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No. 45034-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CITY OF LAKEWOOD,

Respondent/Cross-Petitioner

v.

ROBERT W. WILLIS,

Petitioner/Cross-Respondent.

PETITION FOR REVIEW
TO THE WASHINGTON SUPREME COURT

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A. IDENTITY OF PETITIONER Robert Willis, by and through counsel of record, David Iannotti, asks this court to accept review of the Court of Appeals decision designated in part B of this response.

B. DECISION

Mr. Willis respectfully requests pursuant to RAP 13.4 that this court grant his Petition for Discretionary Review of the April 7, 2015 Court of Appeals Unpublished Opinion, City of Lakewood v. Willis, No. 45034-8-II, 2015 WL 1552179, at *1 (Wash. Ct. App. Apr. 7, 2015), which affirmed the conviction of Robert Willis for Begging in Restricted Areas in the City of Lakewood. A copy of the decision is in the Appendix as Ex. 1. As the City stated in its Motion to Publish, this case is a matter of substantial public interest as it affects similar ordinances and people's constitutional rights throughout the state.

C. ISSUES PRESENTED FOR REVIEW

1. Whether LMC 09.4.020A is a violation of Mr. Willis' First Amendment right to Freedom of Speech as it is a content based prohibition on speech in a public forum?

2. Whether LMC 09.4.020A is a violation of Mr. Willis' First Amendment right to Freedom of Speech as it is not a view point neutral prohibition on speech?

D. STATEMENT OF THE CASE.

Robert Willis was charged in Lakewood Municipal Court, Cause No.CR32174, with Begging in Restrictive Areas – LMC 9A.04.020A. *See* Exhibit 1, Amended Complaint, dated September 9, 2011.

The undisputed facts of this case are that Mr. Willis was standing at the N/B I-5 Exit to Gravelly Lake Drive SW in Lakewood, Washington. He was holding a cardboard sign toward traffic claiming something to the effect of “he was disabled and needed help”. The City alleged that this action put Mr. Willis in violation of Lakewood Municipal Code

09A.4.020A - Restrictive Areas, which states:

Begging shall be deemed a violation of this section of the municipal code under the following conditions: (1) at on and off ramps leading to and from state intersections from any City roadway or overpass; (2) at intersections of major/principal arterials (or islands on the principal arterials) in the City; (3) within twenty five (25) feet of an ATM machine, or financial institution; (4) within fifteen (15) feet of any (a) occupied handicapped parking space, (b) taxicab stand, or (c) bus stop, train station or in any public parking lot or structure or walkway dedicated to such parking lot or structure; (5) before sunrise or after sunset at any public transportation facility or on any public transportation vehicle or (6) while a person is under the influence of alcohol or controlled substances. (Ord. 532 § 1 (part), 2011.).

“Begging” is defined under LMC 09A.4.020 (E) – **Definitions**, as “asking for money or goods as a charity, whether by words, bodily gestures, signs or other means.” Mr. Willis was not charged under the Aggressive Begging section of LMC 09A.4.010.

The jury trial was held on November 16, 2012, where the jury found Mr. Willis Guilty of Begging in Restrictive Areas and the court proceeded to sentencing.

Mr. Willis appealed the decision to the Pierce County Superior Court. Argument was heard on June 7, 2013, and the Superior Court declined to answer whether the code was content neutral and affirmed the lower Court’s ruling.

Mr. Willis sought discretionary review of these issues in the Court of Appeals, which was granted on August 28, 2013.

In its April 7, 2-15 decision, the Division II Court of Appeals rejected Mr. Willis’ freedom of speech and vagueness arguments and held that the ordinance was a constitutional restriction on conduct in a non-public forum, and affirmed the Superior Court’s decision. The Court held that “Freeway onramps are not, and have never been, principally intended as a forum for the exchange of ideas” and therefore not a public forum. The

court also found that “[u]nder the ordinance, no one may beg on a freeway onramp, regardless of why they are begging. In other words, even though the ordinance restricts the speaking of certain content, the ordinance does not concern itself with the speaker's viewpoint. The ordinance evenhandedly regulates conduct, not to suppress any particular viewpoint”.

