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NOTE

Show-Me the Money: Outdated Solicitation Laws Expose Municipalities to Liability

Fernandez v. St. Louis County, 538 F. Supp. 3d 888 (E.D. Mo. 2021).

Jessica Davis*

I. INTRODUCTION

On any given night, roughly half a million people in the United States are homeless.¹ In Missouri alone, approximately 6,500 people are homeless on any given day.² Homeless populations create health, safety, and financial complications for municipalities.³ A strategy used by many

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¹ U.S. Interagency Council on Homelessness, *Key Findings of 2020 Point-in-Time Count*, USIC (July 28, 2021), <https://www.usich.gov/tools-for-action/2020-point-in-time-count/> [<https://perma.cc/55RD-FPG2>].

² U.S. Interagency Council on Homelessness, *Mo. Homelessness Statistics*, USIC, <https://www.usich.gov/homelessness-statistics/mo> [<https://perma.cc/Z3LS-LEPD>] (last visited Oct. 19, 2022).

³ According to the Merriam Webster dictionary, a municipality is “a primarily urban political unit having corporate status and usually powers of self-government” *Municipality*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/municipality> [<https://perma.cc/C5WD-7PEB>] (last visited Jan. 17, 2023); In Missouri there are 1,268 municipal and township-based governments which create a patchwork of different regulations. *Missouri*, U.S. CENSUS BUREAU, <https://www2.census.gov/govs/cog/gc0212mo.pdf> [<https://perma.cc/M7QA-5LM3>] (last visited Jan. 17, 2023); See National Health Care for the Homeless Council, *Homelessness and Health: What's the Connection?*, NHCHC (Jan. 2019), <https://nhchc.org/wp-content/uploads/2019/08/homelessness-and-health.pdf> [<https://perma.cc/T3VR-524W>]; Katherine L. Einstein, *US Mayors Say Homelessness Crisis Falls to Them, but They Lack Support and Funding*, BU TODAY (Jan. 20, 2022), <https://www.bu.edu/articles/2022/us-mayors-lack-support-funding-for-homelessness-crisis/> [<https://perma.cc/ZTC5-SWZV>]; Benjamin Schneider, *CityLab University: Understanding Homelessness in America*, BLOOMBERG (July 6, 2020, 8:24 AM), <https://www.bloomberg.com/news/features/2020-07-06/why-is-homelessness-such-a-problem-in-u-s-cities> [<https://perma.cc/6NY3-JCTC>].

municipalities to control these complications is the passage of ordinances restricting the actions of homeless populations.⁴ Commonly, these laws restrict solicitation, colloquially known as panhandling.⁵ Some laws ban panhandling altogether.⁶ While panhandling ordinances may have been a feasible solution in the past, a recent United States Supreme Court decision, *Reed v. Town of Gilbert*, has rendered many of these laws unconstitutional by limiting the circumstances under which municipalities may restrict speech.⁷ Though the Supreme Court handed down *Reed* over seven years ago, local governments have been slow to update their laws to comply with the new standard.⁸

Fernandez v. St. Louis County provides a timely example of the potential liability cities may face if they delay updating their panhandling statutes.⁹ In Missouri, panhandling ordinances are still found on the books in cities across the state.¹⁰ For municipalities to avoid liability, policymakers must update these ordinances.¹¹ This Note proposes two

⁴ Nat'l Homelessness L. Ctr., *Housing Not Handcuffs 2021: State Law Supplement*, NHLC 1, 7 (Nov. 2021), <https://homelesslaw.org/wp-content/uploads/2022/02/2021-HNH-State-Crim-Supplement.pdf> [https://perma.cc/4566-EXPQ] (“Almost every state, 48 in total, has at least one law restricting behaviors that prohibit or restrict conduct of people experiencing homelessness.”); For a discussion of historic and modern anti-homelessness laws see Javier Ortiz et. al., *The Wrong Side of History: A Comparison of Modern and Historical Criminalization Laws*, SEATTLE UNIV. SCH. OF L.: HOMELESS RTS. ADVOC. PROJECT (May 2015), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1003&context=hrap> [https://perma.cc/5824-URPF].

⁵ Joseph W. Mead, *Most Panhandling Laws Unconstitutional Since there's no Freedom from Speech*, THE CONVERSATION (Mar. 6, 2018, 6:38 AM), <https://theconversation.com/most-panhandling-laws-are-unconstitutional-since-theres-no-freedom-from-speech-92498> [https://perma.cc/RGD3-6H68] (“Thousands of U.S. cities restrict panhandling in some way. These ordinances limit face-to-face soliciting, including interactions that occur on sidewalks and alongside roads, whether they are verbal or involve holding a sign.”).

⁶ Nat'l Homelessness L. Ctr., *supra* note 4, at 7.

⁷ J.B. Wogan, *The Unexpected Reason Panhandling Bans are being Struck Down Across the Country*, GOVERNING (Jul. 23, 2017), <https://www.governing.com/archive/gov-panhandling-homeless-supreme-court-reed-gilbert.html> [https://perma.cc/A3PB-TRNV].

⁸ Nat'l Homelessness L. Ctr., *supra* note 4, at 12 (collecting data on states that still have panhandling laws on the books as of 2021, six years after *Reed* was decided).

⁹ See *infra* Parts II and IV.

¹⁰ See *infra* Part V.

¹¹ Groups such as the American Civil Liberties Union, National Homelessness Law Center, and Southern Poverty Law Center routinely challenge such statutes. See generally, ACLU, *Slidell Panhandling Ordinance Overturned after ACLU Lawsuit*, ACLU (June 20, 2017), <https://www.aclu.org/press-releases/court-affirms-first-amendment-rights-panhandlers> [https://perma.cc/9J2A-GBCY]; Juliana Garcia, *ACLU Warns Marriam new Ordinance Limiting Panhandling is 'Unconstitutional'*, SHAWNEE MISSION POST (Apr. 14, 2021), <https://shawneemissionpost.com/2021/04/>

legal solutions for updating panhandling ordinances to comply with *Reed*.¹² Additionally, this Note presents a social solution that would reduce the necessity for panhandling ordinances by alleviating the underlying problem—homelessness.¹³

Part II of this Note explains the facts of *Fernandez*. Next, Part III discusses the evolution of the standard of review for content-based regulations under the First Amendment and unconstitutional vagueness under the Due Process Clause of the Fourteenth Amendment. Part IV examines the *Fernandez* court’s holding and reasoning. Finally, Part V analyzes current Missouri panhandling laws and offers solutions that municipalities may pursue to avoid liability.¹⁴

II. FACTS AND HOLDING

Robert Fernandez described himself as “a poor, homeless, unemployed man who begs for money from motorists in St. Louis County to support himself and his companion.”¹⁵ As part of his solicitation activities, Fernandez has stood along medians or sidewalks in St. Louis County holding signs that read, “God Bless” and “Anything Helps.”¹⁶ As a result of his solicitation, St. Louis County gave Fernandez numerous warnings, cited him sixty-four times, and arrested him four times for violating the county’s ordinances.¹⁷ Ultimately, Fernandez brought a case challenging three of these ordinances: “(1) the solicitor licensing requirements of Chapter 804, the ‘Peddlers and Solicitors Code’; (2) section 1209.090.1, which prohibits standing in the roadway for certain

14/aclu-merriam-pedestrian-ordinance-119090/ [https://perma.cc/STM8-JXAY]; Morgan R. Kelly, *ACLU of Delaware Calls for Repeal of Panhandling Statute*, ACLU DELAWARE (Mar. 8, 2021), <https://www.aclu-de.org/en/news/press-release-aclu-delaware-calls-repeal-panhandling-statute> [https://perma.cc/CHA2-KQHR]; Southern Poverty Law Center, *Judge Finds Criminalizing Panhandling to be Unconstitutional*, SPLC (Aug. 30, 2021), <https://www.splcenter.org/presscenter/judge-finds-laws-criminalizing-panhandling-be-unconstitutional> [https://perma.cc/AR8M-ALWT].

¹² See *infra* Part V.

¹³ See *infra* Part V.

¹⁴ While *Reed* had a national impact on how states and cities regulate solicitation, this Note specifically focuses on the effects of *Reed* on Missouri municipalities.

¹⁵ *Fernandez v. St. Louis Cnty.*, 538 F. Supp. 3d 888, 893 (E.D. Mo. 2021).

