NO. 06-55750

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Appellee,

v.

CITY OF REDONDO BEACH,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
No. 04-CV-9396-CBM
Honorable Consuelo B. Marshall

BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF APPELLANT, CITY OF REDONDO BEACH

Paul J. Orfanedes
James F. Peterson*
JUDICIAL WATCH, INC.
501 School Street, S.W.
Suite 500
Washington, D.C. 20024
(202) 646-5172

Counsel for Amicus Curiae

*Not Admitted to the Ninth Circuit

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STATEMENT OF THE *AMICUS CURIAE*

Judicial Watch, Inc. ("Judicial Watch"), by counsel, hereby submits this brief as *amicus curiae* in support of Appellant, City of Redondo Beach. Judicial Watch is a not-for-profit, tax-exempt educational organization that seeks to promote integrity in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission.

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 governments' use of taxpayer resources to establish hiring sites for day laborers. Often, such sites are created as a means to address street-side solicitation of employment. *See Berkoski v. Bd. of Trustees*, Case No. 07-12608 (Suffolk Co., N.Y. Supreme Ct.) (*amicus curiae* supporting legal challenge to 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); *Karunakaram v. Town of Herndon*, No. CH 2005 4013 (Fairfax Co., Va. Cir. Ct.) (same). Because day laborer hiring sites often are used by aliens not authorized to work in the United States, these sites facilitate violations of federal immigration laws.

Numerous communities across the nation have attempted to address the burgeoning problem of street-side solicitation of employment by enacting anti-solicitation ordinances. Based upon an erroneous application of First Amendment jurisprudence , however, many local governments have mistakenly believed that, in order to regulate street-side solicitation of employment, it is necessary to establish a taxpayer-funded day laborer hiring site. Much of this mistaken belief arises from decisions by trial courts within the U.S. Court of Appeals for the Ninth Circuit ("Ninth Circuit"), including the ruling of the District Court in this case, that fail to differentiate between commercial speech, which is entitled to lesser protection under the First Amendment, and political or expressive speech, which enjoys greater protection under the First Amendment. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 475 F. Supp. 2d 952 (C.D. Cal. 2006); *see also Comite de Jornaleros de Glendale, et al. v. City of Glendale*, No. 05-55880 (9th Cir., fully briefed, awaiting oral argument).

To Judicial Watch's knowledge, this Court has not yet issued a reported decision in which it has addressed whether a local ordinance regarding the street-side solicitations of employment should be analyzed as lesser-protected

commercial speech or as more highly-protected expressive or political speech.[1] It is thus vital that this Court confirm that local governments may regulate such activity as commercial speech.

Judicial Watch is cognizant of the fact that the briefing of this appeal is ongoing. In this regard, it appears that the due date for Appellees to file their opposition brief has been extended twice and the briefing in a related appeal, *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, Case No. 06-56869 (9th Cir.), has been stayed. Nonetheless, the Court has the discretion to accept the filing of *amicus curiae* briefs at any time, and Judicial Watch respectfully submits that the Court should accept its *amicus curiae* brief at this time because the brief will assist the Court in addressing a pure issue of law and because the parties to this litigation will have additional opportunities to address this issue later in these proceedings. *See* FRAP 29(e) ("Court may grant leave for later filing, specifying the time within which an opposing party may answer.").

In addition, because it was not a participant in the lower court proceedings, it is unclear to Judicial Watch whether the parties fully briefed in that court the issue of whether street-side solicitation of employment should be analyzed as

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[1] This Court's ruling in *ACORN v. City of Phoenix*, 798 F.2d 1260 (9th Cir. 1986) addressed the street-side fundraising by an advocacy group, not the purely commercial solicitation of employment.

lesser-protected commercial speech or more highly-protected expressive or political speech. Whatever the case may be, this Court may invoke its discretion to hear even previously unconsidered claims under three recognized exceptions:

> [1] In the "exceptional" case in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process, [2] when a new issue arises while appeal is pending because of a change in the law, [3] or when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed.

