UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INDIANA CIVIL LIBERTIES UNION FOUNDATION, INC., on their own behalf and on behalf of a class and subclass of those similarly situated, et al., Plaintiffs, v. SUPERINTENDENT, INDIANA STATE POLICE, in his official capacity, et al., Defendants.	)	Case No.: 1:20-cv-01094-JMS-TAB

RESPONSE TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs seek a preliminary injunction to enjoin the enforcement of Indiana Code § 35-45-17-2 (amended eff. July 1, 2020) in its entirety, alleging that the statute represents a content-based restriction on constitutionally protected First Amendment expression. Plaintiffs have failed to meet the requirements for the granting of a preliminary injunction. Specifically, Plaintiffs have failed to show that there is a reasonable likelihood that they will succeed on the merits. Federal law affirms that the state has a compelling interest in preserving the public safety for individual and businesses and to preserve the free flow of traffic. Indiana's panhandling statute is narrowly tailored to achieve this aim.

BACKGROUND

The Indiana Civil Liberties Union Foundation, Inc. and the Indiana Civil

Liberties Union, Inc., together known as the American Civil Liberties Union of Indiana (ACLUI), are two Indiana nonprofit corporations located in Indianapolis. The individually named Plaintiffs, Jane Henegar, Kathryn Blair, and Neil Hudelson are members of the ACLUI, and hold the positions of Executive Director of the ACLUI, Director of Advocacy and Public Policy of the ACLU, and the ACLU's Director of Philanthropy (respectively). They bring their claims against all named respondents.

Plaintiffs challenge the constitutionality of Indiana Code § 35-45-17-2 (amended July 1, 2020) alleging that it violates the First Amendment, and is unconstitutionally vague in violation of due process. The Indiana law in question, Indiana Code § 35-45-17-2, is concerned with the prohibition and prevention of "panhandling" in the State of Indiana. House Enrolled Act 1022 creates new statutory sections, effective July 1, 2020, which provide guidance about the applicability of Indiana Code § 35-45-17-2 (hereinafter, the "Indiana Panhandling Statute").

Effective July 1, 2020, Indiana's Panhandling Statute, Indiana Code § 35-45-17-2, will be amended to prohibit verbal requests for money within fifty feet of an automated teller machine; the entrance or exit to a bank, business, or restaurant; the location where a financial transaction occurs; or a public monument. 2020 Ind. Legis. Serv. Pub. L. 151-2020, § 5 (H.E.A. 1022) (WEST). A financial transaction includes:

(1) a business;
(2) a parking meter or parking pay station on a street or another public place;

(3) a public parking garage or parking lot pay station;
(4) a facility or pay station operated by a public transportation authority; or
(5) a restaurant or the service area of an outdoor seating establishment.

HEA 1022, § 3, Ind. Code § 35–45–17–0.5 (effective July 1, 2020).

The new law removes the prohibition about panhandling at night, and it continues to allow people to obtain money through passive means, such as holding a sign or giving a musical performance.

Plaintiffs allege that Indiana Code § 35-45-17-2 (amended eff. July 1, 2020) restricts their ability to solicit donations on Constitution Day, a yearly celebration to commemorate the signing of the final draft of the Constitution at the Constitutional Convention on September 17, 1787. The ACLU first began soliciting for donations at Monument Circle on Constitution Day in 2016 (Comp. 11). Roughly 20-30 ACLU volunteers participate in Constitution Day activities at Monument Circle each year (Ex. A, Int. 4). ACLU volunteers will engage members of the public in a variety of ways, such as "asking them trivia questions about the Constitution," initiating general conversation, or offering a copy of the Constitution. (Ex. A, Int. 8). Sometimes, people "will be asked to contribute to the ACLU of Indiana or to join the organization," but it "depends on the individual circumstance of each interaction." (Ex. A, Int. 8). The ACLU volunteers collect no more than $50 through their solicitation at Monument Circle on each Constitution Day (Ex. A, Int. 11). In comparison, the total grants and/or donations that the Indiana ACLU receives each year ranges from $1 million to $2.7 million annually (Int. 12).

LEGAL STANDARD FOR PRELIMINARY INJUNCTIONS

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear* showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quoting 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2948, pp. 129–130 (2d ed.1995) (emphasis added by *Mazurek* court).

To obtain a preliminary injunction, a party must show that it: (1) has a reasonable likelihood of success on the merits; (2) lacks an adequate remedy at law; and (3) will suffer irreparable harm if the preliminary injunction is not awarded. *Girl Scouts of Manitou Council, Inc. v. Girl Scouts of U.S., Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008). *See also Winder v. Natural Res. Defense Council*, 555 U.S. 7, 20 (2008). In *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) the Seventh Circuit has also weighed whether the public interest would be served by entering the preliminary injunction.

