July 6, 2016

By Email and First-Class Mail
John A. McNally, Mayor
Charles Sammarone, City Council President
City of Youngstown
26 S. Phelps Street
Youngstown, Ohio 44503

RE: Unconstitutionality of Anti-Loitering Bill and Anti-Homelessness Policies

Dear Mayor and Members of Youngstown City Council,

We write to express our concerns over proposed ordinance 16-224, which purports to prohibit improper conduct in the central business district, and additional steps taken by the City of Youngstown relating to the poor and homeless population. We believe that more constructive and constitutional approaches can be taken that will benefit all of Youngstown's citizens.

We urge the Youngstown City Council to reject the proposed anti-loitering ordinance, as fatally flawed. The proposed ordinance is so vague as to leave citizens without any idea of what behavior is prohibited and fails to meaningfully limit police discretion. Indeed, that appears to be the goal: to potentially sweep in a huge amount of innocent and everyday behavior and then expect the police to enforce the law discriminatorily and arbitrarily against people (rather than behavior) subjectively viewed as undesirable. The United States Supreme Court has repeatedly struck down laws indistinguishable from that proposed here. *See, e.g.*, *City of Chicago v. Morales*, 527 U.S. 41, 47 (1999) (striking down law that prohibited "loitering" or "remain[ing] in any one place with no apparent purpose" in a public place, with a "criminal street gang membe[r]" after being ordered to disperse by the police); *Kolender v. Lawson*, 461 U.S. 352, 353 (1983) (striking down "criminal statute that requires persons who loiter or wander on the streets to provide a 'credible and reliable' identification and to account for their presence when requested by a peace officer"). The flaws with the proposed bill are inherent defects with its core purpose, not quibbles with language, and City Council should reject the Mayor's request for a blank check to target undesirable people rather than behavior.

The people of Youngstown have the right to visit, linger, travel, explore, and simply be present in public streets and sidewalks—rights that are "historically part of the amenities of life as we have known them." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972); *see also Kennedy v. City of Cincinnati*, 595 F.3d 327, 336 (6th Cir. 2010) ("[I]t is clear that Kennedy had a liberty interest 'to remain in a public place of his choice' and that defendants interfered

with this interest."). What the ordinance's drafters appear not to apprehend is that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." *Morales*, 527 U.S. at 53.

But the unconstitutionally vague language of the proposed ordinance potentially criminalizes a swath of innocent activity. To "sit or lie on a . . . bench" may be a crime throughout downtown even if you are, say, waiting for a bus, section (D), and it is doubly illegal if you happen to be within 50 feet of a business, section (C). A person with a physical disability who uses a wheelchair would become a criminal upon venturing into the "sit-free" Central Business District. And the prohibition on loitering—defined as "remaining idle in essentially one place and shall include the concepts of spending time idly, loafing or walking about aimlessly"—might criminalize a lunchtime stroll around the block on a sunny day.

A Youngstown citizen simply cannot know how to conduct herself in the central business district. As the Supreme Court similarly asked in its denunciation of Chicago's anti-loitering ordinance, how would any Youngstown citizen standing in a public place know if she was "idle"? If she were talking to another person, would she be "loafing"? If she were frequently checking her watch and looking expectantly down the street, would she be "walking about aimlessly"? *See Morales*, 527 U.S. at 57, 63. The vagueness of the prohibition dooms this ordinance.

Under this bill, police would be tasked with interrogating and ticketing people caught window-shopping, grabbing a smoke break, or waiting for friends outside of a restaurant. This misguided bill would criminalize the wandering celebrated by poets, *e.g., Walt Whitman, The Open Road*, as well as Petula Clark's more recent musical invitation to travel "Downtown" to "linger on the sidewalk where the neon signs are pretty." Since the lunchtime stroller, Whitman's protagonist, and Clark's downtown reveler would all lack a specific, articulable "aim" to offer to a questioning police officer, all would be subject to ejection or arrest.

And giving virtually unlimited discretion to police compounds rather than solves the problem with the law. Section (E) of the ordinance fails to meaningfully limit a police officer's discretion because police are given absolute authority to determine what violates the vague loitering definition in section (A)(3). Vague and overbroad ordinances like this one are unconstitutional because they fail to give citizens and police sufficient guidance about what conduct is unlawful.

In fact, discriminatory enforcement appears to be the point: rather than identify specific behavior that is harmful and making that behavior illegal, this law criminalizes innocent behavior—sitting, standing, walking, *being*—and then asks the police to selectively enforce it against the undesirables.[1] The Supreme Court has criticized this irresponsible and vague

[1] Remarkably, the mayor has defended the broad sweep of the bill by admitting: "Quite frankly, our police officers know who they're looking for." http://wkbn.com/2016/06/15/youngstown-mayor-proposes-bill-to-prevent-loitering-downtown/ Similarly, patrolman Joseph Moran explains that the law shouldn't concern visitors to downtown because, "We're familiar with the

approach to lawmaking for creating "a regime in which the poor and the unpopular are permitted to stand on a public sidewalk . . . only at the whim of any police officer." *Papachristou*, 405 U.S. at 166, 170 (quotations omitted). This proposed law does not just allow for arbitrary and discriminatory enforcement—it *depends* on it. Youngstown deserves better than this bill, and the Constitution demands better.