¹⁶ Tony Messenger, *Messenger: Judge’s Ruling Spotlights Homelessness in St. Louis County*, ST. LOUIS POST-DISPATCH (May 13, 2021), https://www.stltoday.com/news/local/columns/tony-messenger/messenger-judge-s-ruling-spotlights-homelessness-in-st-louis-county/article_5610966c-5c95-50dd-b6f6-026bea00ec91.html [https://perma.cc/EW3X-A9QC].

¹⁷ *Fernandez*, 538 F. Supp. 3d at 893.

solicitation purposes; and (3) sections 716.080 and 716.090, which define and prohibit vagrancy.”¹⁸

A. Chapter 804: Requirement for Solicitor Licensing

Fernandez first challenged Chapter 804, the Peddlers and Solicitors Code, which establishes the requirement to obtain a solicitor’s license and defines the parameters of the license.¹⁹ To receive a solicitor’s license under Chapter 804, applicants must pay a \$13 license fee, complete and notarize paperwork, attach a photo of themselves, and obtain a background check.²⁰ The application typically takes the county one to three weeks to process.²¹ Applicants must repeat this process every six months when the license expires.²² A solicitor’s license in St. Louis County entitles the recipient to solicit at high-volume traffic intersections three days per year.²³ However, license holders must give the county prior notice of their intent to solicit.²⁴

Robert Fernandez was cited thirty-one times and arrested four times for Chapter 804 violations.²⁵ St. Louis County held him for a total of twenty-eight hours and twenty-six minutes for the arrests.²⁶ The county reported receiving two to three daily complaints about Robert Fernandez’s solicitation activities.²⁷

In his challenge, Fernandez claimed that Chapter 804 fails under the United States Supreme Court’s First Amendment strict scrutiny analysis—that is, he argued that Chapter 804 is a content-based restriction not narrowly tailored to further a compelling government interest.²⁸ Specifically, Fernandez challenged Chapter 804’s license requirement and solicitation limitation at high-volume intersections.²⁹ In response, St.

¹⁸ *Id.* at 893–94.

¹⁹ *Id.* at 893.

²⁰ *Id.* at 894.

²¹ *Id.*

²² *Id.*

²³ St. Louis County claimed that this particular policy was motivated by a desire to reduce the overall number of solicitors at busy intersections. *See id.* at 895.

²⁴ *Id.*

²⁵ *Id.* at 894.

²⁶ *Id.*

²⁷ *Id.* at 896 (Pressing complaints by citizens included, “the same ‘Mexican or black, whatever he is’ beggar was there again; that it is ‘disturbing to live in St. Louis County . . . and have beggars at the damn intersection’; and that it’s bad enough I can’t even take my kids, you know, to a baseball game in the city . . . because of all the homeless beggars . . . I’ll be damned if they’re going to start invading St. Louis County.”).

²⁸ *Id.* at 898–99.

²⁹ *Id.* at 898.

Louis County asserted that Chapter 804 serves the compelling government interest of public safety.³⁰ For support, the county cited accidents that resulted from solicitation at high-volume intersections and complaints from motorists about the solicitation.³¹ The county contended that the solicitor's license requirement increased public safety by reducing accidents and complaints.³²

B. Section 1209.090.1: Prohibition on Standing in Roadway

Fernandez next challenged St. Louis County Code section 1209.090.1, which states, “[n]o person shall stand in a roadway for the purpose of soliciting a ride, employment, charitable contribution or business from the occupant of any vehicle.”³³ Fernandez was cited fourteen times under this section.³⁴ While both parties agreed that Fernandez stood along sidewalks or medians near roads to solicit,³⁵ Fernandez claimed he only ever briefly entered the roadway, always along the shoulder or curbside, and only when a motorist had signaled an intent to give him something.³⁶ However, county police officers reported seeing Fernandez enter roadways, including the second lane of a highly trafficked interstate.³⁷

Like his Chapter 804 claim, Fernandez challenged section 1209.090.1 as a content-based restriction not narrowly tailored to further a compelling government interest.³⁸ In response, St. Louis County argued that section 1209.090.1 is not content-based because solicitation differs from other forms of speech as it is more distracting and inherently intrusive.³⁹ In addition, the county again contended that traffic safety is a compelling government interest.⁴⁰

³⁰ *Id.* at 899.

³¹ *Id.* at 899–901.

³² *Id.* at 895.

³³ ST. LOUIS CNTY. TRAFFIC CODE § 1209.090.1.

³⁴ Fernandez, 538 F. Supp. 3d 888 at 896.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*; According to the Missouri Department of Transportation, I-55 in St. Louis County has over 20,000 vehicles in average daily traffic; 20,000 vehicles is the highest increment measurement MoDOT reports. See Missouri Department of Transportation, *Traffic Volume Maps*, MoDOT, <https://www.modot.org/traffic-volume-maps> [https://perma.cc/4G94-9N8K] (zoom into St. Louis County on interactive map).

³⁸ Fernandez, 538 F. Supp. 3d 888 at 901.

³⁹ *Id.* at 901–02.

⁴⁰ *Id.* at 899.

C. Sections 716.080 and 716.090: Vagrancy Prohibition

Finally, Fernandez challenged sections 716.080 and 716.090 of the St. Louis County Code.⁴¹ Section 716.080 states, “[a] person shall not be a vagrant.”⁴² Section 716.090 defines the following individuals as vagrants within the meaning of section 716:

- (1) Every person without any visible means of support who may be found loitering around houses of ill-fame, gambling houses or places where liquor is sold or drunk.
- (2) Every person who shall attend or operate any gambling device or apparatus.
- (3) Every person who shall be engaged in practicing any trick or device to procure money or other thing of value.
- (4) Every person who shall be engaged in any unlawful calling.
- (5) Every able-bodied man who shall neglect or refuse to provide for the support of his family.
- (6) Every person found tramping or wandering around from place to place without any visible means of support.⁴³

Fernandez was cited eight times for vagrancy under Chapter 716.⁴⁴

Fernandez argued that sections 716.080 and 716.090 are facially unconstitutional under the Due Process Clause because they do not give fair notice of a prohibition and they lead to arbitrary enforcement.⁴⁵ St. Louis County did not deny that the sections were unconstitutional and agreed to repeal or replace both sections.⁴⁶

Ultimately, the court held that all three sections of the St. Louis County code were unconstitutional.⁴⁷ While the court declared sections 716.080 and 716.090 facially unconstitutional,⁴⁸ it held that Chapter 804 and section 1209.090.1 were not narrowly tailored under the United States Supreme Court ruling in *Reed v. Town of Gilbert*.⁴⁹

⁴¹ *Id.* at 902.

⁴² ST. LOUIS CNTY. PETTY OFFENSES CODE, § 716.080 (2022).

⁴³ *Id.* § 716.090.

⁴⁴ *Fernandez*, 538 F. Supp. 3d at 896.

⁴⁵ *Id.* at 902.

⁴⁶ *Id.* at 902–03.

⁴⁷ *Id.* at 906.

⁴⁸ *Id.* at 902–03.

⁴⁹ *Id.* at 900, 902.

III. LEGAL BACKGROUND

The First Amendment prohibits states and municipalities from “abridging the freedom of speech.”⁵⁰ As a result of this prohibition, the government cannot “restrict expression because of its message, its ideas, its subject matter, or its content.”⁵¹ Content-based laws are “those that target speech based on its communicative content.”⁵² In *Reed v. Town of Gilbert*, the United States Supreme Court clarified the standard of review for content-based regulations: such laws must be narrowly tailored to serve a compelling government interest.⁵³ This new standard has opened the door to more challenges to panhandling laws, including those in St. Louis County, which previously survived First Amendment challenges.⁵⁴

Panhandling laws are also occasionally challenged under the Fourteenth Amendment, which prohibits states and municipalities from depriving any “person of life, liberty, or property without due process of law.”⁵⁵ Under the Fourteenth Amendment, laws must “give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden” and not lend themselves to “arbitrary and erratic arrests and convictions.”⁵⁶ In *Fernandez*, two of the St. Louis County ordinances were challenged under the Fourteenth Amendment for due process vagueness.⁵⁷ Advocacy groups have often used procedural due process grounds to challenge homelessness laws.⁵⁸

This Section discusses the level of scrutiny faced by content-based restrictions before and after *Reed*, what constitutes a narrowly tailored compelling government interest, First Amendment challenges to

⁵⁰ U.S. CONST. amend. I.

⁵¹ *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (citing *Cohen v. California*, 403 U.S. 15, 24 (1971)).

⁵² *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (Solicitation is considered free speech under the First Amendment.); *Vill. of Schaumburg v. Citizens for a Better Env’t*, 444 U.S. 620, 639 (1980).

⁵³ *Reed*, 576 U.S. at 163.

