

2011 WL 6370538 (U.S.) (Appellate Petition, Motion and Filing)

Supreme Court of the United States.

CITY OF REDONDO BEACH, Petitioner,

v.

COMITE DE JORNALEROS DE REDONDO BEACH, et al., Respondents.

No. 11-760.

December 15, 2011.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

Petition for a Writ of Certiorari

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***I QUESTION PRESENTED**

The City of Redondo Beach ("City") adopted an ordinance making it unlawful for a person to stand on a street or highway and solicit employment, business, or contributions from the occupant of a motor vehicle. The City's ordinance was patterned after a City of Phoenix ordinance that the Ninth Circuit had previously upheld against a First Amendment challenge.

The Ninth Circuit *en banc* - reversing the panel decision and substantially overturning its earlier decision upholding the City of Phoenix ordinance, and with two judges dissenting - held that the City's ordinance is overbroad and therefore facially invalid under the Free Speech Clause of the First Amendment, because it is not narrowly tailored to achieve the City's goals. The Ninth Circuit's decision conflicts with decisions of other federal circuit courts and a state supreme court, which held that similar ordinances were narrowly tailored and did not violate the First Amendment.

The question presented is:

Whether the City of Redondo Beach's ordinance, which makes it unlawful for a person to stand on a street or highway and solicit employment, business, or contributions from the occupant of a motor vehicle, is overbroad and therefore facially invalid under the Free Speech Clause of the First Amendment.

***II PARTIES TO THE PROCEEDINGS**

The petitioner, which was the defendant and appellant below, is the City of Redondo Beach, California.

The respondents, which were the plaintiffs and appellees below, are Comit  de Jornaleros de Redondo Beach and National Day Laborer Organizing Network.

CORPORATE DISCLOSURE STATEMENT

Petitioner City of Redondo Beach is a public entity.

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*1 PETITION FOR WRIT OF CERTIORARI

Petitioner City of Redondo Beach respectfully petitions this Court for a writ of certiorari to review the Ninth Circuit decision below.

OPINIONS BELOW

The Ninth Circuit's *en banc* decision (App. 1) is reported at 657 F.3d 936. The Ninth Circuit's panel decision (App. 71) is reported at 607 F.3d 1178. The district court decision (App. 150) is reported at 475 F.Supp.2d 952.

JURISDICTION

The Ninth Circuit's *en banc* decision was issued on September 16, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND ORDINANCES

(1) First Amendment, U.S. Constitution:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to *2 petition the government for a redress of grievances.

(2) City of Redondo Beach, Municipal Code § 3-7.1601:

(a) It shall be unlawful for any person to stand on a street or highway and solicit, or attempt to solicit, employment, business, or contributions from an occupant of any motor vehicle. For purposes of this section, "street or highway" shall mean all of that area which is dedicated to public use for public street purposes and shall include, but not be limited to, roadways, parkways, medians, alleys, sidewalks, curbs and public ways.

(b) It shall be unlawful for any person to stop, park or stand a motor vehicle on a street or highway from which any occupant attempts to hire or hires for employment another person or persons.

STATEMENT OF THE CASE

1. The City's Ordinance

The City of Redondo Beach ("City"), California, has for many years experienced law enforcement problems caused by day laborers soliciting employment from passing motorists on streets and highways. To address the problem, the City in 1987 adopted an ordinance, section 3-7.1601 of the Municipal Code ("Ordinance"), prohibiting any person from standing on a street or highway and soliciting *3 employment, business or contributions from the occupant of a motor vehicle. *See* page 2, *supra*. In 1980, the City amended the Ordinance, making it also unlawful for the occupant of a motor vehicle to stop on a street or highway in order to hire or attempt to hire a person for employment. *Id.* The Ordinance now provides:

(a) It shall be unlawful for any person to stand on a street or highway and solicit, or attempt to solicit, employment, business, or contributions from an occupant of any motor vehicle. For purposes of this section, "street or highway" shall mean all of that area which is dedicated to public use for public street purposes and shall include, but not be limited to, roadways, parkways, medians, alleys, sidewalks, curbs and public ways.

(b) It shall be unlawful for any person to stop, park or stand a motor vehicle on a street or highway from which any occupant attempts to hire or hires for employment another person or persons.

Id.

The City's Ordinance was patterned after a City of Phoenix ordinance that the Ninth Circuit had previously sustained against a First Amendment challenge in *ACORN v. City of Phoenix*, 798 F.2d 1260 (9th Cir. 1986). The City of Phoenix ordinance provided:

No person shall stand on a street or highway and solicit, or attempt to solicit, employment, *4 business or contributions from the occupant of any vehicle.

ACORN, 798 F.2d at 1262.

In November 2004, plaintiffs Comite de Jornaleros de Redondo Beach (“Comite”) and National Day Laborer Organizing Network (“NDLON”) brought an action for injunctive and declaratory relief against the City in the district court for the Central District of California, alleging that the Ordinance is facially invalid because it violates the Free Speech Clause of the First Amendment of the Constitution.

2. The District Court Decision

In response to the parties' cross motions for summary judgment, the district court granted the plaintiffs' motion and denied the City's motion. App. 150, 187. The court held that the Ordinance is content-neutral, App. 165, and advances the City's significant government interest in providing for public safety, combating crime, and maintaining the aesthetics of its public forums. App. 172. The court also held, however, that the Ordinance is not narrowly tailored to accomplish the City's goals, App. 177, and does not allow adequate alternative channels for constitutionally-protected expression. App. 182.

3. The Ninth Circuit Panel Decision

On appeal, the Ninth Circuit panel, in a 2-1 decision authored by Judge Ikuta, with Judge *5 Wardlaw dissenting, reversed the district court decision. App. 71-110. The panel held that the Ordinance is a valid restriction of the time, place and manner of expressive conduct and does not violate the First Amendment. App. 80-102. Specifically, the panel held that the Ordinance is content-neutral, App. 84-92, and advances the City's significant government interests. App. 93-94. The panel also held that the Ordinance is narrowly tailored to accomplish the City's significant interest, App. 94-98, because the Ordinance prohibits “in-person demands requiring an immediate response from vehicle occupants,” and does not prevent communication of ideas. App. 95. Finally, the panel held that the Ordinance leaves open adequate alternative avenues of communication, by allowing persons to solicit business, employment or contributions from people on sidewalks or in other public forums. App. 99-102.

