



## **INTEREST OF THE *AMICI CURIAE***

The Suffolk County Coalition for Legal Immigration (NO AMNESTY) (the “Coalition”) and Judicial Watch, Inc., by counsel, hereby submit this brief as *amici curiae* in support of Plaintiffs and the Town of Southampton.

The Coalition, an unincorporated association of concerned residents of the Town of Southampton (“Town”), the Village of Southampton (“Village”), and Suffolk County, supports enforcement of immigration laws and securing the borders. It also is opposed to any use of taxpayer resources that undermines existing immigration laws, promotes illegal immigration, or facilitates the employment of persons not legally present in the United States.

Judicial Watch, Inc. (“Judicial Watch”) is a not-for-profit, tax-exempt educational organization that seeks to promote integrity, transparency, and accountability in government and fidelity to the rule of law. As part of its efforts to promote fidelity to the rule of law, Judicial Watch has provided legal representation to taxpayers and taxpayer organizations seeking to challenge local government actions and expenditures that undermine federal immigration laws. *See Karunakaram v. Town of Herndon*, No. CH 2005 4013 (Fairfax Co., Va. Cir. Ct.) (lawsuit challenging use of taxpayer resources to operate day laborer site); *Garcia v. City of Laguna Beach*, No. 06CC10595 (Orange Co., Calif. Super. Ct.) (lawsuit challenging use of taxpayer resources to operate day laborer site); *Sturgeon v. Bratton*, No. BC351646 (Los Angeles Co., Calif. Super. Ct.) (lawsuit challenging police department policy limiting communication between officers and federal immigration officials). Judicial Watch also regularly files *amicus curiae* briefs as a means to advance its public interest mission.

## PRELIMINARY STATEMENT

*Amici* support Plaintiffs' and the Town of Southampton's legal arguments that the Village's plan to operate a day laborer hiring site on protected open land purchased with monies from the Community Preservation Fund ("CPF") violates state law. In addition, *amici* respectfully submit that the Village's proposed creation of a day laborer hiring site also is contrary to federal law relating to the employment of illegal aliens and, contrary to the Village's legal argument, is not required by the First Amendment to the U.S. Constitution.

The property at issue, which is located along Aldrich Lane and North Sea Road (hereafter "the CPF Land"), is owned jointly by the Village and the Town and was purchased with CPF monies. Not only does the Village intend to use the CPF Land for a day laborer hiring site, but it has already made some modifications to the property for this purpose. In addition, the Village reportedly plans to have a third party -- proposed Intervenor "The Coalition for a Worklink Center" and/or Catholic Charities -- operate the hiring site. *See, e.g.*, Susan J. Greenberg, "Village, Town Debate Creation of Hiring Site," *Suffolk Life*, April 11, 2007 (attached as Exhibit 1); Lisa Finn, "Green Light for Southampton Hiring Site," *The Independent*, April 3, 2007 (Exhibit 2). The Village asserts that its actions are necessary to ameliorate the "adverse impacts on public health, safety, and welfare" caused by the "street-side solicitation of employment" throughout the Village. *See* Aff. of Village Mayor in Opp. to Mot. for Prel. Inj., at 10.

## ARGUMENT

### I. The Village's Creation of a Hiring Site on CPF Land Is Contrary to State Law.

Land purchased with CPF monies is governed by a detailed statutory scheme that authorizes only a narrow range of uses and imposes several specific duties and requirements. Specifically, land purchased with CPF monies must be used in a manner that is “compatible with the natural, scenic, historic, and open space character of such lands” and “preserves the native biological diversity of such lands.” Town Law § 64-e(9); Town Code § 140-6. In addition, the law “limits improvements to enhancing access for passive use of such lands, such as nature trails, boardwalks, bicycle paths and peripheral parking areas, provided such improvements do not degrade the ecological value of the land or threaten essential wildlife habitat.” *Id.* A local government may enter into an agreement with a nonprofit corporation “engaged in land trust activities” to land purchased with CPF monies in a manner consistent with the statute. *Id.*

Working in conjunction with the Coalition, in April 2007, Judicial Watch submitted a Freedom of Information Law (“FOIL”) request to the Village seeking access to records regarding the Village’s proposed use of the CPF Land for a day laborer hiring site, and, more specifically, how the proposed use was consistent with the requirements of the CPF. Judicial Watch requested that the Village produce the following documents, among others:

- Estimates of the number of day laborers expected to use the hiring site on a daily, weekly, monthly, annual, or other similar basis;
- Estimates of the number of employers expected to use the hiring site on a daily, weekly, monthly, annual, or other similar basis;
- Estimates or studies of traffic volume, traffic flow, and/or traffic patterns associated with the proposed use of the parcel as a hiring site;

- Increases or expansion of police presence associated with the proposed use of the parcel as a hiring site;
- Analyses, determinations, or findings of whether (or how) the proposed use of the parcel as a hiring site allows public use and enjoyment of the parcel in a manner compatible with its natural, scenic, historic, and open space character (*see, e.g.*, N.Y. Town Law § 64-e(9));
- Analyses, determinations, or findings of whether (or how) the proposed use of the parcel as a hiring site will preserve the native biological diversity of the parcel and surrounding lands (*see, e.g.*, N.Y. Town Law § 64-e(9));
- Analyses, determinations, or findings of whether (or how) any proposed improvements to the parcel for use as a hiring site, including but not limited to construction of the gravel driveway, will or will not degrade the ecological value of the parcel or threaten essential wildlife habitat (*see, e.g.*, N.Y. Town Law § 64-e(9)); and
- The identity of the entity or organization that will be operating the hiring site, including whether the entity or organization is organized as a not-for-profit corporation under the corporation law and whether the entity or organization has been engaged previously in land trust activities or management (*see, e.g.*, N.Y. Town Law § 64-e(9)).

*See* Letter to Diane Carpenter dated April 30, 2007 (Exhibit 3).

It certainly would be reasonable to expect that, if a municipality were going to propose a particular use of land purchased with CPF monies, then it first would review the CPF statute and undertake an analysis to determine whether the proposed use was consistent with the requirements of the statute. And certainly, it also would be reasonable to expect that, if a municipality undertook such an analysis, then it would have at least some documentation of its efforts, if not its conclusions. Good government and sound policy formulation would require no less. Revealingly, when the Village responded to Judicial Watch's FOIL request by letter from the Village Attorney dated May 25, 2007, it stated that it had no documents responsive to any of

the requests referenced above. *See* Exhibit 4. Nor did it have any documents responsive to any of Judicial Watch’s other, comparable requests. *Id.*

The Village apparently failed to undertake even the most basic analysis of whether its proposed use of the protected land at issue is consistent with the requirements of the statute. Although it is entrusted with maintaining the “natural, scenic, historic, and open space character” of the CPF Land, the Village apparently has made no effort to estimate the number of day laborers who will use the site, the number of prospective employers who will be present on the site, or the resulting traffic impact, much less whether a hiring site is compatible with the natural and open space character of the land. Similarly, the Village cannot have fulfilled its duty not to “degrade the ecological value” of the land or “threaten essential wildlife habitat” if it did not even consider the impact that the proposed day laborer hiring site will have on the on the CPF Land at issue.<sup>1</sup> Certainly if it had done so, then the Village would be able to produce at least some records responsive to Judicial Watch’s FOIL request.

While *amici* will not reiterate here the cogent analyses presented by Plaintiffs and the Town in their briefs, logic and common sense would appear to indicate that use of the CPF Land as a hiring site for day laborer is inconsistent with the requirements governing the use of land purchased with CPF monies. Rather, it would appear that the Village views the CPF Land as a convenient depository for all of the “adverse impacts on public health, safety, and welfare” to

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<sup>1</sup> The Village also has the responsibility to select a not-for-profit corporation engaged in land trust activities to manage the CPF Land in a manner that furthers the requirements of the statute. Instead, the Village apparently plans to select a provider of social services -- either the Coalition for a Worklink Center or Catholic Charities -- to operate the hiring site.

which Mayor Epley referred in his affidavit to the Court. Clearly, the Village's proposed use of the CPF Land to create and operate a hiring site for day laborers is contrary to state law.

## **II. The Village's Facilitation of the Employment of Illegal Aliens Is Contrary to Federal Law.**

It is the Village's stated purpose to use the CPF Land at issue to operate a site that facilitates the hiring of day laborers by prospective employers. As set forth below, creating and operating a taxpayer-funded marketplace that facilitates the hiring of anyone not authorized to work in the United States violates federal immigration laws.