⁵⁴ J.B. Wogan, *The Unexpected Reason Panhandling Bans Are Being Struck Down Across the Country*, GOVERNING (July 23, 2017), <https://www.governing.com/archive/gov-panhandling-homeless-supreme-court-reed-gilbert.html> [<https://perma.cc/74W8-UBGT>].

⁵⁵ U.S. CONST. amend. XIV, § 1.

⁵⁶ *United States v. Harriss*, 347 U.S. 612, 617 (1954); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (citing *Thornhill v. Alabama*, 310 U.S. 88 (1940)).

⁵⁷ *Fernandez v. St. Louis Cty., Mo.*, 538 F. Supp. 3d 888, 902 (E.D. Mo. 2021).

⁵⁸ Joanna Laine, *From Criminalization to Humanization: Ending Discrimination Against the Homeless*, 39 HARBINGER 1, 11 (2015), https://socialchangenyu.com/wp-content/uploads/2016/10/39-1_laine_from-criminalization-to-humanization.pdf [<https://perma.cc/WG87-V4BG>].

panhandling statutes post-*Reed*, and due process challenges to homelessness statutes.

A. Content-Based Restriction Pre-Reed: Intermediate Scrutiny

Section 1209.090.1 of the St. Louis County Code, which prohibits standing in the roadway for solicitation, withstood a previous First Amendment challenge in *Association of Community Organizations for Reform Now v. St. Louis County* (“ACORN”).⁵⁹ In *ACORN*, a community group challenged section 1209.090.1 after the county informed it that the organization’s practice of passing out information and asking for donations at intersections with traffic lights violated the ordinance.⁶⁰ The Eighth Circuit upheld the ordinance as a constitutional time, place, and manner restriction that served a compelling government interest.⁶¹

In reaching this decision, the court found a valid public safety concern related to keeping solicitors off of roadways.⁶² To determine if the ordinance was narrowly tailored to address this concern, the court applied the test outlined by the United States Supreme Court in *Ward v. Rock Against Racism*, which states, “[a] regulation must not ‘burden substantially more speech than is necessary to further the government’s legitimate interests.’”⁶³ This test applies an intermediate level of scrutiny to content-based regulations.⁶⁴ Using the *Ward* test in *ACORN*, the court concluded that section 1209.090.1 did not substantially

⁵⁹ *Ass’n of Cmty. Orgs. for Reform Now v. St. Louis Cnty.*, 930 F.2d 591, 593 (8th Cir. 1991).

⁶⁰ *Id.*

⁶¹ *Id.* When restricting speech, “the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). For a discussion of how time, place, and manner restrictions have been applied over time see Nick Suplina, *Crowd Control: The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism*, 73 GEO. WASH. L. REV. 395 (2005); see also Ronald J. Krotoszynski, Jr., *Our Shrinking First Amendment: On the Growing Problem of Reduced Access to Public Property for Speech Activity and Some Suggestions for A Better Way Forward*, 78 OHIO ST. L.J. 779 (2017).

⁶² *Ass’n of Cmty. Orgs. for Reform Now*, 930 F.2d at 593.

⁶³ *Id.* at 595 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (alteration in original)).

⁶⁴ *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994) (“[T]he appropriate standard by which to evaluate the constitutionality of must-carry is the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech.”).

limit speech more than necessary and the “relationship between the regulation and the government’s interest in safety and traffic efficiency [was] sound.”⁶⁵

B. Content-Based Regulation Post-Reed: Strict and Intermediate Scrutiny

Nearly twenty-five years later, the Supreme Court heightened the level of scrutiny applied to content-based regulations with *Reed v. Town of Gilbert*.⁶⁶ In *Reed*, the town of Gilbert, Arizona, prohibited the display of all signs other than those that fell into specific categories.⁶⁷ One of those excepted categories included “directional signs,” which give direction to a church or a qualifying event under the city code.⁶⁸ However, the town’s ordinances placed strict restrictions on these signs in the following ways:

Temporary directional signs may be no larger than six square feet. They may be placed on private property or on a public right-of-way, but no more than four signs may be placed on a single property at any time. And, they may be displayed no more than 12 hours before the ‘qualifying event’ and no more than 1 hour afterward.⁶⁹

The city fined a local church for failing to comply with the ordinance’s time and specificity requirements with respect to directional signs for the church’s Sunday services.⁷⁰ The Ninth Circuit found that the ordinances were content-neutral and, applying intermediate scrutiny, upheld the city code.⁷¹

The Supreme Court reversed the Ninth Circuit, holding that the ordinances were content-based regulations that were presumptively unconstitutional.⁷² The Court stated that the Ninth Circuit missed “the crucial first step in the content-neutrality analysis: determining whether the law is content neutral on its face.”⁷³ A content-neutral regulation is one that is “justified without any reference to the content of the regulated speech.”⁷⁴ Conversely, anytime a regulation restricts speech because of

⁶⁵ *Ass’n of Cmty. Orgs. for Reform Now*, 930 F.2d at 596.

⁶⁶ *Reed v. Town of Gilbert*, 576 U.S. 155, 159 (2015).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 160–61 (citations omitted).

⁷⁰ *Id.* at 161.

⁷¹ *Id.* at 162.

⁷² *Id.* at 171.

⁷³ *Id.* at 165.

⁷⁴ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

the topic, idea, or message conveyed, it is a content-based regulation.⁷⁵ Further, even regulations that do not “discriminate among viewpoints within [a] subject matter” or are adopted with a benign motive may still qualify as content-based.⁷⁶ In *Reed*, the Court determined that the ordinances were content-based restrictions because they singled out directional-based speech on signs.⁷⁷ While the ordinances did not discriminate among *types* of directional-based speech, they were still content-based because they singled out a specific category of speech altogether.⁷⁸

The *Reed* Court held that strict scrutiny must be applied to content-based speech.⁷⁹ Under strict scrutiny, the government entity must prove that the restriction “furthers a compelling governmental interest and is narrowly tailored to that end.”⁸⁰ Ultimately, the Court held that the Gilbert city sign code failed to withstand strict scrutiny because it was not narrowly tailored to meet the interests of traffic safety or aesthetics.⁸¹ Specifically, the city did not establish that directional signs led to traffic accidents, nor did it prove that directional signs were less aesthetically pleasing than any other type of sign.⁸²

C. Compelling Government Interest and the Narrow Tailoring Requirement

In determining whether there is a compelling interest, courts analyze “whether the interest (the end) is ‘important enough’—that is, sufficiently compelling to abridge core constitutional rights—[which] is informed by an examination of the regulation (the means) purportedly addressing that end.”⁸³ Then, courts must decide how closely tailored the regulation is to

⁷⁵ *Reed*, 576 U.S. at 163.

⁷⁶ *Id.* at 169.

⁷⁷ *Id.* at 168–69.

⁷⁸ *Id.* at 169.

⁷⁹ *Id.* at 159. Several justices expressed concern with this ruling, namely that it would lead to an over-broad application of strict scrutiny. Justice Kagan’s concurrence expressed concern about applying strict scrutiny to all content-based laws, stating the decision would lead to unnecessary lawsuits making the Supreme Court the “Supreme Board of Sign Review.” *Id.* at 185 (Kagan, J., concurring). Justice Breyer joined Kagan’s concurrence and wrote separately to state that content discrimination “should not *always* trigger strict scrutiny.” *Id.* at 176 (Breyer, J., concurring).

⁸⁰ *Id.* at 171 (quoting *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340, (2010)).

⁸¹ *Id.* at 171–72.

⁸² *Id.* at 172.

⁸³ *Republican Party of Minn. v. White*, 416 F.3d 738, 750 (8th Cir. 2005).

the interest.⁸⁴ When a regulation is closely matched with the government's interest and is constructed in such a way as to infringe upon constitutional rights only as strictly necessary to further the interest, a regulation will withstand strict scrutiny.⁸⁵

In addition, courts must determine if the regulation accomplishes the government's interest in a content-neutral manner.⁸⁶ Even if the government entity has a valid justification for the regulation, it will not survive strict scrutiny if the regulation achieves that justification by unnecessarily violating constitutional rights.⁸⁷

Where a compelling government interest exists, the government entity can subject speech to "reasonable time, place, or manner restrictions" so long as they are narrowly tailored.⁸⁸ The Eighth Circuit defined a narrowly-tailored regulation as:

⁸⁴ *Id.* ("A clear indicator of the degree to which an interest is 'compelling' is the tightness of the fit between the regulation and the purported interest: where the regulation fails to address significant influences that impact the purported interest, it usually flushes out the fact that the interest does not rise to the level of being "compelling.").

