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Criminal law -- Panhandling -- Municipal ordinance violation -- Ordinance prohibiting soliciting, begging or panhandling in downtown business district is unconstitutional as a content-based restriction on speech -- Ordinance cannot survive strict scrutiny analysis -- Discussion of U.S. Supreme Court's decision in *Reed v. Town of Gilbert*, which clarified the analysis courts must apply in determining whether statute violates First Amendment

ANDREW TOOMBS, Appellant, v. THE STATE OF FLORIDA, Appellee. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 15-220 AC. L.T. Case No. M15013370. July 11, 2017. An Appeal from the County Court for Miami-Dade County. Robin Faber, Judge. Counsel: John Eddy Morrison, Assistant Public Defender, for Appellant. K. Philip Harte, Assistant State Attorney, for Appellee.

(Before, ELLEN SUE VENZER, MARISA TINKLER MENDEZ, MIGUEL M. DE LA O, JJ.)

(DE LA O, J.) Appellant, Andrew Toombs (“Toombs”), appeals his conviction for violating a City of Miami (“City”)¹ ordinance, section 37-8 of the Miami Municipal Code Part II, which prohibits “soliciting, begging or panhandling” in the “Downtown Business District” (“Ordinance”). This appeal concerns only the constitutionality of the Ordinance.²

We review the constitutional challenge to the Ordinance *de novo*. *City of Fort Lauderdale v. Dhar*, 185 So. 3d 1232, 1234 (Fla. 2016) [41 Fla. L. Weekly S61a]. Because panhandling is speech protected by the First Amendment, *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980),³ and because city streets and sidewalks are recognized as “quintessential public forum[s],” *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983), we first determine if the Ordinance is content-neutral, then apply the level of scrutiny commensurate with the answer.

With over 200 years of constitutional jurisprudence to guide us, we do not typically write on a clean slate when discussing the First Amendment. Here, the slate comes to us especially filled with the binding precedent of the United States Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) [25 Fla. L. Weekly Fed. S383a]. One court has described *Reed* as working a “sea change in First Amendment law.” *Blich v. City of Slidell*, 2017 WL 2840009, at *7 (E.D. La., June 22, 2017).

Although the ordinance in *Reed* addressed outdoor signs rather than panhandling, it clarified the analysis courts must apply in determining whether a statute violates the First Amendment.

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase “content based” requires a court to consider whether a regulation of speech “on its face” draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Reed, 135 S. Ct. at 2227 (citations omitted).

The analytical framework adopted in *Reed* has resulted in the invalidation of panhandling statutes similar to the one at issue here. In the immediate aftermath of *Reed*, the Seventh Circuit granted rehearing in *Norton v. City of Springfield*, 768 F.3d 713 (7th Cir. 2014) and reversed its ruling upholding the constitutionality of

Springfield's panhandling ordinance.⁴

The Town of Gilbert, Arizona, justified its sign ordinance in part by contending, as Springfield also does, that the ordinance is neutral with respect to ideas and viewpoints. The majority in *Reed* found that insufficient: “A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.” 135 S. Ct. at 2228. It added: “a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter.” *Id.* at 2230.

. . . The majority opinion in *Reed* effectively abolishes any distinction between content regulation and subject-matter regulation. Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification.

Norton v. City of Springfield, 806 F.3d 411, 412 (7th Cir. 2015) (citations omitted). Other courts have applied *Reed* to strike down panhandling ordinances nationwide, as the federal district court noted in *Thayer v. City of Worcester*, 144 F. Supp. 3d 218 (D. Mass. 2015):

As to Ordinance 9-16 [the panhandling ordinance], a protracted discussion of this issue is not warranted as substantially all of the Courts which have addressed similar laws since *Reed* have found them to be content based and therefore, subject to strict scrutiny. Simply put, *Reed* mandates a finding that Ordinance 9-16 is content based because it targets anyone seeking to engage in a specific type of speech, *i.e.*, solicitation of donations.

Id. at 233 & n.2. Neither the State nor the City could direct us to any decision post-*Reed* upholding a law criminalizing panhandling. Every single decision after *Reed* has struck down panhandling laws similar to the City's Ordinance.⁵ See *Blich v. City of Slidell*, 2017 WL 2840009 (E.D. La., June 22, 2017); *Champion v. Commonwealth*, 2017 WL 636420 (Ky., Feb. 16, 2017); *City v. Willis*, 375 P.3d 1056 (Wash. 2016); *Homeless Helping Homeless, Inc. v. City of Tampa*, 2016 WL 4162882 (M.D. Fla., Aug. 5, 2016); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177 (D. Mass. 2015); and *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276 (D. Colo. 2015).

Perhaps the court in *Champion* explained best why the City's Ordinance is unconstitutional as a content-based speech restriction:

On its face, Ordinance 14-5 singles out speech for criminal liability based solely on its particularized message. Only citizens seeking financial assistance on public streets and intersections face prosecution. For example, someone standing at a prominent Lexington intersection displaying a sign that reads “Jesus loves you,” or one that says “Not my President” has no fear of criminal liability under the ordinance. But another person displaying a sign on public streets reading “Homeless please help” may be convicted of a misdemeanor. The only thing distinguishing these two people is the content of their messages. Thus, to enforce Ordinance 14-5, law enforcement would have to examine the content of the message conveyed to determine whether a violation has occurred. This then, in effect, prohibits public discussion in a traditional public forum of an entire topic. And as a result, this ordinance is unambiguously content-based and is presumptively unconstitutional.