The panel substantially relied on the Ninth Circuit's earlier decision in *ACORN v. City of Phoenix*, 798 F.2d 1260 (9th Cir. 1986), which had sustained the City of Phoenix's virtually identical ordinance against a First Amendment challenge. App. 73, 87-91, 94-98, 99-100. The panel stated that the City's Ordinance is patterned after the City of Phoenix ordinance, App. 74-75, and that the two ordinances are “nearly identical.” App. 96.

*6 4. The Ninth Circuit *En Banc* Decision

The Ninth Circuit *en banc* overturned the panel decision. App. 1-28. The full court did not decide whether the Ordinance is content-neutral or leaves open adequate alternative channels of communication. App. 23. Instead, the court held that the

Ordinance is “overbroad” and therefore facially invalid, because it is not “narrowly tailored” to serve the City’s goals. App. 20-23. The Ordinance is not “narrowly tailored,” the court ruled, because it might apply in various hypothetical situations involving protected speech - children selling lemonade on the sidewalk, Girl Scouts selling cookies on the sidewalk, motorists stopping to inquire whether a child would be interested in yardwork or babysitting, and the like. *Id.* Although the City argued that the Ordinance does not apply in these situations, the court rejected the City’s interpretation, stating that it is inconsistent with the Ordinance’s “plain language.” App. 17. The court also stated that the Ordinance is “geographically overinclusive,” because it applies to all streets and sidewalks in the City, even though the City had only offered evidence of traffic problems concerning a small number of streets. App. 23. The court overturned its earlier decision in *ACORN* “to the extent that it construed a substantially identically worded ordinance as facially restricting only solicitation conduct.” App. 19 n. 5.

Judge M. Smith wrote a concurring opinion, joined wholly or in part by Judges Thomas and Graber, arguing that the Ordinance also violates the *7 First Amendment because it is not content-neutral and does not leave open adequate alternative channels of communication. App. 29-43.

Chief Judge Kozinski wrote a dissenting opinion, joined by Judge Bea, arguing that the City’s Ordinance does not violate the First Amendment. App. 43-68. First, the Chief Judge argued that the Ordinance regulates conduct rather than speech. App. 46-47. Second, the Chief Judge argued that the Ordinance is narrowly tailored, because the Ordinance can be construed, as the City construes it, as not applicable in the hypothetical situations described in the majority opinion. App. 47-60. The Chief Judge also argued that the Ordinance is not “substantially” overbroad and therefore not subject to a facial challenge. *Id.* Finally, the Chief Judge argued, contrary to the concurring opinion, that the City’s Ordinance is content-neutral and leaves open adequate alternative channels for communication. App. 66-68.

REASONS FOR GRANTING THE WRIT INTRODUCTION

Many American communities face a growing problem caused by day laborers, charitable organizers and others soliciting employment, business or contributions from passing motorists on public streets and highways. J. Middleton, *Contingent Workers in a Changing Economy: Endure, Adapt, or Organize?*, 22 N.Y.U. Rev. L. & Soc. Change 557, 558-560 (1996).

*8 Such solicitations threaten the public safety by disrupting the flow of traffic and often create unaesthetic conditions. As one commentator has stated, “[t]here are reports of rushing cars, vandalism, gambling, and public drinking by day laborers at solicitation sites.” S. Munzer, *Ellison on “Chronic Misconduct” in Urban Spaces: Of Panhandlers, Bench Squatters and Day Laborers*, 32 Harv. C.R.-C.L. L. Rev. 1, 34 (Winter 1997).

To combat this growing problem, many communities, including the City of Redondo Beach (“City”), have adopted ordinances prohibiting persons from soliciting employment, business or contributions from passing motorists on streets or highways. Until the Ninth Circuit’s decision in the instant case, all federal and state appellate courts that have reviewed the constitutionality of these ordinances under the Free Speech Clause of the First Amendment - namely the Fifth, Seventh and Eighth Circuit Courts of Appeals and the Colorado Supreme Court - have upheld their constitutionality. Specifically, these courts have ruled that the ordinances were reasonable, content-neutral restrictions of the time, place and manner of speech, because they were narrowly tailored to serve the government’s legitimate goal of regulating traffic flows and providing for the public safety. The courts cited with approval the Ninth Circuit’s decision in *ACORN v. City of Phoenix*, 798 F.2d 1260 (9th Cir. 1986), which had sustained the constitutionality of the City of Phoenix’s virtually identical ordinance.

*9 Here, the Ninth Circuit *en banc* overturned its decision in *ACORN* and held that the City’s Ordinance prohibiting solicitations for employment, business or contributions from passing motorists is not narrowly tailored, and therefore is “overbroad” and facially invalid under the First Amendment. The Ninth Circuit decision conflicts with the decisions of the Fifth, Seventh and Eighth Circuits and the Colorado Supreme Court, which had upheld the constitutionality of virtually identical ordinances against

First Amendment challenges. The Ninth Circuit now stands alone, among all courts that have reviewed this constitutional question, in holding that such an ordinance violates the First Amendment. This Court should grant the petition to resolve the conflict between the Ninth Circuit, on the one hand, and the other federal circuit courts and the Colorado Supreme Court, on the other, concerning this significant constitutional issue.

Beyond the need to resolve this conflict, the petition presents an important national issue concerning the scope of the Free Speech Clause of the First Amendment, as applied to government regulation of solicitations for employment, business or contributions from passing motorists. Municipal governments have a significant interest in regulating such solicitations, because they disrupt the flow of traffic and create unsafe and unaesthetic conditions. This Court has held that local governments have an important interest in regulating the flow of traffic *10 pursuant to their traditional police power. *Schenck v. Pro-Choice Network*, 519 U.S. 357, 376 (1997).

In particular, the petition presents an important issue concerning the scope of the overbreadth doctrine of the First Amendment. This doctrine holds that a regulation is facially invalid under the First Amendment if it inhibits speech by persons not before the court, even though it may validly be applied to the plaintiff. The Ninth Circuit did not hold that the City's Ordinance is unconstitutional *as applied* to the plaintiffs. Instead, the court held that the Ordinance is *facially* invalid because it is overbroad, in that it might inhibit free speech by other persons, such as children selling lemonade and Girl Scouts selling cookies, among other examples.