⁸⁵ *Id.* The government has the most substantial interest when regulating speech that disrupts the home. *Carey v. Brown*, 447 U.S. 455, 471 (1980) ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."). For this reason, ordinances preventing solicitation outside residences are a reasonable restriction on speech. *See also* *Frisby v. Schultz*, 487 U.S. 474, 488 (1988) (upholding a city ordinance preventing picketing outside residences and dwellings). However, a government entity can also have a legitimate interest in regulating speech in a public forum. *Ward v. Rock Against Racism*, 491 U.S. 781, 796 (1989); *see* *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (upholding an ordinance prohibiting sound trucks from broadcasting on the streets as narrowly tailored to meet the government interest of eliminating distraction and disturbance); *see also* *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 299 (1984) (upholding a prohibition on sleeping in National Parks as narrowly tailored to the government interest of maintaining enjoyable parks for the public).

⁸⁶ *Neighborhood Enter., Inc. v. City of St. Louis*, 644 F.3d 728, 737 (8th Cir. 2011).

⁸⁷ *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429–30 (1993) ("We agree with the city that its desire to limit the total number of newsracks is 'justified' by its interests in safety and esthetics. The city has not, however, limited the number of newsracks; it has limited (to zero) the number of newsracks *distributing commercial publications*. As we have explained, there is no justification for that particular regulation other than the city's naked assertion that commercial speech has 'low value.' It is the absence of a neutral justification for its selective ban on newsracks that prevents the city from defending its newsrack policy as content neutral.") (emphasis in original).

⁸⁸ *Clark*, 468 U.S. at 293; *Kovacs*, 366 U.S. at 87 ("City streets are recognized as a normal place for the exchange of ideas by speech or paper. But this does not mean the freedom is beyond all control.").

[O]ne that actually advances the state’s interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and could be replaced by no other regulation that could advance the interest as well with less infringement of speech (is the least-restrictive alternative).⁸⁹

Overinclusive laws are those that “include within their reach actors or circumstances that do not present the danger the government seeks to avoid.”⁹⁰ Conversely, an underinclusive statute is one that “targets some conduct or actors for adverse treatment, yet leaves untouched conduct or actors that are indistinguishable in terms of the law’s purpose.”⁹¹ While there must be a means–ends fit between the interest and law, a narrowly-tailored restriction does not have to be the “least restrictive or least intrusive means.”⁹²

D. Post-Reed Challenges to Solicitation Statutes

After *Reed*, several courts have examined various First Amendment challenges to panhandling and solicitation statutes.⁹³ The Second Circuit examined an ordinance that prohibited people from stopping vehicles and asking for work.⁹⁴ It held that the prohibition was an underinclusive, content-based restriction.⁹⁵ The court reasoned that the ordinance was not narrowly tailored as it did not restrict other potential traffic safety concerns such as stopping cabs or buses to solicit a ride.⁹⁶ In another case, the United States District Court for Connecticut found that a law was overbroad and restricted spontaneous free speech where it required charitable solicitors to give a twenty-day notice of their plan to solicit and

⁸⁹ *Republican Party of Minnesota v. White*, 416 F.3d 738, 751 (8th Cir. 2005).

⁹⁰ William E. Lee, *The First Amendment Doctrine of Underbreadth*, 71 WASH. U. L. Q. 637, 637 (1993).

⁹¹ *Id.*

⁹² *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

⁹³ See *Ind. C.L. Union Found., Inc. v. Superintendent, Ind. State Police*, 470 F. Supp. 3d 888, 903 (S.D. Ind. 2020); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 184–85 (D. Mass. 2015); *Homeless Helping Homeless, Inc. v. City of Tampa*, 2016 WL 4162882 *4 (M.D. Fla. 2016); *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276, 1282 (D. Colo. 2015); *Messina v. City of Fort Lauderdale*, 546 F. Supp. 3d 1227, 1231 (S.D. Fla. 2021).

⁹⁴ *Centro de la Comunidad Hispana de Locust Valley v. Oyster Bay*, 868 F.3d 104, 112 (2d Cir. 2017).

⁹⁵ *Id.* at 117.

⁹⁶ *Id.* (holding that the overall ordinance was content based, but noting that stopping cars was “conduct based” suggesting that restricting conduct without any specific speech restriction is content–neutral).

keep records of such solicitation.⁹⁷ The Eighth Circuit similarly struck down a statute that restricted people from asking for charity in a “harassing or threatening manner” that was “likely to cause alarm to the other person.”⁹⁸ The court held that it was underinclusive because it did not address harassing political or commercial solicitation.⁹⁹ On the other hand, the Tenth Circuit upheld a Utah city ordinance which “ma[de] it illegal for any person ‘to sit or stand, in or on any unpaved median, or any median of less than 36 inches for any period of time.’”¹⁰⁰ The court labeled the ordinance as constitutional because it was narrowly tailored to restrict only certain medians, and thus allowed the plaintiff to use ample alternate locations to communicate his message.¹⁰¹

E. Procedural Due Process and Panhandling Statutes

In *Papachristou v. City of Jacksonville*, the Supreme Court struck down five different vagrancy statutes banning “vagabonds,” the “common thief,” and “loitering” because they failed to give fair notice.¹⁰² The Court held that the statutes were so broad, encompassing commonplace activities such as walking down the street, that they lent themselves to arbitrary enforcement.¹⁰³ Because the statutes failed to provide fair notice and lent themselves to arbitrary enforcement, they were considered void under the Fourteenth Amendment due to unconstitutional vagueness.¹⁰⁴ Before *Papachristou*, broad-sweeping vagrancy statutes were widespread in the United States.¹⁰⁵ However, following the *Papachristou* decision, many states and cities repealed or reformed such broad-sweeping statutes.¹⁰⁶

⁹⁷ Kissel v. Seagull, 552 F. Supp. 3d 277, 293 (D. Conn. 2021).

⁹⁸ Rodgers v. Bryant, 942 F.3d 451, 454 (8th Cir. 2019).

⁹⁹ *Id.* at 456–57.

¹⁰⁰ Evans v. Sandy City, 944 F.3d 847, 851 (10th Cir. 2019) (quoting Sandy City Traffic Code, Art. 16, § 299.1).

¹⁰¹ *Id.* at 860.

¹⁰² *Papachristou v. City of Jacksonville*, 405 U.S. 156, 157 (1972).

¹⁰³ *Id.* at 162.

¹⁰⁴ *Id.*

¹⁰⁵ Andrew J. Liese, *We Can Do Better: Anti-Homeless Ordinances As Violations of State Substantive Due Process Law*, 59 VAND. L. REV. 1413, 1422 (2006) (“By the 1960s, nearly every state in the nation had passed a statute prohibiting vagrancy in some way.”); Many of these statutes can trace their origin to the great depression, so called “Anti-Okie” laws. Additionally, the Jim-Crow era resulted in the passage of many broad-sweeping laws. For a discussion of the history of anti-homeless laws in the United States, see Javier Ortiz et al., *The Wrong Side of History: A Comparison of Modern and Historical Criminalization Laws*, SEATTLE UNIVERSITY SCHOOL OF LAW: HOMELESS RIGHTS ADVOCACY PROJECT (May 2015).

¹⁰⁶ Tracey Meares, *This Land is My Land*, 130 HARV. L. REV. 1877, 1883 (2017) (“[T]he Court ultimately dealt the death blow to vagrancy statutes in *Papachristou*.”). See generally, Christopher Lowen Agee, *From the Vagrancy Law Regime to the*

Though *Papachristou* was decided fifty years ago, procedural due process challenges to panhandling and anti-homelessness statutes are still somewhat common.¹⁰⁷

IV. INSTANT DECISION

Ultimately, plaintiff Robert Fernandez was successful with his claims against St. Louis County.¹⁰⁸ The court granted Fernandez a permanent injunction against the unconstitutional portions of the county code,¹⁰⁹ awarded him \$150,000 in damages for the county's violation of his First Amendment rights,¹¹⁰ and granted him \$138,515 in attorney's fees and costs.¹¹¹

Carceral State, 43 LAW & SOC. INQUIRY 1658 (2018) (discussing how vagrancy law has developed post-*Papachristou*).

