10-2505-cv

United States Court of Appeals
for the
Second Circuit

CENTRO DE LA COMUNIDAD HISPANA DE LOCUS VALLEY
and THE WORKPLACE PROJECT
Plaintiffs-Counter-Defendants-Appellees,

v.

TOWN OF OYSTER BAY and JOHN VENDETTO,
Town Supervisor of the Town of Oyster Bay,
Defendants-Counter-Claimants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-COUNTER-DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

The Plaintiff-Appellee Centro de la Comunidad Hispana de Locus Valley is an unincorporated membership organization. The Workplace Project is an incorporated membership organization. The Workplace Project has no parent corporation and has no stock and thus no stock owned by any publicly held corporation.

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INTRODUCTION

This case is an appeal from a June 1, 2010 order granting a preliminary injunction enjoining enforcement of Chapter 205-32 of the Town Code of the Town of Oyster Bay (hereinafter, "the Ordinance"), which criminalizes speech related to employment on the streets and sidewalks of the Town. This Court should affirm the order because the Ordinance impermissibly prohibits fully protected speech and cannot be justified under strict scrutiny. In the alternative, the Court should affirm the order based on the District Court's correct legal conclusion that the Ordinance is not narrowly tailored to any legitimate state interest and therefore cannot survive the lesser scrutiny applied to regulations of commercial speech.

Under the First Amendment, streets and sidewalks historically have been recognized as important locations for communication and expression. Absent extraordinary circumstances, municipalities may not limit communication at such locations on the basis of the content of expression. Yet that is precisely what the Town of Oyster Bay has done here. The Ordinance selects speech about employment for special burdens and limitations not imposed upon expression related to any other subject matter, without regard for whether the underlying employment at issue is legal or unlawful.

Under the law, such content-based discrimination can only be sustained if it is narrowly tailored to serve a substantial governmental interest. Although the Town claims that its purpose in enacting the Ordinance was to protect traffic safety, the Ordinance's selective discrimination between prohibited and permitted speech on the basis of content is not actually related to those goals and is certainly not narrowly tailored to the pursuit of legitimate goals. As a result, the Ordinance violates the First Amendment.

In appealing from the District Court's grant of a preliminary injunction, the Town defends the Ordinance as a regulation of purely commercial speech. This argument fails to grapple with the breadth of the terms of the Ordinance and the political aspects of the speech it regulates. The Ordinance reaches day laborers who, like generations of unemployed workers, stand on the sidewalk facing vehicles, or hold signs pointed at vehicles, expressing their availability for employment. That this regulation affects a group of predominantly Latino, immigrant day laborers in the midst of a national debate about immigration policy and the rights of immigrants to work removes any doubt as to the political nature of such speech.

Moreover, even if the speech regulated by the Ordinance could be characterized as nothing more than pure commercial speech, the Court should nonetheless apply strict scrutiny because the content-based distinctions between

regulated and unregulated solicitation drawn by the Ordinance bear no relationship to either the reasons commercial speech is given lesser protection or the Town's purported traffic-safety interest. As such, such distinctions can only be unconstitutional vehicles for impermissible content-based discrimination.

Finally, even the lesser scrutiny typically afforded to regulations of commercial speech applies here, the Court should affirm with the common-sense reasons the District Court found for striking down the Ordinance as unlawful. The District Court rightly questioned both the strength of the relationship between the Ordinance and its stated purpose as well as whether the Ordinance was sufficiently tailored to address those purposes. In particular, the District Court found that the Ordinance regulated far more speech than was necessary to achieve the Town's purported goals, in that it regulated orderly attempts to seek lawful work from the sidewalks and other safe areas. The District Court also found that the enforcement of existing traffic laws directly regulating the activity of which the Town complained would accomplish the Town's purported goals without the need for this otherwise superfluous regulation of speech.

Perhaps responding to its failure to convince the District Court, the Town's brief focuses extensively on allegations that some of the speakers regulated by the Ordinance may be violating labor, tax or immigration laws in various ways based on the terms of the employment relationships that result from their solicitation of

work from sidewalks, rendering their speech "illegal" commercial speech and, therefore, unprotected. This argument fails for three reasons. Most importantly, the Ordinance by its own terms regulates speech about perfectly legal employment transactions. Thus, the Town's assertions about the legality of some hypothetical unlawful transactions do not disturb the soundness of the legal conclusion that there is a lack of a sufficient relationship and narrow tailoring between the Ordinance, as written, and its purported goals. Second, the Town's accusations have no support in the record. Although the Town asks the Court to accord weight to its *intentions* to have introduced facts to the contrary, the irrelevance of the Town's assertions means that the Court has no need to take up the Town's inappropriate invitation to engage in appellate fact-finding. Finally, the Town is not even correct that the laws it identifies would be violated by the employment of casual laborers sought out from the sidewalks of Oyster Bay.

For these reasons, this Court should affirm the District Court's preliminary injunction and uphold the First Amendment rights of people who seek to speak about employment on the streets and sidewalks of their municipalities.

STATEMENT OF FACTS

The only factual record before this Court on this appeal is the text of the Ordinance itself and the testimony, in the form of affidavits, of the Plaintiff

organizations who challenge it.[1] Chapter 205-32 of the Town Code of Oyster Bay provides as follows:

> It shall be unlawful for any person standing within or adjacent to any public right-of-way within the Town of Oyster Bay to stop or attempt to stop any motor vehicle utilizing said public right-of-way for the purpose of soliciting employment of any kind from the occupants of said motor vehicle.

Chapt. 205-32(C). "Public right-of-way" is defined as "All of the areas dedicated to public use for public street purposes and shall include roadways, parkways, highways, streets, medians, *sidewalks, curbs, slopes and areas of land between the sidewalk and the curb which are also known as utility strips*, except for lawful parking areas." Chapt. 205-32(B) (emphasis added).

The true scope of the Ordinance is revealed in its definition of what it means to "solicit employment." The Ordinance explains that "solicit" or "soliciting" means:

> Any request, offer, enticement or action which announces the availability for or of employment, or a request, offer, enticement or action which seeks to offer or secure employment. Examples of behavior which constitute solicitation of employment include but are not limited to waving arms, making hand signals, shouting to someone

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[1] The factual record before the District Court consisted only of two affidavits, one from each of the leaders of the two Plaintiff organizations. Because these affidavits were left out of the Joint Appendix, Plaintiff-Appellees have submitted a Supplemental Appendix (hereinafter, cited as "SA") consisting solely of these two affidavits. The Court granted leave for the filing of this appendix on November 15, 2010.

> in a vehicle, jumping up and down, waving signs soliciting employment pointed at persons in vehicles, standing in the public right-of-way while facing vehicles in the roadway. . . . A solicitation shall be deemed complete when made whether or not an employment relationship is created, a transaction is completed or an exchange of money or property takes place.

Chapt. 205-32(B). Contrary to the Town's contention, therefore, the Ordinance does not "simply prohibit[] the stopping of vehicles . . . ." *See* Corrected Brief for Defendants-Counter-Claimants-Appellants (hereinafter "Appellants' Brief") (Sept. 20, 2010) at 44. To the contrary, the statute goes as far as to prohibit merely "standing in the [sidewalk] while facing vehicles in the roadway" and "waving signs" that "announce the availability for . . . employment." Chapt. 205-32(B). The penalty for violation of the law is a fine of not more than $250 for each offense. Chapt. 205-32(F)(1).

