PANHANDLING AFTER *MCCULLEN V. COAKLEY*

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Laws restricting panhandling are exceptionally common across the country. States, municipalities, and courts have been struggling to discern their First Amendment implications, and a circuit split has emerged over content neutrality and the application of these laws to public streets and sidewalks. To answer the First Amendment questions these laws present, this Article divides them into two categories: those that prohibit all charitable solicitation, and those that prohibit only panhandling on behalf of oneself. It argues that the former are content neutral, while the latter are viewpoint discriminatory. Panhandling laws that discriminate on the basis of viewpoint fail wherever they are applied. For content-neutral solicitation laws, the Court's recent decision in McCullen v. Coakley changed how to think about their application on public streets and sidewalks, particularly when they create large buffer zones to prohibit solicitation near certain public places. This Article is the first to discuss what McCullen means for solicitation laws. It argues that the majority of solicitation laws now fail when applied in a traditional public forum, while they survive when applied in a limited public forum, nonpublic forum, or where there is a captive audience.

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INTRODUCTION

State legislatures and city councils have been cracking down on panhandling, prompting a recent wave of litigation over panhandlers' First Amendment rights. There has been plenty to fight over. Panhandling laws are common across the country and take a variety of forms, sometimes banning all public solicitation for alms, while at other times restricting panhandling to particular places or times. The Supreme Court has not directly addressed whether the First Amendment covers panhandling. Every federal court of appeals to reach the question, however, agrees that it does,[1] and an extensive academic literature developed during the 1990s generally supports them.[2] Instead, the validity of

[1] *See* Reynolds v. Middleton, 779 F.3d 222, 225 (4th Cir. 2015); Thayer v. City of Worcester, 755 F.3d 60, 71 (1st Cir. 2014), *vacated and remanded*, 135 S. Ct. 2887 (2015); Speet v. Schuette, 726 F.3d 867, 870 (6th Cir. 2013); Clatterbuck v. City of Charlottesville, 708 F.3d 549, 555 (4th Cir. 2013); Smith v. City of Fort Lauderdale, 177 F.3d 954, 956 (11th Cir. 1999); Loper v. N.Y.C. Police Dep't, 999 F.2d 699, 704 (2d Cir. 1993); *see also* ACLU of Nev. v. City of Las Vegas, 466 F.3d 784, 788, 792–93 (9th Cir. 2006) (reiterating that "solicitation is a form of expression entitled to the same constitutional protections as traditional speech" in a challenge against a law that prohibited "beg[ging], solicit[ing] or plead[ing] . . . for the purpose of obtaining money . . . for oneself or another person or organization" in certain public areas of the city (alterations in original)).

[2] *See, e.g.*, Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896 (1991); Nancy A. Millich, *Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?*, 27 U.C. DAVIS L. REV. 255, 284–86 (1994); Stephen R. Munzer, *Ellickson on "Chronic Misconduct" in Urban Spaces: Of Panhandlers, Bench Squatters, and Day Laborers*, 32 HARV. C.R.-C.L. L. REV. 1, 42–45 (1997). *But see, e.g.*, Fay Leoussis, *The New Constitutional Right to Beg—Is Begging Really Protected Speech?*, 14 ST. LOUIS U. PUB. L. REV. 529 (1995) (setting forth New York City's argument that "begging is not speech or expressive conduct protected by the First Amendment"); Peter Nichols, *The Panhandler's First Amendment Right: A Critique of* Loper v. N.Y.C. Police Department *and Related Academic Commentary*, 48 S.C. L. REV. 267, 275–89 (1997); Robert Teir, *Maintaining Safety and Civility in Public Spaces: A Constitutional Approach to Aggressive Begging*, 54 LA. L. REV. 285 (1993); Gregory S. Walston, *Examining the Constitutional Implications of Begging Prohibitions in California*, 20 WHITTIER L. REV. 547, 557–65 (1999).

these laws turns primarily on whether they are valid time, place, and manner regulations—and the government often prevails.[3]

The Court recently issued a decision in *McCullen v. Coakley* that changed how courts should think about these types of restrictions on public speech.[4] The Court unanimously struck down a Massachusetts law maintaining buffer zones around abortion clinics as invalid under the Free Speech Clause of the First Amendment.[5] That law made it a crime to stand on a public road or sidewalk within thirty-five feet of the entrance or driveway to any facility, except hospitals, where abortions are performed.[6] *McCullen* sharply cut back on the leeway given to states and municipalities to draw buffer zones prohibiting speech in certain public areas, and that decision carries profound implications for other types of speech that local and state governments often seek to regulate. Thanks to *McCullen*, certain solicitation ordinances now stand out as particularly vulnerable to attack on First Amendment grounds.

This Article is the first to explore *McCullen*'s implications for panhandling laws, and it draws two key lessons from combining *McCullen* and the Court's precedent on solicitation. First, panhandling is speech that receives full First Amendment coverage. Targeted panhandling laws are content-based laws that block speech on public streets, and if municipalities want to deter "aggressive panhandling" or fraud, they are limited to restricting intimidating or fraudulent behavior directly. Second, laws that prohibit all solicitation (including panhandling) in most public areas cannot survive after *McCullen*. Even though general solicitation laws are content neutral, they cannot be applied wholesale to traditional public fora through buffer zones that cover public streets and sidewalks. In contrast, other solicitation laws that apply in a limited public forum, nonpublic forum, or where there is a captive audience survive *McCullen*.

This Article begins in Part I by surveying the current landscape of solicitation and panhandling laws. Part II places these laws in the context of the Court's precedent on solicitation, and explores the circuit split that has developed around First Amendment protections for panhandling. Part III combines the lessons of *McCullen* and the Court's solicitation jurisprudence to conclude that the First Amendment covers panhandling, and that panhandling and solicitation laws that create buffer zones in public spaces are generally invalid. With the circuits divided and advocates calling for the Court to overturn these laws,[7] it is only a matter of time before the Court confronts *McCullen*'s implications for panhandling—a question with weighty implications for the nation's poor, and one for which First Amendment doctrine now provides a clear answer.

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[3] *See, e.g.*, *Thayer*, 755 F.3d at 71.

[4] 134 S. Ct. 2518 (2014).

[5] *Id.* at 2540–41.

[6] *See id.* at 2525.

[7] *See, e.g.*, *Thayer*, 755 F.3d 60, *petition for cert. filed*, 2014 WL 5211978 (U.S. Oct. 14, 2014) (No. 14-428), *vacated and remanded*, 135 S. Ct. 2887 (2015) (vacating for reconsideration in light of Reed v. Town of Gilbert, 135 S. Ct. 2218 (2015)).

I. SOLICITATION AND PANHANDLING LAWS

For the purposes of this Article, it is first important to distinguish what solicitation and panhandling laws are not. They are not laws against obstructing public sidewalks.[8] They are not concerned with regulating vendors who sell goods in public spaces, nor do they place restrictions on where the homeless may sleep. While these and similar laws carry profound implications for the poor and at times overlap with solicitation and panhandling restrictions,[9] they do not implicate the same First Amendment questions as do laws that prohibit requesting charitable donations. Because they raise different issues, they are beyond the scope of this Article.

This Article considers the First Amendment implications of solicitation and panhandling ordinances that prevent the poor from requesting donations for themselves. As I define them, solicitation laws generally restrict the act of asking someone for money, while panhandling laws limit those requests specifically when made on behalf of oneself. Solicitation laws ban donation requests by any individual or organization for any purpose. Panhandling is a subset of solicitation, and laws that target panhandling discriminate among types of solicitation to ban only one kind. Both restrict panhandling in practice, but only the latter target panhandling. There are also important differences in scope within these two categories. Some laws prohibit solicitation throughout entire cities, while others apply only in designated places or during specific times of day.

A central factor to keep in mind is where these laws apply. Many cover areas that have traditionally been open to the public for First Amendment activities. These are traditional public fora, and because they are historically important as places for the free exchange of ideas, courts are particularly skeptical of restrictions on public discourse there.[10] For example, public streets,[11] sidewalks,[12] and parks[13] are traditional public fora. Other laws restrict solicitation on government-owned property that is not as open to the public for First

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[8] *See, e.g.*, Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90–91 (1965) (upholding ban on obstructing the street or sidewalk); Roulette v. City of Seattle, 97 F.3d 300 (9th Cir. 1996) (upholding ban on sitting or lying on sidewalks during daytime hours).

[9] *See* NAT'L COAL. FOR THE HOMELESS & NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, A DREAM DENIED: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 9 (2006) [hereinafter A DREAM DENIED], http://www.nationalhomeless.org/publications/crimreport/report.pdf [http://perma.cc/2PTW-8HJD]; NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 7–8 (2014) [hereinafter NO SAFE PLACE], http://www.nlchp.org/documents/No_Safe_Place [http://perma.cc/MTZ5-ZFYB]; *see also* Farida Ali, *Limiting the Poor's Right to Public Space: Criminalizing Homelessness in California*, 21 GEO. J. ON POVERTY L. & POL'Y 197, 211–16 (2014) (for a discussion of criminal laws that target the homeless).

[10] *See, e.g.*, *McCullen*, 134 S. Ct. at 2529, 2535 (citing Ward v. Rock Against Racism, 491 U.S. 781 (1989)).

[11] *See Ward*, 491 U.S. at 796.

[12] *See* United States v. Grace, 461 U.S. 171, 177 (1983).

[13] *See* Thomas v. Chi. Park Dist., 534 U.S. 316, 322 (2002).

Amendment purposes. For example, a state fairground is a limited public forum,[14] while an airport is a nonpublic forum.[15] While these laws still receive First Amendment scrutiny, the government has greater freedom to restrict speech in a limited public or nonpublic forum than it has in a traditional public forum.[16] All of these laws create profound First Amendment questions, but for reasons explored in Part III, those that target panhandling and those that prohibit solicitation in traditional public fora are particularly problematic.

A. Solicitation Laws

Laws regulating solicitation are exceptionally common. They place equivalent restrictions on everyone who requests donations in public, whether those people are soliciting on behalf of organizations or themselves.[17] Rather than regulate who can solicit by placing restrictions on certain groups or causes, these laws regulate when, where, and how all people can solicit.[18] Solicitation laws typically use general terminology to refer to the prohibited category of activity ("solicitation") rather than words specific to certain subsets of that category ("panhandling" or "begging").[19] While it is not always clear whether a statute broadly prohibits solicitation or narrowly targets panhandling,[20] the hallmark of

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[14] *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 655 (1981).

[15] *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679 (1992).

[16] *See, e.g.*, *id.* at 678–79; Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357, 1359–60 (2001).

[17] *See, e.g.*, FORT LAUDERDALE, FLA., CODE OF ORDINANCES ch. 16, art. IV, § 16-82(b) (2012) ("It shall be unlawful to engage in the act or acts of panhandling, begging or solicitation when either the solicitation or the person being solicited is located in [specified locations].").

[18] *See, e.g.*, *id.*

[19] *Compare, e.g.*, AUSTIN, TEX., CODE OF ORDINANCES § 9-4-13 (2005) (prohibiting "solicitation" and defining "solicit" as "to request . . . an immediate donation . . . regardless of the solicitor's purpose or intended use of the money"), *with* SANTA BARBARA, CAL., MUN. CODE § 9.50.030(B) (2009) (prohibiting "Active Panhandling").

[20] Sometimes cities define "panhandling" to include all solicitation, even though panhandling is normally understood to prohibit only a certain type of solicitation, and courts interpreting these laws will face difficult interpretive questions about their intended scope. *See, e.g.*, KANSAS CITY, MO., CODE OF ORDINANCES art. I, § 50-8.5(b)(8) (2007) ("Panhandling means any verbal or non-verbal solicitation made in person upon any public street, sidewalk, alley, park or other public place, in which a person requests an immediate donation of any item of value, monetary or otherwise, from another person . . . ."); LONGVIEW, WASH., MUN. CODE § 9.23(4) (2008) (" 'Panhandling' is any solicitation made in person, requesting an immediate donation of money or other thing of value."); PITTSBURGH, PA., CODE OF ORDINANCES § 602.02(a) (2005) ("Panhandling shall be defined as: Any personal solicitation made in a public place for an immediate donation of money or any other item of value. This definition applies equally to all persons requesting donations, whether the donation is intended to be used for the panhandler's personal use or on behalf of a religious group or community service organization or for any other reason."). Some cities title their laws as "panhandling prohibitions," but craft definitions that encompass all solicitation. *See, e.g.*, MADISON, WIS., CODE OF ORDINANCES § 24.12(2) (2012) (prohibiting "procur[ing] a

a general solicitation law is that it does not discriminate among would-be solicitors or causes.[21] Variations in solicitation laws relate to the time, place, and manner of prohibited activity.[22]

Some cities prohibit solicitation broadly.[23] These laws appear uncommon, and while they do not go so far as to ban all solicitation at all times—perhaps because the Supreme Court has indicated clearly that such laws would be unconstitutional,[24] or because cities have an interest in making sure local firefighters can ask for donations[25]—some solicitation laws cover entire city areas. For example, Madison, Wisconsin has a blanket prohibition on solicitation anywhere in its central business district and within twenty-five feet of crosswalks throughout the city.[26] Springfield, Illinois likewise bans solicitation in its downtown historic district,[27] while Tampa prohibits downtown solicitation in an area defined to cover more than two square miles.[28] Other cities ban solicitation in economically desirable areas where the concentration of people makes solicita-

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handout," defined as "to request from another person an immediate donation of money, goods or other gratuity, and includes but is not limited to seeking donations").