Champion, 2017 WL 636420 at *4.

Having concluded that the Ordinance is content-based, it can be deemed constitutional only if it passes strict scrutiny analysis. However, “[i]t is rare that a regulation restricting speech because of its content will ever be permissible.” *U.S. v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000) (citations omitted).

When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded Congressional enactments is reversed. Content-based regulations are presumptively invalid and the Government bars the burden to rebut that presumption.

Id. at 816.

The City claims the purpose of the Ordinance is to protect tourism, encourage expansion of the City's economic base, and protect the City's economy, as set forth in the preamble to the Ordinance. Although no evidence was introduced at trial to support these assertions, we would reject these claims as insufficient to survive strict scrutiny even if the City or the State had introduced evidence at trial to support them.

. . . [T]he promotion of tourism and business has never been found to be compelling government interest for the purposes of the First Amendment. *See Pottinger v. City of Miami*, 810 F. Supp. 1551, 1581 (S.D. Fla. 1992) (“The City's interest in promoting tourism and business and in developing the downtown area are at most substantial, rather than compelling, interests.”).

* * *

The mechanism by which Lowell's ban on panhandling downtown would promote tourism flies in the face of the First Amendment. The First Amendment does not permit a city to cater to the preference of one group, in this case tourists or downtown shoppers, to avoid the expressive acts of others, in this case panhandlers, simply on the basis that the privileged group does not like what is being expressed. It is core First Amendment teaching that on streets and sidewalks a person might be “confronted with an uncomfortable message” that they cannot avoid; this “is a virtue, not a vice.” Just as speech cannot be burdened “because it might offend a hostile mob,” *Forsyth Cnty., Ga. v. Nationalist Movement*, 505 U.S. 123, 135 (1992), it cannot be burdened because it would discomfort comparatively more comfortable segments of society.

For First Amendment purposes, economic revitalization might be important, but it does not allow the sensibilities of some to trump the speech rights of others.

McLaughlin v. City of Lowell, 140 F. Supp. 3d 177, 189-90 (D. Mass. 2015) (citations omitted).

Moreover, *Reed* makes clear that benign motives will not shield a facially content-based speech abridgement.

A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of “animus toward the ideas contained” in the regulated speech. *Cincinnati v. Discovery Network Inc.*, 507 U.S. 410, 429 (1993). We have thus made clear that “ ‘[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment,’ and a party opposing the government ‘need adduce no evidence of an improper censorial motive.’ ” *Simon & Schuster, [Inc. v. Members of N.Y. State Crime Victims Bd.]*, 502 U.S. 105, 117 [(1991)]. Although “a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary.” *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994). In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.

Reed, 135 S. Ct. at 2228.

The City argues that it does not discriminate among viewpoints, that no one is allowed to solicit funds whether they are homeless or members of the girl scouts. This is an outdated view of First Amendment jurisprudence which was rendered obsolete by *Reed*. In *Reed*, the Circuit Court of Appeals had upheld the sign ordinance because it did “not mention any idea or viewpoint, let alone single one out for differential treatment.” *Reed v. Town of Gilbert, Ariz.*, 587 F.3d 966, 977 (9th Cir. 2009). The Court firmly rejected this argument.

This analysis conflates two distinct but related limitations that the First Amendment places on government regulation of speech. Government discrimination among viewpoints -- or the regulation of speech based on “the specific motivating ideology or the opinion or perspective of the speaker” -- is a “more blatant” and “egregious form of content discrimination.” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). But it is well established that “[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.” *Consolidated Edison Co. v. Public Serv. Comm'n 17*, 447 U.S. 530, 537 (1980).

Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. *Id.*

Reed, 135 S. Ct. at 2229-30.

Consequently, we **REVERSE** the trial court's finding that the Ordinance is constitutional, and **REMAND** this matter to the trial court for proceedings consistent with this opinion. (ELLEN SUE VENZER and MARISA TINKLER MENDEZ, J.J., concur)

¹After Toombs filed his notice of appeal, the City intervened in this appeal.

²The parties do not dispute the facts which resulted in Toombs' conviction. Toombs was approaching vehicles begging for money within the “Downtown Business District,” but never obstructed traffic. Toombs pled no contest and preserved his constitutional challenge for appeal.

³See *Gresham v. Peterson*, 225 F.3d 899, 904-05 (7th Cir. 2000) (“[w]hile some communities might wish for all solicitors, beggars and advocates of various causes be vanished from the streets, the First Amendment guarantees their right to be there, deliver their pitch and ask for support.”). See also *Smith v. City of Fort Lauderdale*, 177 F.3d 954, 956 (11th Cir. 1999) (“Like other charitable solicitation, begging is speech entitled to First Amendment protection.”).

⁴It is important to note that Springfield's Ordinance also prohibited panhandling in its Downtown Historic District, although the statute was more narrowly drawn than the City's.

⁵*Cf. Watkins v. City of Arlington*, 123 F. Supp. 3d 856, 860 (N.D. Tex. 2015) (ordinance which regulates all interactions between pedestrians and the occupants of vehicles stopped at traffic lights is content neutral).

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