¹⁰⁷ See generally *Alexander v. Gov't of Columbia*, No. CV 17-1885 (ABJ), 2020 WL 3573462, at *12 (D.D.C. 2020) (challenging a District of Columbia statute that made it unlawful to “crowd, obstruct, or incommode . . . [t]he use of any street, avenue, alley, road, highway or sidewalk” as unconstitutionally vague); *McCraw v. City of Oklahoma City*, 973 F.3d 1057 (10th Cir. 2020) (alleging that an ordinance that “prohibited standing, sitting, or staying in public medians” was unconstitutionally vague); *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264, 272 (4th Cir. 2019) (challenging a series of statutes prohibiting conduct of “habitual drunkards” as unconstitutionally vague); *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1155 (9th Cir. 2014) (holding that an ordinance was unconstitutionally vague where it banned using a vehicle “as living quarters either overnight, day-to-day, or otherwise”); *Bell v. Keating*, 697 F.3d 445, 449 (7th Cir. 2012) (finding that an ordinance allowing law enforcement to dispel three or more persons that are “likely to cause substantial harm or serious inconvenience, annoyance or alarm” was unconstitutionally vague).

¹⁰⁸ *Fernandez v. St. Louis Cnty.*, 538 F. Supp. 3d 888, 906 (E.D. Mo. 2021).

¹⁰⁹ *Id.* at 903; see *infra* Sections IV.A–C.

¹¹⁰ *Fernandez*, 538 F. Supp. 3d at 906. Though many news articles highlighted the judgment total in their headlines, they failed to report that the county did not contest the settlement amount. See Robert Patrick, *Homeless Man Wins 150k and Judge Tosses out St. Louis County Anti-Panhandling Ordinances*, ST. LOUIS POST-DISPATCH (May 11, 2021), https://www.stltoday.com/news/local/crime-and-courts/homeless-man-wins-150k-and-judge-tosses-out-st-louis-county-anti-panhandling-ordinances/article_32c5bdcc-1882-54bd-a30a-b4b6dd673413.html [<https://perma.cc/QQ5G-5NX5>]; Nextar Media Wire, *Homeless Man Takes on St. Louis County, Wins \$150,00 Settlement over Panhandling Laws*, FOX4KC (May 13, 2021, 11:10 AM), <https://fox4kc.com/news/homeless-man-takes-on-st-louis-county-wins-150000-settlement-over-panhandling-laws/> [<https://perma.cc/3UFD-KS36>] (Fernandez's attorney stated “I think [Fernandez will] be able to stabilize his life . . . He'll be able to get a place and not be homeless anymore.”); Sarah Fenske, *Homeless Man Wins 150k as Judge Strikes St. Louis County's Solicitation Ordinances*, STL NPR (May 14, 2021, 1:45 PM), <https://news.stlpublicradio.org/show/st-louis-on-the-air/2021-05-14/homeless-man-wins-150k-as-judge-strikes-st-louis-countys-solicitation-ordinances> [<https://perma.cc/6S2F-6LC8>].

¹¹¹ *Fernandez*, 538 F. Supp. 3d at 906.

A. Decision as to Chapter 804: Requirement for Solicitor Licensing

The court ruled that chapter 804 is a content-based regulation that is not narrowly tailored to fit a compelling public interest.¹¹² Chapter 804 regulates speech based on the message the speaker conveys—in this case, solicitation.¹¹³ The court held that St. Louis County failed to prove a causal connection between requiring solicitors to obtain a license and traffic safety.¹¹⁴ Secondly, the statute was not narrowly tailored because it was underinclusive and failed to restrict equally distracting forms of roadside speech such as protest, evangelizing, and organizations asking for donations.¹¹⁵ Because the county could not prove that the statute was narrowly tailored to fit the government interest of traffic safety, the statute violated the First Amendment.¹¹⁶ Ultimately, the court severed the language “soliciting financial assistance of any kind” and all of the requirements requiring a solicitation license at high-volume intersections.¹¹⁷

B. Decision as to Section 1209.090.1: Prohibition on Standing in Roadway

The court held that section 1209.090.1 is a content-based regulation not narrowly tailored to fit a compelling public interest.¹¹⁸ According to the court, Section 1209.090.1 is content-based because it prohibits only a certain type of speech—solicitation.¹¹⁹ It is underinclusive because the county failed to include other forms of speech that also require a response from drivers, such as charitable solicitation and political activism.¹²⁰ Because the ordinance is content-based and underinclusive, section 1209.090.1 violates the First Amendment.¹²¹ The court declared section 1209.090.1 void and severed it from the county traffic code.¹²²

¹¹² *Id.* at 900.

¹¹³ *Id.* at 898.

¹¹⁴ *Id.* at 899.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 898.

¹¹⁷ *Id.* at 901.

¹¹⁸ *Id.* at 902.

¹¹⁹ ST. LOUIS COUNTY TRAFFIC CODE § 1209.090.1 (1984).

¹²⁰ *Fernandez*, 538 F. Supp. 3d at 901–02.

¹²¹ *Id.* at 902.

¹²² *Id.*

C. Decision as to Sections 716.080 and 716.090: Vagrancy Prohibition

Both parties agreed that sections 716.080 and 716.090 were plainly unconstitutional because they violate due process.¹²³ They are unconstitutionally vague as their broad-sweeping definitions of vagrancy do not give fair notice and may lead to arbitrary enforcement.¹²⁴ In a prior hearing, the court granted an injunction preventing enforcement of the sections and the county had agreed to repeal or rewrite the sections.¹²⁵ Because there was no record of the county changing or repealing the sections, the court severed and declared sections 716.080 and 716.090 void.¹²⁶

V. COMMENT

There is a significant homeless population in Missouri.¹²⁷ As a result, most Missouri municipalities have laws that attempt to manage this homeless population. However, many of these laws are likely unconstitutional post-*Reed*. *Fernandez* highlights the costs associated with outdated panhandling laws, but the question remains: how can a city manage its homeless population *and* avoid liability under *Reed*? This Part lays out three possible solutions: reduce homelessness through social intervention or rewrite the statutes in a content-neutral manner, or narrowly tailor the laws to further a compelling government interest.

A. The Choice Facing Municipalities with Outdated Ordinances

Robert Fernandez successfully challenged several St. Louis County ordinances, exposing the county to significant liability.¹²⁸ Under the *Reed* framework, many other municipalities have lost similar challenges to panhandling laws.¹²⁹ These cases highlight cities' difficult balance between two competing interests: an individual's fundamental right to freedom of speech and legitimate concerns related to public safety, traffic flow, and tourism.¹³⁰

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 902–03.

¹²⁶ *Id.*

¹²⁷ *Missouri Homelessness Statistics*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, <https://www.usich.gov/homelessness-statistics/mo> [<https://perma.cc/2LGB-RB3D>] (last updated Jan. 2022).

¹²⁸ *Fernandez*, 538 F. Supp. 3d at 906.

¹²⁹ *See supra* Section D.III.

¹³⁰ *See sources cited supra* note 3.

Given the level of scrutiny applied to panhandling laws under the Supreme Court's First Amendment doctrine, many of these legitimate interests are often not enough to insulate a city from liability.¹³¹ For example, even in *Fernandez*, where the county showed evidence that multiple citizens called and complained *daily* about Fernandez's activities, and the officers observed Fernandez standing in the second lane of one of the most highly trafficked highways in Missouri, the county still could not show its ordinances were sufficiently narrowly tailored.¹³² In fact, post-*Reed*, few laws have been upheld under strict scrutiny.¹³³ As a result, cities with concerns about panhandling that have been slow to update their ordinances face a choice: accept liability for outdated statutes, find a way to update statutes to comply with *Reed*, or work toward solving the underlying cause of panhandling: homelessness.

B. Slowly Changing Missouri Cities Subject to Potential Liability

In Missouri, panhandling ordinances remain widespread.¹³⁴ A statewide law mandates that governing bodies in the state require an application for solicitation.¹³⁵ The law also suggests that governing bodies

¹³¹ Joseph W. Mead, *Most Panhandling Law Are Unconstitutional Since There's No Freedom From Speech*, THE CONVERSATION (Mar. 6, 2018, 6:38 AM), <https://theconversation.com/most-panhandling-laws-are-unconstitutional-since-theres-no-freedom-from-speech-92498> [<https://perma.cc/G9PR-2JWJ>].

¹³² *Fernandez*, 538 F. Supp. 3d at 901–02.

¹³³ See *supra* Section D.III.

