NEW HAMPSHIRE CIVIL LIBERTIES UNION
18 Low Avenue
Concord, New Hampshire 03301
603-225-3080
www.NHCLU.org

DEVON CHAFFEE
EXECUTIVE DIRECTOR

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VIA REGULAR AND ELECTRONIC MAIL (dwensley@JonesWensley.com)

Danford J. Wensley
40 Wakefield Street
Rochester, NH 03867-1500

Re: Rochester "Panhandling Ordinance," Chapter 31 of Rochester City Ordinances

Dear Mr. Wensley:

I write on behalf of the New Hampshire Civil Liberties Union ("NHCLU") in an effort to avoid litigation concerning Chapter 31 of the Rochester City Ordinances. In particular, we ask that the City of Rochester take steps immediately to rescind Chapter 31 of the Rochester City Ordinances in its entirety. If the City does not agree to rescind Chapter 31 by January 3, 2014, we will work with citizens impacted by this law to bring an action seeking preliminary and permanent injunctive relief against the Ordinance's enforcement, as well as attorneys' fees. Contemporaneous with this letter, the NHCLU has submitted a Right-to-Know request pursuant to RSA 91-A.

Chapter 31 is problematic in part because, while the City has sought to justify the law with concerns about "aggressive" behavior, the Chapter's scope is not limited to such conduct. For example, while the Chapter purports to prohibit so-called "aggressive" solicitation, it proscribes a wide range of peaceful conduct—including any form of solicitation (such as merely holding a sign) designed to "immediately" obtain money (i) "within 50 feet of any entrance or exit of any business or organization during its business hours," (ii) within 50 feet of an ATM or bank, (iii) in a bus shelter or at a bus stop, and (iv) in a median of any public road. *See, e.g.,* Chapter 31.3(b)-(i). These prohibitions effectively ban peaceful panhandling on sidewalks and other public spaces in the entire downtown/business district area of Rochester, including most (if not all) of the public square on the corner of North Main Street and Wakefield Street. As explained in more detail below, Chapter 31 is unconstitutional.

First, by prohibiting only a request for "the purpose of immediately obtaining money or any other object of value," the law is a content-based speech restriction and is presumptively unconstitutional. *See, e.g., R. A. V. v. City of St. Paul Minnesota*, 505 U.S. 377, 382 (1992) (stating that content-based restrictions are presumptively invalid); *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 556 (4th Cir. Va. 2013) ("The Ordinance plainly distinguishes between types of solicitations on its face. Whether the Ordinance is violated turns solely on the nature or content of the solicitor's speech: it prohibits solicitations that request immediate donations of things of value, while allowing other types of solicitations, such as those that request future donations ...."). Chapter 31 can only survive constitutional review if it is narrowly tailored to meet some compelling governmental interest—that is, if it is the least restrictive means of addressing whatever compelling interests the City identifies.

Second, Chapter 31 cannot pass strict scrutiny, especially where it bans *all* forms of solicitation (whether it be verbal or in writing) in a large portion of the city. Laws generally banning panhandling in public, or even in some large section of a city, have previously been struck down as unconstitutional abridgements of the right to free speech. *See Clatterbuck*, 708 F.3d at 556 (plaintiff's complaint challenging no-solicitation zone survives motion to dismiss); *Ayres v. City of Chicago*, 125 F.3d 1010, 1015-16 (7th Cir. 1997) (granting injunction against ordinance forbidding the peddling of any merchandise, except newspapers, on either public property or certain private property in districts designated by the city council); *Speet v. Schuette*, 889 F. Supp. 2d 969, 978 (W.D. Mich. 2012) (holding unconstitutional Michigan statute prohibiting begging), *aff'd*, 726 F.3d 867 (6th Cir. 2013); *Loper v. New York City Police Dep't*, 999 F.2d 699, 705 (2d Cir. 1993) (restriction on "begging" was impermissibly content-based); *Pike's Peak Justice & Peace Commission*, No. 12-cv-03095-MSK (D. Colo. Dec. 18, 2012) (ordinance prohibiting all forms of solicitation within a 12-block area of downtown Colorado Springs was unconstitutional). Indeed, we are not aware of a single case anywhere in the country upholding a ban on panhandling in a wide-swathe of a downtown area as is the case here.

