

LFC Requester: \_\_\_\_\_

**AGENCY BILL ANALYSIS  
2024 REGULAR SESSION**

**WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:**

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*{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}*

**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

*Check all that apply:*

**Original**     **Amendment**    \_\_\_\_\_  
**Correction**    \_\_\_\_\_ **Substitute**    \_\_\_\_\_

**Date** 2/1/2024

**Bill No:** SB 248-280

**Sponsor:** Sen. Leo Jaramillo  
**Short Title:** UNSAFE USE OF PUBLIC ROADWAYS & SPACES ACT

**Agency Name and Code**    LOPD 280  
**Number:** \_\_\_\_\_  
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**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY24	FY25		

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY24	FY25	FY26		

(Parenthesis ( ) Indicate Expenditure Decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	<b>FY24</b>	<b>FY25</b>	<b>FY26</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: None known

Duplicates/Relates to Appropriation in the General Appropriation Act: None known

**SECTION III: NARRATIVE**

**BILL SUMMARY**

Synopsis:

SB 248 is a panhandling bill that would create a new statute which would criminalize panhandling in numerous areas, at certain times, and in certain ways.

First, SB 248 would define a number of limited public areas and prohibit “solicitation” (panhandling) in such areas, by making it a petty misdemeanor. SB 248 would define “solicit” and “solicitation” as “a request by a person through words, signs or actions for donations of money or other items of value, appeals for support of person, policies or projects and offers to sell products or services.”

In particular, SB 248 would prohibit and criminalize solicitation in the following areas:

- All nonpublic forums within a right of way which the bill would define as “traffic lanes, turn lanes, on-street parking spaces within a roadway and medians thirty-six inches or less in width;”
- All nonpublic forums within a public parking lot which the bill would define as “vehicular aisles and parking spaces in a parking lot.”

SB 248 would permit limited solicitation during daylight hours only, but criminalize such activity at night, in the following areas:

- All “limited public forums within a right of way” which the bill would define as either a “paved median greater than thirty-six inches in width” or “a paved or unpaved pedestrian walkway immediately adjacent to traffic or turning lands, including a curb;”
- All “limited public forums within a public parking lot” which the bill would define as “a pedestrian walkway not within vehicular aisles or parking spaces of a parking lot.”

SB 248 would permit solicitation in the following area:

- All “traditional public forums,” which the bill defines as “a pedestrian area within a right of way that is not a limited public forum within a right of way, a limited public forum within a public parking lot, a nonpublic forum within a public

parking lot or a nonpublic forum within a right of way.”

SB 248 would also criminalize individuals in vehicles who “offer money or another item of value to a solicitor who” is soliciting in a prohibited area or during a prohibited hour. This could include giving money, food, or water to a person who is on an insufficiently wide median or is soliciting at an improper time.

Finally, the last section of the bill would make “aggressive solicitation” a misdemeanor. It would define such conduct as (1) coming closer than three feet to a person solicited unless that person has indicated that they will make a donation or communication with the person; (2) blocking or otherwise impeding the entrance to any structure or vehicle; (3) continuing to solicit from or follow behind, ahead or alongside a solicited person after the solicited person has declined the solicitation by words or actions; and (4) threatening a person with a word or gesture or direct abusive language at a solicited person.

Because it is likely to face constitutional challenges to some or all of its provisions, SB 248 contains a severability clause.

## **FISCAL IMPLICATIONS**

Passage of SB 248 would almost certainly result in litigation both from criminal justice entities and civil rights groups. *See e.g.*, National Law Center on Homelessness and Poverty, *Housing Not Handcuffs Fact Sheet*, available at: <https://homelesslaw.org/wp-content/uploads/2018/10/criminalization-one-pager.pdf> (noting that numerous panhandling bills have been struck down on 1<sup>st</sup> Amendment free speech grounds including “aggressive panhandling” bans). It is not clear if joining in broader litigation would require additional resources by LOPD, but individual attorneys handling cases where the petty misdemeanor or misdemeanor crimes were charged would likely have to litigate the constitutionality of the statute as part of their defense of the defendant.

In addition, if aggressively charged, it could result in more indigent persons facing criminal charges. Any increase in cases or the complexity of cases handled by the LOPD will require additional attorneys. An entry-level Assistant Trial Attorney’s mid-point salary *including benefits* is \$121, 723.30 in Albuquerque/Santa Fe and \$130, 212.59 in the outlying areas (due to salary differential required to maintain qualified employees). A mid-level felony capable Associate Trial Attorney’s mid-point salary *including benefits* is \$136, 321.97 in Albuquerque/Santa Fe and \$144, 811.26 in the outlying areas. A senior-level Trial attorney’s mid-point salary *including benefits* is \$149, 063.13 in Albuquerque/Santa Fe and \$157, 552.44 in the outlying areas. Recurring statewide operational costs per attorney would be \$12, 780.00; additionally, average support staff (secretarial, investigator and social worker) costs per attorney would total \$126, 722.33.

In addition to the impact on LOPD, courts, DAs, AGs, and NMCD could anticipate increased costs.

## **SIGNIFICANT ISSUES**

LOPD sees several significant issues with SB 248, including constitutional concerns as well as issues with enforcement.