¹³⁴ A new law was passed as recently as July 2022 that criminalizes sleeping on state-owned land. Kacen Bayless & Anna Spoerre, *New Missouri Law Bans Outside Sleeping. KC Leaders Say It Criminalizes Homelessness*, THE KAN. CITY STAR (July 1, 2022), <https://www.kansascity.com/news/politics-government/article-262969308.html>. Some of these laws may be motivated by a desire to prohibit door-to-door solicitation or so called “aggressive panhandling.” For an example policy addressing aggressive panhandling, see BAY AREA RAPID TRANSIT POLICE DEP'T. POLICY 453 (2019), https://www.bart.gov/sites/default/files/docs/08.%20BPD%20Policy%20453%20-%20Aggressive%20Panhandling_0.pdf [<https://perma.cc/4HZV-P4VV>]. The Missouri Department of Labor specifically addresses problems related to door-to-door solicitation. *Door-to-Door Sales*, MO. DEP'T. OF LABOR, <https://labor.mo.gov/dls/youth-employment/door-to-door-sales> [<https://perma.cc/DY3L-PREJ>] (last visited Sept. 23, 2022). Fraudulent door-to-door sales have occurred in cities across Missouri. See Xinyi Luo, *Door-to-Door Fraudulent Scheme Targets Columbia Nonprofit*, KOMU (Feb. 2, 2022), https://www.komu.com/news/midmissourinews/door-to-door-fraudulent-scheme-targets-columbia-nonprofit/article_3e0df8e6-8462-11ec-bfc1-abde30e8e576.html [<https://perma.cc/U3A4-LTJV>]; Russell Colburn, *Northland Families Warn of Solicitors Asking to See Utility Bills, Ignoring Signs*, FOX 4 MORNING NEWS (Feb. 4, 2022), <https://fox4kc.com/news/northland-families-warn-of-solicitors-asking-to-see-utility-bills-ignoring-signs/> [<https://perma.cc/XN35-M87U>].

¹³⁵ MO. REV. STAT. § 67.304 (2007).

require proof of insurance and limit solicitation to stoplights and four-way stops.¹³⁶ Most major cities across Missouri have some form of panhandling statute. For example, Lee’s Summit and Independence, which are both Kansas City suburbs, have ordinances restricting panhandling.¹³⁷ Notably, Independence’s ordinance requires applicants for a solicitation license to show proof of insurance in the amount of \$200,000, effectively banning the license for anyone with limited income.¹³⁸ St. Louis City and surrounding suburbs such as St. Charles and O’Fallon also restrict solicitation.¹³⁹ Jefferson City, the state capital, places a general ban on all solicitation activities by individuals not registered as a “charitable, civic, religious, or fraternal organization.”¹⁴⁰ Smaller cities, including Columbia, Springfield, and Cape Girardeau, also have ordinances restricting solicitation.¹⁴¹

Most of these ordinances are akin to those declared unconstitutional in *Fernandez*. The St. Louis City, O’Fallon, Jefferson City, and Columbia

¹³⁶ *Id.*

¹³⁷ INDEPENDENCE, MO. CODE § 18.08.009 (2020), https://library.municode.com/mo/independence/codes/code_of_ordinances?nodeId=CH18TR_ART8RI-WDUPE_S18.08.009PESESORIBUCHCO [<https://perma.cc/SL4W-QXUJ>]; LEE’S SUMMIT, MO. CODE § 20-3 (2000), https://library.municode.com/mo/lee's_summit/codes/code_of_ordinances?nodeId=COOR_CH20PESO_ARTIISORO [<https://perma.cc/N968-4RG4>].

¹³⁸ INDEPENDENCE, MO. CODE § 18.08.009 (2020), https://library.municode.com/mo/independence/codes/code_of_ordinances?nodeId=CH18TR_ART8RI-WDUPE_S18.08.009PESESORIBUCHCO [<https://perma.cc/AME6-YFYR>].

¹³⁹ ST. LOUIS, MO., CODE OF ORDINANCES ch. 17 § 20.080 (1979), https://library.municode.com/mo/st._louis/codes/code_of_ordinances/364861?nodeId=RECOBALO2020AN_TIT17VETR_DIVITRCH17.20PERIDU_17.20.070PEST [<https://perma.cc/9NXB-UY57>]; ST. CHARLES, MO., TRAFFIC CODE § 340.010 (1988), <https://ecode360.com/27702048?highlight=solicit,soliciting&searchId=7429095326609773#27702048> [<https://perma.cc/SC6L-LX9P>]; O’FALLON, MO., TRAFFIC CODE § 345.100 (1962), <https://ecode360.com/27596195?highlight=soliciting&searchId=7429429957307510#27596195> [<https://perma.cc/6EL7-MPHR>].

¹⁴⁰ JEFFERSON CITY, MO., CODE OF ORDINANCES § 23-14-101 (2019), https://library.municode.com/mo/jefferson_city/codes/code_of_ordinances?nodeId=CD_ORD_CH24PEDODOSATEBULI_ARTIINOFSOST_S24-101SOCO [<https://perma.cc/82UD-28ZH>].

¹⁴¹ COLUMBIA, MO., CODE OF ORDINANCES § 16-186 (2003), https://library.municode.com/mo/columbia/codes/code_of_ordinances?nodeId=PTIICOOR_CH16OFMI-PR_ARTIICOOF_DIV12OFAGPUOR_S16-186UNPA [<https://perma.cc/X84D-BV9Y>]; SPRINGFIELD, MO., CODE OF ORDINANCES § 86-8 (2000), https://library.municode.com/mo/springfield/codes/code_of_ordinances?nodeId=PTIICOOR_CH86PUSO_ARTIINGE_S86-8SOOCMOVE [<https://perma.cc/79PY-FWGD>]; CAPE GIRARDEAU, MO., CODE OF ORDINANCES § 15-16 (1990), https://library.municode.com/mo/cape_girardeau/codes/code_of_ordinances?nodeId=PTIICOOR_CH15LIB-URE_ARTIINGE_S15-15PESOAETSEGOPRPRRE [<https://perma.cc/J2ND-KFYS>].

ordinances all contain bans on solicitation in roadways.¹⁴² The ordinances in Springfield and St. Charles are slightly less restrictive as they allow solicitation of occupants of parked cars.¹⁴³ Lee’s Summit and Independence both require licensing similar to, if not even more elaborate than, those required by St. Louis County in *Fernandez*.¹⁴⁴ Many, if not all, of the ordinances on the books in these cities would likely be struck down under strict scrutiny.¹⁴⁵

Intriguingly, the Cape Girardeau ordinance related to solicitation on roads may be the most likely to withstand strict scrutiny. It states, “[n]o person, peddler, huckster, hawk, solicitor, vendor, or merchant shall conduct activity in the public streets, rights-of-way, intersections, medians or sidewalks, in such a manner where his operations impede or interferes with pedestrians or vehicle traffic.”¹⁴⁶ The Cape Girardeau statute can be read as more of a blanket ban on certain forms of *conduct*, as opposed to certain forms of speech. However, the law includes the categories “peddler, huckster, solicitor, vendor, or merchant,” which suggests that the statute is intended to police the content of these types of speech over others.¹⁴⁷

¹⁴² ST. LOUIS, MO., CODE OF ORDINANCES § 17.20.080 (1979), https://library.municode.com/mo/st._louis/codes/code_of_ordinances/364861?nodeId=RECOALO2020AN_TIT17VETR_DIVITRCH17.20PERIDU_17.20.070PEST [<https://perma.cc/ZXV3-WCW7>]; O’FALLON, MO., TRAFFIC CODE § 345.100 (1962), <https://ecode360.com/27596195?highlight=soliciting&searchId=7429429957307510#27596195> [<https://perma.cc/72FA-WYDZ>]; JEFFERSON CITY, MO., CODE OF ORDINANCES § 23-14-101 (2019), https://library.municode.com/mo/jefferson_city/codes/code_of_ordinances?nodeId=CD_ORD_CH24PEDODOSATEBULI_ARTIINOFOSOST_S24-101SOCO [<https://perma.cc/E9TM-AKVB>]; COLUMBIA, MO., CODE OF ORDINANCES § 16-186 (2003), https://library.municode.com/mo/columbia/codes/code_of_ordinances?nodeId=PTIICOOR_CH16OFMIPR_ARTIICOOF_DIV12OFAGPUOR_S16-186UNPA [<https://perma.cc/97K9-K5A7>].

¹⁴³ SPRINGFIELD, MO., CODE OF ORDINANCES § 86-8 (2000), https://library.municode.com/mo/springfield/codes/code_of_ordinances?nodeId=PTIICO_CH86PUSO_ARTIINGE_S86-8SOOCMOVE [<https://perma.cc/86JQ-LAB7>]; ST. CHARLES, MO., TRAFFIC CODE § 340.010 (1988), <https://ecode360.com/27702048?highlight=solicit,soliciting&searchId=7429095326609773#27702048> [<https://perma.cc/YCJ5-JR7W>].

