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Erin Kennedy Startzman
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July 30, 2019

Louisville Metro Government
Public Safety Committee Members
601 W. Jefferson Street
Louisville, KY 40202

*Re: Proposed Louisville Metro Council Ordinance No. _____,
Series 2019, An Ordinance Repealing Chapter 117 of
Louisville/Jefferson County Metro Government Code of
Ordinances and Enacting a New Section for Pedestrian and
Traffic Safety*

Councilpersons Green, Peden, Sexton Smith, Purvis, Fox, Piagentini,
and Flood:

The American Civil Liberties Union of Kentucky submits these
comments on the Louisville Metro Council Ordinance Chapter 71.

The American Civil Liberties Union of Kentucky (the “ACLU of Kentucky”) is the Commonwealth of Kentucky’s guardian of liberty. The ACLU of Kentucky works in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the constitution and the laws of the United States guarantee to all people in Kentucky. Paramount to a free and ordered democracy is the right to free speech, peaceable assembly, and access to traditional public forums, including public streets. Indeed, freedom of speech is a fundamental right which is safeguarded by the First Amendment and the due process clause of the Fourteenth Amendment of the federal constitution. Our comments are informed by our commitment to the constitution and its values, and to the civil rights statutes that further those values.

Preliminarily, it is important to note that similar ordinances around the country have been found unconstitutional under the First Amendment. The First Circuit held that a complete ban on standing in medians was geographically over-inclusive and unconstitutional. *Cutting v. City of Portland*, 802 F.3d 79 (1st Cir. 2015). The Ninth Circuit held that a prohibition on soliciting on a street “regulate[d] significantly more speech than necessary to achieve the City’s purpose of improving traffic safety.” *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 940 (9th Cir. 2011). Very recently, the Western District of Arkansas held that an ordinance restricting physical interaction between pedestrians and motorists in public roadways “substantially burdens more expressive conduct than is reasonably necessary.” *Rodgers v. Stachey*, No. 6:17-cv-060654, 2019 U.S. Dist. LEXIS 55438 at *23 (W.D. Ark. Apr. 1, 2019). And this month, the



District Court of New Mexico held that an ordinance restricting pedestrian activities on roadways “burden a substantial amount of Plaintiff’s speech.” *Martin v. City of Albuquerque*, No. 1:18-cv-0031, 2019 U.S. Dist. LEXIS 119774 at *56 (D.N.M. July 18, 2019). The ordinances struck down in each of these cases bear striking resemblance to the ordinance currently considered by Louisville Metro Government’s Public Safety Committee. Of course, a successful challenge to the constitutionality of this ordinance would open the city up to liability for attorney’s fees and costs—resources that would be better spent addressing the root causes of homelessness and panhandling.

Constitutional and Legal Issues

The proposed ordinance presents several constitutional problems. As the Committee is well aware, the First Amendment protects individuals’ rights to assemble and express themselves. While the government may place reasonable restrictions of time, place, and manner on citizens’ speech in public forums, such restrictions “must not be based on the content of the message, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication.” *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). To be narrowly tailored, the ordinance cannot burden speech more than necessary to further the legitimate government interest. *McCullen v. Coakley*, 573 U.S. 464 (2014). It does not appear that the proposed ordinance meets that standard. Thus, for the reasons below, we urge the Council to reject or revise the proposed ordinance.

First, the proposed ordinance inappropriately restricts mere presence in a public forum. *Reynolds v. Middleton*, 779 F.3d 222, 225 (4th Cir. 2015) (there is “no question that public streets and medians qualify as traditional public for[a]”) (quotation omitted). Specifically, LMCO § 71.10(B) prohibits pedestrians “from being on a median or gore of an arterial roadway unless he or she is in the process of legally crossing the arterial roadway.” This is not a reasonable time, place, or manner restriction, but rather a complete ban on a person’s mere presence, no matter the reason—it prohibits a person’s presence regardless of whether they’re panhandling, rallying, offering charitable donations, or standing still. Such a complete prohibition on *all* presence cannot survive constitutional muster. *See, e.g., McCullen*. And, there is no evidence that this outright ban would achieve the city’s stated interests—that is, there is no evidence that preventing *all* presence from these areas would decrease the number of pedestrians struck by vehicles or fatal crashes in Louisville.



Second, the ordinance inappropriately restricts speech and expressive activity. Specifically, LMCO § 71.10(C)'s prohibition on "approaching a vehicle" is considered speech that is worthy of First Amendment protection. *See, e.g., Rodgers v. Stachey*, No. 6:17-cv-060654, 2019 U.S. Dist. LEXIS 55438 at *12 (W.D. Ark. Apr. 1, 2019). Thus, the city cannot place an outright prohibition on physical interaction ("approaching a vehicle") without running afoul of the First Amendment. Additionally, this provision violates the federal constitution's protections on soliciting charitable donations from the public. The U.S. Supreme Court has held that the First Amendment protects individuals', including homeless individuals', ability to peacefully solicit these donations. *See United States v. Kokina*, 497 U.S. 720, 725 (1990). Therefore, the proposed ordinance would not only infringe on the general public's ability to engage in protected speech and assembly but also on the public's right to solicit charitable donations. And again, there is no evidence that prohibiting all expressive activity from these areas would actually decrease the number of vehicle-pedestrian accidents or collisions in the Louisville Metro area.

Third, the language of LMCO § 71.10(C) seems to prohibit that same constitutionally protected expressive activity—"approaching a vehicle"—even if the pedestrian is in a location not otherwise contemplated under this ordinance. For instance, even if a pedestrian were present on a sidewalk, which is a traditional public forum and not incorporated into this ordinance as a prohibited space, any approach to a vehicle would be prohibited, if the vehicle were present on one of the arterial roadways. Again, this both bans protected expressive activity *and* improperly regulates pedestrians in a traditional public forum, government regulations of which are subject to the strictest standards, which this ordinance likely could not withstand.

Finally, the penalties in the proposed ordinance are unjustified. LMCO § 71.99 explains that any person who violates the ordinance "shall be fined not less than \$25 nor more than \$250." These excessive fines would drastically chill the public from engaging in constitutionally protected free speech. Furthermore, as referenced above, this ordinance would substantially limit the homeless population's constitutional right to solicit and receive charitable donations from willing motorists. Many people depend on these donations to survive. The ACLU of Kentucky opposes any government policy that has a substantial likelihood of causing or exacerbating homelessness, which is very likely under this proposed ordinance.



Conclusion

It is the right of every Kentucky citizen to speak and assemble in traditional public fora such as public roads. The Commonwealth of Kentucky and the City of Louisville should encourage this civic participation, which only serves to enrich our communities. The proposed ordinance effectively prohibits any pedestrian from speaking publicly, receiving charitable donations, or even being physically present on a public roadway or median—all activities that are protected by the constitution. This ordinance would violate pedestrians' First Amendment protections by prohibiting the free speech of individuals on or near potentially every major roadway in the city. Based on these concerns, we ask the Louisville Metro Government's Public Safety Committee to withdraw the proposed ordinance, or in the alternative, we ask the committee members to vote no on this proposed ordinance.

Sincerely,

A handwritten signature in black ink, appearing to read "Corey Shapiro", with a long horizontal flourish extending to the right.

Corey M. Shapiro
Legal Director

A handwritten signature in blue ink, appearing to read "Heather Gatnarek", with a stylized, cursive script.

Heather Gatnarek
Staff Attorney