E. ARGUMENT IN SUPPORT OF ASSIGNMENTS OF ERROR

1. The Superior Court erred when it determined that LMC 09.4.020A is not a violation of Mr. Willis' First Amendment right to Freedom of Speech.

The constitution allows regulation of protected speech in certain circumstances. *Bering v. Share*, 106 Wash.2d 212, 221–22, 721 P.2d 918 (1986), cert. dismissed, 479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987), *City of Seattle v. Huff*, 111 Wash.2d 923, at 926, 767 P.2d 572, Wash., (1989). However, Government interference with speech or expressive conduct is generally prohibited by the First Amendment. *State v. Halstien*, 122 Wash.2d 109, 121, 857 P.2d 270 (1993). When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions. *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 183, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999).

The City of Lakewood Ordinance LMC 09A.4.020A prohibits begging in certain designated public areas and is a violation of city code punishable as a misdemeanor with up to 90 days jail and/or \$1000 fine. LMC 9A.04.020A is a prohibition on constitutionally protected speech because it places a ban on begging. Since the conduct prohibited is in a public forum and is content based, strict scrutiny must be applied.

The extent of permissible regulation depends on whether the speech takes place in a public or a private forum. *Huff*, 111 Wash.2d at 927, 767 P.2d 572. “[T]he First Amendment affords more protection to speech in a public forum, a place traditionally devoted to assembly and debate, and to channels of communication used by the public at large for assembly and speech.” *City of Seattle v. Ivan*, 71 Wash.App. 145, at 152, 856 P.2d 1116, (1993).

The traditional public forum includes those places such as parks, streets and sidewalks. *Collier v. City of Tacoma*, 121 Wash. 2d 737, 746-47, 854 P.2d 1046, 1050 (1993). Streets and parks are “held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Acorn v. City of Phoenix*, 798 F.2d 1260, 1264-66 (9th Cir. 1986) overruled on other issues by *Comite de Jornaleros de Redondo*

Beach v. City of Redondo Beach, 657 F.3d 936 (9th Cir. 2011). Use of streets and public places has, “from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.” *Id.*

The location and purpose of the property and the government’s subjective intent for building the property are considered when determining the nature of the property for forum analysis. *Jacobsen v. Bonine*, 123 F.3d 1272, 1273 (1997). In *Jacobsen*, the Court held that walkways in rest areas built on interstate highways did not have the characteristics of traditional sidewalks because the walkways were accessible only by persons traveling in motor vehicles on interstate highways and not all pedestrian traffic. *Id.*; see also *Kokinda*, 497 U.S. at 727 (distinguishing a municipal sidewalk which runs parallel to a road which was a public passageway to the entrance sidewalk of a post office).

The majority of the areas listed in LMC 09A.4.020A where speech is restricted are public places used as common thoroughfares. LMC 09A.4.020A includes public sidewalks or roadways which are accessible to all members of the public. Walkways, which are accessible to everyone and used as public thoroughfares, are public forums.

In the present case, Mr. Willis was found to be in violation of section (1) which prohibited him from begging “at on and off ramps

leading to and from state intersections from any city roadway or overpass.” Mr. Willis was at the N/B I-5 Exit to Gravelly Lake Drive SW intersection. This intersection has a sidewalk, crosswalk and traffic signal which is accessible by everyone in the general public and used as a thoroughfare for Gravelly Lake Drive. Intersections are traditional public forums where ideas are expressed. Political signs, signs for employment, signs for church, real estate sales, advertising for community and charitable functions are all typical types of communications that happen in these areas. In this case, the ordinance is regulating speech in a public forum because the N/B I-5 exit to Gravelly Lake Drive SW is accessible by everyone and is a public thoroughfare.