## *Constitutionality Issues*

There are known First Amendment concerns with these types of bans because they act as limitations on speech in public areas. The government's power to restrict speech in "traditional public fora," such as "public streets and sidewalks," "is very limited." *McCullen v. Coakley*, 573 U.S. 464, 476-77 (2014). Such restrictions often have to be narrowly tailored to further a significant or compelling state interest. See *Martin v. City of Albuquerque*, 396 F.Supp.3d 1008, 1024 (D.N.M. 2019), *aff'd sub nom. Brewer v. City of Albuquerque*, 18 F.4th 1205 (10th Cir. 2021). This requires showing that the government "seriously undertook to address the problem with less intrusive tools readily available to it" and that "a substantial portion" of the law's burden on speech "serve[s] to advance its goals." *McCullen*, 573 U.S. at 494.

By allowing solicitation in traditional and limited public forums, with restrictions only during specific times, the language in SB 248 appears to be trying to navigate these constitutional concerns by appearing to be narrowly tailored. However, the content-based restrictions on speech, hand-to-hand transactions, and the specific time-bound limitations on solicitation could still be viewed as infringing on First Amendment rights because they are not clearly connected to substantial government interests, not narrowly tailored to address those interests, and cover conduct already regulated by other laws.

First, SB 248 would likely be deemed to be a content-based restriction in that it prohibits particular kinds of speech or communications. See *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 164-65 (2015). As a result, it would be subject to strict scrutiny, making it less likely to pass constitutional scrutiny. *Id.*; see also *Martin*, 396 F.Supp.3d at 1024 (recognizing that content-based restrictions are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests").

In addition, it is not clear the provisions of SB 248 would be considered sufficiently narrowly-tailored to further the interests of public safety or curbing homelessness or panhandling. In *Messina v. Ft. Lauderdale*, 2024 WL 301574, (S.D. Florida), and *Martin*, aspects of similar ordinances were invalidated for not being narrowly tailored and lacking evidence of achieving traffic safety goals without restricting free speech. SB 248 could be deemed unconstitutional in whole or part for similar reasons.

Like the ordinances in *Messina* and *Martin*, SB 248 would restrict panhandling without clear, evidence-based justifications for how it specifically advances public safety or welfare. Indeed, as homelessness advocacy groups point out, criminalization often worsens homelessness and other less costly efforts often have better outcomes at reducing homelessness and panhandling, than criminalizing such conduct. See e.g., National Law Center on Homelessness and Poverty, *Housing Not Handcuffs Fact Sheet*, available at: <https://homelesslaw.org/wp-content/uploads/2018/10/criminalization-one-pager.pdf>; see also Maggie Germano, Forbes, *How the United States has criminalized poverty and how to change that now*, available at: <https://www.forbes.com/sites/maggiegermano/2020/08/04/how-the-united-states-has-criminalized-poverty-and-how-to-change-that-now/?sh=695310413281> (observing that panhandling laws do not reduce the homeless population and worsens outcomes by putting them into the criminal justice system and imposing fees associated with being jailed, compounding their financial struggles).

Similarly, in *Martin*, the restrictions on panhandling on medians or locations nearby such spots were not shown to be narrowly tailored to increase pedestrian safety, particularly given that

better enforcement of existing traffic laws would likely work better. *Martin*, 396 F. Supp. 3d at 1033–35.

In a similar vein, the more serious conduct SB 248 would criminalize is already addressed by other statutes. For instance, threatening a person would likely constitute an assault and be punishable under NMSA 1978, Section 30-3-1 (criminalizing the attempt to commit a battery, any unlawful act, threat or menacing conduct which causes another to fear a battery, or the use of insulting language toward another impugning the person’s honor, delicacy, or reputation). Such conduct could also constitute disorderly conduct proscribed by NMSA 1978, Section 30-20-1. Blocking or impeding a public entrance could constitute trespassing under NMSA 1978, Section 30-14-1 or run afoul of other similar local ordinances. In assessing whether a statute is narrowly tailored, courts consider whether obvious alternative measures—including those already on the books—could address the problem in question. *See, e.g., McCullen*, 573 U.S. at 490-97; *Doe v. City of Albuquerque*, 667 F.3d 1111, 1133-34 (10th Cir. 2012).

#### *Other concerns*

Beyond First Amendment concerns and the fact the more serious conduct is already addressed under existing laws, SB 248’s more expansive provisions could cause increases in jail populations for non-violent offenses, putting strain on the criminal justice system. In addition, because there are often fines associated with arrest and prosecution, these provisions could effectively criminalize poverty and worsen outcomes for indigent defendants.

Finally, the language of SB 248 is not readily accessible to the average individual, making it unlikely that the average citizen would understand where and when solicitation is prohibited or allowed. As a result, the provisions are likely to be unknowingly and unintentionally violated, simply because individuals (including persons in vehicles giving food or money to someone) cannot tell if a median is of appropriate size, if the panhandling is occurring within half an hour from sunset, or that stepping off a curb into the street or into a parking spot to grab an offered item (money, food, water, etc.) would violate the statute.

#### **PERFORMANCE IMPLICATIONS**

None known

#### **ADMINISTRATIVE IMPLICATIONS**

None known

#### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

None known

#### **TECHNICAL ISSUES**

Analyst is unaware whether this legislation is germane under Art. IV, Section 5. It is not a budget bill and analyst is unaware if it has been drawn pursuant to a special message of the Governor.

#### **OTHER SUBSTANTIVE ISSUES**

**ALTERNATIVES** Better road design, better enforcement of existing traffic statutes (jaywalking, reckless driving, etc.), funding social programs to cut down on homelessness and panhandling.

**WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Status Quo

**AMENDMENTS**

None known