The Ninth Circuit fundamentally misconceived and misapplied the overbreadth doctrine, by applying it expansively to invalidate the City's Ordinance rather than narrowly to sustain it. This Court has stated that the overbreadth doctrine creates "substantial social costs" by precluding the government from regulating constitutionally unprotected speech or conduct even in furtherance of "legitimate" goals, *Virginia v. Hicks*, 539 U.S. 113, 119 (2003), and therefore that the "strong medicine" of the overbreadth doctrine will be employed "sparingly and only as a last resort." *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973). The overbreadth doctrine does not apply simply because "one can conceive of some impermissible application" of the regulation; rather, there must be a "realistic danger" that the regulation will inhibit *11 the free speech rights of others not before the court. *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800, 801 (1984). Further, the overbreadth must be not only "real but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Id.* at 800, *quoting Broadrick*, 413 U.S. at 615; *see Hicks*, 539 U.S. at 122.

Here, the City narrowly construes its Ordinance as applicable only to solicitations that cause motorists to stop in traffic in order to negotiate transactions, and as not applicable in the hypothetical circumstances conceived by the Ninth Circuit; thus, there is no "realistic danger" that the Ordinance will be applied in these hypothetical circumstances. Further, even assuming *arguendo* that the City's Ordinance applies in these hypothetical circumstances, the Ordinance is not "substantially" overbroad judged in relation to its "plainly legitimate sweep"; the Ordinance's application to large congregations of day laborers seeking work on a daily basis from passing motorists is far more "substantial" and consequential than its potential applicability in the relatively minor, isolated and hypothetical circumstances described by the Ninth Circuit - in which, notably, the Ordinance has never been applied. Thus, the Ordinance is not unconstitutionally overbroad.

The Ordinance is also not unconstitutionally overbroad because it regulates conduct rather than speech. The Ordinance prohibits solicitations that cause motorists to stop in traffic to negotiate transactions, and does not prohibit the communication or *12 expression of ideas. This Court has held that the overbreadth doctrine "[r]arely, if ever," applies to conduct unrelated to "pure speech," even where the conduct has an expressive element. *Hicks*, 539 U.S. at 124.

As Chief Judge Kozinski argued in his "deep dissent," the Ninth Circuit decision is "folly" - "demonstrably, egregiously, recklessly wrong." App. 43, 45. Indeed, he would "dissent twice" if he could. App. 45.

In sum, this petition presents an important national issue concerning the scope of the Free Speech Clause of the First Amendment, and whether the government can constitutionally prohibit day laborers, charitable organizers and others from soliciting employment, business or contributions from passing motorists on streets and highways. The petition also raises an important issue concerning the scope of the First Amendment's overbreadth doctrine, and whether the doctrine should be applied expansively or narrowly - whether it restricts the government's ability to prohibit such solicitations, and whether the solicitations are a form of speech at all. The Ninth Circuit decision, in holding that the City's Ordinance violates the First Amendment, conflicts with decisions of other federal circuit courts and a state supreme court, which have held that virtually identical ordinances do not violate the First Amendment. This Court should grant the petition to decide this significant constitutional issue and resolve the *13 conflict between the Ninth Circuit and other federal and state courts.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER FEDERAL CIRCUIT COURTS AND A STATE SUPREME COURT.

The First Amendment of the Constitution, which applies to the federal government and is made applicable to the states through the Fourteenth Amendment, *Gitlow v. New York*, 268 U.S. 652, 666 (1925), prohibits the government from “abridging the freedom of speech.” *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002). The government may, however, reasonably restrict the “time, place, or manner” of protected speech, if the restrictions are “justified without reference to the content of the regulated speech,” “narrowly tailored” to serve a “significant governmental interest,” and “leave open ample alternative channels for communication of the information.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Community for Creative Non-violence*, 468 U.S. 288, 293 (1984); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 703 (1992) (Kennedy, J., concurring).

The Ninth Circuit held that the City's Ordinance is not a valid “time, place, or manner” restriction of free speech and therefore violates the First Amendment, *14 because it is not “narrowly tailored” to achieve the City's goals. App. 20-23. The Ninth Circuit's decision directly conflicts with decisions of other federal circuit courts and the Colorado Supreme Court, which held that virtually identical ordinances were narrowly tailored to serve the government's goals and did not violate the First Amendment.

First, the Ninth Circuit's decision conflicts with the Eighth Circuit's decision in *ACORN v. St. Louis County*, 930 F.2d 591 (8th Cir. 1991). There, St. Louis County (“County”) adopted an ordinance similar to the City's Ordinance here, which stated:

No person shall stand in a roadway for the purpose of soliciting a ride, employment, charitable contribution or business from the occupant of any vehicle.

St. Louis County, 930 F.2d at 593. The County's ordinance was challenged on First Amendment grounds by a charitable organization, ACORN, whose members solicited contributions by approaching stopped vehicles at traffic intersections, carrying cans for collecting money and distributing “tags” containing information about ACORN. *Id.* ¹ The Eighth Circuit held that the County's ordinance was a reasonable, content-neutral restriction of the time, place and manner of speech, and did not violate the First *15 Amendment. Citing this Court's decision in *Ward*, the court stated that the County's ordinance was “narrowly tailored” to serve the county's “significant” interest in protecting the public safety, because the ordinance promoted “a substantial government interest that would be achieved less effectively absent the regulation,” even though it was not “the least-restrictive or least-intrusive means” of serving this interest. *Id.* at 595. The Eighth Circuit approvingly cited the Ninth Circuit's earlier decision in *ACORN v. City of Phoenix*, 798 F.2d 1260 (9th Cir. 1986), which had sustained the constitutionality of the City of

Phoenix's virtually identical ordinance against a First Amendment challenge. *Id.* at 596. The Eighth Circuit's decision and the Ninth Circuit's decision here are in conflict.

The Ninth Circuit's decision also conflicts with the Fifth Circuit's decision in *Int'l Society for Krishna Consciousness, Inc. v. City of Baton Rouge*, 876 F.2d 494 (5th Cir. 1989). There, the City of Baton Rouge also adopted an ordinance virtually identical to the City's Ordinance here, which stated:

No person shall be upon or go upon any street or roadway ... for the purpose of soliciting employment, business or charitable contributions of any kind from the occupant of any vehicle.