Cold Mountain v. Garber, 375 F.3d 884 (9th Cir. 2004) (quoting *Bolker v. Comm'r*, 760 F.2d 1039, 1042 (9th Cir. 1985)). Certainly one, and perhaps two, of these exceptions, apply here. The issue raised by Judicial Watch is a question of pure law that does not depend on the factual record below, and this case clearly is of "exceptional" importance because of the precedent that it may set. It is essential that this Court be fully apprised of the clear error of law committed by the District Court and all the relevant arguments. *See Miller-Wohl Co. v. Commissioner of Labor & Industry*, 694 F.2d 203, 204 (9th Cir. 1982) (the classic role of *amicus curiae* is to assist in a case of general public interest, supplement the efforts of counsel, and draw the court's attention to law that might otherwise escape consideration). Toward that end, Judicial Watch respectfully suggests that its brief will be of significant service to the Court.

SUMMARY OF ARGUMENT

The District Court erred in its review of the City's anti-solicitation ordinance by not analyzing street-side solicitation of employment as commercial speech. By doing so, the District Court failed to apply the appropriate First Amendment analysis to the ordinance. Because of this fundamental error, the District Court's ruling should be reversed.

ARGUMENT

I. The District Court Failed to Use the Appropriate First Amendment Standard In Its Review of the Anti-Solicitation Ordinance.

The speech that the City seeks to regulate in this case is the solicitation of employment by persons gathering in certain public spaces, typically along streets or sidewalks. This type of speech – the proposal of a commercial transaction – is a distinct subset of speech under the First Amendment known as commercial speech. In its review of the City's anti-solicitation ordinance,[2] however, the District Court failed to even consider whether the well-established First Amendment standard governing regulation of commercial speech should have been applied. *See generally Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 475 F. Supp. 2d 952, 958-68 (C.D. Cal. 2006).

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[2] Redondo Beach Municipal Code § 3-7.1601 (the "Ordinance").

The U.S. Supreme Court has long distinguished between commercial and non-commercial speech. *Central Hudson Gas & Electric Corp.*, 447 U.S. 557, 564 (1980). Commercial speech relates solely to the "economic interests of the speaker and its audience" or as "speech proposing a commercial transaction." *Id.* at 561-62. By contrast, the First Amendment affords the most protection to speech which is "integrally related to the exposition of thought." *Virginia State Bd. Of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 779-80 (1976) (Stewart, J., concurring). Because commercial speech is integrally related to advancing economic interests, not thoughts or ideas, it invariably receives "lesser protection than other constitutionally guaranteed expression." *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 422 (1993) (citing *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978).

The Supreme Court has established a clear framework for determining the validity of restrictions on speech that is commercial in nature. Specifically, the Court has:

> 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.

Metromedia, Inc. v. City of San Diego 453 U.S. 490, 507 (1981) (citing *Central Hudson Gas & Electric Corp.*, 447 U.S. at 563-66). In regard to the fourth criterion, a regulation need not be the "least-restrictive means to accomplish the government's goal." *Board of Trustees of State University v. Fox*, 492 U.S. 469, 480 (1989). Instead, there must be a "reasonable fit" between the ends and the means, a fit "that employs not necessarily the least restrictive means, but . . . a means narrowly tailored to achieve the desired objective." *Id.*

In this case, the speech that the City seeks to regulate through its anti-solicitation ordinance is, at most, commercial speech.[3] Not unlike hot dog vendors or t-shirt sellers commonly seen on the streets of busy cities across America, day laborers "propose a commercial transaction" to prospective employers by standing in certain locations, like streets and sidewalks. Their conduct communicates to

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[3] To be considered commercial speech under *Central Hudson*, street-side solicitation of employment by day laborers would first have to be a "lawful activity." In Redondo Beach, however, like elsewhere in the United States, day laborers consist predominantly of persons not legally authorized to work in the United States. A recent, comprehensive study of day laborers determined 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 California). Solicitation of unlawful employment would not seem to be an activity protected under *Central Hudson*.

these employers that they are willing to provide work in exchange for payment. *See Spence v. Washington*, 418 U.S. 405, 409 (1974) (holding that a particularized message by conduct to an intended audience qualifies for First Amendment protection). No other message is intended or communicated. Certainly no political message is conveyed. The only message is "Hire Me."

