No. 91827-9

SUPREME COURT
OF THE STATE OF WASHINGTON

CITY OF LAKEWOOD,

Respondent,

Vs.

ROBERT W. WILLIS,

Petitioner.

ANSWER TO PETITION FOR REVIEW

Matthew S. Kaser, WSBA # 32239
CITY OF LAKEWOOD
6000 Main Street
Lakewood, WA 98499-5027
Telephone: (253) 589-2489
Facsimile: (253) 589-3774
Attorney for Respondent,
City of Lakewood

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Lakewood Municipal Code

I. INTRODUCTION

The City of Lakewood ("Lakewood") requests that this Court deny review of Division II's Unpublished Opinion in this case. Had this case been properly presented prior to reaching this Court, it is likely this case could have been a suitable candidate for this Court to have granted review as it could have presented an issue of importance under the federal Constitution and could have ably presented an issue of significant public interest.

In urging this Court to decline review, our concerns mirror several themes raised by the Court of Appeals expressed both in its decision and from the tone of its questions at oral argument. Because the constitutional challenges raised by Mr. Willis were presented for the first time on appeal, the Court of Appeals recognized that the factual record was not well developed. The centerpiece of the Court of Appeals decision is that Lakewood has chosen to regulate speech in a non-public forum and thus, Lakewood's regulation is subject to a viewpoint-neutral analysis. When Lakewood briefed the classification-of-forum issue before the Court of Appeals, Mr. Willis opted not to respond. All other issues in this matter flow from this threshold determination. His Petition fails to make a showing why this issue was wrongly decided.

As most notably emphasized by an observation in Court of Appeals' concurrence addressed specifically to one issue, but which permeates many facets of this case: an evaluation of the issues raised in this case "should not be made on an inadequate record and without thorough briefing." Unpublished Opinion at p. 11 (Concurrence). This case lacks both. For these reasons, this Court should deny review.

II. ARGUMENT WHY REVIEW SHOULD BE REJECTED

Mr. Willis is entitled to discretionary review of the Court of Appeal's decision only if he satisfies the requirements of RAP 13.4(b). This rule provides:

> *Considerations Governing Acceptance of Review.* A petition for review will be accepted by the Supreme Court only:
>
> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Hindering our ability to meaningfully respond is that Mr. Willis fails to identify which subpart(s) of the rule, and directed to what part(s) of

the Court of Appeals' decision, he believes warrants review. As the sole citation to the rule is in the last paragraph of his Petition, at best, we glean that Mr. Willis' petition focuses on the grounds set forth in RAP 13.4(b)(3) and (b)(4). On that assumption, we endeavor to respond.

A. Mr. Willis Fails to Demonstrate That this Case Presents A Significant Question of Constitutional Law.

In evaluating whether a government restriction, such as the provisions of the Lakewood Municipal Code at issue in this case, offends the First Amendment, "an analysis of the 'character of the property at issue' is the touchstone of a legal inquiry into the constitutional validity of a regulation that attempts to limit expressive activity." *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 350, 96 P.3d 979 (2004)(quoting, *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983)). If the forum qualifies as a traditional public forum, a heightened analysis applies. Speech in a public forum, "is subject to restrictions on time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Mighty Movers*, 152 Wn.2d at 350 (internal citations and quotations omitted). On the other hand, if the forum is a nonpublic forum a lesser form of scrutiny applies. "Speech in nonpublic forums may be restricted

if the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Id*, 152 Wn.2d at 351 (internal citations and quotations omitted).

In this case there are two impediments which frames any grant of review which flow from this threshold determination. The first is the adequacy of the record. The second is whether this issue was properly developed by Mr. Willis before the Court of Appeals.

Mr. Willis raised his challenge to these provisions of the Lakewood Municipal Code for the first time on appeal. This necessarily deprived both parties of the opportunity to develop a meaningful record. At multiple points throughout the Unpublished Opinion, given the procedural posture in which the challenge was raised, the Court of Appeals recognized that the record as it relates to these constitutional challenges was not well-developed. *See* Unpublished Opinion at p. 2, fn. 1 & 2, p. 6 fn.4, p. 9.[1] That court also went so far as to determine that it improvidently granted review on Mr. Willis' equal protection arguments based on the inadequacy of the record, which Mr. Willis does not seek

[1] Before the Court of Appeals, a considerable amount of time was spent during the Petitioner's opening argument going over the inadequacy of the record. Washington Court of Appeals oral argument, *City of Lakewood v. Robert Willis*, Wash. Ct. App. 45034-8-II (Dec. 2, 2014)("COA Oral Argument") at 3 min. 51 sec. through 8 min. 35 sec., *available on-line at* http://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a02&docketDate=20141202

review by this Court. Unpublished Opinion at p. 8. Yet, despite these defects, the Court of Appeals was still able to engage in a forum analysis, and conclude that Lakewood's code survived constitutional scrutiny. The optimal place to have developed the record and frame the issues in such a way to obtain a contrary result would have been to develop the record in the first instance -- not by seeking further review.