ARGUMENT

I. Plaintiffs fail to show a reasonable likelihood of success on the merits.

A. The statute is a permissible time, place, and manner restriction.

When a party seeks a preliminary injunction alleging potential First Amendment violations, "the likelihood of success on the merits will often be the determinative factor." *Connection Distrib. Co.*, 154. F.3d at 288. Prior case law establishes that solicitation (interchangeably referred to as "panhandling") is a form of speech entitled to protection under the First Amendment. *See United States v.*

Kokinda, 497 U.S. 720, 725 (1990); *Heffron v. Int'l Soc. For Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). But the right to panhandle is subject to reasonable regulations in the time, place, and manner in which individuals may panhandle. *See Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980) (stating that solicitation is subject to "reasonable regulations" so long as the regulations reflect "due regard" for the constitutional interests at stake).

Since the vast majority of panhandling in the State of Indiana takes place in public forums such as streets, parks, sidewalks, and monuments, Defendants have an interest in ensuring that the time, place, and manner of the panhandling does not run the risk of jeopardizing public safety and commerce. In *United States v. O'Brien*, 391 U.S. 367 (1968), a protestor faced charges for destroying a draft card during a protest against the Vietnam War. The Supreme Court determined that although Mr. O'Brien's burning of the draft card was a form of "speech," the Court upheld the prohibition against burning draft cards. The Court established the O'Brien test, stating:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

United States v. O'Brien at 377.

The Court in *O'Brien* determined that although the action of burning the draft card was in fact a form of speech, and thereby protected by the First

Amendment, there was still a governmental interest in regulating the speech. The Supreme Court later developed this rationale further in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), stating that the government may reasonably restrict the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech that they are narrowly tailored to serve a significant interest, and that they leave open ample alternative channels for communication of the information." *Ward* 491 U.S. at 791.

The Court in *Ward* added a fourth prong to the *O'Brien* Test, requiring that there are "ample alternative[s]" for communicating the restricted free speech. With the advent of the *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155 (2015) and its subsequent incorporation into the Seventh Circuit's second decision in *Norton v. City of Springfield, Ill.*, 806 F.3d 411, 411 (7th Cir. 2015), the notion of what constitutes "content-neutral" changed dramatically.

Reed v. Gilbert deemed that content-based laws are those that target speech based on its communicative content, and are presumably unconstitutional and justified only if the government proves that they are narrowly tailored to serve compelling state interests. *Reed*, 576 U.S. 155, at 2226. *Norton* applied that concept in the context of the City of Springfield's anti-panhandling ordinance. However, it must be noted that in a second, post-*Reed* decision, the City of Springfield did not put forth arguments that the ordinance was justified. Rather, the parties in *Norton* "agreed that the ordinance stands or falls on the answer to the question whether it is a form of content discrimination." *Norton v. City of Springfield, Ill.,* 806 F.3d at

413. The Indiana Panhandling Statute is distinguishable from the Ordinance in *Norton* because the Indiana Panhandling Statute, in its current and future form, is narrowly tailored and serves a compelling state interest, and that it is justified in both form and function.

B. The Indiana Panhandling Statute serves a compelling state interest and is narrowly tailored to achieve that purpose.

Since Plaintiffs have moved for the preliminary injunction, they have the burden of showing they are likely to succeed on the merits of their claim. They have failed to meet this burden, because they have not satisfactorily showed that the Indiana Panhandling Statute fails to pass strict scrutiny. Plaintiffs have failed to show that the statute that it does not serve a compelling state interest or that it is not narrowly tailored.

The Indiana Panhandling Statute promotes a compelling state interest. Indiana has a legitimate interest in promoting the safety and convenience of its citizens on public streets. *See Gresham v. Peterson*, 225 F.3d 899, 906 (7th Cir. 2000) (holding that the state "also has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks…" (quoting *Madsen v. Women's Health Center*, 512 U.S. 753, 768 (1994)); s*ee also Ayres v. City of Chicago*, 125 F.3d 1010, 1015 (7th Cir. 1997) ("There are unquestionable benefits from regulating peddling, First Amendment or otherwise, [including] the control of congestion."); *Ovadal v. City of Madison, Wisconsin*, 416 F.3d 531, 537 (7th Cir. 2005) ("Ovadal concedes that the city has an interest in protecting public safety and promoting the free flow of traffic on public streets.").

The Supreme Court noted that it is not unreasonable to prohibit solicitation on the ground that it is unquestionably a particular form of speech that is disruptive to business and impedes the normal flow of traffic. *United States v. Kokinda*, 497 U.S. 720, 733 (1990). "As residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information." *Id.* "Since the act of soliciting alms or contributions usually has as its objective an immediate act of charity, it has the potentiality for evoking highly personal and subjective reactions. Reflection usually is not encouraged, and the person solicited often must make a hasty decision whether to share his resources with an unfamiliar organization while under the eager gaze of the solicitor." *Id.* (quoting 43 Fed. Reg. 38824 (1978))).