¹⁴⁴ LEE’S SUMMIT, MO. CODE § 20-3 (2000), https://library.municode.com/mo/lee's_summit/codes/code_of_ordinances?nodeId=COOR_CH20PESO_ARTIISORO [<https://perma.cc/EA7X-KB6D>].

¹⁴⁵ All of the ordinances restrict panhandling, while not restricting other forms of road-side speech as stringently. See sources cited *supra* notes 133–140.

¹⁴⁶ CAPE GIRARDEAU, MO., CODE OF ORDINANCES ch. 15 § 16 (1990), https://library.municode.com/mo/cape_girardeau/codes/code_of_ordinances?nodeId=PTIICOOR_CH15LIBURE_ARTIINGE_S15-16PEMEOTPEPRSTINSI [<https://perma.cc/2SYP-CJJZ>] (emphasis added).

¹⁴⁷ *Id.*

What options remain for cities that seek to keep solicitation in check? One option is to pursue a legal solution: redraft laws in a content-neutral and narrowly-tailored manner. Another option, as some advocates suggest, is a social solution: reduce panhandling by offering broader public services.¹⁴⁸

C. A Social Solution: Reducing Panhandling Through Public Services

One solution to cut down on panhandling would be to offer more public services for homeless persons. In the housing-first approach, or supportive housing model, advocates for the homeless prioritize immediate placement in housing.¹⁴⁹ Studies indicate that placing people in housing can help them exit homelessness more quickly and stay housed at rates between seventy-five to ninety-one percent.¹⁵⁰

However, even running existing homeless programs is costly. For example, St. Louis City recently committed \$6 million toward programs to help prevent or respond to homelessness.¹⁵¹ Yearly expenses for just one of the private community shelters and meal service programs in St. Louis total over \$3.5 million.¹⁵² Another private St. Louis program that focuses on housing and rehabilitation reported yearly expenses of \$1.4 million.¹⁵³ With at least fifteen shelters in the St. Louis area, the costs to

¹⁴⁸ See *infra* Section IV.C.

¹⁴⁹ *Housing First*, NAT. ALL. TO END HOMELESSNESS (Apr. 20, 2016), <https://endhomelessness.org/resource/housing-first/> [<https://perma.cc/YSP2-TXTK>]. But see Shahla Farzan, *St. Louis Moved Homeless People Into Hotels, Putting Some In Danger: 'We Were An Eyesore To Them'*, STL NPR (March 25, 2021, 5:20 AM), <https://news.stlpublicradio.org/government-politics-issues/2021-03-25/st-louis-moved-homeless-people-into-hotels-putting-some-in-danger-we-were-an-eyesore-to-them> [<https://perma.cc/58N3-DDT6>]; Jesse Bogan, *51 Homeless Veterans Were Given Free Apartments. How Have They Done?*, ST. LOUIS POST-DISPATCH (July 27, 2015), https://www.stltoday.com/news/local/crime-and-courts/51-homeless-veterans-were-given-free-apartments-how-have-they-done/article_6f487596-e387-5358-a5f8-d025f193e7d6.html [<https://perma.cc/VD3Q-9AS8>].

¹⁵⁰ *Housing First*, *supra* note 149.

¹⁵¹ Jacob Barker and Mark Schlinkmann, *New 'Intentional' Homeless Encampment Planned on St. Louis' North Riverfront*, ST. LOUIS POST-DISPATCH (Dec. 23, 2021), https://www.stltoday.com/news/local/metro/new-intentional-homeless-encampment-planned-on-st-louis-north-riverfront/article_d04f89fc-6b4a-5ace-9e7b-0d2095c221b5.html#tracking-source=article-related-bottom [<https://perma.cc/74JG-ZMXV>].

¹⁵² *Peter and Paul Community Services*, CAUSE IQ, <https://www.causeiq.com/organizations/peter-and-paul-community-services,431349643/> [<https://perma.cc/KFH3-E2ED>].

¹⁵³ *Gateway Home Services, Inc: Financial Statements and Independent Auditor's Report*, GATEWAY 180 (Sept. 24, 2020), <https://gateway180.org/app/uploads/G180-2019-Final-Audit-by-Anders.pdf> [<https://perma.cc/R2WJ-XFN7>].

keep already existing programs running are high.¹⁵⁴ Even with many existing programs, St. Louis shelters must sometimes turn people away due to gaps in coverage, overcrowding, and strict admission criteria.¹⁵⁵

Despite the existing costs, studies have found that current structures often see homeless individuals cycling between temporary shelters, inpatient hospital beds, and psychiatric wards, costing taxpayers up to twice as much as providing permanent housing.¹⁵⁶ Additionally, other studies have found that the cost of criminalizing homelessness is higher than simply providing housing.¹⁵⁷ The housing-first approach has worked in at least one Missouri city. In Springfield, a private organization, Kitchen Inc., estimates that its housing-first program costs \$12,000 per year compared to the \$32,000 per year each unsheltered individual costs the city.¹⁵⁸

¹⁵⁴ *St. Louis, MO Homeless Shelters*, HOMELESS SHELTERS DIRECTORY, <https://www.homelessshelterdirectory.org/city/mo-st.louis> [https://perma.cc/3CEN-LS55] (last visited Oct. 19, 2022).

¹⁵⁵ Overcrowding was a particular problem after the 2020 pandemic. Riley Mack, *St. Louis Shelters Strained as Homelessness Surges in U.S.*, RIVER FRONT TIMES (Apr. 6, 2021, 6:02 AM), <https://www.riverfronttimes.com/stlouis/st-louis-shelters-strained-as-homelessness-surges-in-us/Content?oid=35249431> [https://perma.cc/R7KG-HXY9]; Rachel Lippmann, *St. Louis Officials Admit Gaps in Homeless Services*, STL NPR (Jan. 11, 2018, 5:18 PM), <https://news.stlpublicradio.org/politics-issues/2018-01-11/st-louis-officials-admit-gaps-in-homeless-services> [https://perma.cc/H6F2-VMFF]. Even the process for finding a shelter that serves a particular person can be complex. For example, one service's website divides potential housing by gender. St. Louis Area Res. Directory, *Housing: Shelters for Men*, <https://www.startherestl.org/shelters-for-men.html> [https://perma.cc/5P5K-H3CN] (last visited Oct. 19, 2022). Each individual shelter listed within that website then has its own requirements for admission, such as youth only, one that focuses on those with mental illness and HIV positive persons, or one that serves mothers with up to two children. Covenant House Missouri, <https://www.covenanthousemo.org> [https://perma.cc/5AXA-VZYQ] (last visited Oct. 19, 2022); Peter and Paul Cmty. Serv., *About Us*, <https://ppcsinc.org/about-us> [https://perma.cc/8YGQ-P2YB] (last visited Oct. 19, 2022); Almost Home, <https://almosthomestl.org> [https://perma.cc/V7T2-HT7Y] (last visited Oct. 19, 2022). While the number of shelters in St. Louis may seem significant, the number that will actually serve a particular population may be extremely limited.

¹⁵⁶ *Ending Chronic Homelessness in 2017*, USICH, https://www.usich.gov/resources/uploads/asset_library/Ending_Chronic_Homelessness_in_2017.pdf [https://perma.cc/VG5B-2CFE] (Supportive housing increases government spending on housing and Medicaid type programs to homeless persons.) (last visited Oct. 19, 2022).

¹⁵⁷ Gregory A. Shinn, *The Cost of Long-Term Homelessness in Central Florida*, SHNNY, 23–27 (2014).

¹⁵⁸ Callie Rainey, *Housing First Philosophy Helps Homeless Individuals, Saves Taxpayers Money*, OZARKS FIRST (June 22, 2016, 6:19 PM), <https://www.ozarksfirst.com/local-news/housing-first-philosophy-helps-homeless-individuals-saves-taxpayers-money-2/> [https://perma.cc/5CPK-8HMN]. While this organization has had

While the housing-first option is popular in some sectors, others argue that it could actually increase homelessness. Proponents of the housing-first option often cite a study from the U.S. Department of Housing Urban Development,¹⁵⁹ but its critics contend that the study is incomplete.¹⁶⁰ Additionally, because municipalities already bear many of the costs and problems associated with homelessness, they may be reluctant to pivot their current program.¹⁶¹ Cities would likely face political hurdles for any attempt to implement a housing-first model. Because homelessness is viewed by many members of the public as a nuisance, there would likely be outcry over any program which *increased* the already-high costs associated with the problem. However, when balancing the cost per individual taxpayer, particularly in more populous locales, implementing housing-first policies may largely become a conversation about priorities. Should a city fund a new museum, roadway improvements, sports stadium infrastructure, or a housing development for a select few citizens at the expense of the many? The reality that the many will benefit from a higher quality of life for the few is easy to overlook until the homeless population starts impacting the general population.