Baton Rouge, 876 F.2d at 495-496. The Baton Rouge ordinance was challenged on First Amendment grounds by a religious organization whose members solicited contributions from, and distributed literature *16 to, motorists at traffic intersections. The Fifth Circuit held that the ordinance did not violate the First Amendment, because it was "narrowly tailored" to serve Baton Rouge's "significant safety interest." *Id.* at 498. The court approvingly cited and quoted from the Ninth Circuit's decision in *ACORN*, which, the court stated, had upheld a "substantially similar" ordinance. *Id.* The court rejected the plaintiff's argument that the ordinance was unconstitutionally "overbroad," stating that there was no evidence that the ordinance would have a "different impact on third parties' interests in free speech than it had" on the plaintiffs. *Id.* at 500, quoting *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984). The Fifth Circuit's decision and the Ninth Circuit's decision here are in conflict.

The Ninth Circuit's decision also conflicts with the Seventh Circuit's decision in *United States Labor Party v. Oremus*, 619 F.2d 683 (7th Cir. 1980). There, the State of Illinois enacted a statute virtually identical to the City's ordinance here, which provided:

No person shall stand on a highway for the purpose of soliciting employment, business or contributions from the occupant of any vehicle.

Oremus, 619 F.2d at 686. The Illinois statute was challenged on First Amendment grounds by a labor organization that claimed the right to sell its newspapers and advocate its views to motorists at traffic intersections. The Seventh Circuit held that the *17 statute did not violate the First Amendment, because it is a "narrow and reasonable limitation on solicitation in intersections," is "precisely drawn," and "only modestly restricts solicitation." *Id.* at 688. The Seventh Circuit's decision and the Ninth Circuit's decision here are in conflict.

The Ninth Circuit's decision also conflicts with the Colorado Supreme Court's decision in *Denver Publishing Co. v. City of Aurora*, 896 P.2d 306 (Colo. 1995). There, a Colorado city adopted an ordinance making it unlawful for any person to "solicit employment, business, contributions, or sales" from "the occupant of any vehicle traveling upon any street or highway" under defined circumstances. *Aurora*, 896 P.2d at 309. The ordinance was challenged on First Amendment grounds by a Denver newspaper whose employees "hawked" newspapers at traffic intersections. The Colorado Supreme Court held that the ordinance did not violate the First Amendment, because it is "narrowly tailored" to serve the city's "significant governmental interest." *Id.* at 313-317. The Court approvingly cited the Ninth Circuit's earlier decision in *ACORN*, which, the Court stated, involved an ordinance that "closely tracked" the ordinance in the *Aurora* case. *Id.* at 317. The Colorado Supreme Court's decision and the Ninth Circuit's decision here are in conflict.²

*18 In sum, the Ninth Circuit decision conflicts with decisions of the Fifth, Seventh and Eighth Circuits and the Colorado Supreme Court, which held that virtually identical ordinances did not violate the First Amendment because they were narrowly tailored to serve the government's goal in regulating traffic flows and providing for the public safety.³ The ordinances reviewed in these cases contained common language, by prohibiting any “person” on a “street,” “roadway” or “highway” from soliciting “employment,” “business” or “contributions” from the “occupant of any vehicle.” The reviewing courts cited with approval the Ninth Circuit's decision in *ACORN*, which had upheld the constitutionality of a virtually identical ordinance. Since the Ninth Circuit in this case overturned its *ACORN* decision and held that the City's Ordinance is unconstitutional, the Ninth Circuit's decision *19 conflicts with the decisions of other federal circuit courts and the Colorado Supreme Court. This Court should grant the petition to resolve the conflict.

II. THE NINTH CIRCUIT FUNDAMENTALLY MISAPPLIED THE FIRST AMENDMENT'S OVERBREADTH DOCTRINE, BY HOLDING THAT THE CITY'S ORDINANCE IS NOT NARROWLY TAILORED TO SERVE THE CITY'S GOALS.

A. The Ninth Circuit Held That The City's Ordinance Is Unconstitutionally Overbroad Because It Is Not Narrowly Tailored To Serve The City's Goals.

As noted above, the First Amendment does not preclude reasonable governmental regulation of the “time, place or manner” of protected speech, if the regulation is “content-neutral,” “narrowly tailored” to serve a “significant governmental interest,” and leaves open “ample alternative channels for communication of the information.” *Ward*, 491 U.S. at 791; *Clark*, 468 U.S. at 293; *Perry*, 460 U.S. at 45.

The Ninth Circuit held that the City's Ordinance is facially invalid under the First Amendment because it is not “narrowly tailored” to serve the City's goals of promoting traffic flow and safety. App. 20-28. The Ordinance is not narrowly tailored, the court stated, because it “restricts significantly more speech than is necessary, and because the City could have employed various less restrictive alternatives to *20 achieve its goals.” App. 21. The court stated that the Ordinance might be applied in several hypothetical situations “that do not cause the types of problems that motivated the Ordinance,” such as children selling lemonade on sidewalks, Girl Scouts selling cookies on sidewalks, and signbearers on sidewalks seeking patronage or offering handbills, among other examples. App. 21-23.

Notably, the Ninth Circuit did not hold that the Ordinance is unconstitutional *as applied* to the plaintiffs. Instead, the court held that the Ordinance is *facially* unconstitutional because it is “overbroad,” in that it might inhibit free speech by other persons, such as children selling lemonade and Girl Scouts selling cookies. App. 12-13, 16, 21-23, 28.

Under the First Amendment's overbreadth doctrine, a government regulation of protected speech is facially invalid if it is written so broadly that it might inhibit free speech by persons not before the court, even though the regulation may validly be applied to the plaintiff. *United States v. Stevens*, 130 S.Ct. 1577, 1587 (2010); *Virginia v. Hicks*, 539 U.S. 113, 118-119 (2003); *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798-799 (1984); *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973); *Dombrowski v. Pfister*, 380 U.S. 479, 486 (1965). The overbreadth doctrine is an exception to the general rule that a party does not have Article III standing to challenge a regulation that may validly be applied to him. *Vincent*, 466 U.S. at 799; *Broadrick*, 413 U.S. at 612. The overbreadth doctrine is also an exception to *21 the general rule that a regulation is not facially invalid unless there is “no set of circumstances” under which the regulation might be valid. *Hicks*, 539 U.S. at 118; *United States v. Salerno*, 481 U.S. 739, 745 (1987).

This Court has acknowledged the “risk” that the overbreadth doctrine “might sweep so broadly” that the exception might “swallow” the general rules relating to standing and facial challenges. *Vincent*, 466 U.S. at 799. More broadly, this Court has stated that the overbreadth doctrine creates “substantial social costs” by precluding the government from enforcing a law “that reflects legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.” *Hicks*, 539 U.S. at 119 (citation and internal quotation marks omitted).