The Ordinance also contains several exclusions and omissions that further divorce its regulation of speech from its purported traffic-safety purpose. For example, although the law prohibits solicitation of employment, it does not prohibit solicitation of contributions, directions, or petition signatures. Chapt. 205-32(B). Although it prohibits waving signs related to securing employment, it does not prohibit waving signs on any other topic other than employment. *Id.* The Ordinance, by its terms, specifically excludes from regulation solicitation of and by taxicabs, limousine services, public transportation, towing operations, and ambulances. Chapt. 205-32(E)(1) Neither the law nor common sense can explain

why a "streetside solicitation" of employment "compromises the safety of pedestrians and motorists," *see* Chapt. 205-32(A), but solicitation of campaign contributions or taxicabs does not.

Plaintiffs are two organizations who directly represent the interests of the day laborers whose speech and livelihoods are affected by the Ordinance and whose own speech about matters related to the employment of those laborers is regulated by the Ordinance. Centro de la Comunidad Hispana de Locust Valley ("Centro") is a membership organization whose members are day laborers and the families of day laborers working and residing in Locust Valley, a hamlet in the Town of Oyster Bay. *See* Affidavit of Luz Torres ¶ 1 (November 17, 2010) (SA 1). The mission of Centro is to promote the right to work with dignity, respect and justice for the Locust Valley community. *Id.* ¶ 2-3 (SA 1). The Workplace Project is a membership organization located in Hempstead, New York. *See* Affidavit of Nadia Marin ¶ 1 (SA 3). Its membership includes day laborers from across Long Island, including in the Town of Oyster Bay. *Id.* ¶ 3 (SA 3). The mission of the Workplace Project is to end the exploitation of Latino immigrant workers on Long Island and achieve socioeconomic justice for its members in the communities in which they live. *Id.* ¶ 2 (SA 3). Members of both organizations are among the day laborers who have sought to obtain work in public places throughout the Town of Oyster Bay. Affidavit of Luz Torres ¶ 7; Affidavit of Nadia Marin ¶ 3 (SA 2, 3).

These facts are undisputed and they are the only facts in the record. The Town's brief on appeal repeatedly asserts several additional allegations about the purported nature of typical labor solicitation in Oyster Bay, the dynamics of traffic flow on particular streets, and the legality of the employment transactions that result from labor solicitation in the Town. *See, e.g.*, Appellants' Brief at 9-11, 13, 31, 38. Although it might be true that the Town intended (as it repeatedly asserts) to "proffer to prove" such facts before the District Court, *see id.*, it did not do so and, as a result, no such facts are before this Court on appeal.

PROCEDURAL HISTORY

On May 17, 2010, Plaintiffs filed a Complaint challenging the Ordinance as a violation of the First and Fourteenth Amendments to the U.S. Constitution. Along with the Complaint, Plaintiffs filed an Order to Show Cause seeking a temporary restraining order (TRO) and preliminary injunction enjoining enforcement of the Ordinance on First Amendment grounds. *See* Order to Show Cause (May 17, 2010) (A-5). The Complaint additionally alleges that the Ordinance is unconstitutional under the Equal Protection Clause because it is intended to discriminate against Latinos, but that fact-intensive issue was not part of the motion for preliminary injunction and is, therefore, not before the Court on this appeal.

On May 19, 2010, the District Court held argument on the TRO, *see* Transcript of Proceedings (May 19, 2010) (A-24), and, the following day, on May 20, 2010, granted the temporary order, issuing an oral opinion from the bench stating its reasoning. *See* Order to Show Cause (May 20, 2010) (A-6); Transcript of Proceedings (May 20, 2010) (hereinafter "Transcript/Opinion") (A-102). In that opinion, the District Court held that the Ordinance was not narrowly tailored because "there are a number of existing regulations and statutes on the books that are more than adequate to address" the Town's stated goals and that "its scope is considerably broader than necessary to accomplish the intended goal." *See* Transcript/Opinion at 70, 72 (A-121). As a result, the Court found, "there is a clear violation of the First Amendment." *Id.* at 74. (A-123).

In reaching its conclusions, the District Court did not, as Appellants assert, "adopt[] all of the assertions of ultimate facts proffered by the Town." Appellants' Brief at 14. To be sure, the District Court assumed certain facts in order to give the Town the benefit of the doubt while nonetheless concluding that the Ordinance could not survive constitutional scrutiny, but in no sense did this entail any finding of fact regarding that Town's purported traffic safety interest or the legality of the speech at issue that would be entitled to any deference from this Court.

In its May 20, 2010 opinion, the District Court also set a schedule for a full factual hearing on Plaintiffs' motion for preliminary injunction.

Transcript/Opinion at 53 (A-76). Rather than proceed with that factual hearing, however, the Town chose to ask the Court to convert the TRO into a preliminary injunction in order to enable the Town to appeal based on the record created for the TRO. Order Granting Preliminary Injunction (June 1, 2010) (A-128). In choosing to proceed in this fashion, the Town opted to forego following through on its stated intention to introduce facts supporting its broad assertions of threats to traffic safety – assertions that it would have the burden of proving under law. Plaintiffs did not oppose the Town's request to forego a preliminary injunction hearing. *Id.* (A-128-29). On June 1, 2010, therefore, responding to the Town's request, the District Court issued a preliminary injunction, incorporating its reasoning from its May 20 opinion. *Id.* The preliminary injunction has remained in place and the Ordinance has been enjoined for the nearly five months between the District Court's decision and the filing of this brief.

SUMMARY OF ARGUMENT

The standard governing preliminary injunction motions in the Second Circuit requires the plaintiff to establish (1) a substantial likelihood of success on the merits and (2) irreparable harm. *See County of Nassau v. Leavitt*, 524 F.3d 408, 414 (2d Cir. 2008); *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 348-49 (2d Cir. 2003). The Town does not dispute the District Court's finding that

the Plaintiffs established irreparable harm. Appellants' Brief at 2. Instead, the Town argues that the District Court erred as a matter of law in finding that Plaintiffs established a likelihood of success on the merits on their First Amendment claim.

The Court should affirm the grant of the preliminary injunction on grounds different from those reached by the District Court, which analyzed the Ordinance under the lesser scrutiny afforded to commercial speech by *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980). The Ordinance regulates fully protected speech and expression triggering strict scrutiny, for two reasons. First, the terms of the Ordinance reach political speech. Second, even if the Ordinance regulated only commercial speech, the content-based distinctions drawn by the Ordinance require strict scrutiny. The Ordinance cannot pass strict scrutiny as it discriminates on the basis of content and is not narrowly tailored to the pursuit of any compelling interest.

In the alternative, the Court should affirm the District Court's correct legal conclusion that the Ordinance cannot survive the test established in *Central Hudson*. Traffic safety may be a compelling interest, but this broad ban on speech related to employment bears no relationship to that interest, and is not narrowly tailored to accomplish it. Rather than choosing to regulate dangerous conduct directly, the Ordinance targets speech and, in doing so, sweeps in a great deal of

speech that poses no threat whatsoever to traffic safety. Moreover, the type of dangerous conduct the Town claims is "associated" with this type of speech is already regulated by existing traffic and pedestrian safety laws, the enforcement of which is within the Town's authority and would more directly address the Town's interest without criminalizing speech.