The City has not even identified a compelling interest for this ban on peaceful, protected speech, especially where the "Intent of the Ordinance" primarily concerns the prevention of "threatening, intimidating or harassing behavior." As Councilor Lauterborn explained in a May 14, 2013 article in the *Rochester Times*, "members of the community who have complained about the issue see panhandling as a nuisance that can foster a negative image for the city." Of course, this is not a compelling interest for precluding the exercise of free speech by the City's poor and vulnerable, and it goes without saying that the very reason for the First Amendment's existence is to protect speech that others find a "nuisance." *See Boos v. Barry*, 485 U.S. 312, 322 (1988) ("As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate 'breathing space' to the freedoms protected by the First Amendment.") (internal quotations omitted).

Even if the City has a compelling interest (which it does not), the City cannot demonstrate that an effective ban on all panhandling in medians and much of downtown Rochester is a narrowly tailored and least restrictive means of advancing that interest. As both the Supreme Court and the Tenth Circuit have explained, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (quoting *Schneider v. State*, 308 U.S. 147, 163 (1939)); *ACORN v. Golden*, 744 F.2d 739, 749 n.8 (10th Cir. 1984) (same); *see also Comite de Journaleros v. the City of Redondo Beach*, 657 F.3d 936, 947-51 (9th Cir. 2011) (ordinance making it unlawful "for any person to stand on the street and solicit employment, business, or contributions from an occupant of any motor vehicle" was unconstitutional); *People v. Griswold*, 821 N.Y. S. 2d 394, 402-403 (City Ct. of N.Y. 2006) ("There is no reason why prohibiting the homeless from standing on traffic islands to solicit donations is necessary to protect safety, if others are permitted to engage in similar conduct.").

Third, Chapter 31.3(a)'s language purporting to ban solicitation in an "aggressive manner" is not necessary to assure safety or preserve the peace, especially given that other statutes already criminalize the very "aggressive" behavior that the City purports to address.

New Hampshire, for example, already prohibits individuals from interfering with traffic and from engaging in threatening behavior in a public place. *See* RSA 265:40(I) ("No person shall stand on the travelled portion of a roadway for the purpose of soliciting a ride, employment, business or contributions from the occupant of any vehicle."); RSA 644:2 ("A person is guilty of disorderly conduct if: I. He knowingly or purposely creates a condition which is hazardous to himself or another in a public place by any action which serves no legitimate purpose; or II. He or she: (a) Engages in fighting or in violent, tumultuous or threatening behavior in a public place; or (b) Directs at another person in a public place obscene, derisive, or offensive words which are likely to provoke a violent reaction on the part of an ordinary person; or (c) Obstructs vehicular or pedestrian traffic on any public street or sidewalk or the entrance to any public building.").

Fourth, the language in Chapter 31.2(b) and 31.3(a) purporting to ban "aggressive" solicitation is unconstitutionally vague, as it fails in many instances to specify the prohibited conduct, leaving police free to implement a discriminatory policy of selectively enforcing the Chapter against the poor. For example, Chapter 31.2(b), which defines "aggressive manner," prohibits a soliciting person from (i) following "a person being solicited," (ii) "continuing to solicit within five feet of the person being solicited after the person has made a negative response to such solicitation," (iii) "using words," or (iv) approaching a person to the extent that all such conduct is done in a manner that is "likely to intimidate the person" being solicited or likely to cause a reasonable person to fear the commission of a criminal act. Because, for example, it is entirely unclear from the Chapter what specific acts or words or even whether the continued display of a sign can be considered "aggressive" or "intimidating," it is up to individual police officers to determine whether this language has been violated.

Finally, by carving out from the Chapter's scope solicitations for future donations and ordinary commercial transactions, Chapter 31 is plainly targeted, without any valid basis, at the poor and homeless. Thus, the law also violates the Equal Protection Clause of the Fourteenth Amendment. *See, e.g., Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 99-100 (1972); *Parr v. Mun. Court for Monterey-Carmel Judicial Dist.*, 479 P.2d 353 (Cal. 1971).

We urge you to review the precedents discussed above and to conduct your own independent review of the law's constitutionality. We do not believe it is a productive use of anyone's time or of taxpayers' money for the City to defend such a patently unconstitutional law. I am, of course, more than willing to discuss this matter and to answer any questions you may have concerning the constitutional issues discussed above. I enjoyed our productive conversation yesterday, and I look forward to your response.

Very truly yours,

Gilles Bissonnette
NHCLU, Staff Attorney
Gilles@nhclu.org