[21] *Compare* AUSTIN, TEX., CODE OF ORDINANCES § 9-4-13 (prohibiting "solicitation" and defining "solicit" as "to request . . . an immediate donation . . . regardless of the solicitor's purpose or intended use of the money"), *with* ST. LOUIS, MO., CODE OF ORDINANCES § 15.44.010(A)(1)–(3) (2008) (defining "panhandling" as "any solicitation in person, by a person, other than a charitable organization, for an immediate grant of money" and defining "charitable organization" as "any nonprofit community organization, fraternal, benevolent, educational, philanthropic, or service organization, or governmental employee organization, which solicits or obtains contributions solicited from the public for charitable purposes").

[22] *See infra* notes 25–48.

[23] *See infra* notes 26–28.

[24] *See, e.g.*, Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 639 (1980).

[25] *See, e.g.*, *Panhandling Ban Hits Firefighters' Fill the Boot Fundraiser*, THEDENVERCHANNEL.COM (Feb. 28, 2007, 5:52 AM), http://www.thedenverchannel.com/news/panhandling-ban-hits-firefighters-fill-the-boot-fundraiser [http://perma.cc/QY3T-HTMU].

[26] MADISON, WIS., CODE § 24.12(2) (prohibiting "procur[ing] a handout," defined as "to request from another person an immediate donation of money, goods or other gratuity, and includes but is not limited to seeking donations").

[27] SPRINGFIELD, ILL., CODE OF ORDINANCES tit. 13, § 131.06(a)(3) (2007).

[28] TAMPA, FLA., CODE OF ORDINANCES ch. 14, art. II, div. 2, § 14-46(c)(2) (2013).

> "*Downtown/Ybor Area Prohibited Zone*" means that land area bounded on the north by West Palm Avenue (to the northern edge of pavement), bounded on the west by North Boulevard (to the western edge of pavement) until North Boulevard crosses the Hillsborough River, then by the Hillsborough River (to the water's edge), bounded on the south by Garrison Channel (to the water's edge), and bounded by the east by Ybor Channel (to the water's edge) as far north as E. Harbor Street (the northern edge of pavement) then west until the eastern edge of pavement of N. 14th Street, then north until the southern edge of pavement of Adamo Dr., then east until the eastern edge of 26th Street bounded on the east by 26th Street (to the eastern edge of pavement) (see graphic map attached as Exhibit "A.").

Id. Interested readers can view the graphic map in Exhibit A at http://www.tampagov.net/sites/default/files/special-events-coordination/files/ordinance_2013-95_solicitation.pdf, or create a similar graphic by manually inputting the listed parameters at http://www.mapdevelopers.com/area_finder.php.

tion particularly profitable, such as public parks,[29] boardwalks,[30] and beaches.[31] Some cities require permits for any type of solicitation, be it charitable, religious, educational, or otherwise.[32] Others require all solicitors to register with the city before engaging in solicitation.[33]

In contrast, other cities place more limited restrictions on solicitation. Austin, Texas has a law against "aggressive solicitation" that illustrates a common approach to time, place, and manner restrictions in traditional public fora.[34] First, Austin's time restriction prohibits solicitation in its downtown business district between 7:00 p.m. and 7:00 a.m.[35] Second, its place restrictions prohibit solicitation at marked crosswalks, on streets where certain schools are located, at outdoor dining establishments, and within twenty-five feet of an ATM or bank entrance.[36] Finally, its manner restrictions prohibit solicitation when done by touching, intimidating, following, blocking, or using obscene language or gestures directed at the person solicited.[37]

Other cities place similar restrictions on solicitation in limited public or nonpublic fora. For example, Los Angeles bans solicitation at its major airport,[38] while New York City prohibits solicitation on the subway.[39] Austin likewise prohibits solicitation at bus stops or on public transportation.[40] Other cities have "Green River Ordinances" that ban solicitation at private residences under certain circumstances, such as during nighttime hours[41] or in the presence of a "No Solicitation" sign.[42]

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[29] *See, e.g.*, FORT LAUDERDALE, FLA., CODE OF ORDINANCES ch. 16, art. IV, § 16-82(b)(5) (2012).

[30] *See, e.g.*, MADEIRA BEACH, FLA., CODE OF ORDINANCES § 58-97 (2007).

[31] *See, e.g.*, SARASOTA, FLA., CODE OF ORDINANCES § 23-7(a) (2013) ("It shall be unlawful to engage in an act of panhandling when either the panhandler or the person being solicited is located at . . . a public park, beach, fairground, or sporting facility, including entryways or exits thereto . . . ."); *see also* DEERFIELD BEACH, FLA., CODE OF ORDINANCES § 46-34(d)(13) (2012).

[32] *See, e.g.*, MEMPHIS, TENN., CODE OF ORDINANCES § 6-64-3 (1985). Memphis also prohibits certain types of panhandling specifically, in addition to solicitation generally. *See id.* §§ 6-56-1 to -9 (2010).

[33] *See, e.g.*, ROGERS, ARK., CODE OF ORDINANCES § 38-22 (1997).

[34] *See* AUSTIN, TEX., CODE OF ORDINANCES § 9-4-13 (2005).

[35] *Id.* § 9-4-13(C)(7).

[36] *Id.* § 9-4-13(C)(3)–(6).

[37] *Id.* § 9-4-13(B)(1), (C)(1).

[38] L.A., CAL., MUN. CODE § 171.02(c) (2000); *see* Int'l Soc'y for Krishna Consciousness of Cal., Inc. v. City of L.A., 764 F.3d 1044, 1046 (9th Cir. 2014) (upholding ban on solicitation at LAX).

[39] N.Y. COMP. CODES R. & REGS. tit. 21, § 1050.6(b)–(c) (2005); *see* Young v. N.Y.C. Transit Auth., 903 F.2d 146, 148–49 (2d Cir. 1990) (upholding New York City's ban on solicitation on subway cars).

[40] AUSTIN, TEX., CODE OF ORDINANCES § 9-4-13(C)(2) (2005).

[41] *See, e.g.*, GREEN RIVER, WYO., CODE OF ORDINANCES § 20-5 (2013).

[42] *See id.* § 20-1.

A common variation on place restrictions is to create buffer zones around certain areas that cities believe entail a risk of coercion or intimidation. Cleveland's law against "aggressive solicitation" is illustrative. Cleveland bans all solicitation within twenty feet of an ATM, bus stop, people waiting in line, sidewalk cafe, or valet, within fifteen feet of public toilets, and within ten feet of a building or parking lot entrance.[43] Pittsburgh likewise bans solicitation "at locations or times deemed particularly threatening and dangerous," including within twenty-five feet of an outdoor eating establishment, admission line, entrance to a religious building, or ATM, or within ten feet of a food vendor or bus stop.[44] Springfield, Missouri goes even further. Its buffer zones effectively span its downtown area, banning solicitation within twenty feet of any office building, store, bank, home, or outdoor dining area, and within five feet of any curb or sidewalk.[45]

In addition to restricting where solicitation takes place, cities commonly impose time restrictions, particularly bans on nighttime solicitation.[46] Time restrictions also can overlap with place or manner restrictions, with nighttime solicitation prohibited only in certain places or when combined with certain techniques. Albuquerque, for example, prohibits nighttime solicitation only in certain downtown areas.[47] In contrast, Chapel Hill prohibits nighttime solicitation only if done through verbal or "direct written" appeal,[48] but allows passive nighttime solicitation, such as by holding a sign or leaving a guitar case open while performing.[49]

B. Panhandling Laws

Rather than ban all solicitation, some cities prohibit only "panhandling" or "begging" as a type of solicitation. Cities have targeted panhandlers for centuries,[50] and anti-begging laws in the United States date to the eighteenth century.[51] Today, panhandling ordinances are on the books in an estimated 76 percent of cities across the country.[52] They are also becoming more common.

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[43] CLEVELAND, OHIO, CODE OF ORDINANCES § 605.031(b) (2006).

[44] PITTSBURGH, PA., CODE OF ORDINANCES §§ 602.01–.04 (2014).

[45] SPRINGFIELD, MO., CODE OF ORDINANCES art. I, § 78-2(c)–(d) (2014).

[46] *See, e.g.*, AUSTIN, TEX., CODE OF ORDINANCES § 9-4-13(C)(7) (2005).

[47] ALBUQUERQUE, N.M., CODE OF ORDINANCES § 12-2-28(D)(1) (2004).

[48] CHAPEL HILL, N.C., CODE OF ORDINANCES art. XVII, § 11-170(f) (2003).

[49] *See* Memorandum from W. Calvin Horton, Town Manager, & Ralph Karpinos, Town Attorney, to Mayor and Town Council of Chapel Hill, NC (Mar. 3, 2003) http://townhall.townofchapelhill.org/archives/agendas/ca030303/7-solicitation%20item.htm.

[50] *See* Teir, *supra* note 2, at 294–300.

[51] *See* Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1202–19 (1996) ("Plato urged the banishment of beggars; John Locke favored whipping panhandlers under age fourteen and sentencing older ones to hard labor; Karl Marx was famously scornful of the lumpenproletariat." (footnotes omitted)); Leoussis, *supra* note 2, at 543.

[52] NO SAFE PLACE, *supra* note 9, at 17, 20 (relying on a 2014 study of 187 U.S. cities).

From 2002 to 2005, prohibitions on panhandling in certain public places increased 12 percent, while prohibitions on aggressive panhandling rose 18 percent.[53] The prevalence of the former increased another 20 percent from 2011 to 2014.[54] Whether large or small, affluent or struggling, or on one coast or the other, states and municipalities often pass laws prohibiting panhandling to some degree.[55]

Not all cities define panhandling or begging, but their ordinary meaning is the solicitation of alms on behalf of oneself.[56] What exactly, however, is being prohibited when cities ban "panhandling" or "begging" as opposed to solicitation generally? Are people forbidden only from verbally asking for money, or also from holding a sign requesting donations? What about playing music with a nearby jar for change? The answer depends on the city. Some cities prohibit all solicitation of alms, while others ban only certain types of panhandling.

There is a common distinction between "active" panhandling, such as verbally asking for money or otherwise directly engaging with the listener, and "passive" panhandling, such as holding a sign requesting donations.[57] Santa Barbara, for example, prohibits only verbal requests for donations in certain places, but not passive displays of signs requesting money.[58] In contrast, Myrtle Beach defines panhandling far more broadly as "aggressive or nonaggressive solicitation" that can be "verbal or nonverbal," such as by singing, street performing, or giving an item of little or no monetary value.[59]

As with general solicitation laws, there are important differences in where panhandling laws apply within cities. The broadest laws prohibit panhandling across entire cities. For example, New Orleans makes "begging" a crime anywhere in the city,[60] and Duluth, Minnesota bans public solicitation for money except when done by a charitable organization.[61] Savannah, Georgia similarly bans "begging" or solicitation on one's own behalf at any business, house, or on any city street.[62] A 2014 national study found that 24 percent of cities ban all panhandling, a 25 percent increase from 2011 to 2014.[63] On the other end of the

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[53] A DREAM DENIED, *supra* note 9, at 9 (relying on a 2006 study of 224 U.S. cities).

[54] NO SAFE PLACE, *supra* note 9, at 17, 20 (relying on a 2014 study of 187 U.S. cities).

[55] *See* A DREAM DENIED, *supra* note 9, at 9.

[56] *See* Speet v. Schuette, 726 F.3d 867, 873–74 (6th Cir. 2013) (defining "begging" according to the "standard dictionary definition" of "soliciting alms," despite lack of definition in Michigan statute).

[57] *See, e.g.*, KANSAS CITY, MO., CODE OF ORDINANCES art. I, § 50-8.5(c)(4) (2007) (prohibiting only active panhandling within certain downtown areas and prohibiting active and passive panhandling within 20 feet of any outdoor dining establishment or the entrance of any office building, business, bank, or home).

[58] SANTA BARBARA, CAL., CODE §§ 9.50.020(A), 9.50.030(B) (2009) (prohibiting active panhandling, but not passive panhandling, in certain public areas).

[59] MYRTLE BEACH, S.C., CODE OF ORDINANCES art. XI, div. 1, § 14-301 (2013).

[60] NEW ORLEANS, LA., CODE OF ORDINANCES art. VI, div. 4, §§ 54-411, 54-412 (2011).

[61] DULUTH, MINN., LEGIS. CODE § 34-31 (1979).

[62] SAVANNAH, GA., CODE OF ORDINANCES § 9-1001 (1977).