The Town's primary argument to the contrary is that the Ordinance regulates only "illegal" speech because the employment relationships created by the speech regulated by the Ordinance violate labor, tax and/or federal immigration laws. *See* Appellants' Brief at 22-29. But the Ordinance does not regulate only speech that results in an unlawful act; it regulates all employment-related speech, even lawful speech. Moreover, even if the Town's argument that *some* of the speech regulated by the Ordinance might be illegal did have any relevance, the facts on which the Town bases this supposition are nowhere in the record. Finally, the Town's assertion that speech it envisions occurring on the streets is "illegal" is based on a misreading of New York and federal law. For these reasons, the Court should uphold the District Court's issuances of the preliminary injunction.

ARGUMENT

I. THE DISTRICT COURT'S ORDER SHOULD BE UPHELD BECAUSE THE ORDINANCE IS A CONTENT-BASED REGULATION OF POLITICAL SPEECH AND CANNOT SURVIVE STRICT SCRUTINY.

For most of our country's history, unemployed workers have taken to the streets, often by the tens of thousands, to express their desire for jobs.[2] In 1837, some 20,000 workers assembled in Philadelphia; in the panic of 1857, 15,000 assembled in New York City's Tompkins Square to demand work, while 10,000 more gathered in Philadelphia, and 20,000 in Chicago. During the depression of 1893, "Coxey's Army" of the unemployed descended on Washington. And during the Great Depression of the 1930s, the "unemployed councils" took to the streets in virtually every major city.[3] No one would seriously dispute, at least as long as those gatherings remained peaceful, that the participants were engaged in political activity that was fully protected by the First Amendment.[4]

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[2] That history is recounted in Piven & Cloward, POOR PEOPLES' MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 1977, republished at http://libcom.org/history/1930-1939-unemployed-workers-movement.

[3] *Id.*

[4] *Hague v. CIO*, 307 U.S. 496, 515 (1939), in which the Court made its classic statement of the right of persons to use the "streets and parks" for "purposes of assembly, communicating thoughts between citizens, and discussing public questions," involved an assertion of free speech rights by labor organizers.

Over the past twenty years, a new generation of unemployed workers has gathered on the sidewalks of communities across the country to express their desire for jobs. Commonly known as day laborers, they are almost exclusively immigrants and mostly Latino and, in many communities, they have been met with intense hostility.[5] That hostility is not only about jobs. Indeed, the issue of jobs is only one manifestation, though certainly a highly contentious one,[6] of a deeper controversy. At bottom, the controversy is about immigration policy which embraces issues of cultural and linguistic homogeneity as well as issues of race and ethnicity.[7] Oyster Bay's Ordinance, like similar ordinances that have been enacted

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[5] *See* Pritchard, *We Are Your Neighbors: How Communities Can Best Address a Growing Day-Labor Workforce*, 7 SEATTLE J. SOC. JUST. 371, 380 (2008) ("Opposition to day-labor pick-up sites can become emotional, with the community often directing its anger at the workers. Opponents may try to paint all day laborers as drug dealers, sex offenders, and murderers.").

[6] "The opposition is often a part of a larger anti-immigrant campaign against the influx of undocumented immigrants who take jobs away from those considered to be 'real' Americans." Pritchard, *supra* note 5, at 380.

[7] McKanders, *Sustaining Tiered Personhood: Jim Crow and Anti-Immigrant Laws*, 26 HARV. BLACKLETTER J. 163, 191 (2010) (noting that members of Congress supporting enforcement of immigration laws wanted "to create fear of rapists, drunk drivers, drug dealers and people who conceal weapons," and quoting San Bernadino County Supervisor whose proposed immigration legislation was intended to save "California from turning into a 'Third World cesspool' of illegal immigrants.").

across the country, is rooted in the anti-Latino sentiment that is a thinly disguised feature of the anti-immigrant movement.[8]

A. The Ordinance Prohibits Political Speech and Advocacy By Day Laborers.

A proper understanding of the manner in which the Ordinance regulates political speech begins with a full understanding of the terms of the Ordinance. It punishes persons who do no more than "stand[] in the public right-of-way [i.e., sidewalk] while facing vehicles in the roadway" and indicate their "availability for . . . employment." Chapt. 205-32(B). In other words, persons violate the Ordinance without saying anything about the particulars of any commercial arrangement or anything else that might lead to commercial harms. It also punishes persons who communicate a message about their availability for employment by "waving signs . . . pointed at persons in vehicles." *Id.* Finally, as the Town concedes, the Ordinance is meant to target groups of people who gather together collectively to communicate such messages. *See* Appellants' Brief at 8

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[8] The link between race and an anti-immigrant campaign of harassment was a central finding in a recent case in a District Court of this Circuit. *See Doe v. Village of Mamaroneck*, 462 F. Supp.2d 520, 549 (S.D.N.Y. 2006) ("[T]he claims and comments made by public officials in Mamaroneck about the day laborers who plied the streets of Mamaroneck looking for work were negative and stigmatizing. That is some evidence of racism. And while Defendants vigorously deny that race had anything to do with the unremitting hostility they displayed toward the day laborers, the evidence . . . dramatically undercuts their argument.").

(discussing the "daily congregation of large numbers of day laborers on certain street corners and intersections").[9]

The Town would have the Court believe that the Ordinance is merely an effort to regulate speech about commerce. But the cases affording wider authority to regulate commercial speech grow out of advertisements of products, and misleading and deceitful claims, and the specific terms of business arrangements. *See, e.g.*, *Virginia State Bd. Of Pharmacy v. Virginia Citizens' Consumer Council, Inc*., 425 U.S. 748, 772 (1976); *Edenfield v. Fane,* 507 U.S. 761, 767 (1993). The Town concedes that the Ordinance is not animated by such traditional concerns of commercial speech regulation, *see* Appellants' Brief at 11, but nonetheless argues that the speech regulated by the Ordinance is commercial in that day laborers' solicitation of work "does no more than propose a commercial transaction." *Id.* at 19 (citing *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 385 (1973)).

As the Supreme Court has said, however, there is a "commonsense" difference, *Virginia State Bd. of Pharmacy*, 425 U.S. at 772, between commercial speech and political speech. When day laborers assemble on the sidewalks of

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[9] A plausible argument can be made that the ordinance which prohibits "any action which seeks to… secure employment" Chapt. 205-32(B) would directly bar general political advocacy designed to "secure" the employment of day laborers or any category of potential employee.

Oyster Bay, they do announce their desire for jobs. But this fact does not necessarily mean that they are engaged in pure commercial speech. As this Court has said, that speech "has an economic motivation or is conceded to be advertisement[] is not by itself sufficient to convert that speech into 'commercial' speech." *New York State Ass'n of Realtors v. Shaffer*, 27 F.3d 834, 840 (2d Cir. 1994) (internal citations and quotations omitted). The "commonsense" invoked by the Supreme Court in *Virginia State Bd. of Pharmacy* tells us that, as participants in a national controversy about their right to be in this country and their right to work, their presence is, in addition, a response to those who would seek to exclude poor immigrants from this country and deny them jobs, particularly those who are dark-skinned and whose first language is not English. Their collective message is that they and others like them are willing to work and be self-sufficient, and to contribute to the economic well-being of the community and to the country. That is surely a message warranting plenary protection under the First Amendment.