Even then, however, this Court has observed that its review is generally limited to questions presented before and determined by the Court of Appeals and to claims of error directed to that court's resolution of such issues. *Peoples Nat'l Bank v. Peterson*, 82 Wn.2d 822, 830, 514 P.2d 159 (1973)(citing, *Wood v. Postelthwaite*, 82 Wn.2d 387, 510 P.2d 1109 (1973)). When Lakewood presented its forum-based arguments before the Court of Appeals, Mr. Willis elected not to respond to them – in writing at least. Given a chance, as a matter of right to respond, Mr. Willis opted to submit a three-sentence (exclusive of headers) & two-paragraph reply brief. *See*, Reply Brief of Appellant, *City of Lakewood v. Robert Willis*, Wash. Ct. App. 45034-8-II (Apr. 28, 2014).

If the issues presented by Mr. Willis are indeed, "significant," questions arising under the Constitution, under RAP 13.4(b)(3), they deserved better treatment at the Court of Appeals and these issues deserve better treatment before this Court. Despite the fact that the identification

of the forum is the touchstone of any forum-based challenge, Mr. Willis dedicates only two paragraphs, and no citations to authorities or the record, to this argument before this Court. (Pet. for Review at p. 6-8). "[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)(quoting, *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970)).

The proper approach would have been to set forth, with citations to both the record and authority to demonstrate why the decision of the Court of Appeals is incorrect and that this Court's intervention is warranted. Mr. Willis simply failed to make this showing. In the absence of such a showing, assuming that Mr. Willis had intended to assert RAP 13.4(b)(3) grounds for review, he fails to satisfy them.

B. Mr. Willis Fails to Demonstrate that this Case Presents a Suitable Vehicle on an Issue of Substantial Public Interest.

As we noted in our (unsuccessful) Motion to Publish, municipalities across the state, and indeed, the country, continue to struggle with regulating panhandling and solicitation-type regulations. Done properly, this case could have presented a suitable vehicle for this Court to illustrate how such regulations could survive constitutional review and delineate appropriate contours of municipal regulation, thereby

warranting review under RAP 13.4(b)(4). But because of many of the concerns addressed above, this case is not that candidate.

This Court's only prior experience with panhandling and begging regulations in the First Amendment context, occurred in the case of *City of Seattle v. Webster*, 115 Wn.2d 635, 802 P.2d 1333 (1990). In *Webster*, this Court held that municipalities may impose panhandling and solicitation regulations, provided that those regulations conform to the requirements of the First Amendment. However, post-*Webster*, only a few Washington appellate decisions touch on panhandling regulations and none address permissible bounds of those regulations. *City of Seattle v. McConahy*, 86 Wn. App. 557, 568, 937 P.2d 1133 (1997)(declining to equate act of sitting as expressive conduct akin to panhandling); *City of Spokane v. Marr*, 129 Wn. App. 890, 120 P.3d 652 (2005)(sufficiency of evidence challenge to conviction under local ordinance due to failure to establish "aggressive solicitation" element). And, our research reflects that only one Washington-based panhandling code was the focus of federal litigation. *Roulette v. City of Seattle*, 850 F. Supp. 1442, 1451 (W.D. Wash. 1994), *aff'd on other grounds*, 78 F.3d 1425 (9th. Cir. 1996).[2]

[2] Before the Court of Appeals, Mr. Willis argued that he believed that his challenge was a facial challenge to the Code, emphasizing the inclusion of charitable activities within the definition of "begging," contained in LMC 9A.04.020(E). COA Oral Argument at 8 min.