The Supreme Court has recognized solicitation of employment as a form of commercial speech in an analogous context. In *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), the Court considered whether in-person solicitation of clients by attorneys was constitutionally protected speech. The Court specifically concluded that solicitation of clients is lesser-protected commercial speech that does not rise to the level of speech "more traditionally within the concern of the First Amendment." *Id.* at 457. Moreover, according to the Court, "in-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component." *Id.* The Court also stated that a lower level of judicial scrutiny, consistent with the commercial speech doctrine, was appropriate. *Id.* Clearly, if lawyers' solicitation of potential clients is lesser-valued commercial speech, then solicitation of employment by day laborers should merit no greater First Amendment protection.

Despite the obviously "commercial" nature of day laborer "speech," the District Court failed to analyze the Ordinance as lesser-protected commercial speech.[4] Instead, the Court, without any discussion of this issue, applied the "time, place, or manner" test intended for higher-value non-commercial speech. 475 F. Supp. 2d at 958 (following the test developed in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Under this stricter test, the government may impose content-neutral "time, place, or manner" restrictions on protected speech if the restrictions are narrowly tailored to serve a significant government interest and leave open alternative channels of communication. 475 F. Supp. 2d at 958 (citing *Ward*, 491 U.S. at 491). This test plainly is different from the *Central Hudson* test for commercial speech, and, if this lesser standard for commercial speech had been appropriately applied in this case, it would have yielded a different result.

The cases relied upon by the District Court do not even address lesser-protected commercial speech, but instead concern solicitation relating to more expressive activity. For example, *ACORN v. City of Phoenix*, 798 F.2d 1260 (9th Cir. 1986) ("ACORN"), involved review of a city ordinance restricting solicitation

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[4] In fact, the District Court's only reference to commercial speech was in a footnote in which it correctly stated that review under the overbreadth doctrine would not be available in a commercial speech case. 475 F. Supp. 2d 952, 958 n.2.

on streets. *Id.* at 1262. Critically, however, the "speech" at issue in ACORN was speech by a "political activist organization" whose members would, among other things, approach motorists to solicit contributions and distribute information about the organization. 475 F. Supp. 2d at 964. Hence, the speech at issue in ACORN was not commercial, but was higher-value political speech. Thus, application of the "time, place, or manner" in ACORN was entirely appropriate. ACORN, however, provides no support for application of a "time, place, or manner" test in this case.

Other solicitation cases cited by the District Court similarly involved non-commercial speech. *ACORN v. St. Louis County*, 930 F.2d 591, 594 (8th Cir. 1991) (political organization seeking donations) (religious organization seeking donations); *International Society for Krishna Consciousness of New Orleans (ISKCON) v. City of Baton Rouge*, 876 F.2d 494 (5th Cir. 1989) (members of religious organizations seeking donations); *Los Angeles Alliance for Survival v. City of Los Angeles*, 22 Cal. 4th 352, 93 Cal. Rptr. 2d 1, 993 P.2d 334 (2000) (members of charitable organization seeking funds). Similarly, the only reported cases addressing street-side solicitation of employment overlook the commercial nature of the "speech" involved and erroneously apply the "time, place, or manner" test. *Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA)*

v. Burke, 2000 U.S. Dist. LEXIS 16520, *18 (C.D. Cal. 2000); *Xiloj-Itzep v. City of Agoura Hills*, 24 Cal. App. 4th 620, 29 Cal. Rptr. 2d 879 (Cal. Ct. App. 1994).