The political nature of this speech is evident by comparison to this Court's decision in *Loper v. New York City Police Dept*., 999 F.2d 699 (2d Cir. 1993). At issue in that case was whether begging on a New York City sidewalk constituted political speech. In concluding that begging was entitled to full First Amendment protection, the Court acknowledged that, while "begging does not always involve a particularized social or political message . . . it seems certain that it usually

involves some communication of that nature." *Id.* at 704. The Court further explained:

> Begging frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation. Even without particularized speech, however, the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation conveys a message of need for support and assistance.

Id.

The message conveyed by the day laborers is no less deserving of full First Amendment protection. What *Loper* recognized about beggars, namely, that, in seeking handouts, they convey a "social or political message," is no less true of day laborers. The "social and political message" recognized by this court in *Loper* was understood in connection with the broader debate about homelessness that was taking place at the time *Loper* was decided. So too the political message conveyed by the persons regulated by the Ordinance in this case must be understood in the broader context of the current national debate about immigration policy. Just as beggars inform public debate by conveying a very personal perspective about poverty and homelessness, so day laborers, while standing on the sidewalks of Oyster Bay announcing their desire to obtain work, convey a vitally important, and personal, perspective about immigration policy. The expression of that perspective is fully protected by the First Amendment.

The political nature of speech about jobs is forcefully articulated by the Supreme Court in the context of labor-related speech. When day laborers announce their desire to work, their message, for constitutional purposes, is indistinguishable from the message of union picketers that they are available for work if afforded fair working conditions. To appreciate the Court's commitment to protecting job-related speech, it is worth remembering its ringing repudiation of government attempts to restrict the speech of union picketers.

> The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion is essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communication of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion.

Thornhill v. Alabama, 310 U.S. 88, 95 (1940).

And so, if, in the tradition of the unemployed and union workers, the day laborers carried signs that said, "We Want Work" or "We Demand Decent Jobs," there would not be any doubt that Oyster Bay's attempt to suppress such speech would be flatly unconstitutional under the First Amendment. It should be self-evident that the result is no different if they convey a comparable message while standing collectively on the sidewalk to express their desire for jobs.

The Town's argument that the Ordinance regulates speech that "does no more than propose a commercial transaction," *see* Appellants' Brief at 19, also

ignores the Supreme Court's repeated insistence that an ordinance regulating speech may not be subjected to more relaxed First Amendment scrutiny unless the speech at issue is exclusively commercial. In that regard, the operative words in cases the Town cites are "no more." *See id.* (citing *Pittsburgh Press*, 413 U.S. at 385 (1973) (defining as commercial speech that which is "*no more* than a proposal of possible employment"); *Virginia State Bd. of Pharmacy*, 425 U.S. at 762 (defining commercial speech as "speech which does *no more* than propose a commercial transaction") (internal citation omitted) (emphasis added)). Only "purely commercial speech," *Schaumberg v. Citizens for Better Env't*, 444 U.S. 620, 632 (1980), lacks full constitutional protection. Speech does not "retain its commercial character when it is inextricably intertwined with otherwise fully protected speech." *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988) (holding that "we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, we apply our test for fully protected expression."). As argued above, while the Ordinance punishes the face-to-face negotiation of employment between a day laborer and a motorist, speech that is arguably commercial speech,[10] it also punishes persons who, by merely standing on the

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[10] Even such face-to-face negotiation cannot be necessarily described as purely commercial speech. For example a day laborer negotiating for a living wage may

sidewalk, either convey a political message about their availability for work or their right to work, or exercise their constitutional right of assembly and association by standing with others who are similarly conveying a message. Insofar as the Ordinance prohibits both commercial speech and conduct that is fully protected by the First Amendment, therefore, it must be subject to full constitutional scrutiny.

B. <u>The Ordinance's Content-Based Regulation of Speech Cannot Survive Strict Scrutiny.</u>

"[P]ublic places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.'" *United States v. Grace*, 461 U.S. 171, 177 (1983). In such forums, the government's right "to limit expressive activity [is] sharply circumscribed." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). When, as here, a regulation is content-based, the government must show that the restriction "is necessary to serve a compelling state interest and is narrowly tailored to achieve that end." *Id. See also Lopez v. Town of Cave Creek*, 559 F. Supp.2d 1030, 1030 (D. Ariz. 2008) (applying strict scrutiny to strike down an anti-labor-solicitation ordinance indistinguishable from Oyster Bay's).

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be negotiating the terms of his or her employment but also unquestionably is participating in a political debate about the living wage.

That the Ordinance is content-based is beyond question. It prohibits only solicitation of work and not other forms of solicitation carried out in precisely the same manner. The Ordinance says nothing about the solicitation of donations, solicitation of directions to a location, or solicitation of ballot signatures, even though all of these types of solicitation pose threats to traffic safety indistinguishable from those posed by solicitation of employment. The distinction among these various forms of solicitation is the content of the associated communicative message, not their potential to create traffic hazards. This belies the Town's suggestion that "the Ordinance does not restrict the words or content of such solicitation but, rather, solely describes acts of solicitation . . . ." Appellants' Brief at 35-36. The Ordinance does not regulate conduct, it regulates by reference to communicative purpose.[11]

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[11]Appellants argue that the Ordinance can be justified as a reasonable time, place and manner restriction on speech, *see* Appellants' Brief at 41-44, but this test cannot apply because, as established above, the Ordinance is not content-neutral. Even if this test did have any application, moreover, the Ordinance would not pass muster because time, place and manner regulations, like regulations of commercial speech, must be narrowly tailored to serve an important government interest. Indeed, as Appellants correctly argue, *see* Appellants' Brief at 33 n.6, the Supreme Court has repeatedly analogized the test for commercial speech to the test for content-neutral time, place and manner restrictions established in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989). *See United States v. Edge Broadcasting Co.*, 509 U.S. 418, 429-31 (1993); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001); *Bd. of Trs. of SUNY v. Fox*, 492 U.S. 469, 477-78 (1989). Thus, for all of the reasons stated in Part III, *infra*, the Ordinance could not be justified as a reasonable time, place and manner restriction even if it were content-neutral.

In *Police Dept. v. Mosley*, 408 U.S. 92 (1972), reviewing a challenge to a Chicago ordinance that prohibited picketing and other expressive activity within 150 feet of any school but created an exception for "peaceful picketing of any school involved in a labor dispute[,]" the Court concluded that the ordinance's content-based distinction violated the First Amendment. In so doing, the Court observed that "[o]nce a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say." *Id*. at 96. If, as in *Mosley*, it was impermissible to privilege speech about employment or labor activity it is similarly impermissible to disfavor such speech. In both instances, the municipality has engaged in content-based discrimination impermissible under the First Amendment.

If the Town's concern in enacting the Ordinance was to prevent and punish conduct that threatens traffic safety, it begs the question why the Town did not regulate such behavior directly, but instead chose to single out for regulation a specific category of speech. As the Court said in discussing the regulation of solicitation of financial contributions:

> Solicitation impedes the normal flow of traffic. . . Solicitation requires action by those who would respond: The individual solicited must decide whether or not to contribute (which itself might involve reading the solicitor's literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check, or produce a credit card.

United States v. Kokinda, 497 U.S. 720, 733-734 (1990). There is simply no legitimate explanation for the Ordinance's prohibition of employment solicitation but not the solicitation of donations described in *Kokinda*. This selective prohibition of speech permits only one reasonable inference, namely that Oyster Bay singled out day laborer speech to drive away day laborers, and not for any reason having to do with traffic.