To limit these risks and costs, this Court has limited the breadth of the overbreadth doctrine itself, stating that the “strong medicine” of the overbreadth doctrine will be employed “sparingly and only as a last resort.” *Broadrick*, 413 U.S. at 613; *see Hicks*, 539 U.S. at 120. The overbreadth doctrine does not apply simply because “one can conceive of some impermissible application of a statute”; rather, there must be a “*realistic danger* that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.” *Vincent*, 466 U.S. at 800, 801 (emphasis added). Additionally, the overbreadth must be not only “real but *substantial* as well, judged in relation to the statute’s plainly *22 legitimate sweep.” *Id.* at 800 (citation omitted; emphasis added); *see Hicks*, 539 U.S. at 123-124. The plaintiff asserting the overbreadth doctrine “bears the burden of demonstrating ... that substantial overbreadth exists.” *Hicks*, 539 U.S. at 122 (citation omitted).

As this petition will now explain, the Ninth Circuit decision fundamentally misapplied the overbreadth doctrine, by expansively applying the doctrine to invalidate a regulation that does not present a “realistic danger” of “substantial” overbreadth judged in relation to its “legitimate” application. The question whether the overbreadth doctrine applies expansively or narrowly, and whether it bars the government from prohibiting solicitations for employment, business and contributions from passing motorists, is one of national significance, as indicated by the fact that many other jurisdictions have prohibited such solicitations in the cases described above. *See* pages 14-19, *supra*. This Court should grant the petition to review this significant constitutional question.

B. The City's Ordinance Is Narrowly Tailored To Serve The City's Significant Interest.

As noted above, the Ninth Circuit held that the City's Ordinance is unconstitutionally overbroad because it is not narrowly tailored to meet the City's goals. App. 20-28. On the contrary, the Ordinance meets the First Amendment's narrow tailoring *23 requirement, as established by this Court in *Ward*, *Clark* and other cases cited above.

1. The Ordinance Serves A “Significant Governmental Interest.”

First, the City's Ordinance serves a “significant governmental interest,” as required by this Court's decisions. *E.g.*, *Ward*, 491 U.S. at 791. The Ordinance - by prohibiting persons from soliciting employment, business or contributions from passing motorists - serves the City's interest in regulating traffic flows, providing for the public safety, and maintaining an aesthetic environment. The very purpose of the solicitations is to encourage motorists to stop in traffic and consummate transactions, which unavoidably creates hazards to the public safety. This Court has held that the government has a significant interest in “promoting the free flow of traffic on streets and sidewalks,” *Schenck v. Pro-Choice Network*, 519 U.S. 357, 376 (1997), and in regulating expressive conduct in order to “advance esthetic values.” *Vincent*, 466 U.S. at 805. “The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.” *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941).

*24 Chief Judge Kozinski argued in his dissenting opinion that the Ordinance promotes safe traffic conditions and aesthetic values, stating:

For years, the city of Redondo Beach has had a serious problem with day laborers - sometimes as many as seventy-five - crowding sidewalks and street-corners, soliciting work from passing motorists. [Citation.] As might be expected when large groups of men gather at a single location, they litter, vandalize, urinate, block the sidewalk, harass females and damage property. Cars and trucks stop to negotiate employment and load up laborers, disrupting traffic, [¶] Residents and citizens need not suffer these harms and indignities day in and day out for years on end. It is to secure the safety, beauty, tranquility and orderliness of neighborhoods that municipal governments are instituted among men. Nothing in the First Amendment prevents government from ensuring that sidewalks are reserved for walking rather than loitering; streets are used as thoroughfares rather than open-air hiring halls; and bushes serve as adornment rather than latrines. [Citation.]

App. 43-45.

2. The Ordinance Is Narrowly Tailored.

Second, the City's Ordinance is narrowly tailored to serve the City's significant interest. The Ordinance prohibits persons from seeking employment, business *25 or contributions from passing motorists on streets and highways, but does not prevent persons from contacting motorists for other purposes - such as distributing literature to them - or from seeking employment, business or contributions at other locations. As the panel decision stated in upholding the City's Ordinance, "an ordinance prohibiting in-person demands requiring an immediate response from vehicle occupants, but allowing the distribution of literature to those same occupants, is narrowly tailored to meet traffic and safety concerns." App. 95-96.

The Ninth Circuit held that the City's Ordinance is not narrowly tailored because the City could have employed "less restrictive" alternatives, means and measures to achieve its goals. App. 4 ("less restrictive measures"), 21 ("less restrictive alternatives"), 24 ("less restrictive means"). In *Ward*, however, this Court stated that a regulation may be narrowly tailored even though the government's goals "could be adequately served by some less-speech-restrictive alternative." *Ward*, 491 U.S. at 798, 800. ⁴ According to *Ward*, a government regulation is narrowly tailored "as long as the regulation promotes a substantial government interest that would be achieved less *26 effectively absent the regulation." *Id.* at 799 (citation omitted). Here, the City's "substantial" interest in promoting the public safety "would be achieved less effectively absent the regulation," because - absent the regulation - the City would be unable to prohibit solicitations to passing motorists that create traffic problems and unaesthetic conditions. The Ninth Circuit, by holding that the City could have pursued "less restrictive" alternatives, applied a stricter standard of scrutiny than required by *Ward*.

The Ninth Circuit also held that the City's Ordinance is not narrowly tailored because it might inhibit speech in various hypothetical situations, as in the case of children selling lemonade and Girl Scouts selling cookies, among other examples. App. 20-23. The City, however, narrowly construes its Ordinance as applicable only to solicitors who cause motorists to stop in traffic and engage in face-to-face negotiations with the solicitors, and as not applicable in the hypothetical situations described in the Ninth Circuit decision. App. 17. Since the City narrowly construes its Ordinance, there is no "realistic danger" that the Ordinance will be applied in these hypothetical situations, and no basis for concluding that the Ordinance is overbroad.

The Ninth Circuit rejected the City's narrow construction of its Ordinance, stating that the City's construction is inconsistent with the "plain language" of the Ordinance. App. 17. This Court has held, however, that a state or local government's "limiting

construction” of its regulation is highly relevant in *27 determining whether a regulation is narrowly tailored for First Amendment purposes. As this Court stated in *Ward*:

Administrative interpretation and implementation of a regulation are, of course, highly relevant to our analysis, for in evaluating a *facial challenge* to a state law, a federal court must ... consider any *limiting construction* that a state court or enforcement agency has proffered.