Because the District Court failed to apply the commercial speech doctrine to the City's efforts to regulate street-side solicitation of employment, the District Court erred in its review of the Ordinance.

II. Street-Side Solicitation of Employment Must Be Regulated As Commercial Speech.

As discussed above, the District Court should have applied the *Central Hudson* test for commercial speech in its review of the Ordinance. If it had, it is likely the Ordinance would have been upheld.

First, the District Court would have considered whether street-side solicitation of employment by day laborers is lawful activity, which is doubtful.[5] Next, assuming that the activity is lawful, the District Court would have found that the Ordinance directly advances the substantial government interests asserted by the City, namely traffic flow and safety. 475 F. Supp. 2d at 963. The District Court already has stated that both of these constitutes at least a "significant

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[5] The District Court simplistically states that "there does not appear to be any law that bars undocumented persons from seeking work." 475 F. Supp. 2d at 957. This assertion ignores, among other things, that it is unlawful to enter into conspiracies to violate federal law (18 U.S.C. § 371) or to aid or abet (8 U.S.C. § 2) the violation of federal immigration laws.

interest." *Id.* at 964; *Metromedia, Inc. v. City of San Diego* 453 U.S. at 507 (City's interest in traffic safety justified prohibition on commercial billboards).

Finally, the District Court would have found that the Ordinance is a "reasonable fit" for the activity it seeks to regulate. What is required is "a reasonable fit" between the ends and the means chosen to accomplish those ends. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 632 (1995). The fit need not be perfect nor the single best to achieve those ends, but one whose scope is narrowly tailored to achieve the City's objective. *Id.* In this case, while the fit may not be "perfect," it is a reasonable means to accomplish the City's goals.

Accordingly, when properly reviewed under the commercial speech doctrine, the Ordinance is an entirely proper use of the City's power to regulate commercial speech. Otherwise, if the 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.*

CONCLUSION

Because of its failure to apply the law governing commercial speech, the judgment of the District Court should be reversed.

Dated: July 6, 2007

Respectfully submitted,

Paul J. Orfanedes
James F. Peterson (Not Admitted to the Ninth Circuit)
JUDICIAL WATCH, INC.
501 School Street, S.W.
Suite 500
Washington, D.C. 20024
(202) 646-5172

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the attached amicus brief is proportionally spaced, has a typeface of 14 points or more and contains 3,398 words.

July 6, 2007

Paul J. Ohanedes

CERTIFICATE OF SERVICE

I hereby certify that on July 6, 2007 two true and correct copies of the foregoing **BRIEF OF *AMICUS CURIAE* JUDICIAL WATCH, INC. IN SUPPORT OF APPELLANT, CITY OF REDONDO BEACH** was served on the following counsel of record and by first class U.S. mail, postage prepaid:

Robert Rubin, Esq.
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS
131 Steuart Street
San Francisco, CA 94105

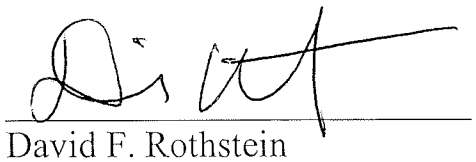
Cynthia A. Valenzuela, Esq.
MEXICAN AMERICAN LEGAL DEFENSE
AND EDUCATION FUND
634 S. Spring Street
Los Angeles, CA 90014

Counsel for Appellees

Michael Webb, Esq.
OFFICE OF THE CITY ATTORNEY
415 Diamond Street
P.O. Box 270
Redondo Beach, CA 90277-0270

Julie M. Fleming, Esq.
MANNING & MARDER KASS ELLROD
RAMIREZ LLP
801 S. Figueroa Street
Los Angeles, CA 90017

Counsel for Appellant



David F. Rothstein