Indeed, Oyster Bay has engaged not only in subject-matter discrimination, but in the more constitutionally suspect viewpoint discrimination. Under the Ordinance persons remain free to stand on the sidewalks of Oyster Bay waving signs urging motorists not to give day laborers a job. On the other hand, day laborers are prohibited by the Ordinance from standing on the sidewalk "waving signs . . . pointed at motorists" announcing their desire to work. *See* Chapt. 205-32(B) (prohibiting "waving signs soliciting employment pointed at persons in vehicles.") By favoring one viewpoint on the controversial subject of employing day laborers, Oyster Bay has engaged in constitutionally impermissible viewpoint discrimination. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson,* 491 U.S. 397, 414 (1989).

For these reasons, it is beyond question that the Ordinance cannot survive strict scrutiny. As the Supreme Court has stated, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 818 (2000). Although traffic safety is an important interest, to be sure, it is not the sort of "compelling state interest" required to justify a restriction of speech under strict scrutiny. Moreover, for reasons discussed extensively in Part III, *infra*, the Ordinance cannot even meet the "narrow tailoring" requirement of the lesser standard applicable to commercial speech; it therefore, for the same reasons, cannot survive under the heightened requirements of strict scrutiny. On this basis alone, then, the Court should uphold the District Court's order issuing a preliminary injunction.

II. EVEN IF THE ORDINANCE REGULATES ONLY COMMERCIAL SPEECH, STRICT SCRUTINY APPLIES BECAUSE THE ORDINANCE'S CONTENT-BASED REGULATION IS UNRELATED TO THE REASONS COMMERCIAL SPEECH IS ACCORDED LESSER CONSTITUTIONAL PROTECTION.

The Town disputes the argument that the Ordinance is an unconstitutional content-based regulation of speech on the basis that the Ordinance regulates only commercial speech. *See* Appellants' Brief at 19-41. As established above, the Ordinance does not regulate only commercial speech. But even if it did, the Ordinance regulates, on its face, perfectly legal commercial speech that is entitled to constitutional protection. Moreover, because the Ordinance discriminates based

on content in a manner unrelated to the reasons for distinguishing commercial speech from non-commercial speech, the Ordinance should be subject to strict scrutiny.

A. The Ordinance Regulates Lawful, Non-Misleading Speech That Is Entitled to Constitutional Protection.

"It is undisputed that commercial speech is entitled to the protection of the First Amendment." *New York State Rest. Ass'n v. N.Y. City Bd. of Health*, 556 F.3d 114, 131 (2d Cir. 2009). Although there was a time when commercial speech had no constitutional protection, under the modern rule courts have increasingly emphasized the value of commercial speech and the need to subject governmental regulations of it to rigorous scrutiny, particularly when those regulations are content-based. As the Supreme Court stated:

> The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish. Some of the ideas and information are vital, some of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented. Thus, even a communication that does no more than propose a commercial transaction is entitled to the coverage of the First Amendment.

Edenfield 507 U.S. at 761. An individual's interest in commercial speech "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia State Bd. of Pharmacy* 425 U.S. at 763.

In *Edenfield*, the Supreme Court struck down a regulation on in-person solicitation of clients by accountants. Noting that it was "clear that this type of personal solicitation is commercial expression to which the protections of the First Amendment apply," 507 U.S. at 765, the Court articulated a rationale for protecting accountants' speech that applies equally – indeed, in an even more compelling manner – to laborers of often limited economic means who solicit informal work from the sidewalks:

> In the commercial context, solicitation may have considerable value. Unlike many other forms of commercial expression, solicitation allows direct and spontaneous communication between buyer and seller. . . . Personal interchange enables a potential buyer to meet and evaluate the person offering the product or service and allows both parties to discuss and negotiate the desired form for the transaction or professional relation. Solicitation also enables the seller to direct his proposals toward those consumers who he has a reason to believe would be most interested in what he has to sell. For the buyer, it provides an opportunity to explore in detail the way in which a particular product or service compares to its alternatives in the market.

507 U.S. at 766.

The Town's primary argument on appeal is that "commercial speech concededly advertising an employment transaction intended to violate federal and state labor, tax, and immigration laws is entitled to *no* constitutional protection." Appellants' Brief at 15-16, 22-29. Perhaps, but the Ordinance does not regulate speech intended to violate federal and state labor, tax or immigration laws. Indeed, the Town concedes that preventing violations of such laws is not the purpose of the

Ordinance. *Id.* at 16. The Ordinance criminalizes the solicitation of work from the sidewalk and, even if this is purely commercial speech, it is entitled to protection. "Government may not suppress lawful speech as the means to suppress unlawful speech." *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

That the Ordinance does not distinguish between speech about "lawful" employment and speech about "unlawful" employment is enough to dispense with the Town's argument. Nonetheless, it is worth emphasizing that the Town's assertions have no support in the record and no amount of discussion of the Town's desire to have made a record on such facts makes it so. There is no basis for accepting the Town's broad allegations that all of "the contractors hiring the day laborers do not maintain workers' compensation insurance to cover and protect the laborers," Appellants' Brief at 23, or that all the contractors "do not withhold for federal or state income tax purposes, and that the laborers do not report or pay federal or state income tax," *id.* at 24, or that all of the laborers hired are undocumented. *Id.* at 25-26. And there is equally no basis to suggest that the District Court credited any such plainly unsupported and unsupportable accusations.

Compounding these errors of fact are some crucial errors of law regarding casual work. There is no requirement under New York law, for example, to maintain workers' compensation insurance for independent contractors or casual

workers. N.Y. WORKERS' COMPENSATION LAW § 2(4). There is also no obligation under federal law for employers who hire independent contractors or casual laborers to inquire into their immigration status. 8 C.F.R. § 274a.1(f). As argued above, these mistakes are irrelevant to the central question of whether the Ordinance's regulation of plainly legal solicitation of employment passes constitutional muster. Among other things, however, these mistakes highlight the impropriety of localities that lack a clear understanding of federal immigration law undertaking to enforce it, when such enforcement is plainly the exclusive purview of the federal government. *Cf. United States of America v. State of Arizona*, 703 F. Supp.2d 980 (D. Ariz. 2010).

B. Content-Based Distinctions Within The Category of Commercial Speech Should Be Subject to Strict Scrutiny When They Are Divorced From the Rationale for Distinguishing the Category of Commercial Speech.

As discussed in Part I, *supra*, laws that differentiate between regulated and unregulated behavior by reference to communicative purpose have always been inherently suspect. *See Consolidated Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 536 (1980) ("[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited merely because public officials disapprove the speaker's views.") (quotation omitted). At the same time, however,

"when courts are asked to determine whether a species of speech is covered by the First Amendment, they must look to the content of expression." *Id.* at 539 n.5.

In *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), the Supreme Court held that even though a hate speech ordinance regulated only speech that fell within the unprotected content-category of "fighting words," it was unconstitutional because "it prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech addresses." *Id.* at 381. In so holding, the Court established the principle that, within such categories of unprotected or lesser protected speech, there is a presumption against further content discrimination such that it will be found unconstitutional unless it is either based on the very same reasons that category of speech is treated differently or proscribes a subclass of speech due to secondary effects unique to the subclass. *Id.* at 382-85, 388-89. This is so for the same reasons content discrimination is unconstitutional in any other context – the risk of government discrimination against particular speech and particular speakers. *Id.*

This principle applies no less forcefully in the context of commercial speech, where content-based distinctions that do not fall into the two exceptions articulated above have long been considered suspect. In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993) for example, the Court struck down an ordinance that banned the use of newsracks to distribute commercial handbills but permitted their use for the distribution of newspapers because "[u]nder the

city's newsrack policy, whether any particular newsrack falls within the ban is determined by the content of the publication resting inside that newsrack. Thus, by any commonsense understanding of the term, the ban in this case is content-based." 507 U.S. at 429. In so doing, the Court emphasized that the city had "not asserted an interest in preventing commercial harms by regulating the information distributed by respondent publishers' newsracks, which is, of course, the typical reason why commercial speech can be subject to greater governmental regulation than noncommercial speech." *Id.* at 426.