Ward, 491 U.S. at 795-796 (citations and internal quotation marks omitted; emphases added). *See also Hicks*, 539 U.S. at 119 (statute not overbroad if “limiting construction” removes it from “seeming threat or deterrence” to protected expression); *Broadrick*, 413 U.S. at 613 (same). Under established canons of construction, a government regulation must be construed narrowly to avoid constitutional conflicts, not broadly to create them. *Frisby v. Schultz*, 487 U.S. 474, 483 (1988).

The City's limiting construction of its Ordinance is reasonable and entitled to deference. As Chief Judge Kozinski stated in his dissenting opinion:

Part (a) of the Ordinance makes it “unlawful for any person to stand on a street or highway and *solicit*, or attempt to solicit, employment, business or contributions from an *28 occupant of any motor vehicle. [Citation.] The operative term here is “solicit,” and it can be read broadly as including all communications with motorists, including holding up a billboard urging drivers to support a political candidate or patronize a local establishment; or it can be read narrowly as requiring face-to-face conversation with a vehicle occupant for the purpose of consummating a transaction on the spot, such as being hired as a day laborer, obtaining a donation or offering sexual services. It's obvious that the narrower construction is at least plausible: It's consistent with the dictionary meaning of the term [footnote omitted], as well as its common understanding. It's also the more plausible meaning, given that the ordinance specifically refers to soliciting employment, which is hard to do while a car is moving.... It doesn't matter whether the narrow reading of “solicit” is the more plausible; it is enough that it's *a* plausible meaning, which means we must adopt it rather than striking down the law as unconstitutional.

App. 49-50 (original emphasis).⁵

*29 Chief Judge Kozinski argued that the court should defer to the City's narrow construction of its Ordinance, because the City's construction is consistent with the Ordinance's drafting and enforcement history. Quoting the City Attorney, he stated that the City “ ‘interprets and enforces the Ordinance as prohibiting solicitations that cause drivers of motor vehicles to stop in traffic.’ ” App. 55. He stated that the Ordinance was adopted to deal with the “festering problem” of “men standing on street corners soliciting work from motorists”; that the City's police department had received “numerous complaints from business owners and residents ... that the day laborers interrupt the flow of traffic while they contact employers from the City sidewalks and streets” and that the day laborers “commit acts of vandalism, litter, and urinate”; that a business association had written to the mayor complaining about “the gathering of day laborers” and that the mayor had written to the City Council complaining about the problem of “recurring gathering of day laborers”; and that the City Attorney then wrote to the mayor and City Council urging passage of the Ordinance. App. 52-54 (brackets omitted). The Chief Judge concluded:

The drafting and enforcement history is thus consistent with a commonsense reading of the ordinance as applying only to people on *30 sidewalks looking to stop passing motorists so they can deal with them. The city enforces the ordinance consistent with this narrow meaning. ... [¶] There is no evidence that the city has ever enforced, threatened to enforce or dreamt of enforcing the ordinance against sidewalk food vendors,

tyke lemonade moguls, Girl Scout cookie peddlers, high school car washers, disaster relief solicitors or middle-aged men cruising neighborhoods looking to pick up teenage girls from the front yards. Plaintiff has shown none of the *realistic* dangers that the Supreme Court said must be shown in making a facial challenge. *Vincent*, 466 U.S. at 801.

App. 54-55 (original emphasis).

Chief Judge Kozinski argued that the City's construction of its Ordinance is "authoritative," stating:

As the Supreme Court has instructed us, when considering a "facial challenge, we must consider the city's authoritative constructions of the ordinance, including its own implementation and interpretation of it." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992). [¶] The majority turns up its collective nose at the city's proffered interpretation as somehow not authoritative enough, ... but I'm at a loss to understand why a declaration from the city's top law enforcement officer doesn't cut the mustard. Time and again, the Supreme Court has *31 accepted the construction of a statute proffered by a state, county or city. [Citations.]

App. 55-56 (brackets omitted).⁶

In sum, the Ninth Circuit misapplied the overbreadth doctrine by disregarding the City's "limiting construction" of its Ordinance, under which the Ordinance does not have an overbroad effect.

III. THE NINTH CIRCUIT FUNDAMENTALLY MISCONCEIVED AND MISAPPLIED THE OVERBREADTH DOCTRINE BY FAILING TO CONSIDER WHETHER THE CITY'S ORDINANCE IS "SUBSTANTIALLY" OVERBROAD JUDGED IN RELATION TO ITS "LEGITIMATE" APPLICATION.

A. The City's Ordinance Is Not "Substantially" Overbroad Judged In Relation To Its "Legitimate" Application.

Even assuming *arguendo* that the City's Ordinance applies in the hypothetical situations conceived *32 by the Ninth Circuit, the Ordinance is still not overbroad and facially unconstitutional.

As noted above, the Ninth Circuit reasoned that the Ordinance is overbroad and facially unconstitutional because it is not narrowly tailored. App. 20-28. In its conclusion, for example, the court stated that "[b]ecause the Ordinance is not narrowly tailored to achieve the City's goals, it is facially unconstitutional." App. 28. The Ninth Court thus assumed that a non-narrowly tailored regulation is facially unconstitutional.

The Ninth Circuit's assumption that a non-narrowly tailored regulation is facially unconstitutional is incorrect. As the Fifth Circuit has stated, " 'overbreadth' is not simply the converse of 'narrowly tailored.' " *Int'l Society for Krishna Consciousness, Inc. v. City of Baton Rouge*, 876 R2d 494, 500 (5th Cir. 1989), citing *Vincent*, 466 U.S. at 801. Rather, this Court has held that the overbreadth doctrine - under which a regulation is *facially* unconstitutional - applies only if the regulation, "*taken as a whole*, is *substantially* overbroad judged in relation to its *plainly legitimate sweep*." *Hicks*, 539 U.S. at 122 (first emphasis original; second and third emphases added). Thus, the overbreadth doctrine requires a comparison of the regulation's "legitimate" application and its arguably overbroad application, to determine whether the supposed overbreadth is "substantial" based on the comparison. Overbreadth and narrow tailoring are not opposite sides of the same coin, contrary to the Ninth Circuit's view. Facial invalidity *33 requires a stronger showing than simply non-narrow tailoring.