D. Legal Solutions: Content-Neutral and Narrow Tailoring

Even if investing money in homelessness programs could reduce the number of individuals who are soliciting, any continuation of this behavior

strong success, it is worth noting it is a privately funded organization. Public shelters may have more sustainable funding and accept more generalized populations into shelters. Conversely, private shelters may struggle to reach fundraising goals each year while being able to focus on targeted interventions or populations.

¹⁵⁹ The Family Options Study conducted by the Department of Housing and Urban Development traced the success of various homeless families placed in differing types of shelters overtime. The Study analyzed how frequently families returned to the streets after placement in various programs, the fiscal costs of each model, and the overall well-being of the participants. PD&R, *The Family Options Study*, HUD USER, https://www.huduser.gov/portal/family_options_study.html [https://perma.cc/FE3L-TT6Y].

¹⁶⁰ *Housing First Could Stimulate Homelessness*, CITYGATE NETWORK, <https://www.citygatenetwork.org/NEWSBOT.ASP?MODE=VIEW&ID=1384> [https://perma.cc/2ZNW-QJH7] (last visited Oct. 19, 2022); Kriston Capps, *The Consultant Leading the White House Push Against Homelessness*, BLOOMBERG (Dec. 12, 2019, 7:56 AM), <https://www.bloomberg.com/news/articles/2019-12-12/trump-s-homeless-policy-gets-a-controversial-boss?sref=QFCZ3YPm> [https://perma.cc/8FH3-V5CR].

¹⁶¹ Kayla Drake, *Tiny Homes Shelter St. Louisans in Need, But \$600K City Project Draws Criticism*, STL NPR (Feb. 23, 2020, 7:38 AM), <https://news.stlpublicradio.org/government-politics-issues/2021-02-23/tiny-homes-shelter-st-louisans-in-need-but-600k-city-project-draws-criticism> [https://perma.cc/8QD8-V6GZ] (St. Louis City ultimately rejected a proposal to build a \$880,000 housing center based on its costliness).

may still be one that cities find objectionable and wish to regulate. The decision in *Reed* will make this more difficult for municipalities. One possibility is to draft an ordinance to be content-neutral. Another is to narrowly tailor the ordinance to apply only in a specific time, place, and manner.

For guidance on drafting a content-neutral restriction, cities may look to the ordinance upheld in *Evans v. Sandy City*, which banned standing on a median.¹⁶² In *Evans*, the Tenth Circuit held that the ordinance was written so that it “permits Evans to express his views, including the solicitation of financial support, on literally thousands of linear feet within Sandy City.”¹⁶³ However, in reaching the decision that the ordinance was content-neutral, the court closely analyzed the city council’s purpose in passing it to make sure it was not neutral on its face while acting as a shield for policing panhandling.¹⁶⁴

A content-neutral ordinance could help cities regulate persons on roadways. Still, the city would have to write the ordinance to evenly apply to all persons regardless of what speech they may be engaging in and demonstrate that the ordinance was truly meant to protect citizens from dangerous traffic.¹⁶⁵ For example, the Cape Girardeau ordinance, while somewhat similar in structure to the ordinance in *Evans*, would likely not be upheld because it includes activities like solicitation and peddling in the language, which suggests it is meant to restrict panhandling.¹⁶⁶ Further, the Cape Girardeau ordinance widely applies to all sidewalks and streets, while the Sandy City ordinance applies only to medians over a certain width.¹⁶⁷ A municipality seeking to employ this method would need credible evidence of genuine concern with traffic safety and would need to draft the ordinance to apply it to all persons engaging in particular conduct.

Another option available to cities is narrowly tailoring ordinances by time, place, or manner. For example, a California district court upheld an ordinance restricting solicitation within the confines of a farmer’s market

¹⁶² *Evans v. Sandy City*, 944 F.3d 847, 860 (10th Cir. 2019).

¹⁶³ *Id.*

¹⁶⁴ The court’s analysis delved into reviewing city council meeting transcripts for evidence that the council passed the ordinance with a particular intention to prohibit panhandling. *Id.* at 854.

¹⁶⁵ *Id.* at 858.

¹⁶⁶ *Id.* at 853; CAPE GIRARDEAU, MO., CODE OF ORDINANCES ch. 15 § 16 (1990), https://library.municode.com/mo/cape_girardeau/codes/code_of_ordinances?nodeId=PTIICOOR_CH15LIBURE_ARTIINGE_S15-16PEMEOTPEPRSTINSI [<https://perma.cc/2SYP-CJJZ>].

¹⁶⁷ *Id.* at 860; CAPE GIRARDEAU, MO., CODE OF ORDINANCES ch. 15 § 16 (1990), https://library.municode.com/mo/cape_girardeau/codes/code_of_ordinances?nodeId=PTIICOOR_CH15LIBURE_ARTIINGE_S15-16PEMEOTPEPRSTINSI [<https://perma.cc/2SYP-CJJZ>].

while it was taking place.¹⁶⁸ Additionally, several restrictions on speech have been upheld when they are limited to busy events.¹⁶⁹ Finally, some cities have successfully upheld restrictions on speech when limiting it to a specific area outside public buildings such as senior centers, convention centers, or arenas.¹⁷⁰ When a municipality has a particular concern with protecting a public space from solicitation for a valid reason, it may be able to restrict solicitation by tailoring the ordinance to address a narrow, particular concern.¹⁷¹ Additionally, when certain busy events occur where crowd control is a concern, a restriction on solicitation would be more likely to be upheld.

VI. CONCLUSION

Restricting solicitation has rendered many ordinances unconstitutional post-*Reed*. Robert Fernandez's case is a prime example of how the *Reed* decision may widely invalidate existing city ordinances, exposing cities to liability. Cities across Missouri and elsewhere have many ordinances on the books that are likely unconstitutional. Continuing to enforce these ordinances could expose these cities to costly litigation.¹⁷²

¹⁶⁸ *Mahgerefteh v. City of Torrance*, 324 F. Supp. 3d 1121, 1136 (C.D. Cal. 2018) (“Thus, in contexts where the State’s interests in ‘[t]he flow of the crowd and demands of safety are more pressing,’ the Court has upheld regulations ‘confining distribution, selling, and fund solicitation activities to fixed locations.’”) (“Here, as in *Heffron*, the City’s interest in regulating the flow of the crowd ‘is sufficient to satisfy the requirement that a place or manner restriction must serve a substantial state interest.’ On Market days, the Market hosts over 100 vendors and nearly 3,000 patrons in a space that is less than 2 acres in area. A regulation confining solicitation activities to booths and areas adjacent to the Market is reasonable and is narrowly tailored to regulating the flow of the resulting crowd within the Market.”).

¹⁶⁹ *O’Connell v. City of New Bern*, 447 F. Supp. 3d 466, 483 (E.D. N.C. 2020).

¹⁷⁰ *See San Antonio Firefighters’ Ass’n, Loc. 624 v. City of San Antonio*, 404 F. Supp. 3d 1045, 1060 (W.D. Tex. 2019); *Pomicter v. Luzerne Cty. Convention Ctr.*, 568 F. Supp. 3d 515, 526 (M.D. Pa. 2021).

¹⁷¹ For example, the original ordinance in *Fernandez* could have potentially withheld scrutiny had it only restricted solicitation at schedule one intersections on St. Louis Cardinal’s gamedays. *See Fernandez v. St. Louis City*, 538 F. Supp. 3d 888 (E.D. Mo. 2021).

¹⁷² In twist that makes these words almost prophetic, shortly before this Note was set to be published, Robert Fernandez filed another lawsuit challenging panhandling ordinances in another St. Louis suburb, Des Peres. Erin Heffernan, *A man sued St. Louis County over his right to panhandle. Now the fight’s in Des Peres*, ST. LOUIS POST-DISPATCH (Dec. 12, 2022), https://www.stltoday.com/news/local/govt-and-politics/a-man-sued-st-louis-county-over-his-right-to-panhandle-now-the-fight-s/article_37782a23-56ad-504b-8116-03eaf3ad7846.html [https://perma.cc/3C7R-NY5E].

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Repealing or rewriting these ordinances would be in cities' best interests. While these ordinances may no longer be a tool for combatting solicitation, the problem of homelessness will persist. Cities will have to make policy decisions to either support these populations through social programs or draft ordinances to be content-neutral or narrowly tailored to combat solicitation.