It is common knowledge that it is unlawful for employers to hire persons who are not authorized to work in the United States. Federal law expressly prohibits the recruiting or hiring of an alien if it is known that the alien is not authorized to work in the United States. 8 U.S.C. § 1324a(a)(1)(A). Moreover, it is unlawful to hire any individual for employment in the United States without complying with federal employment eligibility verification requirements. 8 U.S.C. § 1324a(a)(1)(B)(I). It also is unlawful to aid or abet the commission of an offense against the United States. 8 U.S.C. § 2.

In addition, federal immigration law makes it illegal to "encourage or induce an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law." 8 U.S.C. § 1324(a)(1)(A)(iv). Federal immigration laws also make it unlawful to aid or abet the commission of such acts. 8 U.S.C. § 1324(a)(1)(A)(v)(II). Facilitating the illegal employment of undocumented aliens may be deemed encouraging or inducing an alien to come to, enter, or

reside in the United States. *See, e.g., U.S. v. Kim*, 193 F.3d 567, 574 (2<sup>d</sup> Cir. 1999); *United States v. Oloyede*, 982 F.2d 133 (4<sup>th</sup> Cir. 1992).

In Suffolk County, like elsewhere in the United States, it cannot be reasonably disputed that day laborers consist predominantly of persons not legally present or authorized to work in the United States. Village Mayor Epley recently acknowledged that day laborers are subject to deportation as illegal aliens. *Southampton Press*, “The View East: ‘High Noon’ With Mark Epley” (May 31, 2007) (“Either they [federal government] have to deport all these guys, or they have to have a registration program so that the men don’t stand on the street.”) (Exhibit 5). Moreover, a recent, comprehensive study of day laborers confirms that at least seventy-five percent (75%) of day laborers in the United States are illegal aliens. *See Abel Valenzuela, Jr., et al.*, “On the Corner: Day Labor in the United States,” at 4 (Jan. 2006) (UCLA/University of Illinois survey of 2,260 day laborers at 264 hiring sites in 20 states, including New York) (Exhibit 6). Accordingly, it is abundantly clear that users of the Village’s proposed hiring site will include illegal aliens.

By creating and operating a taxpayer-funded marketplace for the employment of illegal aliens, the Village will become complicit in illegal activity. It also will encourage and induce illegal aliens to remain in the United States by making it easier for them to obtain employment and will aid and abet unlawful hiring. Such conduct violates both the letter and the spirit of federal law. It should not be countenanced by the Court.

### **III. The Village’s Attempt to Hide Behind the First Amendment Is Unavailing.**

The Village attempts to justify its actions by invoking the alleged First Amendment rights of day laborers. First, as a preliminary matter, it is axiomatic that the First Amendment cannot be

invoked as a justification to engage in illegal activity. *United States ex rel. John Turner v. Williams*, 194 U.S. 279, 292 (1904); *see also Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Rights*, 413 U.S. 376 (1973) (no First Amendment right to advertise illegal activity). Illegal aliens simply have no right under the First Amendment to seek illegal employment, and employers likewise have no right to hire them.

In any event, the Village's own interpretation of the First Amendment belies its application in this case. The First Amendment rights of day laborers, assuming any exist, do not allow the Village to trample valid land-use statutes or violate federal law. Nor do they create an affirmative duty to provide a taxpayer-funded marketplace for laborers to solicit employment, legal or otherwise. On the contrary, the First Amendment allows many limitations on speech, including the power to enact content-neutral "time, place or manner" restrictions. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989); *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1982).

The speech at issue in this case undisputably is "commercial speech," and, as such, it is entitled to lesser protection under the First Amendment, if it is entitled to any protection at all. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 562-63 (1980) (holding that the Constitution "accords a lesser protection" to commercial speech and only if that speech concerns "lawful activity"). In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), the U.S. Supreme Court reaffirmed that, in *Central Hudson Gas & Electric Corp.*, it:

adopted a four (4) part test for determining the validity of government restrictions on commercial speech, as distinguished from more fully protected speech. (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial

governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

453 U.S. at 507 (citing *Central Hudson Gas & Electric Corp.*, 447 U.S. at 563-66). By contrast, the authority on which the Village chiefly arises, *Loper v. New York City Police Dep't.*, 999 F.2d 699, 704 (2d Cir. 1993), did not even address regulation of commercial speech, but instead concerned loitering/begging, which the Court found analogous to more protected, expressive speech.<sup>2</sup> If this Court were to interpret soliciting employment as more akin to expressive political speech than less protected commercial speech, it would effectively destroy the distinction between political speech and commercial speech established by the U.S. Supreme Court in *Central Hudson Gas & Electric Corp.* and reaffirmed in *Metromedia, Inc.*