Here, the City's Ordinance applies - and the City applies it - to large congregations of day laborers seeking work on a daily basis from passing motorists. The Ordinance's actual application in these situations has far greater significance and impact than its potential applicability in the relatively minor, isolated and hypothetical situations described by the Ninth Circuit - in which, notably, the Ordinance has never been applied. Thus, the Ordinance "taken as a whole" is not "substantially" overbroad judged in relation to its "plainly legitimate sweep."

The Ninth Circuit made no inquiry whatever into whether the Ordinance "taken as a whole" is "substantially" overbroad in light of its "legitimate" application. The Ninth Circuit thus misconceived and misapplied the overbreadth doctrine.

This Court has also held that a regulation is not overbroad if it does not have a "different impact on any third parties' interests in free speech than it has" on the plaintiffs. *Vincent*, 466 U.S. at 801; see *Int'l Society for Krishna Consciousness, Inc. v. City of Baton Rouge*, 876 F.2d 494, 500 (5th Cir. 1989). The City's Ordinance does not have a different impact on third parties' free speech interests than on the plaintiffs' interests, because the Ordinance - even under the Ninth Circuit's construction - applies to everyone who solicits employment, business or contributions from passing motorists, and does not apply to anyone *34 else. Since the Ordinance applies to all such solicitations equally, the Ordinance is not overbroad for this additional reason. Again, the Ninth Circuit failed to consider whether the Ordinance has a different impact on third parties than on the plaintiffs.

Chief Judge Kozinski in his dissenting opinion argued that the Ordinance does not create a "realistic danger" of "substantial" overbreadth, stating:

The majority seems to think ... the ordinance [is] "significantly overinclusive," ... because it " 'technically applies' " to all manner of conduct my colleagues seem to believe is protected.... But what's remarkable about the majority's parade of horrors is just how unlikely and contrived they are: children selling lemonade; Girl Scouts selling cookies; "sidewalk food vendors ... advertising their wares to passing motorists"; "a motorist who stops, on a residential street, to inquire whether a neighbor's teen-age daughter or son would be interested in performing yardwork or babysitting"; "school children shouting 'carwash' at passing vehicles." [¶] The judicial imagination can always run wild in conjuring how laws can be misapplied, but the Supreme Court instructs us that "the mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). Rather, "there must be a realistic danger that the statute itself will *35 significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds." *Id.* at 801. The Court goes on to explain that the effect on third parties can be considered in an overbreadth challenge only to the extent that the ordinance will have a "different impact on any third parties' interests in free speech than it has" on the parties before the court. *Id.* This is an important limitation that my colleagues overlook, and it wipes out most of their examples: lemonade stands, food carts, cookie vendors, car washers, fund raisers.... As the Supreme Court explained in *Vincent*, piling on examples of the same kind of conduct affected by the regulation does not an overbreadth challenge make. 466 U.S. at 801-03. [¶] ... [T]o come up with even these farfetched examples, the majority has to stretch the statutory language to the limit. Why do that? Our job is not to construe statutes broadly so as to imperil their constitutionality; it's to read them narrowly so as to preserve them.

App. 47-49 (citations, footnote, brackets and internal quotation marks omitted).

B. The City's Ordinance Is Not "Geographically" Overbroad.

The Ninth Circuit also held that the City's Ordinance is "geographically overinclusive" because it applies to all City streets and sidewalks, even though *36 the City offered evidence only of traffic problems concerning a relatively small number of streets. App. 23. Again, the Ninth Circuit misconceived and misapplied the overbreadth doctrine by failing to determine whether the

City's Ordinance is "substantially" geographically overbroad judged in relation to its "legitimate" application to the streets and highways where day laborers mainly congregate.

Chief Judge Kozinski in his dissenting opinion argued that the Ordinance is not "geographically overinclusive," stating:

Since when are cities and states precluded from passing laws of general applicability because problems manifest themselves at specific locations? How exactly is a city to ensure that a problem cured by a spot ordinance at one location won't migrate elsewhere? Are city officials truly precluded by the First Amendment from exercising legislative judgment in dealing with the city's current and future problems in a citywide ordinance?

App. 60. As the Chief Judge suggested, if the City limited its regulation to designated streets and highways, there is little doubt that the solicitation problem would "migrate" to non-designated streets and highways.⁷

*37 In sum, the Ninth Circuit fundamentally misconceived and misapplied the overbreadth doctrine, by applying the doctrine expansively to invalidate the City's Ordinance rather than narrowly to sustain it. This Court has cautioned that the overbreadth doctrine applies "sparingly and only as a last resort," *Broadrick*, 413 U.S. at 613, because the doctrine creates "substantial social costs" by precluding regulation of constitutionally unprotected speech and expression even in furtherance of "legitimate" regulatory goals. *Hicks*, 539 U.S. at 119. The Ninth Circuit brushed aside these cautionary admonitions, and expansively applied the overbreadth doctrine to invalidate a regulation that does not present a "realistic danger" of "substantial" overbreadth. Indeed, the Ninth Circuit failed to even undertake the inquiry - required by this Court in *Hicks* and other cases - into whether the Ordinance "taken as a whole" is "substantially" overbroad judged in relation to its "legitimate" *38 application. The Ninth Circuit should have considered whether the Ordinance is valid *as applied* to the plaintiffs - which it clearly is - rather than holding that the Ordinance is *facially* invalid under the overbreadth doctrine. This Court should grant review to determine whether the overbreadth doctrine applies expansively or narrowly, and whether the doctrine precludes government regulation of solicitations to passing motorists that cause unsafe traffic conditions and create an unaesthetic environment.

IV. THE CITY'S ORDINANCE IS NOT OVERBROAD BECAUSE IT REGULATES CONDUCT RATHER THAN SPEECH.

The overbreadth doctrine also does not apply because the City's Ordinance regulates conduct rather than speech, as Chief Judge Kozinski argued in his dissenting opinion. App. 46. This Court has held that the overbreadth doctrine rarely, if ever, applies to government regulation of conduct rather than speech, even where the conduct may have an expressive element.

[T]he overbreadth doctrine's concern with "chilling" protected speech attenuates as the otherwise unprotected behavior that it forbids the State to sanction moves from "pure speech" toward conduct. [Citation.] Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating).

*39 *Hicks*, 539 U.S. at 124 (citation and partial internal quotation marks omitted). Since the City's Ordinance is not “specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating),” the overbreadth doctrine does not apply for this additional reason.