The Court of Appeals opinion held that because interstate highways are not public forums that on and off ramps to the interstate are also not public forums. However, on and off ramps the city had the burden to prove that this is not a public forum. There is no evidence of any other statutes prohibiting speech in these areas. On and off ramps are distinguished from the interstate because this is a traveler’s first contact with the city. Billboards on the highway are free to advertise and entice travelers to the city. Campaigners, employers, companies all solicit business as you enter the city from the highway. , Judges, Politicians,

Real Estate agencies all place their signs at these intersections. The City of Lakewood provided nothing to the Court to show that this area prohibited any other form of solicitation. Unlike interstate highways, the on and off ramps are the connection point between cities and the travelers on the interstate. How else do people communicate their message and get people to support their businesses when exiting the highway? Why is it that Lakewood gets to prohibit only the people and organizations looking for charity from communicating their message to those entering their city?

2. The Lakewood Municipal Code is not viewpoint neutral.

“Laws that by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based.” *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 643, 114 S.Ct. 2445, 2459-60, 129 L.Ed.2d 497 (1994). City Ordinances that proscribe certain forms of solicitations while permitting other forms are content based since these laws are making a distinction between “good” forms of solicitations, such as selling girl scout cookies, and “bad” forms, such as begging. *Id.* In determining whether a restriction is content-neutral or content-based, the Supreme Court has held that “[g]overnment regulation of expressive activity is content neutral so long as it is ‘justified without reference to the content of the regulated speech.’ ” *Rock Against Racism,*

491 U.S. at 791, 109 S.Ct. at 2753 (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984)).

“A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others.” *Rock Against Racism*, 491 U.S. at 791. However, “the mere assertion of a content-neutral purpose [is not] enough to save a law which, on its face, discriminates based on content.” *Turner Broad. Sys., Inc.*, 512 U.S. at 642-43. “As a general rule, laws that by their terms distinguish favored speech on the basis of the ideas or views expressed are content based.” *Id.* at 643. A solicitation ordinance is content-based if either the main purpose in enacting it is to suppress or exalt speech of certain content, or it differentiates based on the content of speech on its face. *A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784, 793 (9th Cir. 2006).

In the present case, the language in LMC 9A.4.020A is content based on its face. LMC 9A.4.020A specifically bans “begging,” which is a protected area of speech. The Court of Appeals Opinion held that the statute was content based but view point neutral. “LMC 09A.4.020A is also viewpoint neutral. See *Herbert*, 136 Wn.App. at 264. Under the

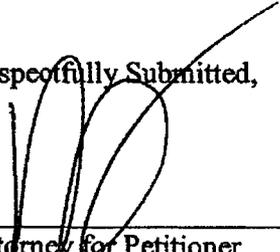
ordinance, no one may beg on a freeway onramp, regardless of why they are begging.” But this is wrong, only people begging for charity are in violation of the ordinance. A person is free to speak against begging and charities in these areas. Only those speaking for charities are in violation. A person is free to approach vehicles under this ordinance and say “don’t go to church”, “don’t help the homeless”, etc.. This makes the statute both content based and not viewpoint neutral.

F. CONCLUSION

For the reasons indicated in Part E above, Mr. Willis respectfully requests the Washington Supreme Court grant his request for discretionary review pursuant to RAP 13.4, so Mr. Willis may argue his position in support of reversal of the Court of Appeals Opinion in this case finding LMC 09.4.020A constitutional.

DATED: June 4, 2015.

Respectfully Submitted,



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G. APPENDIX

Exhibit 1: Order on RALJ Appeal, dated and filed June 7, 2013

toward oncoming traffic.¹ Willis had a cardboard sign stating he was disabled and needed help. Willis approached a car by walking out from the shoulder and into the lane of travel.