Unfortunately, this proposed bill appears to be only the latest in a series of counterproductive and unconstitutional efforts to rid the City of the visible poor. According to press reports and a local nonprofit organization, the City of Youngstown recently destroyed private property of several homeless individuals without notice. The mean-spirited reasons given for this destruction was to combat the charity of "folks who think they're doing the right thing by delivering food or clothes or other items," http://wkbn.com/2016/06/21/ypd-works-to-clean-up-homeless-encampments-downtown/, and instead "force a few of [the homeless] into programs." http://www.wfmj.com/…/32…/youngstown-homeless-camp-crackdown

Such wanton destruction may violate the Constitution and subject the city to liability. Indeed, the Case Western Reserve University School of Law Milton A. Kramer Law Clinic is in the midst of litigation against the City of Akron over similar destruction of homeless peoples' tents and personal belongings. *See Moe et al. v. City of Akron et al.*, No. 5:14-CV-02197 (N.D. Ohio). It is without question that homeless people enjoy a constitutionally protected interest in their personal items and shelter, regardless of whether they are stored on city property. *Cash v. Hamilton Cty. Dep't of Adult Prob.,* 388 F.3d 539, 542, 544 (6th Cir. 2004) (holding that homeless individuals must receive due process—notice and an opportunity to reclaim property—prior to a local government's removal and destruction of personal belongings). Therefore, the seizure and destruction of homeless peoples' property may violate both the Fourth Amendment and the Fourteenth Amendment. *See Cash*, 388 F.3d 539; *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1030 (9th Cir. 2012) (holding that Los Angeles' destruction of homeless peoples' property on sidewalks in violation of city ordinance amounted to an unlawful seizure and violated Due Process Clause).

Sadly, the trend of anti-poor animus by the City continues with the apparent enforcement of an unconstitutional anti-panhandling law. Last year, Youngstown replaced its obviously unconstitutional anti-begging law with another patently unconstitutional "improper solicitation" law. Youngstown Ord. § 509.08. By discriminating against one type of disfavored speech, Youngstown's latest law runs into the same constitutional defect identified as *every single* anti-panhandling law considered by *every single* federal court in recent years, from Massachusetts to Hawaii.[2] Indeed, the City of Akron recently repealed its similar anti-panhandling law a few days

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people who are causing the problems." http://www.vindy.com/news/2016/jun/24/anti-loitering-bill-cleared-for-vote-in- In other words, the mayor asks for the power to target *people* rather than behavior, an approach that is particularly troubling and dangerous in light of the long history of anti-loitering laws being used to selectively target racial minorities. *Morales*, 527 U.S. at 54 n. 20.

[2] *E.g.*, *Norton v. City of Springfield, Ill.*, 806 F.3d 411, 412 (7th Cir. 2015); *Reynolds v. Middleton*, 779 F.3d 222, 232 (4th Cir. 2015); *Clatterbuck v. City of Charlottesville*, 708 F.3d 549 (4th Cir. 2013); *Thayer v. City of Worcester*, --- F. Supp. 3d ---, 2015 WL 6872450 (D.

after the American Civil Liberties Union of Ohio and the Cleveland-Marshall College of Law Civil Litigation Clinic filed a federal suit challenging it. *Hill v. City of Akron*, Case No. 5:16-cv-01061 (N.D. Ohio). Arresting people simply for asking for help is also not a valid law enforcement strategy.

Using law enforcement to harass, ticket, and arrest people for being poor or homeless is expensive and ineffective (as well as being cruel and unconstitutional). Jail is the most expensive possible option to provide shelter. The City of San Francisco recently concluded that enforcement of laws against the homeless had no effect on the City's homeless population, even though the City had spent more than $20 *million* in 2015 alone enforcing such laws. http://ow.ly/WFrY301Lymy Other research has come to the same conclusion. *See, e.g.*, University of Denver Sturm College of Law, Too High A Price: What Criminalizing Homelessness Costs Colorado, http://www.law.du.edu/documents/homeless-advocacy-policy-project/2-16-16-Final-Report.pdf And the cost for Youngstown could be even greater still, since criminalizing homelessness can prevent the City's nonprofits from receiving funding under HUD's Continuum of Care program. Yet a further cost could come from litigation—including Plaintiffs' attorney's fees, specifically authorized by 42 U.S.C. § 1988—if Youngstown continues down this path.

Investing in solutions—housing, support services, etc.—rather than enforcement has consistently been shown to be more effective than criminal justice responses. Indeed, apart from wasting taxpayer dollars, the primary effect of enforcement is to make individuals more suspicious and resistant to programs that are available. We urge the City to reconsider its approach towards homelessness, and choose a path towards effective, constitutional solutions.

Sincerely.

/s/ Avidan Cover
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/s/ Doron Kalir
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Mass. Nov. 9, 2015); *McLaughlin v. City of Lowell*, --- F. Supp. 3d ---, 2015 WL 6453144 (D. Mass. Oct. 23, 2015); *Browne v. City of Grand Junction, Colorado*, --- F. Supp. 3d ---, 2015 WL 5728755 (D. Colo. Sept. 30, 2015); *American Civil Liberties Union of Idaho, Inc. v. City of Boise*, 998 F. Supp. 2d 908, 917 (D. Idaho 2014); *Guy v. County of Hawaii*, 2014 WL 4702289, at *5 (D. Hawaii 2014); *Kelly v. City of Parkersburg*, 978 F. Supp. 2d 624, 631 (S.D.W.Va. 2013).

/s/ Freda Levenson
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