The Ninth Circuit held that the City's Ordinance regulates speech because “[s]olicitation constitutes protected expression under the First Amendment.” App. 14. Although solicitations are in many cases a form of speech, as in the case of solicitations for charitable or political causes, *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 633 (1980), the solicitations prohibited by the City's Ordinance consist of conduct unrelated to speech, much less “pure speech.” The prohibited solicitations seek an immediate, on-the-spot response from passing motorists in the nature of a transaction, and do not involve a communication of ideas, as in the case of picketing or demonstrating. As the Ninth Circuit stated in its earlier *ACORN* decision, in construing a virtually identical ordinance:

[S]olicitation goes beyond pure speech in the response it demands on the part of the audience. Unlike oral advocacy of ideas, or even the distribution of literature, successful solicitation requires the individual to respond by searching for currency and passing it along to the solicitor.

*40 *ACORN*, 798 F.2d at 1268-1269. Similarly, the Fifth Circuit, in upholding a virtually identical ordinance, stated:

[R]estrictions on solicitations are particularly appropriate in the context of assuring the free movement of vehicles and promoting traffic safety on city streets.... Direct communication of ideas, including the distribution of literature to occupants in vehicles, is not restricted.

Int'l Society for Krishna Consciousness of New Orleans, Inc. v. City of Baton Rouge, 876 F.2d 494, 498 (5th Cir. 1989).

Justice Kennedy, in his concurring opinion in a case upholding a prohibition against solicitation and receipt of funds in an airline terminal, distinguished for First Amendment purposes between in-person solicitations for money and other solicitations involving communication of ideas. He stated:

In-person solicitation of funds, when combined with immediate receipt of that money, creates a risk of fraud and duress that is well recognized, and that is different in kind from other forms of expression or conduct.

Int'l Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 705 (1992) (Kennedy, J., concurring); *cf. Heffron v. Int'l Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 653 (1981) (upholding restriction on solicitations at state fair that are intended to “intercept[] fair patrons as they move about, ... *41 stopping them momentarily or for longer periods as money is given or exchanged for literature.”).

In his dissenting opinion, Chief Judge Kozinski argued that the City's Ordinance regulates conduct rather than speech, stating:

Is this even a regulation of speech? Sure, it implicates speech, but almost everything implicates communication of some sort; governing would be impossible if price fixing, street-walking, gambling, blackmail, employment discrimination, the sale of human organs, operating a retail business and the gazillion other activities that involve communication were all subject to strict scrutiny.... Redondo Beach's ordinance seeks to regulate conduct - precisely the kind of conduct that's regulated when we require retail establishments to obtain business licenses, maintain health standards, buy insurance and hire workers based on merit rather than race or sex.

App. 46.

In sum, the City's Ordinance is not overbroad because it regulates conduct rather than speech, and more specifically because it "is not specifically addressed to speech or to conduct necessarily associated with speech (such as picketing or demonstrating)." *Hicks*, 539 U.S. at 124. There is a fundamental difference for First Amendment purposes between solicitations encouraging motorists to stop in traffic and negotiate immediate, on-the-spot transactions, as in *42 this case, and other solicitations involving a communication of ideas, such as the distribution of literature. The Ninth Circuit's categorical view that all "solicitations" are protected "speech" irrespective of their nature, purposes and surrounding circumstances misconceives the limitations of the First Amendment, and of the overbreadth doctrine.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Footnotes

- 1 ACORN was the same plaintiff as in the earlier Ninth Circuit case, *ACORN v. City of Phoenix*, 798 F.2d 1260 (9th Cir. 1986), and ACORN's practices in the two cases were similar.
- 2 The federal circuit courts and the Colorado Supreme Court in the above-described cases also held that the ordinances met other First Amendment requirements, in that they were content-neutral and left open "alternative channels for communication." *St. Louis County*, 930 F.2d at 594; *Baton Rouge*, 876 F.2d at 497-499; *Oremus*, 619 F.2d at 687-688; *Aurora*, 896 P.2d at 313, 316-317.
- 3 The Ninth Circuit's decision also conflicts with the California Court of Appeal's decision in *Juan Xiloj-Itzep v. City of Agoura Hills*, 24 Cal.App.4th 620, 29 Cal.Rptr.2d 879 (Cal. Ct. App. 1994). There, the Court of Appeal, citing the Ninth Circuit's decision in *ACORN*, held that the City of Agoura Hills' ordinance prohibiting persons from "soliciting employment, business or contributions from occupants of vehicles" did not violate the First Amendment, because the ordinance is "narrowly tailored" to serve the government's "legitimate public interest in safety and the free flow of traffic on city streets." *Agoura Hills*, 24 Cal.App.4th at 638-640.

- 4 This Court in *Ward* overturned a lower court decision that had held that a regulation was not narrowly tailored because the government had “several alternative methods” of achieving its goals “that would have been less restrictive” of free speech rights. *Ward*, 491 U.S. at 797.
- 5 Chief Judge Kozinski also argued that part (b) of the Ordinance, which prohibits motorists from stopping on the street to hire workers, could be severed from part (a), which prohibits persons from soliciting employment, business and contributions from passing motorists, and thus that part (b) should survive even if part (a) cannot. App. 60-66. As he argued, “[e]ach part deals with a different aspect of the problem,” and each “can stand without the other’s help.” App. 60.
- 6 The Chief Judge also explained that if the court narrowly construes the City’s Ordinance as the City construes it, the narrow construction would be binding in any future application of the Ordinance, thus removing any basis for an overbreadth challenge. App. 57. He stated that “[i]f we construe the ordinance to avoid constitutional concerns, our interpretation then defines what the ordinance means,” and that “[i]f the city were to enforce it more broadly in the future, it would be subject to a swift injunction...” *Id.*
- 7 The Ninth Circuit concurring opinion argued that the City’s Ordinance does not satisfy other “time, place or manner” requirements of the First Amendment, because it is not content-neutral and does not leave open “ample alternative channels of communication.” App. 29-42. As Chief Judge Kozinski argued in his dissenting opinion, the concurring opinion is wrong on both counts. First, the Ordinance is content-neutral because it does not regulate solicitations for employment, business or contributions from passing motorists on the basis of the message conveyed, but instead categorically prohibits all such solicitations regardless of the message conveyed. App. 66-68 (Kozinski, C.J., dissenting). Second, the Ordinance leaves open “ample alternative channels of communication,” because it does not prohibit solicitations from locations other than streets or highways, or from pedestrians, or by going door-to-door, or by advertising in the newspaper or on Craigslist. *Id.*

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