Similarly, in *Linmark Assoc., Inc. v. Township of Willingboro*, 431 U.S. 85 (1977), the Supreme Court struck down a prohibition on the posting of "for sale" and "sold" signs. The Court found this content-based regulation of commercial speech *per se* unacceptable, noting that "Willingboro has proscribed particular types of signs based on their content because it fears their 'primary' effect that they will cause those receiving the information to act upon it." *Id.* at 94 (internal citations omitted).

And in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), the plurality opinion striking down a content-based regulation of liquor advertisements stated that "[o]ur commercial speech cases have recognized the dangers that attend governmental attempts to single out certain messages for suppression." *Id.* at 501. This is particularly so, the Court noted, when the singling out of certain

commercial speech is "unrelated to the preservation of a fair bargaining process," as such regulations "often serve only to obscure an 'underlying governmental policy' that could be implemented without regulating speech." *Id.* at 501, 502-03 (quoting *Central Hudson*, 447 U.S. at 566 n.9).[12]

Although these cases did not expressly adopt strict scrutiny, their analysis supports a fatal-in-fact approach to content-based regulations of commercial speech that have the potential to effectuate a discriminatory purpose. In other instances, although the Supreme Court has opted to decide cases on narrower grounds, members of the Court have expressly endorsed this view. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 577 (2001) (Thomas, J., concurring) ("Whatever power the State may have to regulate commercial speech, it may not use that power to limit the content of commercial speech, as it has done here, 'for reasons unrelated to the preservation of a fair bargaining process.' Such content-discriminatory regulation – like all other content-based regulation of speech – must

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[12] Although the Court in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), held that "content-based restrictions on commercial speech may be permissible," it did so only "[i]n light of the greater potential for deception or confusion in the context of certain advertising messages." *Id.* at 65 (internal citations omitted). Thus, *Bolger* supports the notion that content-based restrictions on commercial speech are acceptable only when they are related to the marketplace-protection rationale for according lesser protection to commercial speech. If anything, moreover, *Bolger* illustrates the need for heightened scrutiny of content-based regulations of commercial speech, as the regulation of contraceptive advertisements at issue there was plainly motivated by a governmental desire to suppress speech that was, at the time, controversial.

be subjected to strict scrutiny."); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (Souter, J., concurring). Moreover, some district courts confronting this precise question have adopted strict scrutiny for such content-based regulations of commercial speech. *See Kennedy v. Avondale Estates,* 414 F. Supp.2d 1184, 1212 (N.D. Ga. 2005) (applying strict scrutiny to content-based distinctions in a regulation of commercial flags); *Citizens United for Free Speech II v. Long Beach Township Bd. of Commissioners*, 802 F. Supp. 1223, 1232 (D. N.J. 1992) ("It is clear from the Supreme Court's recent decision in *R.A.V. v. City of St. Paul* that commercial speech must be protected by the usual strictures against content-based discrimination."); *cf. MD II Entertainment, Inc v. City of Dallas*, 28 F.3d 492, 495 (5th Cir. 1994) (acknowledging the case for applying strict-scrutiny to content-based regulations of commercial speech but declining to reach the question because the statute at issue could not meet even the *Central Hudson* test); *Valley Broadcasting Co. v. United States*, 107 F.3d 1328, 1330 n. 3 (9th Cir. 1997) (same).

This Court has, so far, declined to subject content-based regulations of commercial speech to strict scrutiny. *See Clear Channel Outdoor, Inc. v. City of New York*, 594 F.3d 94,108-09 (2d Cir. 2010); *Long Island Bd. Of Realtors, Inc. v. Incorporated Village of Massapequa Park*, 277 F.3d 622 (2d Cir. 2002); *Anderson v. Treadwell*, 294 F.3d 453, 460 (2d Cir. 2002). In these cases, however, the Court

was not asked to address the distinction between, on the one hand, content-based distinctions that flow from the reasons commercial speech may be more heavily regulated or from secondary effects unique to a subcategory of speech and, on the other hand, content-based distinctions that are unrelated to those reasons. These cases reflect this Court's unwillingness to part entirely with content-based distinctions within the category of commercial speech and its recognition that, in some instances, government "may value one category of commercial speech over another *where it has valid reasons for doing so*." *Clear Channel*, 594 F.3d at 106 n.12 (emphasis added). These cases do not foreclose application of strict scrutiny to the content-based regulation imposed here by the Town of Oyster Bay, which bears no relationship whatsoever to either the interest in traffic safety advanced by the Town or the truth-in-advertising principles that counsel for lesser constitutional protection for commercial speech. Recognizing this distinction balances properly the government's need to value some commercial speech over others with the risk of suppression of disfavored content inherent in any content-based regulation of speech, whether "commercial" or "non-commercial."

As discussed in Part I, *supra*, the Ordinance bars solicitation of work but not solicitation of donations, solicitation of directions to a location, or solicitation of ballot signatures, even though all of these types of solicitation have equivalent potential effects on traffic safety. Indeed, the Ordinance does not even ban all

solicitation of work, as it exempts the solicitation of work by taxi and limousine drivers without any explanation for why solicitation by those specific workers should be treated differently from other solicitation of employment. Just as these content-based distinctions are unrelated to the Town's purported traffic safety interests, they are also unrelated to the marketplace-protection reasons for subjecting commercial speech to lesser constitutional scrutiny. As such, they serve no constitutionally justifiable purpose and create a genuine risk of government discrimination based on content; indeed, here, the potential for the Town to use such content-based distinctions to target the disfavored speech of day laborers is clear. Therefore, following the Supreme Court's decision in *R.A.V. v. City of St. Paul* and the other cases cited above, the Court should subject the Ordinance to strict scrutiny and, for the reasons articulated in Part I, *supra*, find the Ordinance unconstitutional.

III. EVEN IF THE CENTRAL HUDSON ANALYSIS APPLIES, THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE ORDINANCE IS UNCONSTITUTIONAL BECAUSE THERE IS AN INSUFFICIENT RELATIONSHIP TO THE TOWN'S PURPORTED INTERESTS AND THE ORDINANCE IS NOT NARROWLY TAILORED.

Plaintiff-Appellees have argued, first, that the Ordinance regulates non-commercial speech and, second, that even if the Ordinance does regulate only commercial speech, its particular content-based approach requires strict scrutiny.

Even if the Court rejects these arguments and applies the *Central Hudson* test as urged by Appellants, however, the Ordinance cannot survive constitutional scrutiny because there is an insufficiently close relationship between the Ordinance's regulation of that speech and the Town's purported traffic safety interests and the Ordinance is not narrowly tailored.