[63] NO SAFE PLACE, *supra* note 9, at 18, 20 (relying on a 2014 study of 187 U.S. cities).

spectrum, some cities outlaw panhandling in a harassing or aggressive manner, and 45 percent of cities surveyed in 2005 had such laws.[64] Others fall in the middle, outlawing panhandling in particular places or at certain times. In 2005, 43 percent of surveyed cities had these types of restrictions.[65]

The distinction between these latter two categories—forbidding "aggressive" panhandling on the one hand, and restricting panhandling in certain places on the other—has been collapsing. There is an increasing trend among cities to frame panhandling laws as bans on aggressive panhandling, defined to include the manner and context of solicitation.[66] Many restrictions do target aggressive behavior (the manner of solicitation).[67] Others target when or where panhandling occurs (its context), even absent conduct that is, in fact, aggressive, under the rationale that panhandling in certain locations or at certain times is inherently threatening.[68] Many panhandling laws, like general solicitation ordinances, include both manner and context restrictions.

The panhandling ordinance of St. Louis, Missouri is illustrative.[69] Its law, entitled "Aggressive Begging," includes five manner prohibitions and eleven context prohibitions.[70] The manner prohibitions forbid (1) threatening or intimidating the person solicited, (2) persisting in panhandling after a denial, (3) blocking someone's path, (4) touching that person, or (5) washing car windows or performing a similar service without permission and then asking for money.[71] In contrast, St. Louis's context prohibitions forbid panhandling (1) in a public transportation vehicle, (2) within fifty feet of an ATM, bank entrance, or school, (3) within thirty feet of a public building entrance, including businesses, (4) at sidewalk cafes, (5) at bus stops, train stops, or taxi stands, (6) within twenty feet of crosswalks, (7) in government buildings, (8) at public parks, golf courses, or playgrounds, (9) on private property without permission, (10) at nighttime, or (11) in a group of two or more people.[72]

Context restrictions thus focus on the time and location of panhandling. Some laws like St. Louis's define "aggressive panhandling" broadly to create large panhandling buffer zones around certain public places.[73] As with solicitation laws, these buffer zones sometimes blanket downtown districts or economically desirable areas, creating wide swaths of cities where panhandling is prohibited. For example, New Orleans bans "panhandling" near a variety of

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[64] A DREAM DENIED, *supra* note 9, at 9 (relying on a 2006 study of 224 U.S. cities).
[65] *Id*.
[66] *See id*. at 14.
[67] *See, e.g.*, ST. LOUIS, MO., CODE OF ORDINANCES §§ 15.44.010–.020 (2008).
[68] *See, e.g.*, *id*. § 15.44.020.
[69] *See id*. §§ 15.44.010–.020.
[70] *See id*.
[71] *Id*. § 15.44.010.
[72] *Id*. § 15.44.020.
[73] *See id*. §§ 15.44.010–.020.

downtown locations in addition to its citywide ban on "begging,"[74] explained by a New Orleans lawmaker as adding "teeth" to the law.[75] Other cities ban panhandling or begging in public parks,[76] streets,[77] and beaches.[78]

Solicitation and panhandling laws thus have much in common. Depending on the city, they can apply in a traditional public forum such as city streets and sidewalks, or in a limited public or nonpublic forum such as airports and subways. Both can be broad or narrow, and both can include manner or context prohibitions against aggressive behavior. Both can create buffer zones that prohibit speech around certain places, and even when the targeted location is a bus stop or private business, the buffer zones can extend well into public streets and sidewalks. Both prohibit panhandling. The difference to keep in mind, however, is that solicitation laws reach all immediate requests for money. Only panhandling laws target people who request charitable donations solely on behalf of themselves.

II. THE EVOLUTION OF PANHANDLING DOCTRINE

Cities are not passing these laws in a doctrinal vacuum. Over the past several decades, courts have confronted the First Amendment implications of a variety of solicitation and panhandling laws. The Supreme Court has yet to give the final word on whether panhandling should receive First Amendment coverage,[79] but it has developed a line of cases to help measure the speech interests at stake. This Part first traces the Court's precedent on solicitation. It then explores the circuit split that has developed around two central questions: are solicitation laws content-neutral restrictions on covered speech? And if they are, how far can cities go in their prohibitions?

A. Supreme Court Guidance

A central lesson to take from the Court's solicitation jurisprudence is that the First Amendment covers requests for donations made by an array of actors, including charities,[80] for-profit organizations and individuals acting on behalf of non-profits,[81] and political groups.[82] Scholars generally agree that these cases

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[74] NEW ORLEANS, LA., CODE OF ORDINANCES art. VI, div. 4, §§ 54-411, 54-412 (2011).

[75] Emily Lane, *New Orleans Lawmaker's Bill Banning Solicitation Cracks Down on Panhandlers, Prostitutes*, TIMES-PICAYUNE (Apr. 30, 2014, 7:25 PM), http://www.nola.com/politics/index.ssf/2014/04/prostitution_panhandling_new_o.html [http://perma.cc/A84P-M48P].

[76] ST. LOUIS, MO., CODE OF ORDINANCES § 15.44.020(B)(8) (2008).

[77] *See, e.g.*, VIRGINIA BEACH, VA., CODE OF ORDINANCES § 23-15 (1979) ("It shall be unlawful . . . for any person to beg on the streets or beaches of the city.").

[78] *See, e.g.*, *id.*

[79] *See* Speet v. Schuette, 726 F.3d 867, 874 (6th Cir. 2013) (acknowledging lack of controlling Supreme Court precedent).

[80] *See* Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 644 (1980).

[81] *See* Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781 (1988); Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947 (1984).

logically extend to First Amendment coverage for individual panhandling to solicit donations on behalf of oneself.[83] Equally important, however, is the Court's message that solicitation, while covered under the First Amendment, still is subject to reasonable governmental regulation. But what is a "reasonable" time, place, and manner restriction on solicitation in general, or panhandling in particular? This Part lays out the Court's solicitation precedent, while Part III explores what these cases mean for today's panhandling laws.

1. First Amendment Coverage for Solicitation

The Court's solicitation jurisprudence firmly establishes the starting point for any First Amendment challenge to panhandling laws: charitable solicitation is covered speech. The leading case is *Village of Schaumburg v. Citizens for a Better Environment*.[84] In *Schaumburg*, the Court considered a municipal ordinance that imposed a fine on charitable organizations engaged in solicitation without a permit.[85] To obtain a permit, organizations had to submit proof that 75 percent of proceeds would be used directly for their charitable purposes.[86] The organization in *Schaumburg*, however, relied on canvassers to promote its environmental protection goals, and it spent more than two-thirds of collected funds on salaries and employee benefits.[87] The Village sought to defend its ordinance as "deal[ing] only with solicitation" and thereby outside the scope of the First Amendment.[88]

The Court rejected the idea that asking for money is conduct unprotected by the First Amendment. Recognizing that its cases have "implied that soliciting funds involves interests protected by the First Amendment's guarantee of freedom of speech,"[89] the Court concluded that "charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment."[90] The Court emphatically rejected the idea that charitable solicitation is "purely commercial speech."[91] Rather, the Court reasoned that "[c]anvassers . . . are necessarily more than solicitors for money," because their financial requests are "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular

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[82] *See* United States v. Kokinda, 497 U.S. 720 (1990).
[83] *See supra* note 2.
[84] 444 U.S. 620.
[85] *Id.* at 624.
[86] *Id.*
[87] *Id.* at 625–26 & n.6.
[88] *Id.* at 628.
[89] *Id.* at 629.
[90] *Id.* at 632.
[91] *Id.*

views on economic, political, or social issues."[92] Any regulation, the Court cautioned, must take account of that reality, as well as the fact that "without solicitation the flow of such information and advocacy would likely cease."[93] The real issue, the Court continued, was "not whether charitable solicitations . . . are within the protections of the First Amendment"—the Court considered it "clear that they are"—but instead whether the Village abused its power to enact reasonable regulations.[94] The Court held that it did.[95]

The Court reaffirmed this approach to charitable solicitation in *Secretary of State v. Joseph H. Munson Co.*[96] The ordinance in question was similar to the one considered in *Schaumburg*, with the exception of allowing organizations to spend more than 25 percent of donations on administrative and similar costs if they could demonstrate financial necessity.[97] The Court embraced *Schaumburg*'s characterization of charitable solicitations as "so intertwined with speech that they are entitled to the protections of the First Amendment."[98] The question for these types of restrictions was not whether the law addressed covered speech, but whether the statute that "impose[d] a direct restriction on protected First Amendment activity" risked chilling that speech through imprecise means.[99] As in *Schaumburg*, the Court held that it did.[100]

Likewise in *Riley v. National Federation of the Blind of North Carolina*, the Court extended these protections to solicitation by individual professional fundraisers on behalf of charitable organizations.[101] North Carolina placed disclosure and licensing obligations on professional fundraisers and prohibited the collection of excessive fees, arguing the regulations were necessary to maximize the solicited funds actually reaching charitable organizations.[102] The Court characterized that argument as "a variation of the argument rejected in *Shaumburg* and *Munson* that this provision is simply an economic regulation with no First Amendment implication."[103] As in *Munson*, the Court reaffirmed that charitable solicitation is not "merely commercial speech" "akin to a business proposition."[104] The Court refused to accept that "a professional's speech is necessarily commercial whenever it relates to that person's financial motivation for speaking," reasoning that even if speech abstractly has a "commercial" nature, it loses that commercial character "when it is inextricably intertwined with

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[92] *Id.*
[93] *Id.*
[94] *Id.* at 633.
[95] *Id.* at 633–34.
[96] Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 950 (1984).
[97] *Id.* at 959, 962.
[98] *Id.* at 959.
[99] *Id.* at 967–68.
[100] *Id.*
[101] Riley v. Nat'l Fed'n of the Blind of North Carolina, 487 U.S. 781, 784 (1988).
[102] *Id.* at 784, 786, 789.
[103] *Id.* at 790.
[104] *Id.* at 787.

otherwise fully protected speech."[105] The Court was unwilling "to separate the component parts of charitable solicitations from the fully protected whole" to "parcel out the speech, applying one test to one phrase and another test to another phrase," an endeavor it called "artificial and impractical."[106] Instead, the Court held that the "regulation burdens speech, and must be considered accordingly."[107]

The Court's decision in *Riley* is particularly striking for its treatment of individual, for-profit professional fundraisers. While the *Munson* plaintiff was a for-profit corporation acting on behalf of a charitable organization,[108] the several *Riley* plaintiffs included three professional solicitors, named as individuals in the suit.[109] The Court considered it irrelevant whether the restriction was viewed as burdening a charity's ability to speak through fundraisers, or burdening the professional fundraisers' own ability to speak—either way, the Court considered the restriction "undoubtedly one on speech" that "cannot be countenanced here."[110] The Court specifically recognized "the First Amendment interest of professional fundraisers in speaking," reiterating the "well settled" principle "that a speaker's rights are not lost merely because compensation is received."[111] Moreover, the Court subjected the licensing portion of North Carolina's ordinance to First Amendment scrutiny because of the burden on the individual, for-profit fundraisers.[112] North Carolina claimed "a heightened interest in regulating those who solicit money," but the Court struck down the State's licensing scheme on First Amendment grounds.[113]

The Court has recognized that the First Amendment also covers solicitation on behalf of non-charitable organizations. In *United States v. Kokinda*, the Court confronted political advocacy and solicitation on federal postal property by volunteers for the National Democratic Policy Committee.[114] A federal regulation prohibited solicitation on postal premises, and the respondents were convicted for their solicitation of contributions on the sidewalk near the post office entrance.[115] While the Court ultimately upheld the restriction as a reasonable limitation on speech,[116] the plurality began by asserting that "[s]olicitation is a

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[105] *Id.* at 795–96.
[106] *Id.* at 796.
[107] *Id.* at 790.
[108] Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 950 (1984).
[109] *See* Nat'l Fed'n of the Blind of N.C., Inc. v. Riley, No. 86-3998, 1987 WL 37243, at *1 (4th Cir. Apr. 23, 1987); Nat'l Fed'n of the Blind of N.C., Inc. v. Riley, 635 F. Supp. 256, 257 (E.D.N.C. 1986).
[110] *Riley*, 487 U.S. at 794.
[111] *Id.* at 801.
[112] *Id.*
[113] *Id.* at 802.
[114] United States v. Kokinda, 497 U.S. 720, 723 (1990).
[115] *Id.* at 723–24.
[116] *Id.* at 731.

recognized form of speech protected by the First Amendment,"[117] and Justice Kennedy concurred that the regulation survived as a "content-neutral time, place, or manner restriction on protected speech."[118] In *Kokinda*, as in *Schaumburg*, *Munson*, and *Riley*, the Court thus treated restrictions on solicitation as raising First Amendment questions.