As we noted in our merits briefing and our motion to publish, nationally, the majority of cases interpreting local panhandling regulations focus on the forum as the first step in the analysis. Most conclude that the municipality has engaged in regulations of speech in a public forum, or assumed for the purpose of analysis that the forum is a public one. This outcome, in turn, evaluates the applicable regulation under a heightened analysis, and determines whether the regulation is content-neutral and an appropriate time, place and manner restriction. *Mighty Movers*, 152 Wn.2d at 350. The case at bar, however, is the only case which we can locate in which an appellate court has evaluated the propriety of a local government panhandling regulation and concluded that they were viewpoint neutral because the forum was not a public forum.

The key impediment to any grant of review and allowing this case to proceed further is that Mr. Willis failed to create a proper record in the first instance before challenging Lakewood's code on appeal. The absence of a record necessarily limits the reach of any decision which could be rendered by this Court on what is indisputably an important issue.

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36 sec. through 9 min. 18 sec. While a record is not necessary for a facial challenge, *Webster*, 115 Wn.2d at 640; Lakewood's definition of "begging" mirrors the definition upheld in *Roulette* against multiple forums of constitutional challenges. Regardless, before reaching this definition, a forum analysis is necessary, which is inherently factual.

But simply because an issue is of public concern, it does not follow that this Court should decide this issue. The Court of Appeals seemingly recognized this concern. When it granted review, it did so on the basis that this case was an issue of public concern, but after review of the record and briefing, it opted to take a different direction, and left its opinion unpublished limiting the precedential reach of its decision. For this case to go further, a suitable record for review and well-developed arguments on both sides are a prerequisite.

Accordingly, if Mr. Willis had intended to raise RAP 13.4(b)(4) grounds for review, he fails to satisfy them.

CONCLUSION

For the foregoing reasons, the City of Lakewood requests that this Court deny review.

DATED: June 25, 2015.

By: _____
Matthew S. Kaser, WSBA #32239
Assistant City Attorney

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing on:

David Ianotti
655 W Smith St Ste 210
Kent, WA98032-4477
david@sbmhlaw.com

By the following indicated methods:

- Deposit into the public defender box at Lakewood City Hall; and

The undersigned hereby declares, under penalty of perjury, that the foregoing statements are true and correct.

EXECUTED this ___ day of June, 2015 at Lakewood, Washington.

_____

Matthew S. Kaser

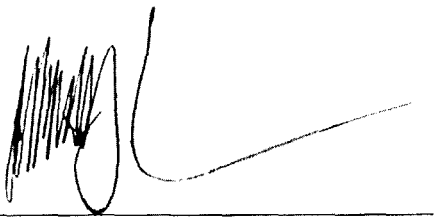
But simply because an issue is of public concern, it does not follow that this Court should decide this issue. The Court of Appeals seemingly recognized this concern. When it granted review, it did so on the basis that this case was an issue of public concern, but after review of the record and briefing, it opted to take a different direction, and left its opinion unpublished limiting the precedential reach of its decision. For this case to go further, a suitable record for review and well-developed arguments on both sides are a prerequisite.

Accordingly, if Mr. Willis had intended to raise RAP 13.4(b)(4) grounds for review, he fails to satisfy them.

CONCLUSION

For the foregoing reasons, the City of Lakewood requests that this Court deny review.

DATED: June 25, 2015.

By: 

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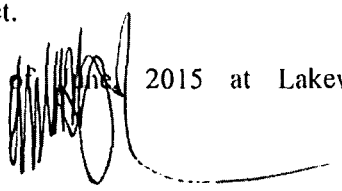
The undersigned hereby declares, under penalty of perjury, that the foregoing statements are true and correct.

EXECUTED this 25th day of June, 2015 at Lakewood, Washington.



Matthew S. Kaser

OFFICE RECEPTIONIST, CLERK

To: Cynthia Wright
Cc: Matthew Kaser; david@sbmhlaw.com
Subject: RE: COL V ROBERT WILLIS 91827-9

Rec'd 6/25/15

From: Cynthia Wright [mailto:cwright@cityoflakewood.us]
Sent: Thursday, June 25, 2015 3:20 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Matthew Kaser; david@sbmhlaw.com
Subject: COL V ROBERT WILLIS 91827-9

Please accept this attached for filing of the City of Lakewood's Answer to Petition For Review in City of Lakewood v Robert W. Willis, 91827-9.

This is filed on behalf of Assistant City Attorney Matthew S. Kaser, (253) 983-7838, mkaser@cityoflakewood.us WSBA# 32239

Thank you,

Cynthia Wright - | Paralegal| Legal & City Clerk
City of Lakewood
6000 Main Street SW | Lakewood, WA 98499
Ph: 253.983.7822 | Fax: 253.589.3774 |