

August 21, 2019

Via Electronic Mail and Fax

BART Board of Directors
P.O. Box 12688
Oakland, CA 94604-2688
boardofdirectors@bart.gov

Re: Proposed Ordinance to Prohibit Panhandling on BART

Dear BART Board of Directors:

I am writing on behalf of the American Civil Liberties Union Foundation of Northern California regarding Director Allen's effort to potentially prohibit panhandling on BART.¹ According to the San Francisco Chronicle, Director Allen plans to propose an ordinance to end all panhandling on BART and recently tweeted "Why do BART riders endure constant panhandling on trains?"² Last year, the ACLU Foundation of Northern California and Legal Services of Northern California won a preliminary injunction in the Eastern District of California because the City of Sacramento intended to restrict solicitation, including panhandling, in various places across the City. The Eastern District halted that ordinance and stated among other points "it is rare that a regulation restricting speech because of its content will ever be permissible."³ However, this is exactly what Director Allen seems to be contemplating with an anti-panhandling ordinance. We have concerns when a government entity plans to restrict fundamental free speech rights and make it illegal to panhandle or busk. Indeed, the Ninth Circuit ruled "[i]t is beyond dispute that solicitation is a form of expression entitled to the same constitutional protections as traditional speech."⁴ The Board of Directors has publicly stated it is considering proactive approaches to how it can be a resource to homeless individuals and has policies that seem to be consistent with this statement, but criminalizing busking, panhandling, and other forms of free speech seems wholly inconsistent with this approach.

Prohibiting panhandling conflicts with court rulings across the country regarding free speech. Panhandling, as well as busking and other types of communication where individuals

¹ Rachel Swan, "Rapper Tone Oliver makes up to \$200 a day on BART. Should he be barred from busking?", SF Chronicle, Aug. 18, 2019, <https://www.sfchronicle.com/bayarea/article/Rapper-Tone-Oliver-makes-up-to-200-a-day-on-14340819.php>.

² Rachel Swan, "Rapper Tone Oliver makes up to \$200 a day on BART. Should he be barred from busking?", SF Chronicle, Aug. 18, 2019, <https://www.sfchronicle.com/bayarea/article/Rapper-Tone-Oliver-makes-up-to-200-a-day-on-14340819.php>.

³ *SRCEH v. City of Sacramento*, No. 2:18-cv-00878-MCE-AC (E.D. CA July 19, 2018).

⁴ *ACLU v. City of Las Vegas*, 466 F.3d 784, 792 (9th Cir. 2006).

may solicit and receive donations, are forms of speech protected under the First Amendment.⁵ Singling out and prohibiting these forms of communication would restrict speech based on its content. But content-based restrictions are “presumed invalid” and must meet the “exacting” strict scrutiny test to pass constitutional muster.⁶ In *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015), the Supreme Court clarified the definition of what makes a law content-based by holding that if a law on its face regulates speech based on its content, then it “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.”⁷

Adopting an anti-panhandling ordinance obstructs clear free speech and would likely be unconstitutional. In addition, people like rapper Tone Oliver make nearly \$200 a day by entertaining individuals as they commute on BART.⁸ Adopting a new anti-panhandling ordinance will restrict his and many other individual’s free speech rights based on the content of the speech.

As a reminder, individuals have the right to ask for donations and they can ask more than once.⁹ If the Board plans to adopt an ordinance that restricts speech that addresses how people can ask for donations and money, that type of restriction will likely have issues as well. And it would be akin to many of the pitfalls that the recently enjoined Sacramento ordinance suffered.

BART has a policy to invest in access choices to ensure that disadvantaged communities share the benefits of BART accessibility.¹⁰ An anti-panhandling ordinance seems to be inconsistent with that policy. Instead of targeting people for panhandling and busking, some of whom may be disadvantaged, BART should be utilizing this time to invest in choices that help individuals who need to panhandle or busk for every day needs.

Rather than expend resources trying to draft an anti-panhandling ordinance that will likely be riddled with constitutional pitfalls, the Board should use its resources and time to discuss free speech and how the Board can be of service to individuals who panhandle and busk.

The question is, does BART want to take the stance that an individual will shed their constitutional protections once they enter the station? I hope the answer is no.

⁵ See *Loper v. New York City Police Dept.*, 999 F.2d 699, 704 (2nd Cir. 1993) (“We see little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed.”); see also *Berger v. City of Seattle*, 569 F.3d 1029, 1050 (9th Cir. 2009) (internal citations omitted) (“Speech that solicits funds is protected by the First Amendment.”); *Reynolds v. Middleton*, 779 F.3d 222, 225 (4th Cir. 2015).

⁶ *United States v. Alvarez*, 567 U.S. 709, 717, 724 (2012).

⁷ *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct at 2228 (2015).

⁸ Rachel Swan, “Rapper Tone Oliver makes up to \$200 a day on BART. Should he be barred from busking?”, SF Chronicle, Aug. 18, 2019, <https://www.sfchronicle.com/bayarea/article/Rapper-Tone-Oliver-makes-up-to-200-a-day-on-14340819.php>.

⁹ *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 193 (D. Ma. 2015) (“[a]dditional post-rejection messages do not necessarily threaten public safety”).

¹⁰ BART Station Access Policy, adopted June 6, 2016, available at <https://www.bart.gov/sites/default/files/docs/BART%20Access%20Policy%20-%20Adopted%202016-06-09%20Final%20Adopted.pdf>.

We hope you seriously consider not moving forward with any anti-panhandling ordinances and use time and resources to help those who may need donations in places where there are other individuals who want to donate.

Sincerely,



Abre' Conner
Staff Attorney
ACLU Foundation of Northern California

cc: Debora Allen, Director
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