Plaintiffs concede that the government has a substantial interest in protecting public safety, but they argue that other enacted laws are sufficient to protect the public and local business (ECF 22, "Memo" at 21–22). However, Plaintiffs' cursory recitation of other Indiana statutes does not take into account the particulars of what Indiana's panhandling statute is trying to achieve and the aims of these other criminal laws.

Indiana's battery statute prohibits touching in a rude, insolent, or abusive manner, *see* Ind. Code § 35-42-2-1(c), criminal recklessness prohibits an act that "creates a substantial risk of bodily injury to another," *see* Ind. Code § 35-42-2-2(a), and disorderly conduct prohibits fighting or in tumultuous conduct, *see* Ind. Code §

35-45-1-3. Indiana statutes on theft and robbery prohibit the act of stealing from someone. Ind. Code § 35-43-4-2 (theft); 35-42-5-1 (robbery). These statutes prohibit serious crimes that often involve the bodily touching of another person, or at the least, very aggressive conduct towards another person. But the panhandling statute is trying to prevent an opportunity for that behavior to occur in the first place by avoiding a confrontation between a solicitor and the general public with a verbal request for money.

Plaintiffs rely on Indiana's provocation statute, which prohibits behavior that would "likely to promote a reasonable person to commit battery," Ind. Code § 35-42-2-3, suggesting that this is enough to avoid the abusive behavior by panhandlers (Memo 22). But again, the panhandling statute is trying to avoid a different form of abusive conduct in order to provide a safe place for people to enjoy public spaces. *See, e.g.* Ind. Code § 35-45-17-2(3) ("Panhandling while touching the individual being solicited without the solicited individual's consent."). And the crime of stalking requires that multiple actions be taken by the offending person before they can be arrested for that offense. *See* Ind. Code § 35-45-10-1. In contrast, the panhandling statute prohibits even an initial action of intimidating behavior, before it escalates to multiple acts.

Plaintiffs claim that verbal solicitations are merely annoying and that the First Amendment prevents government from curtailing speech merely because the public finds it disagreeable or unwanted (Memo 22). However, the Seventh Circuit has affirmed "that vocal requests for money create a threatening environment or at

least a nuisance for some citizens," and a government's regulation of such speech falls within the government's "legitimate interest in promoting the safety and convenience of its citizens on public streets." *Gresham*, 225 F.3d at 906 (collecting cases).

The Indiana Panhandling Statute is tailored, in part, to prevent undue duress or harassment of individuals in circumstances where they may be more vulnerable, such as in the midst of a financial transaction or while stationary in a vehicle. Plaintiffs erroneously contend that the statute is somehow both over-inclusive and under-inclusive, but the acts proscribed in the Panhandling Statute are appropriately balanced to serve the state's interests in protecting the public's safety.

The panhandling statute is trying to create a safe space where there is no verbal request for money that could escalate to more serious criminal behavior. The panhandling statute ensures the easy flow of foot traffic and provides a safe place for people to park their cars, go shopping, and purchase food without fear of being confronted with a request for money. But to ensure that individuals and charitable organizations may continue soliciting money, the statute allows for passive panhandling by holding a sign or performing music, including within 50 feet of a public monument, business, or bank. The new statute also removes the prohibition for panhandling at night, thus creating more opportunities for people to passively solicit funds, even within the proscribed areas.

Federal precedent affirms that the Panhandling statute overcomes a strict

scrutiny review by promoting a compelling government interest which would be achieved less effectively absent the regulation. The Indiana Panhandling Statute is a necessary regulation to serve the state's compelling interests and is narrowly tailored to achieve those interests. Given Defendants' reasonable arguments on these grounds, Plaintiffs do not have a reasonable likelihood of success on the merits. Plaintiffs' request for a preliminary injunction should be denied.

C. The Indiana panhandling statute is not unconstitutionally vague, in whole or in part.

Under Plaintiff's argument that the Indiana Panhandling Statute is unconstitutionally vague, Plaintiffs must show that the statute "(1) does not provide a person of ordinary intelligence a reasonable opportunity to know what is prohibited, or (2) fails to provide explicit standards to prevent arbitrary and discriminatory enforcement by those enforcing the statute." *United States v. Lim*, 444 F.3d 910, 915 (7th Cir. 2006). The crux of whether or not a statute is void for vagueness hinges upon whether or not it is likely to cause confusion in the mind of an ordinary person about whether or not their conduct is proscribed by the statute. *Id.*

"A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law." *Vill. Of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). Plaintiffs have stated on multiple occasions that their intended conduct is to solicit donations around Monument Circle, a

location that is clearly a public monument within the ambit of the Indiana Panhandling Statute (Henegar-2 ¶ 44; Hudelson ¶ 18). Consequently, they cannot complain of vagueness since they have already identified that their conduct is clearly proscribed.