2. First Amendment Protection in Public and Nonpublic Fora

Since the Court has granted solicitation First Amendment coverage, the question becomes, what is a reasonable regulation of that speech? In *Schaumburg*, the Court made clear that "[s]oliciting financial support is undoubtedly subject to reasonable regulation"—provided that restrictions take account of the intertwined nature of financial requests and protected speech, and the reality that blocking solicitation would likely stem the flow of related information and advocacy.[119] While the Court has at times upheld solicitation laws as reasonable time, place, and manner restrictions, particularly in a limited public or nonpublic forum, it often strikes them down as overbroad when they restrict speech on public streets.

Consider first a series of cases striking down solicitation laws intended to prevent fraud when they restricted speech in public areas that had traditionally been places of public discourse. In *Schaumburg*, the Village argued that permitting solicitation only by organizations that used at least 75 percent of donations for direct charitable purposes was necessary to prevent fraud.[120] The Court recognized the Village's "substantial" interest at hand, but reasoned that the ordinance also restricted the speech of research, advocacy, and public education organizations that use paid staff to achieve their goals.[121] Those organizations often spend more than 25 percent of donations on salaries but are not truly engaged in "fraudulent" activities.[122] The Court held that the Village may not "lump such organizations with those that in fact are using the charitable label as a cloak for profitmaking and refuse to employ more precise measures to separate one kind from the other."[123] Instead, the Court limited the Village to drawing narrower regulations, such as direct prohibitions on fraudulent misrepresentations, that would not "unnecessarily interfer[e] with First Amendment freedoms."[124] "If it is said that these means are less efficient and convenient" than broadly banning solicitation, the Court concluded, "the answer is that con-

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[117] *Id*. at 725.

[118] *See id*. at 740 (Brennan, J., dissenting) (characterizing Justice Kennedy's concurring opinion).

[119] Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980).

[120] *Id*. at 636.

[121] *Id*.

[122] *Id*. at 636–37 & n.10.

[123] *Id*. at 637.

[124] *Id*.

siderations of this sort do not empower a municipality to abridge freedom of speech and press."[125]

The Court reaffirmed this approach in its later charitable solicitation cases. In *Munson*, the Court struck down on its face a similarly overbroad ban, also justified by the State on grounds of combatting fraud, when "the means chosen to accomplish the State's objectives [we]re too imprecise."[126] Again in *Riley*, the Court rejected the State's regulation as "in sharp conflict with the First Amendment's command that government regulation of speech must be measured in minimums, not maximums."[127] Even the risk of a mistaken application of the law, the Court reasoned, "necessarily chill[s] speech in direct contravention of the First Amendment's dictates."[128] Once again, the Court concluded that even if enforcing antifraud laws is not "the most efficient means of preventing fraud, we reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency."[129]

In contrast, the Court has upheld bans on solicitation in other contexts. While no rationale commanded a majority of the Court in *Kokinda*, the Court upheld a ban on solicitation on a sidewalk outside a postal office.[130] In his concurrence, Justice Kennedy viewed the law as a reasonable time, place, and manner restriction of protected expression.[131] While the plurality reasoned that the sidewalk was not a traditional public forum,[132] Justice Kennedy declined to characterize the sidewalk, instead deferring to the Postal Service's conclusion that restricting solicitation was warranted for facilitating postal transactions, the purpose to which the government had dedicated the property.[133] He concluded that the regulation survived because it was "narrow in its purpose, design, and effect," did not "discriminate on the basis of content or viewpoint," was "narrowly drawn to serve an important governmental interest," and permitted alternative expressive conduct.[134]

In two similar cases, the Court likewise upheld solicitation laws in a limited public or nonpublic forum. Both involved solicitation by a religious nonprofit organization, the International Society for Krishna Consciousness (ISKCON), on government-owned property. In one case, the Court upheld a regulation that allowed solicitation only in designated areas of state fairgrounds as a valid time, place, and manner restriction, considering the rule to be content neutral because it applied even-handedly to "all who wish . . . to solicit

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[125] *Id*. at 639 (quoting Schneider v. State, 308 U.S. 147, 164 (1939)).
[126] Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 949, 966, 968 (1984).
[127] Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 790 (1988).
[128] *Id*. at 794.
[129] *Id*. at 795.
[130] *See* United States v. Kokinda, 497 U.S. 720 (1990).
[131] *Id*. at 738 (Kennedy, J., concurring).
[132] *Id*. at 727 (plurality opinion).
[133] *Id*. at 738–39 (Kennedy, J., concurring).
[134] *Id*. at 739.

funds."[135] The Court sharply contrasted fairgrounds to public streets, reasoning that while the latter have historically "been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," fairgrounds are a limited public forum.[136]

A decade later, the Court again upheld an ordinance against a challenge by ISKCON, this time regarding a ban on all solicitation inside an airport terminal.[137] As before, the Court distinguished between laws that restrict "speech on government property that has traditionally been available for public expression," which are "subject to the highest scrutiny," and those that regulate speech in a limited public or nonpublic forum.[138] Because the Court considered an airport terminal to be a nonpublic forum, it asked only whether the regulation was reasonable, and concluded it was.[139]

B. The Circuit Split on First Amendment Protections for Panhandling

Federal courts of appeals have been grappling with how to apply the Court's guidance on solicitation to panhandling, particularly for restrictions in a traditional public forum. As outlined in Part I, solicitation and panhandling laws take a variety of forms. Lower courts have struggled with how to apply the Court's precedent to laws that vary in scope. Every court of appeals to reach the question has held that panhandling is speech or expressive conduct covered by the First Amendment,[140] and not one has treated panhandling as outside the First Amendment's reach.[141] While the Second Circuit once suggested panhandling is not covered speech,[142] it has since recognized that "begging constitutes communicative activity" and struck down a citywide panhan-

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[135] Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 648–49 (1981).

[136] *Id*. at 651, 655 (quoting Hague v. CIO, 307 U.S. 496, 515 (1939)).

[137] *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 675–76 (1992).

[138] *Id*. at 678–79.

[139] *Id*. at 683, 685.

[140] *See* Reynolds v. Middleton, 779 F.3d 222, 225 (4th Cir. 2015); Thayer v. City of Worcester, 755 F.3d 60, 71 (1st Cir. 2014), *vacated and remanded*, 135 S. Ct. 2887 (2015); Speet v. Schuette, 726 F.3d 867, 870 (6th Cir. 2013); Clatterbuck v. City of Charlottesville, 708 F.3d 549, 555 (4th Cir. 2013); Smith v. City of Fort Lauderdale, 177 F.3d 954, 956 (11th Cir. 1999); Loper v. N.Y.C. Police Dep't, 999 F.2d 699, 704 (2d Cir. 1993); *see also* ACLU of Nev. v. City of Las Vegas, 466 F.3d 784, 788, 792–93 (9th Cir. 2006) (reiterating that "solicitation is a form of expression entitled to the same constitutional protections as traditional speech" in a challenge against a law that prohibited "beg[ging], solicit[ing] or plead[ing] . . . for the purpose of obtaining money . . . for oneself or another person or organization" in certain public areas of the city (alterations in original)).

[141] *See* Norton v. City of Springfield, 768 F.3d 713, 714 (7th Cir. 2014) (noting that the parties agreed that "panhandling is a form of speech, to which the First Amendment applies"), *on reh'g*, 806 F.3d 411 (7th Cir. 2015); Gresham v. Peterson, 225 F.3d 899, 904 (7th Cir. 2000) ("[A]ssuming for the purposes of this appeal that some panhandler speech would be protected by the First Amendment . . . .").

[142] Young v. N.Y.C. Transit Auth., 903 F.2d 146, 154 (2d Cir. 1990).

dling ban in New York City.[143] The real disagreement has been over what protections to afford that speech. A circuit split has begun to emerge around two central questions: (1) are solicitation laws content neutral? And if they are, (2) which laws are valid time, place, and manner regulations, and which are not?

1. Are Solicitation Laws Content Based or Content Neutral?

First, a quick overview of content discrimination: A law is content neutral if it is "justified without reference to the content of the regulated speech,"[144] while a law is content based if it is "adopted . . . because of disagreement with the message" that the speech conveys.[145] If a law's purpose is to suppress or approve certain content, or if it facially discriminates based on content, the law is content based.[146] The categorization matters because content neutrality determines how high the hurdle is for the government to prevail. To ban speech in a traditional public forum, a content-neutral law need only be narrowly tailored to meet a significant governmental interest and allow for alternative channels of communication.[147] In contrast, a content-based law will be subject to strict scrutiny, and it will survive only if the law is the least restrictive means to achieve a compelling governmental interest.[148]

The first real division among the circuits is whether solicitation laws are content based or content neutral. A central sticking point has been over the difference between solicitation and panhandling laws identified in Part I: solicitation laws ban all types of solicitation, while panhandling laws target only one type. Does that difference mean that solicitation laws are content neutral? The First[149] and D.C. Circuit[150] say yes.[151] The First Circuit, for example, reasoned

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[143] *Loper*, 999 F.2d at 704, 708.

[144] McCullen v. Coakley, 134 S. Ct. 2518, 2531 (2014) (quoting Renton v. Playtime Theaters, Inc., 475 U.S. 41, 48 (1986)).

[145] Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). The Court's recent decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), has generated significant controversy because it may have effected a radical departure from this test. *See* Adam Liptak, *Court's Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), http://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html?_r=0 [http://perma.cc/AK95-4VQH]. In *Reed*, the Court held that a law is content based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 135 S. Ct. at 2227. If taken literally, this would make significantly more laws content based than would be under *Ward*, which focused on the government's reason for adopting the regulation. *See Ward*, 491 U.S. at 791. It remains to be seen whether *Reed* will be interpreted to dramatically shift First Amendment law on content discrimination. This Article argues, however, that solicitation laws in traditional public fora fail even if they are content neutral. Accordingly, no matter how much import *Reed* is interpreted to have, it only undermines these laws further.

[146] *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429–30 (1993).

[147] *McCullen*, 134 S. Ct. at 2535 (citing *Ward*, 491 U.S. at 799).

[148] *See id.* at 2530 (citing United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000)).

[149] *See* Thayer v. City of Worcester, 755 F.3d 60, 70 (1st Cir. 2014), *vacated and remanded*, 135 S. Ct. 2887 (2015).

that the solicitation ordinance of Worcester, Massachusetts, was content neutral in part because "Girl Scout cookie sellers and Salvation Army bell-ringers are as much subject to the Aggressive Panhandling Ordinance as the homeless panhandler."[152] The D.C. Circuit likewise has held that bans on all immediate requests for donations are content neutral.[153]

In contrast, the Ninth[154] and Seventh Circuits[155] say no. The Ninth Circuit found a law to be content based when it prohibited begging, soliciting, or pleading, because it prohibited the distribution of handbills requesting money but not the distribution of handbills saying other things.[156] Similarly, while the Seventh Circuit initially considered a solicitation law to be content neutral, it reversed course in light of the Court's recent decision in *Reed v. Town of Gilbert*.[157] Likewise, the Fourth Circuit suggested that a similar ordinance was content based, but refrained from deciding the issue because of an underdeveloped record.[158] The court reasoned that prohibiting immediate requests for donations—even if extended to donations for any purpose—discriminates among types of solicitation by permitting requests for future donations or signatures.[159]

There is no disagreement over more targeted panhandling laws. The only two circuits to consider panhandling-specific laws concluded they were content based.[160] The Sixth Circuit overturned Michigan's panhandling statute in part

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[150] *See* ISKON of Potomac, Inc. v. Kennedy, 61 F.3d 949, 955 (D.C. Cir. 1995).

[151] *See also* Reynolds v. Middleton, 779 F.3d 222, 225–26, 231 & n.1 (4th Cir. 2015) (assuming content neutrality and reasoning that a law was not narrowly tailored after *McCullen* when it banned soliciting contributions from drivers by prohibiting all solicitation by people standing on streets and medians); Gresham v. Peterson, 225 F.3d 899, 905–06 (7th Cir. 2000) (recognizing colorable arguments on either side but not deciding because the parties agreed the regulations were content neutral); Smith v. City of Fort Lauderdale, 177 F.3d 954, 955–56 & n.1 (11th Cir. 1999) (analyzing the law as content neutral without reaching the question).

[152] *Thayer*, 755 F.3d at 70.

[153] *Kennedy*, 61 F.3d at 954–55; *see also Gresham*, 225 F.3d at 905–06 (recognizing colorable arguments on either side but not deciding because the parties agreed the regulations were content neutral); *Smith*, 177 F.3d at 955–56 & n.1 (analyzing the law as content neutral without reaching the question).

[154] *See* ACLU of Nev. v. City of Las Vegas, 466 F.3d 784, 794 (9th Cir. 2006).

[155] *See* Norton v. City of Springfield, 806 F.3d 411, 411–13 (7th Cir. 2015).

[156] *ACLU*, 466 F.3d at 794.

[157] *Norton*, 806 F.3d at 411–13 (holding that *Reed* "requires" a finding of content discrimination because *Reed* stated that "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed" (quoting Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015))); *see also* discussion *supra* n.145.

[158] Clatterbuck v. City of Charlottesville, 708 F.3d 549, 556 (4th Cir. 2013).