The Village is well aware of its power to regulate speech. Just recently, the Village adopted an ordinance proscribing demonstrations on a public street in front of a private residence. See Mitchell Freedman, *Newsday*, “Law Makes It Illegal to Picket at Mayor’s House” (May 30, 2007) (Exhibit 7).<sup>3</sup> The Village also recently entered into a settlement agreement relating to the upcoming July 4<sup>th</sup> parade under which the Village will adopt regulations governing participation in the parade. Jennifer Davis, *Southampton Press*, “Settlement Clears the Way for July 4 Parade” (May 31, 2007) (Exhibit 8). While both of these situations involve political speech, as opposed to lesser-valued commercial speech, the ability of the Village to impose reasonable “time, place or manner” restriction on speech is unquestioned.

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<sup>2</sup> The Village also erroneously relies on *People v. Barton*, 8 N.Y.3d 70 (N.Y. 2006), which likewise addressed an anti-panhandling statute rather than commercial speech.

<sup>3</sup> This new ordinance apparently was enacted after opponents of the proposed hiring site demonstrated in front of Mayor Epley’s residence.

In this case, the Village seeks to end “street-side solicitation of employment” but erroneously believes that, in order to do so, it is necessary to create an alternative channel for day laborers to solicit employment. Not only does this argument erroneously rely on the standards governing regulation of political speech, which requires alternate channels of communication be left open (*Perry Educ. Ass’n*, 460 U.S. at 45), but it also ignores the standard applicable to regulation of commercial speech, which does not contain any such requirement. *Metromedia, Inc.*, 453 U.S. at 507; *Central Hudson Gas & Electric Corp.*, 447 U.S. at 563-66. Moreover, the Village has a variety of options available to it to address the problem of street-side solicitation of employment other than creating and operating a taxpayer-funded marketplace that facilitates unlawful hiring. The Village, like all municipalities, has well-established authority to regulate persons engaged in commerce. Municipalities routinely require that such persons obtain a registration and/or license relating to their commercial activities. The Town, for instance, requires that any persons who solicit on the street or door-to-door first obtain a license and, among other information, provide photographs and fingerprints to be used in a criminal background check. *See* Town Code § 254-(3)(4) (“Peddlers and Solicitors Law”) (Exhibit 9).

The Village thus has other, reasonable alternatives available to address street-side solicitation of employment, such as a licensing or registration scheme. As part of a registration process, the Village could require verification of eligibility for employment in the United States in order to promote, rather than undermine, enforcement of federal immigration laws. This could be accomplished easily through the electronic system now widely used by employers called “Basic Pilot,” a program created and administered by the federal government. *See* Exhibit 10. In the alternative, it could require, as part of the registration process, that persons seeking to engage

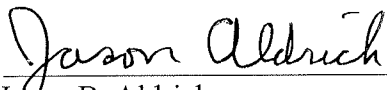
in street-side solicitation swear under penalty of perjury that they are authorized to work in the United States. Regardless, the Village clearly can regulate the street-side solicitation of employment in a manner that not only is consistent with the law, but also promotes enforcement of federal immigration laws.

Accordingly, *Amici* respectfully suggest that the Village explore such reasonable alternatives rather creating and operating a taxpayer-funded marketplace that facilitates unlawful employment and runs afoul of both state and federal law.

Dated: June 25, 2007  
Washington, D.C.

Respectfully submitted,

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CERTIFICATE OF SERVICE

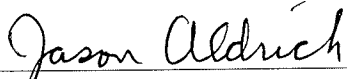
I hereby certify that on the 25<sup>th</sup> of June, 2007, the foregoing Order to Show Cause, Affirmation in Support of Filing of Brief By *Amici Curiae*, and the accompanying Brief of *Amici Curiae* The Suffolk County Coalition for Legal Immigration (NO AMNESTY) and Judicial Watch, Inc. was sent by overnight mail to the following:

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