost three-fourths (73%) of pedestrian fatalities occurred in an urban setting versus a rural setting. Substantial numbers of pedestrian deaths occurred throughout Texas during 2012, as follows: 136 in Dallas, 132 in San Antonio, 76 in Austin, 59 in Fort Worth, and 54 in El Paso.

WHEREAS, according to a report prepared for the Governors Highway Safety Association (GHSA), a fifteen percent increase in pedestrian deaths occurred from 2009 to 2012, which compared with a three percent decrease in all other motor vehicle deaths during the same period. Further, there is an uneven distribution of pedestrian deaths among the states of the United States. The GHSA reported that approximately one-third of the 4,743 pedestrian traffic deaths that occurred in the United States in 2012 occurred in California (612), Texas (478), and Florida (476). More than four thousand pedestrian deaths from traffic accidents occurred each year from 2000 through 2012. During the period of January through June of 2013, Texas had more pedestrian traffic deaths (245) than any other state in the United States. During January through June of 2013, 244 pedestrian deaths occurred in California, while 179 and 128 occurred in Florida and New York, respectively.

WHEREAS, in order to narrowly tailor the ordinance, the City of Arlington is adopting the language of the ordinance found to be content-neutral in the *Houston Chronicle Publishing Co. v. City of League City, Texas*, 488 F.3d 613 (5th Cir. 2007) because this narrowly tailored language only applies at intersections controlled by traffic-signal lights, while leaving open adequate alternative channels for communication. The Fifth Circuit found this language was a reasonable means to narrowly tailor the reach of the ordinance. The Fifth Circuit further found that intersections requiring traffic-signal lights are generally the most heavily trafficked and, therefore, the most dangerous.

WHEREAS, in the recent Supreme Court case of *McCullen v. Coakley* (June 26, 2014), the Supreme Court identified an ordinance prohibiting solicitation in roadways as one example of several “less intrusive means” for the government to address public safety risk. Slip op. at 24-25. The “local ordinance” that the Supreme Court described as a lesser intrusion provided: “No person shall solicit while walking on, standing on or going into any street or highway used for motor vehicle travel, or any area appurtenant thereto (including medians, shoulder areas, bicycle lanes, ramps and exit ramps.)” /d. at 25 (quoting Boston, Mass., Municipal Code, ch. 16-41.2(d) (2013)).

WHEREAS, the City may impose reasonable time, place and manner restrictions in a traditional public forum that serve the City’s significant public safety interests.

WHEREAS, the City finds that conduct by pedestrians at intersections has been regulated in the City of Arlington, Texas since at least 1994.

WHEREAS, the City is not attempting to regulate the speech of any group or individual, but desires only to promote public safety.

WHEREAS, the ordinance language from the City of League City, as discussed by the Fifth Circuit, provides for a common sense regulation that is both effective and easy to understand.

WHEREAS, the City finds that limiting the sale, solicitation and distribution of materials to occupants of vehicles at intersections controlled by traffic signal lights by pedestrians in the roadway promotes the safety of not only pedestrians but also vehicular traffic and, also, leaves open ample alternative channels of communication;

NOW THEREFORE

**BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF
ARLINGTON, TEXAS:**

TRAFFIC SAFETY SAMPLE ORDINANCE⁷

Ord. No. _____

AN ORDINANCE TO PROMOTE TRAFFIC SAFETY FOR DRIVERS AND PEDESTRIANS

Whereas, [Input the reasons why you are passing the ordinance. Include as much traffic safety evidence as you can. The need for such research cannot be over-emphasized.

Without doing so you virtually ensure a successful constitutional attack of the ordinance],

Now therefore be it ordained:

Section 1 Definitions.

“**Crosswalk**” shall mean that portion of a roadway ordinarily included within the connection of curb lines at intersections, or any portion of a roadway clearly indicated for pedestrian crossing by lines on the road surface or by other markings or signs.

“**Curb**” shall mean the lateral lines of a roadway, whether constructed above grade or not, which are not intended for vehicular travel.

“**Material**” shall mean any tangible object, item, or thing.

“**Median**” shall mean that area or portion of a divided street, road, or highway within the City separating lanes of traffic of said street, road, or highway and shall be held to include the curb, if any, at the outer edge of said area.

“**Roadway**” shall mean that portion of the public street that is improved and designed for vehicular travel, but does not include the curb.

“**Sidewalk**” shall mean that improved surface which is designed for pedestrian travel.

“**Traffic island**” shall mean any area or space within a roadway that is set aside by the use of materials or paint for the purpose of separating or controlling the flow of traffic and which is not constructed or intended for use by vehicular traffic or by pedestrians, unless the area or space is marked or designated as a crosswalk.

Section 2 Prohibited activities.

- A. Pedestrian crossings shall be made within the limits of marked crosswalk and as provided below. No person shall persist in walking or standing on any traffic island, or roadway except to cross the roadway at an intersection or crosswalk or for any other lawful purpose. Any police officer observing any person violating this provision may order such person to remove themselves from such roadway or traffic island. Failure to comply with a lawful order under this section is a violation of this ordinance.⁸
- B. No person who is within a roadway may receive material from or distribute material to the occupant of any motor vehicle stopped on a roadway in obedience to a traffic control signal light. A person may receive material from or distribute material to the occupant of a motor vehicle

⁷ As a sample this ordinance is not intended to be adopted as is. It should be tailored to fit your municipality's needs. The League suggests substantial efforts be made in this regard prior to the passage of the ordinance.

⁸ In *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 234 (D. Mass. 2015) the court held that a similar ordinance to this one is content neutral, but that it was not sufficiently narrowly tailored to achieve a compelling government interest. You should limit this section to only the busiest roads and most dangerous intersections, otherwise there is a good chance this ordinance will be unconstitutional.

Before you enact an ordinance you need to perform intensive fact finding showing how the ordinance is necessary, such as finding accident reports, traffic flow calculations, and other pertinent information. To craft the safest possible ordinance you should limit the ban on crosswalks to only highly trafficked streets which present the highest danger.

on a public roadway so long as he or she remains on the surrounding sidewalks and unpaved shoulders, and not in or on the roadway itself, including the medians and traffic islands.⁹

a. This section shall only apply to the following intersections:

[these will be determined from the studies done prior to the drafting of this ordinance]

i. [intersection a.]

ii. [intersection b.]

iii. [intersection c.]

Section 3 Exemptions.

This ordinance shall not apply to activity otherwise prohibited by state law.

Section 4 Violation.

A violation of this ordinance shall constitute a misdemeanor punishable pursuant to

_____.

Section 5 Repeal.

Ord. No. _____ regulating [panhandling or solicitation] is hereby repealed. Any ordinance or resolution in conflict with this ordinance is hereby repealed.

⁹ In *Watkins v. City of Arlington*, 123 F. Supp. 3d 856, 860 (N.D. Tex. 2015) the court held a similar ordinance content neutral and constitutional.



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