Parts three and four of the four-part *Central Hudson* test ask "whether the regulation directly advances the governmental interest asserted" and "whether it is not more extensive than is necessary to serve that interest." 447 U.S. at 557; s*ee also Bd. of Trustees, State Univ. of New York v. Fox*, 492 U.S. 469, 477-78 (1989); *Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010) (affirming the four-part *Central Hudson* test in striking down regulations of attorney advertisements). Here, the Town asserts that the sole governmental interest at stake is traffic safety. *See* Appellants' Brief at 16, 30-31. This is certainly an important cause, but there is no relationship between it and the Ordinance's bar on speech that solicits employment. As the Supreme Court has held, just because the Town's "asserted interests are substantial in the abstract" does not mean that a particular regulation on speech "serves them." *Edenfield*, 507 U.S. at 770. The Town "must do more than simply 'posit the existence of the disease sought to be cured.' It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner*

Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) (internal citations omitted). *See also Ibanez v. Florida Dept. of Bus. & Prof'l Regulation*, 512 U.S. 136, 146 (1994) (holding that "[i]f the protections afforded commercial speech are to retain their force, we cannot allow rote invocation" of a state interest to justify a regulation).

The lack of a relationship between Ordinance and its asserted traffic-safety purpose is illustrated in three ways. First, the Ordinance sweeps far too broadly, criminalizing speech that poses no demonstrable threat to traffic. Second, there are ample less restrictive alternatives available to the Town should it seek to protect motorists and pedestrians from behavior that poses traffic concerns. The fact that some of these alternatives are already enacted as law demonstrates that the Ordinance is, in fact, utterly unnecessary to achieve the Town's purported purpose. Third, the Ordinance leaves unregulated a broad array of behavior that is indistinguishable from the solicitation of work in terms of any potential threat to traffic. Indeed, regulated and unregulated activity is distinguishable only in terms of the particular message conveyed, a distinction that demonstrates not only the lack of a reasonable fit between the Ordinance's means and its professed ends but also the Town's true intent to discriminate against a particular type of speech, and a particular kind of speaker.

A. The Ordinance Regulates Too Much Speech.

Prophylactic rules that regulate more speech or expressive activity than is necessary to address the state's concerns – as this does, since not every solicitor of work poses an actual threat to traffic safety – are constitutionally unacceptable. *See Peel v. Attorney Registration & Disciplinary Comm'n*, 496 U.S. 91, 107 (1990) (holding that a restriction on commercial speech may not be "broader than reasonably necessary to prevent the perceived evil."); *Frisby v. Schultz*, 487 U.S. 474, 485 (1988) (holding that regulation of commercial speech is only narrowly tailored if it "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy") (citation omitted); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 644 (1985) (striking down a blanket regulation of attorney advertising, noting that "broad prophylactic rules may not be so lightly justified if the protections afforded commercial speech are to retain their force").

As the District Court correctly concluded, *see* Transcript/Opinion at 72-74 (A-95-97), the Ordinance's broad approach criminalizes a wide range of speech that does not present any threat to traffic safety. For example, all of the following are punishable under the Ordinance:

- A person holding a sign stating "Homeless Veteran: Will Work For Food."
- A high school sports team soliciting cars for a car-wash fundraiser.
- A neighbor who stops, on a residential street, to inquire whether a neighborhood teenager would be interested in performing yard work or babysitting.

- A person waiting on the sidewalk with the intent that cars safely pull over and hire him, without any threat to traffic or pedestrian safety.[13]

These are not "imaginary concerns" or "hypothetical examples," *see* Appellants' Brief at 40, but rather actual examples of speech directly criminalized by the Ordinance, demonstrating that it is "broader than reasonably necessary to prevent the perceived evil." *Peel*, 496 U.S. at 107. In a case indistinguishable from this one, the a District Court in the Southern District of New York issued a preliminary injunction against enforcement of a prohibition on commercial solicitation of passersby on New York City streets, applying *Central Hudson* to hold that the regulation was "more extensive than is necessary to serve the asserted government interest" because it banned all such solicitation rather than only combating harassing solicitors or those who block the sidewalks. *HX Magazine v. City of N.Y.*, 2002 WL 31059318 (S.D.N.Y. 2002).

Similarly, in *Berger v. City of Seattle*, 569 F.3d 1029 (9th Cir. 2009), the Ninth Circuit struck down a permitting scheme for street performers in Seattle

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[13] As the Town correctly points out, *see* Appellants' Brief at 17, 39, the District Court was mistaken about one of the several examples of the Ordinance's excessively broad scope mentioned in its opinion, in that the solicitation of work directed at traffic but conducted from private property is exempted by Ordinance. *See* Transcript/Opinion at 72 (A-95). But this minor error does not detract from its broader point that the Ordinance sweeps in far too much speech. The District Court cited multiple examples of this, *see id.*, and the Town's suggestion that solicitation from private property was the "sole reason" cited, *see* Appellants' Brief at 39, is disingenuous.

parks that was enacted in response to complaints about crowd safety because, "by the City's own account, most street performers are not problematic. So the permitting requirement burdens all performers to root out the occasional bad apple. By doing so, it fails to 'target[] and eliminate[] no more than the exact source of the "evil" it seeks to remedy.'" 569 F.3d at 1045-46 (quoting *Frisby*, 487 U.S. at 485); *see also ACLU v. City of Las Vegas*, 466 F.3d 784, 796 n.13 (9th Cir. 2006) (holding that a ban on solicitation in downtown Las Vegas was not narrowly tailored because it barred more than just solicitation that posed a threat to pedestrian safety).

This Court employed a similar analysis in its recent decision in *Alexander v. Cahill*, striking down a regulatory scheme directed at attorney advertising in part because the regulation banned a whole category of "speech that is *potentially* misleading, but is not inherently or actually misleading in all cases." 598 F.3d 79, 96 (2nd Cir. 2010) (emphasis in the original). Likewise here, the Ordinance bans a whole category of speech that, at best, poses hypothetical or *potential* traffic concerns, but is not inherently or actually interfering with traffic.

In response to these cases, the Town relies almost exclusively on the decision of a panel of the Ninth Circuit in *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 607 F.3d 1178 (9th Cir. 2010). After the filing of Appellants' Brief, however, the panel decision was vacated and the case has been

taken for *en banc* review. --- F.3d ---, 2010 WL 4069338 (Oct. 15, 2010). As a result, the more compelling persuasive authority from this Court's sister-circuit – and the authority more consistent with this Court's recent approach in *Alexander v. Cahill* – is *Berger* and *ACLU v. City of Las Vegas*, *supra*.

The Town also argues that the breadth of the Ordinance is irrelevant because the "the overbreadth doctrine does not apply to commercial speech." Appellants' Brief at 17, 39 (citing *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982)). In so doing, the Court misconstrues the distinction between overbreadth as a standing doctrine – a matter not at issue here - and overbreadth as a fatal flaw in a regulation of commercial speech. *Cf. Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 504 n.11 (1981) ("We have held that the overbreadth doctrine, under which a party whose own activities are unprotected may challenge a statute by showing that it substantially abridges the First Amendment rights of parties not before the court, will not be applied in cases involving 'commercial speech.' However, we have never held that one with a 'commercial interest' in speech also cannot challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment interests of others."). As the cases cited here make clear, there is no question but that when a law regulates far too much speech in relation to its purported state interest it is not narrowly tailored and, therefore, unconstitutional. Because the Ordinance

regulates a great deal of speech that poses no threat whatsoever to traffic safety, it cannot survive constitutional scrutiny.