[159] *Id.*

[160] The Eleventh Circuit upheld a challenge to a law that prohibited soliciting, begging, and panhandling, terms that the court stated were "interchangeable." This suggests that the law in question may have targeted panhandling specifically, as opposed to other forms of solicitation. The plaintiffs did not argue, however, that the law was content based. Accordingly, the court analyzed the law as content neutral without reaching the issue. *See* Smith v. City of Fort Lauderdale, 177 F.3d 954, 955–56 & n.1 (11th Cir. 1999).

because it prohibited some types of solicitation while allowing others, a distinction it characterized as "based on content."[161] The panel did not engage in a lengthy analysis of content neutrality, however, and focused instead on the fact that the statute, which prohibited begging anywhere in public, "simply bans an entire category of activity that the First Amendment protects."[162] The Second Circuit similarly struck down a ban on "begging" throughout New York City, reasoning that it was "not content neutral because it prohibits all speech related to begging."[163]

2. Which Laws Are Valid Time, Place, and Manner Regulations?

Solicitation or panhandling laws that courts of appeals consider content discriminatory have been struck down every time.[164] If courts find or assume them to be content neutral, however, the disagreement has been whether the government can validly restrict panhandling in a traditional public forum. The courts of appeals are split on this question. No court has invalidated such laws, however, when applied in a limited public or nonpublic forum.[165]

On one side of the divide, the Fourth and D.C. Circuits have struck down content-neutral solicitation laws that restricted speech in traditional public fora. The Fourth Circuit, for example, invalidated an ordinance that prohibited solicitation on public streets and medians. While the law furthered a significant governmental interest in traffic safety, the court reasoned that the law was invalid for the same reason as the buffer zones in *McCullen*: the law was overbroad because it prohibited all roadside solicitation, whether or not the specific activity was, in fact, dangerous.[166] The D.C. Circuit likewise held that a solicitation law could not be applied to prevent solicitation within a restricted permit area of the National Mall.[167]

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[161] Speet v. Schuette, 726 F.3d 867, 870 (6th Cir. 2013).

[162] *Id.* at 879.

[163] Loper v. N.Y.C. Police Dep't, 999 F.2d 699, 705 (2d Cir. 1993).

[164] *See* Norton v. City of Springfield, 806 F.3d 411, 412–13 (7th Cir. 2015); *Speet*, 726 F.3d at 870, 880; ACLU of Nev. v. City of Las Vegas, 466 F.3d 784, 794 (9th Cir. 2006); *Loper* 999 F.2d at 705; *see also Clatterbuck*, 708 F.3d at 558 (remanding to the district court because of an underdeveloped factual record regarding the city's "censorial purpose" and reasoning "the complaint plausibly alleges that the City enacted the Ordinance with a censorial purpose and in violation of the First Amendment").

[165] *See, e.g.*, Int'l Soc'y for Krishna Consciousness of Cal., Inc. v. City of Los Angeles, 764 F.3d 1044, 1049 (9th Cir. 2014) (upholding a ban on solicitation in LAX when the parties agreed that the law was content neutral and the ban applied in a nonpublic forum); Young v. N.Y.C. Transit Auth., 903 F.2d 146, 161 (2d Cir. 1990) (upholding panhandling ban in New York City subway and noting that the subway is not a traditional public forum).

[166] Reynolds v. Middleton, 779 F.3d 222, 231 (4th Cir. 2015).

[167] ISKCON of Potomac, Inc. v. Kennedy, 61 F.3d 949, 954–56 (D.C. Cir. 1995) (noting, however, that the court's decision "does not require the Park Service to let rampant panhandling go unchecked").

On the other side, the First,[168] Seventh,[169] and Eleventh Circuits[170] have upheld content-neutral solicitation laws in traditional public fora. The First Circuit upheld a law creating buffer zones around bus stops and other areas because the law was not substantially overbroad.[171] The Seventh Circuit upheld a similar ordinance that prohibited solicitation at bus stops, parked or stopped vehicles, sidewalk cafes, in public transportation vehicles and facilities, within twenty feet of ATMs and bank entrances, and after dark. The parties agreed the law was content neutral, and the court considered the designated places and times to be "where citizens naturally would feel most insecure in their surroundings."[172] Finally, the Eleventh Circuit upheld Fort Lauderdale's solicitation ban that reached public beaches and sidewalks, citing the city's interests in promoting tourism and creating a "safe, pleasant environment" on the beach.[173]

If and when the Court takes a panhandling case, it is likely to address one or both of the questions that have divided courts of appeals: (1) are solicitation ordinances content neutral? And if they are, (2) can cities ban solicitation by panhandlers in a traditional public forum?

III. PANHANDLING BUFFER ZONES AFTER *MCCULLEN V. COAKLEY*

McCullen provides a roadmap for how to start thinking about the questions that have divided courts of appeals. The first step is to ask whether the First Amendment covers panhandling. If panhandling is simply commercial conduct, for example, panhandling laws do not create First Amendment questions at all. If the First Amendment covers panhandling, the next question is whether solicitation and panhandling laws discriminate on the basis of content or viewpoint, which determines how high the government's hurdle will be. The most difficult question is the last: If at least some of these laws are content neutral, are they valid time, place, and manner regulations, even if they restrict panhandling in a traditional public forum? What about in a limited public or nonpublic forum, or where there is a captive audience?

Following the Court's precedent, the best answers are that the First Amendment covers panhandling, and laws that target panhandling are impermissible whether applied in a public, limited public, or nonpublic forum because they discriminate on the basis of content and viewpoint. Even if some laws are content neutral, however—and general solicitation ordinances may

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[168] *See* Thayer v. City of Worcester, 755 F.3d 60, 73 (1st Cir. 2014), *vacated and remanded*, 135 S. Ct. 2887 (2015).

[169] *See* Gresham v. Peterson, 225 F.3d 899, 901, 906 (7th Cir. 2000). *But see Norton*, 806 F.3d at 411–13 (striking down a solicitation law because it was content discriminatory after *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015)).

[170] *See* Smith v. City of Fort Lauderdale, 177 F.3d 954, 956–57 (11th Cir. 1999).

[171] *Thayer*, 755 F.3d at 73.

[172] *Gresham*, 225 F.3d at 901, 906. *But see Norton*, 806 F.3d at 411–13 (striking down a solicitation law because it was content discriminatory after *Reed*, 135 S. Ct. 2218).

[173] *Smith*, 177 F.3d at 956–57.

be—they cannot extend to most traditional public fora after *McCullen*. Elsewhere, they likely survive.

A. Does the First Amendment Cover Panhandling?

The starting question is whether the First Amendment covers panhandling. If it does not, the discussion ends there. The Court has held repeatedly that charitable solicitation is covered speech, but it has yet to decide whether panhandling is similarly covered. This is largely well-trodden ground. The consensus among academics[174] and federal courts of appeals[175] is that panhandling is covered speech, and everything the Court has said about charitable solicitation supports First Amendment coverage.[176] The purpose of this Part is not to rehash coverage arguments that have been thoroughly explored in the literature, but instead to provide a starting point and framing for the protection debate that the Court's recent decisions have changed.

As scholars have argued, panhandling serves the First Amendment's traditional values of enlightenment, democratic governance, and self-realization.[177] To the extent the purpose of protecting speech is to promote a marketplace of ideas and search for truth within communities, panhandlers expose their fellow citizens to the dimensions of their need and the conditions of poverty in society.[178] That exposure further advances the First Amendment's second goal of promoting democratic governance by giving people a better understanding of the social issues that public policy is meant to address.[179] Indeed, studies have found that receiving a face-to-face request for money increases that person's support for the right to panhandle and leads the listener to consider homelessness a greater burden on the community.[180] Finally, protecting a panhandler's right to solicit alms furthers her own "individual dignity and choice" by allowing her the right of free expression.[181] This particular expression can be a core facet of autonomy and central to personal liberty for those who panhandle.[182]

While some argue that panhandling is conduct outside the First Amendment's scope or that panhandling is entitled to lesser protection as purely com-

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[174] *See supra* note 2.

[175] *See supra* notes 140–41.

[176] *See, e.g.*, Sec'y of State v. Joseph H. Munson Co., 467 U.S. 947, 959 (1984) ("[C]haritable solicitations are so intertwined with speech that they are entitled to the protections of the First Amendment." (citing Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980))).

[177] *See, e.g.*, Hershkoff & Cohen, *supra* note 2, at 898–904.

[178] *See id.* at 896–901.

[179] *Id.* at 901–02.

[180] Barrett A. Lee & Chad R. Farrell, *Buddy, Can You Spare a Dime? Homelessness, Panhandling, and the Public*, 38 URB. AFF. REV. 299, 315–16 (2003).

[181] *See, e.g.*, Hershkoff & Cohen, *supra* note 2, at 903.

[182] *See, e.g.*, Munzer, *supra* note 2, at 8–12.

mercial speech,[183] those arguments run head-on into the Court's charitable solicitation precedent. Panhandling fits squarely within the Court's decisions in *Schaumburg*, *Munson*, and *Riley*. In *Schaumburg*, the Court recognized that charitable solicitation has commercial aspects, but it considered them to be so intertwined with noncommercial components that it protected the entirety of the speech. Like organized charitable solicitors, panhandlers are "necessarily more than solicitors for money," because their pleas are "characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or particular views on economic, political, or social issues."[184] When a panhandler requests a donation, he necessarily communicates information about social conditions and implicitly advocates for greater public attention to poverty. As in *Schaumburg*, the "flow of such information and advocacy would likely cease" if the panhandler were forbidden from requesting donations.[185]

Consider what it would mean for the First Amendment to cover charitable solicitation by organizations but not panhandling. Imagine an organization that runs a soup kitchen in Manhattan, where Sally volunteers on weekends. The soup kitchen is low on funds, so Sally spends Saturday soliciting contributions from passersby in Times Square. Because of those donations, she is able to keep the soup kitchen running, and the people who donated to the organization learned more from her about the conditions of poverty in New York. *Schaumburg* stands for the proposition that the First Amendment covers her solicitation on behalf of the soup kitchen.

Now imagine Jim is a beneficiary of the soup kitchen, and he eats lunch there every day. Because of low funds, however, the soup kitchen has to change its hours and stop serving lunch on Mondays. Would it make sense for the First Amendment to cover Sally's solicitation, but not Jim's request for alms on Mondays, on the one day a week the soup kitchen is closed? If there is a constitutional difference between panhandling and charitable solicitation on behalf of organizations, the First Amendment would cover a soup kitchen's request for money to buy food for the poor, while excluding a panhandler's request for money to buy food for himself.

Now imagine a different case. Suppose Jim is still a beneficiary of the soup kitchen, but he also wants to give back by volunteering for their fundraising efforts. Now Jim's solicitation on behalf of the soup kitchen is covered speech, for the same reasons as Sally's. When Jim gives the money he solicits to the soup kitchen, it uses that money to buy food, and it gives that food to him. Jim has solicited contributions that directly benefit him. Is there a constitutional difference between Jim soliciting funds to be used by an organization for his bene-

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[183] *See, e.g.*, Ellickson, *supra* note, 51 at 1229–31; Teir, *supra* note 2, at 328–30.
[184] *See* Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980).
[185] *Id.*

fit, and him bypassing an organized intermediary to spend those funds for himself at the grocery store? Should there be?

The main differences between charitable solicitation on behalf of organizations and charitable solicitation by individuals on behalf of themselves are that the latter is more direct and can be more emotionally powerful. Whereas organizations often solicit money for the purpose of providing assistance to people, panhandlers directly solicit those same contributions for themselves. There is no principled distinction to draw between the two for First Amendment purposes. If anything, the Court has suggested that when the form of "face-to-face" solicitation creates "a greater opportunity for the exchange of ideas and the propagation of views," it is entitled to more First Amendment protection, not less.[186] Organized charitable groups may ask for donations in ways that sanitize poverty and cause the listener to feel less uncomfortable than he would if directly confronted with severe need, but that difference in emotive impact cannot be what distinguishes covered from uncovered speech.[187]

B. Do Solicitation or Panhandling Laws Discriminate on the Basis of Content or Viewpoint?

The First Amendment covers panhandling, but it is without doubt subject to reasonable regulation.[188] What, however, counts as reasonable? The answer depends in part on the combination of where these laws apply and whether they discriminate on the basis of content or viewpoint. This Part argues that the critical difference between solicitation and panhandling laws is that the former are content neutral, while the latter discriminate on the basis of content and viewpoint. This will carry different implications depending on whether the law applies in a traditional public forum, a limited public forum, or a nonpublic form. A full forum analysis is not necessary here—core disagreements are not about how to categorize the relevant fora, and the analysis of content and viewpoint discrimination will show that it is unnecessary to disaggregate limited public from nonpublic fora[189]—but the basic framework is helpful for knowing why and how content and viewpoint discrimination matter. The next Part argues that after *McCullen*, these laws fail, whether content neutral or not, when applied in a traditional public forum. Viewpoint discrimination will be determinative,

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[186] *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 798–99 (1985).