Aspects of the Indiana Panhandling Statute also serve to mitigate the law's vagueness. "[A] scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed." *Id*. At 499. The Indiana Panhandling Statute, both in its current enactment, and in its amended July 1, 2020 form, both provide ample notice to the public about what types of behavior are prohibited under the statute.

The discretion of law enforcement officials to enforce the statute is not overly broad, and is in fact appropriately narrowly tailored. Panhandling statutes have been enacted and enforced in Indiana for decades, and the Indiana Panhandling Statute merely identifies new areas where panhandling is prohibited without fundamentally changing what is deemed "panhandling." Accordingly, the law is not a material change in *how* the law is enforced, and thus it does not "open the door" for arbitrary discriminatory enforcement by those enforcing the statute.

II. Plaintiffs fail to meet the burdens of showing irreparable harm absent a preliminary injunction.

"A party seeking to obtain a preliminary injunction must demonstrate: (1) its case has some likelihood of success on the merits; (2) that no adequate remedy at law exists; and (3) it will suffer irreparable harm if the injunction is not granted." *Ty, Inc. v. Jones Grp., Inc.*, 237 F.3d 891, 895 (7th Cir. 2001). As outlined above,

Plaintiffs have not shown that they have a reasonable likelihood of succeeding on the merits. However, even if the Court believed that Plaintiffs carried their burden, they have not proven that any harm to them would be outweighed by the harm to the Defendants.

If the Court determines that the first three factors for a preliminary injunction have been met, "then it must consider the irreparable harm that the *nonmoving party* will suffer if preliminary relief is granted, balancing such harm against the irreparable harm the moving party will suffer if relief is denied." *Ty, Inc.*, 237 F.3d at 895 (emphasis added) (referencing the "three conditions" a party must demonstrate to obtain a preliminary injunction, including (1) its case has some likelihood of success on the merits; (2) that no adequate remedy at law exists; and (3) it will suffer irreparable harm if the injunction is not granted). Thus, Plaintiffs have still failed to show that the balance of harms weighs in their favor.

Plaintiffs allege that the Indiana Panhandling Statute precludes them from soliciting donations and membership in the ACLU of Indiana during Constitution Day (Memo 9, quoting Henegar-2 ¶ 36; Blair ¶ 9; Hudelson ¶ 10). However, Plaintiffs have failed to represent to the Court any sort of metric for the funds they've raised, or the members they've recruited, as a result of their Constitution Day solicitations. At best, the ACLU collects $50 through their solicitation at Monument Circle on each Constitution Day (Ex. A, Int. 11), but receives $1 million to $2.7 million in annual grants and donations (Ex. A, Int. 12).

Defendants would suffer irreparable harm if the preliminary injunction were

awarded. Defendants, serving in their capacities as public servants, have a duty to protect the public from harassment by panhandlers, which would decrease the public's enjoyment of business and public monuments. It is important to local economies that the public feels safe frequenting areas of commercial activity, such as in downtown areas of cities where businesses tend to be concentrated the heaviest. If the public does not feel safe or comfortable patronizing these commercial areas, it is likely that businesses will suffer, and thus local economies will suffer. These harms cannot be undone, and those losses cannot be recouped. As such, the balance of harms favors Defendants, and the preliminary injunction should be denied.

III. Denying the preliminary injunction serves the public's best interests.

"Finally, the court must consider the public interest (non-parties) in denying or granting the injunction." *Ty, Inc.,* 237 F.3d at, 895. The public's best interests would be served by a denial of the preliminary injunction. The Indiana Panhandling Statute protects the safety and convenience of the public, and allows for the free flow of traffic on the streets, sidewalks, and within businesses. The vast majority of the public would prefer to avoid being confronted by a stranger with verbal requests for money, food, or other items of value. "Confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information." *United States v. Kokinda*, 497 U.S. 720, 721 (1990).

This concern is exacerbated by the current COVID-19 pandemic sweeping the

world. Many states, including Indiana, have implemented measures such as "stay-at-home" and "social distancing" orders to prevent the continued spread of this disease, and it is certainly within the public's interest to have any and all safeguards against unwanted close contact with unknown third parties. A preliminary injunction would render Defendants unable to enforce the Indiana Panhandling Statute in a time when its effects are especially desirable.

CONCLUSION

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). Plaintiff has failed to carry that burden, and consequently, Plaintiff's motion for preliminary injunction should be denied.

Respectfully submitted,

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