B. There Are Less Speech-Restrictive Alternatives to Achieve the Town's Purported Traffic Safety Goals.

As the District Court found, *see* Transcript/Opinion at 70-71 (A-93-94), there are ample less restrictive and more reasonable alternatives for addressing the town's traffic safety interests without suppressing speech and expressive activity. To begin with, the Town already has local laws forbidding pedestrians from obstructing traffic, *see* Town Code of Oyster Bay, Chapt. 17-231, forbidding motorists from driving at dangerously slow speeds, *see id.* Chapt. 203-2(D), prohibiting littering, *see id.* Chapt. 201, and prohibiting excessive noise. *See id.* Chapt. 156. In addition, the Town has authority to enforce New York State traffic laws, which limit pedestrian behavior when entering roadways, N.Y. VEH. & TRAF. LAW § 1152, prohibit persons from standing in roadways for the purpose of solicitation, *see id.* § 1157(a), prohibit driving "at such a slow speed as to impede the normal and reasonable movement of traffic," i*d.* § 1181 (a), and prohibit stopping, standing or parking in restricted areas. *Id.* § 1202. The Town has authority to enforce the state penal law, which regulates, among other things, disorderly conduct. *See* N.Y. PENAL LAW § 240.20. The Town is simply wrong when it suggests that it lacks authority to enforce these laws. *See, e.g.,* MUNICIPAL HOME RULE LAW § 10; N.Y. CRIM. PROC. LAW § 2.20; N.Y. TOWN LAW § 39.

Moreover, the issue is not capacity to enforce, since such capacity issues affect enforcement of the Ordinance as much as any other law. The issue whether the Ordinance's regulation of speech is reasonably related to the need to preserve traffic safety when there is every reason to believe that any conceivable traffic concern the Town could posit related to day laborers' solicitation of work could be addressed by enforcement of any one or all of these existing laws. *Cf. Loper v. NYPD*, 999 F.2d 699, 701 (2d Cir. 1993) (striking down a statute barring loitering for the purposes of begging because it was "ludicrous" to suggest that the NYPD did not have other tools to prevent harassing and coercive conduct associated with begging).

The Town argues that the District Court's consideration of the existence of these alternatives improperly transformed the "narrow tailoring" analysis into a heightened "least restrictive means" analysis, *see* Appellants' Brief at 17, 35-38, but that is not the case. The District Court considered exactly what the law requires – namely, whether there existed "a reasonable fit between the goals sought to be advanced by the government in which they have a substantial interest and the ordinance under attack. We do know that the methodology employed by the municipality need not be the least restrictive means available to address that substantial government interest." Transcript/Opinion at 69-70 (A-92-93). In *Discovery Network,* the Supreme Court held that consideration of less speech-

restrictive alternatives is “a relevant consideration in determining whether the ‘fit’ between ends and means is reasonable,” specifically rejecting the Town’s argument that such consideration transforms the analysis into a “least-restrictive-means” test. 507 U.S. at 417 n.13. *See also Central Hudson*, 447 U.S. at 565 (holding that “[t]he State cannot regulate [commercial] speech . . . when narrower restrictions on expression would serve its interest as well.”); *Zauderer*, 471 U.S. at 649 (holding that a blanket ban on attorney advertisements could not be justified where the state had not shown that a case-by-case enforcement of existing anti-fraud laws would not suffice for its stated purpose of regulating truth in advertising); *Thompson v. Western States Medical Center*, 535 U.S. 357, 358 (2002) (striking down a regulation on drug manufacturers’ speech based primarily on the existence of non-speech-related alternatives that would accomplish the government’s safety goals, writing that “[i]f the Government can achieve its interests in a manner that does not restrict [commercial] speech, or that restricts less speech, the Government must do so.”). Thus, although the existence of less speech-restrictive alternatives is not dispositive, as it would be under strict scrutiny, the District Court correctly found that the existence of such obvious alternatives is still relevant to the “reasonable fit” inquiry associated with commercial speech. Transcript/Opinion at 69 (A-92). The sole case on which the

Town relies, the Ninth Circuit's now-vacated *Redondo Beach* panel decision, *see* Appellants' Brief at 36-37, does not contradict this well-established authority.

The principle underlying all of these cases has its origin in the Supreme Court's holding more than seven decades ago in *Schneider v. New Jersey,* 308 U.S. 147 (1939). In *Schneider*, various municipalities defended ordinances that prohibited leafleting on the ground that leafleting had resulted in excessive littering. While the Court recognized that the prohibition on leafleting would serve to reduce litter, the Court held that "the purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it." *Id*. at 162. The Court confirmed that the First Amendment protection afforded leafleting did not leave the state without power to deal with the related problem of littering: "There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets." *Id*.

So too here. It is not the class of all solicitors of work on the sidewalks of Oyster Bay who are causing traffic problems any more than it was all the leafletters in the towns of New Jersey who were doing the littering. Like the regulations in those cases, Oyster Bay's Ordinance is not limited to conduct that actually creates traffic concerns, nor is it confined those areas in which traffic problems have arisen or are likely to arise. The Town of Oyster Bay is free to

punish those drivers of vehicles who actually cause traffic safety problems, and, as previously noted, already has ample tools to do so.

C. The Ordinance Fails to Regulate Activity That is Indistinguishable from the Regulated Speech Activity With Regard to Traffic Safety Concerns.

Finally, even if the Court finds that the Ordinance's speech-based distinctions between regulated and unregulated behavior are not sufficient to trigger strict scrutiny, as argued in Part II, *supra*, such content-based distinctions, at a minimum, provide further evidence of the lack of "fit" between the Ordinance and its purported traffic-safety purpose. The Town has not chosen to target all street-side solicitation, but only solicitation of work, and only when the worker does not drive a taxi, a bus, or a limousine. In *City of Ladue v. Gilleo*, the Supreme Court noted that "[e]xemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place." 512 U.S. 43, 52-53 (1994) (internal citations omitted).

If the interest the Town seeks to protect is traffic safety, it begs the question why the Town does not regulate behavior that threatens traffic safety directly, rather than attacking the problem at best indirectly by banning a certain category of speech. *See Bolger*, 463 U.S. at 73 (striking down a restriction on contraceptive

advertisements because the regulation had only a "marginal" impact on the state's stated purpose); *Central Hudson*, 447 U.S. at 564 (noting that "the Court has declined to uphold regulations that only indirectly advance the state interest involved."). In *Bolger*, the state's ban on contraceptive advertisements was plainly a means of discriminating against what, at the time, was controversial speech. Thus, even in the context of commercial speech, demanding a direct approach to advancing the purported government interest necessary to ensure that the lesser protection afforded to commercial speech does not become a means of justifying otherwise impermissible government interests.

As the District Court correctly found, therefore, for all of these reasons – the sweeping in of speech that poses no threat to traffic safety, the existence of obvious and non-speech-related means of protecting against such threats, and the fact that the Ordinance makes exceptions that undermine any claim of a legitimate relationship between its means and its purported traffic-safety purpose – the Ordinance cannot be justified under Parts 3 and 4 of the *Central Hudson* test for regulations of commercial speech and is, therefore, unconstitutional.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellees respectfully request that the Court affirm the District Court's June 1, 2010 order granting Plaintiff-Appellees'

motion for a preliminary injunction enjoining enforcement of Chapter 205-32 of the Town Code of the Town of Oyster Bay.

Respectfully submitted,

__/s/_Corey Stoughton__________

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,541 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

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