[187] *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 207 (1983) ("[T]he government ordinarily may not restrict speech because of its *communicative impact*—that is, because of 'a fear of how people will react to what the speaker is saying.'" (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 111 (1980))).

[188] *See Schaumburg*, 444 U.S. at 632.

[189] Additionally, *Rosenberger* laws face the same test for reasonableness in limited public and nonpublic fora, and content-neutral solicitation laws will face the same standard of review in either case. *See* Note, *Strict Scrutiny in the Middle Forum*, 122 HARV. L. REV. 2140, 2147–48 (2009).

however, when considering the application of these laws in a limited public or nonpublic forum.

It is "axiomatic" that the substantive content of speech or the message it conveys cannot be the basis for governmental regulation in a traditional public forum.[190] There, content-based laws are subject to strict scrutiny and survive only if they are the "least restrictive" or least intrusive way to serve the government's compelling interests.[191] Laws that discriminate against speech on the basis of its content or message are presumed to be unconstitutional.[192] Those that discriminate on the basis of a speaker's viewpoint, an "egregious" form of content discrimination, are even more suspect as "censorship in its purest form."[193]

The government faces different limitations when it regulates speech in a limited public or nonpublic forum. These are places that are not generally open to the public for First Amendment activity.[194] There, the government can exclude a speaker or discriminate on the basis of subject matter, so long as it is "reasonable in light of the purpose served by the forum."[195] The government thus may exclude a class of speakers from a limited public or nonpublic forum if doing so "preserves the purposes of that limited forum."[196] What it still may not do, however, is exclude speakers because of the particular views they take.[197] The Court almost always strikes down viewpoint-based regulations, no matter where they apply.[198]

Part II introduced the distinction between content-neutral and content-based laws. As *McCullen* clarified, the central question to ask when evaluating content neutrality is whether a law is "justified without reference to the content of the regulated speech."[199] A law is content based if it facially discriminates on the basis of content, or if its purpose is to suppress or approve certain con-

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[190] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828 (1995) (citing Police Dep't v. Mosley, 408 U.S. 92, 96 (1972)).

[191] *See* McCullen v. Coakley, 134 S. Ct. 2518, 2529–30 (2014) (citing United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000)).

[192] *Rosenberger*, 515 U.S. at 828 (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641–43 (1994)).

[193] *See id.* at 828–29 (citing R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992)); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting).

[194] Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 679 (1998).

[195] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 804–06 (1985).

[196] *Rosenberger*, 515 U.S. at 828–30.

[197] *Id.*

[198] Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 444 (1996).

[199] McCullen v. Coakley, 134 S. Ct. 2518, 2531 (2014) (quoting Renton v. Playtime Theaters, Inc., 475 U.S. 41, 48 (1986)). The Court went even further in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), when it wrote that "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227.

tent.[200] Practically, facial discrimination is where a legal violation depends on what has been said, and it requires " 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred."[201] A law is also content based if it is "concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech,' " such as speech that is prohibited for causing offense or making listeners "uncomfortable."[202]

Viewpoint discrimination is different. Rather than just exclude particular speakers or distinguish certain subject matter, a law that discriminates on the basis of viewpoint "intend[s] to discourage one viewpoint and advance another."[203] The line between viewpoint-based restrictions and other content-based restrictions is at times fuzzy, but the difference is generally between, for example, restricting political advertisements on billboards (subject-matter based) and restricting political advertisements supporting Democrats (viewpoint based).[204] Even in a nonpublic or lesser public forum, a speaker's viewpoint cannot be the basis for exclusion. "[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject."[205] Once the government allows a class of speech in the forum, it cannot single out and exclude particular speech within that otherwise permitted class on the basis of the "specific motivating ideology or the opinion or perspective of the speaker."[206] While the government can regulate "mode[s] of expression," it cannot proscribe communication of certain messages while allowing others of the same type: "Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas."[207]

1. Solicitation Laws

There is an intuitive appeal to concluding that all solicitation laws, whether targeted at panhandling or not, discriminate on the basis of content. Some scholars and judges have taken this view.[208] To know whether someone has

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[200] *See* City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429–30 (1993).

[201] *McCullen*, 134 S. Ct. at 2531 (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 383 (1984)); *see Discovery Network*, 507 U.S. at 429–30.

[202] *McCullen*, 134 S. Ct. at 2531–32 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).

[203] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 49 (1983).

[204] Kagan, *supra* note 200.

[205] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985).

[206] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828–30 (1995).

[207] R.A.V. v. City of St. Paul, 505 U.S. 377, 393–94 (1992).

[208] *See* Norton v. City of Springfield, 806 F.3d 411, 412 (7th Cir. 2015) (holding that a solicitation ordinance was content based because it "regulates 'because of the topic discussed' " (quoting Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015))); ACLU of Nev. v. City of Las Vegas, 466 F.3d 784, 794 (9th Cir. 2006) (holding that a solicitation ordinance is content based because it prohibits distributing handbills that request donations but does not prohibit distributing those that say other things); Hershkoff & Cohen, *supra* note 2, at 906.

violated a solicitation ordinance, the enforcement authorities must ask whether there was a request for money. They must "examine the content" of the solicitor's message to know whether any solicitation took place.[209] Particularly when solicitation laws prohibit only "immediate" requests for money, as many do, a person who asks a stranger for an immediate donation would violate the law, while a person who asks for something else—perhaps directions, or a future donation—would not. Violations, therefore, facially hinge on the content of what was said. There is no way to know whether a violation has taken place without examining the words that were spoken and the message that was conveyed.

Moreover, legislatures sometimes justify solicitation laws for content discriminatory reasons. A law is content based, for example, if it restricts speech because that speech makes listeners uncomfortable.[210] Legislatures commonly explain their laws as intended to prevent "fear," particularly the fear of becoming a victim of crime, which they say people feel more often when solicited near certain places.[211] Cities also speak of the importance of creating a "pleasant environment" conducive to tourism and business in downtown districts.[212] Because those justifications for prohibiting certain content turn on the emotional reactions of listeners—the "direct impact of speech on its audience"—it would seem those laws are content based.[213]

Although it is certainly possible that the Court would consider all solicitation laws to be content-based restrictions on covered speech, its solicitation jurisprudence has not gone that far.[214] The Court has said that charitable solicita-

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[209] *See* McCullen v. Coakley, 134 S. Ct. 2518, 2531 (2014) (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 383 (1984)).

[210] *Id*. at 2532.

[211] *See* SPRINGFIELD, MO., CODE OF ORDINANCES art. I, § 78-2(a)(1) (2014) ("This section is intended to protect citizens from the fear and intimidation accompanying certain kinds of solicitation . . . [where there is] enhanced fear of crime . . . [and] an implicit threat to both persons and property."); ALBUQUERQUE, N.M., CODE OF ORDINANCES § 12-2-28(B) (2004); AUSTIN, TEX., CODE OF ORDINANCES § 9-4-13(A) (2005).

[212] *See, e.g*., MADISON, WIS., CODE OF ORDINANCES § 24.12(1) (2012).

[213] *McCullen*, 134 S. Ct. at 2531–32 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).

[214] This may change after the Court's recent decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). In *Reed*, the Court concluded that a sign regulation was content based because it applied to "particular speech because of the topic discussed or the idea or message expressed," reasoning that a speech regulation is content based if "on its face" it "draws distinctions based on the message" or defines "regulated speech by its function or purpose." *Id*. at 2227 (quoting in part Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2664 (2011)). The Court reiterated that laws are content based if they "cannot be 'justified without reference to the content of the regulated speech.' " *Id*. (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)). Some commentators believe this decision may dramatically reduce the government's ability to regulate speech. *See* Adam Liptak, *supra* note 145. Moreover, the Seventh Circuit has reversed its reasoning on the content neutrality of solicitation ordinances because of *Reed*. *See* Norton v. City of Springfield, 806 F.3d 411, 411 (7th Cir. 2015). To date, however, the Court has not expressly changed its approach to solicitation, and it remains to be seen what import *Reed* will have for content discrimination more broadly. In any case, this Article argues that solicitation laws fail when applied in traditional public fora

tion is subject to reasonable regulation,[215] and it has considered general solicitation laws to be content neutral.[216] If they were considered content based simply because an enforcement agency must determine whether there was a request for money, it would be difficult to understand the standard that the Court has applied to these laws.[217] It has asked whether solicitation laws are valid time, place, and manner restrictions on speech, and it has considered the absence of a narrowly tailored law or a substantial governmental interest sufficient to strike them down. In *Schaumburg*, the Court invalidated a law not because it failed to meet a "compelling" governmental interest through the least restrictive means available, but because the government's "substantial" interests "could be sufficiently served by measures less destructive of First Amendment interests."[218] This resembles the test that the Court applies to content-neutral laws. Indeed, content neutrality is a prerequisite to applying the entire time, place, and manner test in the first place in a traditional public forum.[219]

This is the right approach for laws that do not discriminate among types of charitable solicitation. A commercial request for money may be "intertwined" with core speech interests, but charitable solicitation is still its own activity. At times, the government may have legitimate reasons to restrict solicitation in certain places, just as it does for any number of activities. The central question for the First Amendment is how much restricting the general subject matter of charitable solicitation endangers the interests that the First Amendment seeks to protect. At its core, a driving purpose of asking whether a law is content based is to prevent the government from distorting public debate.[220] Eliminating certain "ideas, viewpoints, or items of information from public debate" can un-

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even if they are considered content neutral. Accordingly, *Reed* only makes that ultimate conclusion stronger.

[215] Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980) ("Soliciting financial support is undoubtedly subject to reasonable regulation . . . .").

[216] *See, e.g.*, United States v. Kokinda, 497 U.S. 720, 736 (1990) (plurality opinion) ("It is the inherent nature of solicitation itself, a content-neutral ground, that the Service justifiably relies upon when it concludes that solicitation is disruptive of its business."); *id.* at 739 (Kennedy, J., concurring) ("The Postal Service regulation . . . does not discriminate on the basis of content or viewpoint . . . ."); Cantwell v. Connecticut, 310 U.S. 296, 306–07 (1940) ("The state is . . . free to regulate the time and manner of solicitation generally, in the interest of public safety, peace, comfort or convenience."); *see also* Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 798 (2007).

[217] In *Schaumburg*, the Court analyzed a solicitation law under a more deferential standard than it usually applies to content-based restrictions, and recognized that "[s]oliciting financial support is undoubtedly subject to reasonable regulation." 444 U.S. at 632; *see supra* Part II.A.; *see also* Nat'l Fed. of the Blind v. FTC, 420 F.3d 331, 338 n.2 (4th Cir. 2005) (recognizing that it is unclear whether the *Schaumburg* test amounts to strict scrutiny or intermediate scrutiny, and noting other courts of appeals consider it to be equivalent to the regular time-place-and-manner standard).

[218] *Schaumburg*, 444 U.S. at 636.

[219] *See* McCullen v. Coakley, 134 S. Ct. 2518, 2530 (2014).

[220] *See* Stone, *supra* note 189, at 198 (discussing viewpoint discrimination).

dermine the First Amendment's values and purposes, but restrictions on solicitation, directed at an entire subject of expressive activity, present less risk of such distortion.[221]

Treating solicitation laws as content neutral, even though they restrict speech on an entire subject matter, follows how the Court has occasionally treated other laws that require an enforcement agency to ask what has been said and discriminate on the basis of subject matter. For example, the Court upheld a law that restricted partisan political activities (including solicitation on behalf of a political organization) by certain State employees. Because the statute was not "censorial" or "directed at particular groups or viewpoints," the Court reasoned that it "regulate[d] political activity in an even-handed and neutral manner."[222] The Court has likewise upheld restrictions (although not applied in a traditional public forum) on all political advertisements in a public transit system,[223] and on politically partisan publications at a military base.[224] Where there are legitimate reasons for the government to regulate an activity that encompasses an entire subject matter, and it does not single out particular viewpoints for favor or disfavor, the First Amendment does not and should not bar reasonable regulation.

Even where solicitation laws have a disproportionate effect on one group—panhandlers—that "differential impact" does not render an otherwise neutral law content discriminatory.[225] The Court has rejected the idea that a law is content based simply because "it systematically and predictably burdens most heavily those groups" with disfavored viewpoints.[226] The relevant inquiry is whether a law "serves purposes unrelated to the content of expression," not whether "it has an incidental effect on some speakers or messages but not others."[227] In *McCullen*, the Court reaffirmed that approach by finding a law to be content neutral even though it had the "inevitable effect" of restricting speech on some topics more than others.[228]

Moreover, legislatures typically provide content-neutral justifications for solicitation regulations.[229] For example, Madison, Wisconsin justifies its solicitation law as ensuring "unimpeded pedestrian traffic flow," helping to combat alcohol abuse, protecting pedestrians' physical safety and wellbeing, and reduc-

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[221] *Id*. at 199, 241.

[222] Broadrick v. Oklahoma, 413 U.S. 601, 616 (1973).

[223] *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974).