The City charged Willis with begging in restrictive areas under LMC 09A.4.020A. LMC 09A.4.020A provides: "Begging shall be deemed a violation of this section of the municipal code under the following conditions: (1) at on and off ramps leading to and from state intersections from any City roadway or overpass." Begging is defined as "asking for money or goods as a charity, whether by words, bodily gestures, signs or other means." LMC 09A.4.020(E). A municipal court jury found Willis guilty of begging in restrictive areas.

Willis appealed to the Pierce County Superior Court and, for the first time, raised constitutional challenges to the ordinance.² The superior court affirmed his conviction and held that LMC 09A.4.020A is a reasonable time, place, and manner regulation that does not violate the First Amendment, the Due Process Clause, or the Equal Protection Clause. The superior court reasoned that the ordinance was "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Clerk's Papers (CP) at 108. The City argued that the restrictions were content-neutral; however, the superior court did not rule on the issue.

Willis and the City petitioned this court for discretionary review, which we granted. We affirm the superior court.

¹The record is somewhat confusing, as it appears to indicate that the citing officer was coming southbound from the north, meaning that if Willis had been on the *northbound* ramp, the officer would have had to cross the median to reach Willis. Regardless, the uncontroverted testimony established that Willis was at an "on [or] off ramp[] leading to [or] from state intersections from any City roadway or overpass." LMC 09A.4.020A. This fact suffices for the foregoing analysis.

² Because Willis did not raise his constitutional issues in the municipal court, the factual record is not well developed.

ANALYSIS

I. STANDARD OF REVIEW

The constitutionality of a statute or ordinance is a matter of law we review de novo. *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 509, 104 P.2d 1280 (2005). In general, a duly enacted ordinance is presumed constitutional, and the challenger must demonstrate its unconstitutionality beyond a reasonable doubt. *Mattress Outlet*, 153 Wn.2d at 509. But in the First Amendment context, the burden shifts to the State to justify a restriction on speech. *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 183, 119 S. Ct. 1923, 144 L. Ed. 2d 161 (1999). This shift also occurs where the challenged law restricts the time, place, or manner of speech. *Collier v. City of Tacoma*, 121 Wn.2d 737, 759, 854 P.2d 1046 (1993). As we explain below, LMC 09A.4.020A restricts the place of speech. Therefore, Lakewood bears the burden to meet each element of the time, place, and manner test.

II. FIRST AMENDMENT

Willis argues that LMC 09A.4.020A violates his right to freedom of speech because it is a content-based prohibition on speech and less restrictive alternatives were available. Even if the ordinance were content-neutral, Willis argues that the City failed to demonstrate that the ordinance supported a compelling state interest or was reasonably related to supporting that interest. The City argues that LMC 09A.4.020A is a permissible regulation of speech in a non-public forum. Alternatively, the City argues that LMC 09A.4.020A is permissible as a content-neutral restriction on the time, place, or manner of speech. We agree with the City and hold that a freeway onramp is a non-public forum. We hold that LMC 09A.4.020A is a reasonable and viewpoint neutral regulation, and we affirm the superior court without reaching the City's alternative argument.

A. Forum Analysis

“Forum analysis requires a two-step inquiry. First, we must determine the type of forum affected by the restriction here: Is it a public forum, a limited public forum, or a nonpublic forum? If the forum is determined to be nonpublic, the restriction is constitutional if it is reasonable in light of the purposes of the forum and is viewpoint-neutral.” *Herbert v. Wash. State Pub. Disclosure Comm'n*, 136 Wn. App. 249, 263, 148 P.3d 1102 (2006).

The First Amendment to the federal constitution protects the right to freedom of speech.³ But the government is not obligated to permit all forms of speech on property that it owns and controls. *Sanders v. City of Seattle*, 160 Wn.2d 198, 208, 156 P.3d 874 (2007). Therefore, “[i]n reviewing a free speech challenge to a government regulation, the level of judicial scrutiny is determined by the category into which a specific type of property falls.” *Sanders*, 160 Wn.2d at 208.

