

May 22, 2014



Nathan Woodliff-Stanley, Executive Director
Mark Silverstein, Legal Director

MEMORANDUM

To: Members of the Boulder City Council

From: Mark Silverstein, Legal Director, ACLU of Colorado
Barry Satlow, Chair, ACLU of Colorado Boulder County Chapter

Dear Council members:

For more than 50 years, the ACLU of Colorado and its Boulder County Chapter have supported the First Amendment rights of all people, especially the least fortunate in our society, to free expression, speech and association without undue government interference.

Today we write to urge you to reject the proposed ordinance that would add a Section 5-3-15, titled "Solicitation Restricted," to the Boulder Municipal Code. (The agenda item for the May 6 council meeting calls it "Solicitation Limited," Agenda Item 2E, Page 7, but the accompanying proposed ordinance is titled "Solicitation Restricted.")

Boulder already has a law against aggressive begging, § 5-3-7 of the municipal code. It also restricts begging on parts of the Pearl Street Mall and in the University Hill commercial district, in § 5-3-12. Now it proposes to restrict begging even more.

The overly broad proposed ordinance would make it a crime to engage in peaceful, polite, non-threatening expression that poses no risk to public safety and is squarely protected by the First Amendment and Article II, Section 10 of the Colorado Constitution.

The proposed ordinance is a content-based restriction of expression. It regulates requests for money but not other types of solicitation. A person working to put an initiative on the ballot may solicit signatures at a bus stop but may not ask for contributions to help fund the effort. Evangelicals are free to approach patrons of an ATM to ask if they are saved but not to ask for a donation to a church or charity. A person may approach people at a bus stop to solicit directions or information about bus schedules, but asking for change is forbidden. In ruling on a request for a temporary restraining order in the ACLU's pending challenge to Grand Junction's panhandling ordinance, Judge Brimmer ruled that the ordinance, "by its very terms, singles out particular content for differential treatment' and thus constitutes a content-based restriction on speech." *Browne v. City of Grand Junction*, 2014 U.S. Dist. Lexis 37516, at *9 (D. Colo. March 21, 2014), quoting *Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009) (en banc). The same analysis applies to the proposed Boulder ordinance. A content-based regulation of speech is subject to the strictest judicial scrutiny, a test that the proposed ordinance would surely fail.

Earlier this year, a federal court in Idaho issued a preliminary injunction against enforcement of a Boise ordinance that contained several provisions similar to those now proposed for Boulder. The court held that the content-based regulations likely violated the First Amendment. *ACLU of Idaho v. City of Boise*, 2014 U.S. Dist. Lexis 291 (D. Idaho Jan. 2, 2014).

The proposed ordinance prohibits a wide swath of ordinarily lawful expression that does not pose the kind of harms that apparently prompted the Boulder staff to draft this measure. Here are a few examples: Directors of nonprofit organizations often take prospective donors to lunch at restaurants that may include outdoor dining areas. If the director solicits a donation over lunch, she violates the ordinance. Other patrons of the restaurant violate the ordinance if they ask their companions for a few dollars to help with leaving a tip. A bus patron violates the ordinance if she asks her companion for change for the bus. At a parking pay station, the proposed ordinance makes it a crime to ask one's friend for change to help pay for parking. When a teenager accompanies her mother to an ATM, it is a crime to ask mom for a portion of the withdrawal to fund some shopping.

Of course Boulder does not want the ordinance to be enforced in these situations, and surely it won't be enforced in these situations. The ordinance will not be enforced in an evenhanded manner. Instead, it will be enforced selectively, only against persons who everyone knows are the real targets of this ordinance.

From a strictly public policy perspective, the new proposal, when combined with the recent decision to restore jail time for many first-time minor offenses, as well as revelations about new surveillance cameras, originally kept secret from the public, sends a chilling message to residents and to other municipalities around the state that the City of Boulder is consciously moving away from its long-held commitment to protecting civil liberties in favor of a draconian crackdown aimed squarely at the vulnerable and least fortunate in the community.

For these reasons the ACLU of Colorado and its Boulder County chapter request that the Boulder City Council reject this proposed ordinance.