[224] *See* Greer v. Spock, 424 U.S. 828, 840 (1976).

[225] Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 696 (2010).

[226] *Id*. at 695.

[227] *Id*. (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

[228] McCullen v. Coakley, 134 S. Ct. 2518, 2529, 2531 (2014).

[229] *See* Boos v. Barry, 485 U.S. 312, 321 (1988) (identifying "congestion" and "the need to protect . . . security" as content-neutral justifications).

ing harassment.[230] The latter types of safety justifications are particularly common. Deerfield Beach, Florida likewise justifies its law as intended to "promote the health, safety and welfare of the residents and visitors," reasoning that solicitation is particularly dangerous on or near public streets where drivers can become distracted, or where solicitation can create "crowd control problems."[231] Other common justifications are preventing fraud or economic loss to businesses and tourist districts.[232]

This is not to suggest all general solicitation laws are content neutral. At times, solicitation ordinances are motivated by concerns that render them content based. As the Court stated in *McCullen*, speech prohibitions are content based if enacted because certain speech causes offense or makes listeners feel "uncomfortable."[233] Were Madison's solicitation law justified only by its desire to create a "pleasant environment" that it considered to be undermined by solicitors whose requests make people feel uncomfortable, that law would be content based. It would directly target the "emotive impact" of covered speech without being grounded in permissible governmental objectives.[234] The typical justifications, however—preventing traffic congestion, physical assault, fraud, etc.—are content neutral.

2. Panhandling Laws

Panhandling laws target speech on the basis of content in a way general solicitation laws do not. They discriminate on the basis of viewpoint. Panhandling laws restrict a certain type of charitable solicitation, and their application depends directly on the cause that the solicitor is advocating. The problem with these laws is not that they regulate interactions that involve the exchange of money, but rather that they distinguish between some requests and others. Even if a blanket prohibition on all solicitation—or even on all charitable solicitation—would be content neutral when applied to panhandlers, panhandling ordinances target only one type of charitable solicitation. The First Amendment problem is that the government allows a class of speech in the forum (charitable solicitation), but it singles out and excludes particular speech (panhandling) within that otherwise permitted class on the basis of the speaker's particular cause (her own welfare).[235] When the distinction between forbidden and invited types depends on what the speaker says, rather than when, where, how, or to

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[230] *See, e.g.*, MADISON, WIS., CODE OF ORDINANCES § 24.12(1) (2012); *see also* PITTSBURGH, PA., CODE OF ORDINANCES § 602.01 (2005) (citing traffic flow and protection from "intimidation, threats, and harassment" as primary purposes); ALBUQUERQUE, N.M., CODE OF ORDINANCES § 12-2-28(B) (2004) (citing prevention of "fear, intimidation and disorder," physical violence, and threats of harm as intent of the law).

[231] DEERFIELD BEACH, FLA., CODE OF ORDINANCES § 46-34(a) (2012).

[232] *See, e.g.*, ALBUQUERQUE, N.M., CODE OF ORDINANCES § 12-2-28(B) (2004).

[233] *McCullen*, 134 S. Ct. at 2529, 2531–32.

[234] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 394 (1992) (quoting *Boos*, 485 U.S. at 321).

[235] *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828–30 (1995).

whom she says it, panhandling laws are not only content based, but viewpoint discriminatory as well.

To illustrate, imagine a solicitation law that facially discriminates between two causes. Suppose the law permits charitable solicitation on behalf of organizations dedicated to environmental causes, but forbids solicitation on behalf of organizations that run soup kitchens or deliver other services to the poor. That law clearly discriminates on the basis of viewpoint because it favors certain opinions over others, and allows organizations to engage in First Amendment-covered speech only if they support the government's favored purpose. To prosecute violators, the enforcement agency would need to ask what the defendant said, and which cause he supported.

The panhandler is like the latter type of organization, soliciting on behalf of an organization with the purpose of delivering services to the poor. Panhandling laws do not stop someone from asking for money on behalf of Greenpeace, but they kick in as soon as that same person asks for money on behalf of herself, at the same time, in the same place, in the same manner, and from the same listener. The primary difference between a charitable organization and a panhandler is that the panhandler's chosen cause is the improvement of her own situation. She is advocating on behalf of herself, but that does not make her advocacy any less tied to a specific purpose. That same purpose would be a protected viewpoint if advanced by a charitable organization advocating on her behalf. There is no principled reason why an organization's advocacy for her should be treated any differently than the individual's exercise of that same right.

Some panhandling laws are also content based because of the justifications that legislatures provide. For example, Kansas City, Missouri explains the purpose of its law as partly to prevent the "sense of fear" created by aggressive panhandling, which, arising out of the emotive impact of the speech, is a content-based rationale.[236] After all, a law is content based if it is "concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or '[l]isteners' reactions to speech.' "[237] To be sure, Kansas City also cites several content-neutral justifications, such as protection of public safety and unobstructed traffic flow.[238] Even for panhandling laws that are justified by wholly neutral considerations, however, their facial classifications render them viewpoint discriminatory. The Court consistently rejects the idea that a facially discriminatory law is content neutral just because it is justified by content-neutral reasons.[239]

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[236] *See* KANSAS CITY, MO., CODE OF ORDINANCES art. I, § 50-8.5(a) (2007).

[237] *McCullen*, 134 S. Ct. at 2531–32 (alteration in original) (quoting *Boos*, 485 U.S. at 321).

[238] *See* KANSAS CITY, MO., CODE OF ORDINANCES art. I, § 50-8.5(a) (2007).

[239] *See* Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 259 (2012).

C. Are Panhandling Buffer Zones Valid Time, Place, and Manner Restrictions?

Laws that specifically target panhandling discriminate on the basis of content and viewpoint. Whether applied in a traditional public forum, a limited public forum, or a nonpublic forum, they are subject to strict scrutiny, and that test "nearly always proves fatal" in the First Amendment context.[240] Especially in a traditional public forum, the government has a "very limited" ability to restrict speech,[241] and it typically has "no power" to restrict speech there "because of its message, its ideas, its subject matter, or its content."[242] The Court has recognized that "it is all but dispositive" in the ordinary case "to conclude that a law is content-based and, in practice, viewpoint-discriminatory."[243] No one seriously contends panhandling or solicitation laws can survive strict scrutiny.[244]

But what about solicitation laws that are content neutral? Their fate will hinge on where they prohibit solicitation. This Part argues that content-neutral laws banning solicitation in a traditional public forum are invalid after *McCullen*, particularly those that create large buffer zones covering public streets and sidewalks. In contrast, more targeted laws that prohibit solicitation in a limited public forum, nonpublic forum, or where there is a captive audience survive.

1. Traditional Public Fora

Recently in *McCullen*, the Court shed new light on the extent to which state and local governments can create buffer zones in which they prohibit normally protected speech in a traditional public forum. As its starting point, *McCullen* reaffirmed the standard that the government's content-neutral solicitation laws must meet. Restrictions on speech in a traditional public forum are valid time, place, or manner regulations only if they (1) are "justified without reference to the content of the regulated speech," (2) are "narrowly tailored to serve a significant governmental interest" without burdening "substantially more speech than is necessary," and (3) allow for "ample alternative channels for communication."[245] The narrow tailoring requirement is designed in part to prevent the government from suppressing speech "for mere convenience," because when "certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance."[246] Despite significant gov-

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[240] *See id.* at 237.

[241] *McCullen*, 134 S. Ct. at 2529 (quoting United States v. Grace, 461 U.S. 171, 177 (1983)).

[242] *Id.* (quoting Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972)).

[243] Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2667 (2011) (citing R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992)).

[244] *See, e.g.*, ACLU of Nev. v. City of Las Vegas, 466 F.3d 784, 792 (9th Cir. 2006) ("The City concedes in its briefing to our court that if the solicitation ordinance is content-based, it is facially invalid . . . .").

[245] *McCullen*, 134 S. Ct. at 2529, 2535 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791, 799 (1989)).

[246] *Id.* at 2534.

ernmental interests, the First Amendment "prevents the government from too readily 'sacrific[ing] speech for efficiency.'"[247]

In *McCullen*, the Court considered a law that made it a crime to stand on a public road or sidewalk within thirty-five feet of the entrance or driveway to any facility, except hospitals, where abortions are performed.[248] The law excluded petitioners from public sidewalks in front of abortion clinics, where they wished to engage in "sidewalk counseling" and persuade women through intimate conversations to forego abortions.[249] The Court reasoned that the law was content neutral because it restricted all speech in certain areas, not just anti-abortion viewpoints.[250] The effect of the law, however, was to hamper petitioners' counseling efforts, leading to fewer conversations and less leaflet distribution than before the buffer zones went into effect.[251] The Court unanimously struck down the Massachusetts law as invalid under the Free Speech Clause of the First Amendment, despite its content neutrality.[252] That decision carries profound implications for how courts should think about panhandling buffer zones that restrict covered speech in a traditional public forum—especially for those who consider solicitation (or panhandling) laws to be content neutral.

A key factor for the Court was where the law banned speech. The fact that the law blocked access to public streets and sidewalks—areas that "occupy a 'special position in terms of First Amendment protection' because of their historic role as sites for discussion and debate"—was critical.[253] Public streets and sidewalks are where listeners encounter speech they "might otherwise tune out."[254] These are the traditional public fora that have historically been places where people are free to talk to strangers, furthering the First Amendment ideal "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[255] Moreover, the forms of speech at issue—"normal conversation and leafleting on a public sidewalk"—are historically associated with sharing ideas.[256] "Protecting people from speech they do not want to hear," Justice Scalia concurred, "is not a function that the First Amendment allows the government to undertake in the public streets and sidewalks."[257]

The buffer zones in *McCullen* primarily failed because they were not narrowly tailored.[258] The problem with the law was not that the government lacked

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[247] *Id*. at 2534–35 (alterations in original) (quoting Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988)).
[248] *Id*. at 2525.
[249] *Id*. at 2527.
[250] *Id*. at 2530–32.
[251] *Id*. at 2528.
[252] *Id*. at 2541.
[253] *Id*. at 2529 (quoting United States v. Grace, 461 U.S. 171, 180 (1983)).
[254] *Id*.
[255] *Id*. (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984)).
[256] *Id*. at 2536.
[257] *Id*. at 2546 (Scalia, J., concurrence).
[258] *See id*. at 2537 (majority opinion).

significant interests, which it clearly had in promoting public safety, healthcare access, and unobstructed use of public sidewalks and streets.[259] The problem was that the law also burdened petitioners' ability to reach the audience they sought to engage with, and it led them to be "far less successful" in their conversations.[260] The buffer zones kept petitioners from engaging in sidewalk counseling where they wanted to on a public street, and the alternatives would not have allowed them to communicate how and with whom they desired. The government could directly regulate the behavior it sought to eliminate, whether by criminalizing harassment, obstruction of access to facilities, or otherwise, but it could not "exclud[e] individuals from areas historically open for speech and debate" when their speech did not itself threaten those governmental interests.[261] The fact that police found it difficult to enforce alternative regulations was insufficient. That buffer zones would make the job of police "so much easier" was "not enough to satisfy the First Amendment."[262]

McCullen signaled a significant shift in the government's ability to enforce content-neutral laws that restrict speech in traditional public fora. While historically content-neutral laws were reviewed under a quite lenient version of intermediate scrutiny,[263] *McCullen* raised the bar. Now, the central challenge for the government is to "demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier."[264] The government will have to do more than simply assert that its laws are narrowly tailored to achieve significant interests when they block speech on public streets and sidewalks.

The analysis for content-neutral solicitation laws in traditional public fora will follow the same lines as *McCullen*.[265] As a starting point, what is the significant governmental interest at stake? Professor Ellickson and others have detailed the harms of panhandling and other costs to cities associated with "chronic street nuisances," including costs for businesses, privacy, and race relations.[266] Cities also have significant interests in "protect[ing] the well-being and tranquility of a community,"[267] ensuring proper traffic flow, combatting fraud, preventing physical violence or harassment, and achieving other com-

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[259] *Id*. at 2535.

[260] *Id*. at 2535–37.

[261] *Id*. at 2537–39.

[262] *Id*. at 2540.

[263] *See* Kendrick, *supra* note 241, at 237–38 (describing intermediate scrutiny applied to content-neutral laws before *McCullen* as "in practice a highly deferential form of review which virtually all laws pass").

[264] *McCullen*, 134 S. Ct. at 2540.

[265] There is even a chance the Court would consider them content based after *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), in which case these laws would be even more vulnerable to attack. *See supra* note 216.

[266] *See, e.g.*, Ellickson, *supra* note 51, at 1175, 1181–83; Teir, *supra* note 2, at 288–90.

[267] *See* Kovacs v. Cooper, 336 U.S. 77, 83 (1949).

mon content-neutral goals that underlie solicitation laws.[268] The real question is whether prohibiting solicitation on public streets, sidewalks, parks, and other traditional public fora is an acceptable way to achieve those goals.