The courts distinguish between three categories of forums. First, there are traditional public forums which “have immemorially been held in trust for the use of the public and . . . for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983) (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515, 59 S. Ct. 954, 83 L. Ed. 1423 (1939)). To be a traditional public forum, a property must have “as a principal purpose . . . the free exchange of ideas.” *Sanders*, 160 Wn.2d at 209 (quoting *Int’l Soc’y for*

³ “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.” U.S. CONST. amend. I.

Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 679, 112 S. Ct. 2701, 120 L. Ed. 2d 541 (1992) (alteration in original) (internal quotation marks omitted)).

Second, the government may create a public forum "by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 802, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985). The courts will not "infer that the government intended to create a public forum when the nature of the property is inconsistent with expressive activity." *Cornelius*, 473 U.S. at 803.

Third, "government property may be considered a nonpublic forum when it is not a traditional public forum and has not been designated by government as a forum for public communication." *Sanders*, 160 Wn.2d at 210.

Here, Willis was convicted of begging on a freeway onramp. To determine whether the onramp is a public forum, we consider "whether a 'principal purpose' of the property is the free exchange of ideas, whether the property shares the characteristics of a traditional public forum, and the historical use of the property." *Sanders*, 160 Wn.2d at 211. Applying this analysis we hold that a freeway onramp is a non-public forum.

Freeway onramps are not, and have never been, principally intended as a forum for the exchange of ideas. They are components of the Interstate System and are meant to "facilitate safe and efficient travel by motorists along the System's highways." *Jacobsen v. Bonine*, 123 F.3d 1272, 1274 (9th Cir. 1997) (quoting *Sentinel Commc'ns Co. v. Watts*, 936 F.2d 1189, 1203 (11th Cir. 1991)). Nothing in the record indicates that the government intended to open the freeways to public discourse. Allowing expressive activity in the freeway and its onramps would disrupt the principal purpose of the freeway which is to facilitate travel. In fact, Willis's activities disrupted travelers because he entered the lane of travel and approached cars. Freeways and their onramps

are not traditional public forums, nor have they been designated as forums for public communication. Therefore, we hold that freeway onramps are nonpublic forums.

B. Reasonable Restriction & Viewpoint Neutral

“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.’” *City of Seattle v. Huff*, 111 Wn.2d 923, 926, 767 P.2d 572 (1989) (quoting *City of Seattle v. Eze*, 111 Wn.2d 22, 32, 759 P.2d 366 (1988)) (alteration in original) (internal quotation marks omitted).⁴ “Viewpoint-neutral regulations are those not in place ‘merely because public officials oppose the speaker’s view.’” *Herbert*, 136 Wn. App. at 264 (quoting *Perry*, 460 U.S. at 46).

It is reasonable to prohibit begging activity in a forum that is primarily meant for the passage of automobiles. When persons confront motorists to ask for money, they interrupt the flow of traffic and disrupt the efficient functioning of the freeway system. Begging on the freeway also creates significant safety risks, particularly where, like Willis, a person enters into cars’ lanes of travel.

LMC 09A.4.020A is also viewpoint neutral. *See Herbert*, 136 Wn. App. at 264. Under the ordinance, no one may beg on a freeway onramp, regardless of why they are begging. In other words, even though the ordinance restricts the speaking of certain content, the ordinance does not concern itself with the speaker’s viewpoint. The ordinance evenhandedly regulates conduct, not to suppress any particular viewpoint, but to reduce a potentially severe threat to public safety. We

⁴ Because Willis raised his constitutional challenges for the first time on appeal, we are mindful that the City was precluded from making a complete factual record to defend its positions. For example, it never litigated the compelling interest the City had in enacting the ordinance. Nonetheless, we feel there are sufficient facts on the forum issue for us to decide the case.

hold that LMC 09A.4.020A is a permissible regulation of a nonpublic forum, and we affirm the superior court without reaching the City's arguments on cross-review.