To the extent solicitation laws impose blanket restrictions on solicitation across entire downtown areas, they run afoul of *Schaumburg*, *Munson*, and *Riley* (as well as *McCullen*). Even supporters of panhandling ordinances admit as much.[269] Wholesale bans on solicitation across entire cities or neighborhoods are not narrowly tailored to meet a substantial governmental interest because these laws are not tailored at all, much less narrowly. It would be simple to replace a few words in *McCullen*'s concluding paragraph to apply its lessons to downtown solicitation bans:

> Petitioners wish to converse with their fellow citizens about an important subject on the public streets and sidewalks—sites that have hosted discussions about the issues of the day throughout history. Respondents assert undeniably significant interests in maintaining public safety on those same streets and sidewalks, as well as in preserving access to adjacent ~~healthcare facilities~~ [businesses, restaurants, and the like]. But here the Commonwealth has pursued those interests by the extreme step of closing a substantial portion of a traditional public forum to all ~~speakers~~ [panhandlers, and other solicitors]. It has done so without seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes. The Commonwealth may not do that consistent with the First Amendment.[270]

But what about other, more narrowly tailored bans on solicitation in a traditional public forum, particularly those that create buffer zones around places thought to involve a high risk of coercion or intimidation? After *McCullen*, the answer is that in most cases, the government will not be able to show that these laws are narrowly tailored. The fit between means and ends, for each of the government's justifications, is crucial—and *McCullen* makes clear it is not enough for the government simply to assert the necessity of its chosen path. Rather, the government must demonstrate that it tried less restrictive alternatives and that they failed to secure the interests at stake.[271]

McCullen speaks most directly to a particularly pervasive justification for solicitation laws: combatting threatening behavior. Cities commonly assert that residents feel threatened when solicited in certain locations, and that solicitation buffer zones around such places are necessary to prevent intimidation, harassment, and physical assault.[272] There are differences in precisely which locations are singled out—businesses, parks, sidewalks, bus stops, ATMs, etc.—as well as in the distances surrounding those places that cities believe create adequate buffer zones to prevent threatening behavior. The common thread, how-

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[268] *See* Teir, *supra* note 2, at 288–90, 303–04.

[269] *See id*. at 327.

[270] McCullen v. Coakley, 134 S. Ct. 2518, 2541 (2014).

[271] *Id*. at 2539.

[272] *See, e.g*., PITTSBURGH, PA., CODE OF ORDINANCES § 602.01 (2005).

ever, is that cities believe a no-solicitation zone of some size is necessary to protect people from "aggressive solicitation."

The answer to these concerns is twofold. First, there is substantial doubt that solicitation is in fact threatening, even when conducted within thirty-five feet of bus stops or restaurant entrances. Studies question the extent to which panhandling typically makes people feel threatened, pointing instead to it being "more nuisance than threat."[273] That finding probably resonates with how the reader typically feels when solicited—uncomfortable, maybe a little guilty, but generally not threatened. Without evidence that solicitation is ordinarily harassing, such assertions do not show that the law is narrowly tailored to the government's desired end—an evidentiary burden that *McCullen* placed squarely with the government.[274] If "aggressive solicitation" is defined to include solicitation in certain places that is not ordinarily aggressive in fact, the law would prohibit a substantial amount of speech that does not cause the harms targeted by the government. Accordingly, that law would not be narrowly tailored to achieve the government's substantial interest.

Second, *McCullen*'s answer to threatened intimidation is to regulate intimidating behavior directly. In *McCullen*, the government was concerned that without a buffer zone around abortion clinics, patients and staff would be harassed and intimidated, and argued that earlier laws failed to prevent those harms.[275] The Court recognized the legitimacy of the governmental interests at stake, but it believed they could be served by criminal and civil laws against harassment, intimidation, assault, and the like.[276] The problem with maintaining buffer zones was that they "unnecessarily swe[pt] in innocent individuals and their speech."[277] The Court left it to the government to "show[] that it seriously undertook to address the problem with less intrusive tools readily available to it."[278] Where cities have not shown serious attempts to restrict intimidating solicitation directly through harassment laws and similar tools, their laws will fail for restricting peaceful, protected solicitation in addition to harassing conduct. Just like harassment at abortion clinics would be easy to detect,[279] so too would truly aggressive solicitation lend itself to the direct enforcement of harassment laws.

A similar response applies to another common justification for solicitation laws: preventing fraud. In *Schaumburg*, the government defended its regulation

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[273] Lee & Farrell, *supra* note 182, at 318.

[274] *See McCullen*, 134 S. Ct. at 2539 (rejecting the government's argument that it had tried less restrictive alternatives that were unsuccessful, because the government did not identify past prosecutions or injunctions).

[275] *Id*. at 2537, 2539.

[276] *Id*. at 2537–38.

[277] *Id*. at 2538.

[278] *Id*. at 2539.

[279] *Id*. at 2540.

of charitable solicitation as necessary to prevent fraud.[280] The Court again told the government that it could not indirectly regulate conduct by prohibiting speech, and was instead limited to prohibiting directly the behavior it wanted to prevent.[281] The fundamental problem with the law was that in creating a uniform requirement to combat fraud for all organizations, it also barred certain forms of non-fraudulent charitable solicitation.[282] The Court held that the government may not "lump such organizations with those that in fact are using the charitable label as a cloak for profitmaking and refuse to employ more precise measures to separate one kind from the other."[283] The government likewise cannot justify solicitation laws on the rationale that some panhandlers are not in fact homeless or poor; to lump all solicitors together because some may be acting fraudulently is exactly what the Court forbade in *Schaumburg*. A chosen route being "easier" is not enough to make a law narrowly tailored.[284]

For lack of narrow tailoring, solicitation laws fail regardless of whether they allow for ample alternative channels for speech. But if a court were to reach that question, *McCullen* again provides the answer: where "buffer zones . . . ma[k]e it substantially more difficult" to reach a desired audience and communicate as intended, it is inadequate to offer speakers an alternative forum down the street.[285] The burden specifically on "one-on-one communication," which the Court characterized as "the most effective, fundamental, and perhaps economical avenue of political discourse," cannot be excused by offering speakers an alternative mode of communication.[286]

The adequacy of the alternative forum, however, will vary by the size of the buffer zone in question. Blanket downtown prohibitions offer an easy case. Where the law prohibits solicitation across entire downtown areas, whether expressly or de facto, it will be substantially more difficult for solicitors to reach their intended audience by virtue of the downtown concentration of pedestrians. The outskirts of town are not an adequate alternative forum for someone who wants to reach a large audience. In addition, highly targeted prohibitions just as clearly provide for adequate alternatives. For example, a law that prohibits solicitation only within five feet of an ATM allows for adequate alternative means of communication. That law would designate only narrow segments of the city as off-limits to solicitation, leaving open equally appropriate nearby locations. Accordingly, the law's narrow tailoring to achieve security interests, combined with the ability to solicit donations a few feet away, will satisfy the time, place, and manner test.

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[280] Vill. of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 636 (1980).
[281] *Id*. at 636–37.
[282] *Id*. at 637.
[283] *Id*.
[284] *See McCullen*, 134 S. Ct. at 2540.
[285] *Id*. at 2536.
[286] *Id*. (quoting Meyer v. Grant, 486 U.S. 414, 424 (1988)).

The difficult cases are solicitation laws that cover significant swaths of public property but do not entirely exclude solicitors from downtown areas. For example, a typical law might prohibit solicitation within twenty-five feet of bus stops and restaurant entrances. The length of a typical block varies by city, but to illustrate, it is about 400 feet in Sacramento, about 525 feet in Columbus, and about 450 feet in Philadelphia.[287] For a street with one bus stop and one restaurant, the buffer zone might eliminate 25 percent of the potential solicitation area on that street. This probably allows for ample alternative places for solicitation, whether on the 75 percent of that street where solicitation is permitted, or on nearby streets that do not have a bus stop or restaurant. The solicitor would still have access to a concentrated downtown population, and unlike the abortion clinic buffer zones in *McCullen*, there is nothing unique to the bus stop or restaurant location that is necessary to the message solicitors hope to convey. Accordingly, the real fight will center on whether these laws are narrowly tailored, because the government will have little difficulty showing the availability of ample alternative channels for communication.

2. Limited Public Fora, Nonpublic Fora, and Captive Audiences

Unlike in a traditional public forum, the government has far greater leeway to restrict speech in a limited public or nonpublic forum. Most types of content discrimination are fair game, and the government can exclude a speaker or discriminate on the basis of subject matter so long as the law is "reasonable in light of the purpose served by the forum."[288] In this context, the Court has considered it "significant" that speakers have alternative avenues for expression.[289]

One of the few boundaries on the government's ability to regulate speech in a limited public or nonpublic forum is the prohibition on viewpoint discrimination. Once the government allows a class of speech in the forum, it cannot single out and exclude particular speech within that otherwise permitted class because of the "specific motivating ideology or the opinion or perspective of the speaker."[290] To the extent panhandling laws are viewpoint discriminatory, the government can no more restrict panhandling in a limited public or nonpublic forum than it can in a traditional public forum. Content-neutral solicitation laws, however, need only be "reasonable."[291]

General solicitation laws in a lesser public forum or nonpublic forum are almost certainly reasonable in light of the purposes of those fora. Such solicitation laws apply most commonly in transit centers, such as subways and airports, and the Court recognized in *Lee* that restricting airport solicitation is rea-

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[287] These areas were calculated using Google Maps. *See* GOOGLE MAPS, http://maps.google.com (last visited Feb. 2, 2016).

[288] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985).

[289] Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 690 (2010).

[290] *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

[291] *See Cornelius*, 473 U.S. at 806.

sonable in light of the government's interest in ensuring orderly transit.[292] Laws that reach bus stops likely survive for similar reasons. The Court's permissive approach in *Heffron* to regulations in a lesser public forum likewise suggests that the government will have little trouble enforcing solicitation laws in either forum.[293]

This will also be true in places where there is a captive audience. The Court has recognized that in situations such as public transportation where the audience is "there as a matter of necessity, not of choice," the government "may recognize degrees of evil and adapt its legislation accordingly."[294] While the government cannot shut off speech unless "substantial privacy interests are being invaded in an essentially intolerable manner," it can protect a "'captive' audience [that] cannot avoid objectionable speech."[295]

There may be gray areas for defining exactly which locations have captive audiences,[296] but some undoubtedly involve groups who qualify. These include bus stops, public transportation, areas where people are waiting in line, crosswalks, and similar places where people cannot readily avoid unwanted speech. A key distinction, however, is that while a bus stop itself may be a legitimate place to regulate solicitation, a buffer zone of thirty feet around the bus stop would not be. There is no equivalent doctrine that allows the government to ban speech in a traditional public forum simply because it is near a captive audience.

The following chart summarizes how to think about panhandling and solicitation laws, whether applied in a traditional public forum, a limited public forum, a nonpublic forum, or where there is a captive audience. Both types of laws prohibit panhandling, but their scope determines whether they violate the First Amendment.

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[292] *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 676 (1992) (upholding ban on solicitation in an airport terminal, a nonpublic forum).

[293] *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 648–49 (1981).

[294] Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974) (quoting Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 468 (1952) and Packer Corp. v. Utah, 285 U.S. 105, 110 (1932)) (upholding restriction on political advertisements on the city's transit system).

[295] Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n, 447 U.S. 530, 541–42 (1980) (quoting in part Cohen v. California, 403 U.S. 15, 21 (1971)).

[296] *See* Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 943–51 (2009).

TABLE 1: SOLICITATION AND PANHANDLING LAWS

	Traditional Public Forum	Limited Public Forum, Nonpublic Forum, or Captive Audience
Panhandling Laws (Content and Viewpoint Based)	Invalid	Invalid
Solicitation Laws (Content Neutral)	Usually Invalid	Usually Valid

CONCLUSION

Courts around the country will continue to grapple with panhandling laws until the Court weighs in and delineates the boundaries of panhandlers' First Amendment rights. There is certainly no shortage of state and local laws for them to consider. It is fairly clear that the First Amendment covers panhandling, but cases will come down to the details of how these laws are written and where they apply. Some broadly regulate solicitation in a content-neutral way, while others are viewpoint discriminatory for singling out panhandling for prohibition. Wherever targeted panhandling laws apply, whether on public streets or subways, they violate the First Amendment because they are unnecessary to meet a compelling governmental interest. General solicitation laws pose a more difficult question. After *McCullen*, however, solicitation buffer zones in a traditional public forum usually will not be sufficiently tailored to meet the government's substantial interests in fraud and public safety. Instead, the answer is to target those interests directly, through antifraud and public safety statutes. In contrast, when applied in a limited public forum, nonpublic forum, or where there is a captive audience, general solicitation laws usually should survive.

It remains to be seen whether *McCullen* will turn out to be just a case about abortion-related speech. On its face, however, the decision signals a change for speech regulations more broadly. The bottom line for states and municipalities is that *McCullen* likely made it more difficult for the government to create buffer zones that ban covered speech in a traditional public forum. Simply saying that panhandling runs counter to the public interest should not, and likely will not, be enough.