III. VAGUENESS

Willis argues that LMC 09A.4.020A is unconstitutionally vague and violates the Due Process Clause of the Fourteenth Amendment. The City argues that Willis has failed to provide facts to support his vagueness claim, and that even if the record were adequate to permit review of Willis's claim, LMC 09A.4.020A is not void for vagueness. We agree with the City and affirm the superior court.

Willis appears to challenge LMC 09A.4.020A as unconstitutionally vague on its face. "When it is alleged that a statute is wholly unconstitutional, the court looks not to the conduct of the defendant, but to the face of the statute to determine whether any conviction under the statute could be constitutionally upheld." *State v. Maciolek*, 101 Wn.2d 259, 262-63, 676 P.2d 996 (1984) (quoting *State v. Hood*, 24 Wn. App. 155, 158, 600 P.2d 636 (1979)).

An ordinance is sufficiently specific if two requirements are met: "First, criminality must be defined with sufficient specificity to put citizens on notice concerning conduct they must avoid. And second, legislated crimes must not be susceptible of arbitrary and discriminatory law enforcement." *City of Seattle v. Webster*, 115 Wn.2d 635, 642-43, 802 P.2d 1333 (1990); accord *Kolender v. Lawson*, 461 U.S. 352, 357-58, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). Here, both requirements are satisfied.

LMC 09A.4.020A very clearly describes what behavior is proscribed, i.e. "asking for money or goods as a charity" while on a freeway onramp or other enumerated area. LMC 09A.4.020(E). The ordinance gives citizens and law enforcement alike precise direction about what conduct is forbidden, and where it is forbidden. Willis complains that the ordinance would

sweep in “all charities asking for contributions . . . people requesting donations in support of political campaigns or interest groups . . . [and] people stranded on the side of a road.” Br. of Appellant at 19. Even if we accept Willis’s position, it does not make the ordinance vague. Willis does not argue that LMC 09A.4.020A “invest[s] a police officer with discretion to *define* the prohibited conduct.” *Roulette v. City of Seattle*, 850 F. Supp. 1442, 1446 (W.D. Wash. 1994), *aff’d*, 97 F.3d 300 (9th Cir. 1996) (emphasis added). Rather, “the ordinance itself defines what constitutes an infraction.” *Roulette*, 850 F. Supp. at 1446. LMC 09A.4.020A is not unconstitutionally vague, and we reject Willis’s vagueness challenge.

IV. EQUAL PROTECTION

Willis argues that LMC 09A.4.020A discriminates against “individuals that need help or money” in violation of the Equal Protection Clause of the Fourteenth Amendment. Br. of Appellant at 21. The City argues that Willis has failed to provide facts to support his equal protection claim, and that even if the record were adequate to permit review of Willis’s claim, LMC 09A.4.020A does not impermissibly discriminate against the poor. We agree that the record is not adequate to properly analyze Willis’s equal protection claim, and we hold that we improvidently granted discretionary review of Willis’s equal protection challenge.

As a threshold to any equal protection challenge, a party must establish that he or she is similarly situated with other persons in a class who have received different treatment under the same law. *State v. Osman*, 157 Wn.2d 474, 484, 139 P.3d 334 (2006). Willis argues that LMC 09A.4.020A discriminates on the basis of poverty. But the record does not indicate whether Willis is impoverished. It is true that the municipal court found Willis indigent. But this finding does not mean that Willis is below the poverty line—only that he “lacks sufficient funds to prosecute

an appeal.” CP at 115. On this record, Willis cannot meet his burden to show that he is similarly situated with members of the allegedly targeted class.

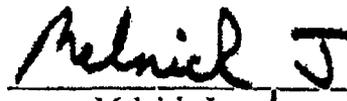
Even if Willis could show that he was similarly situated with the impoverished, this record is not adequate to determine the merits of Willis’s equal protection claim. “A defendant must establish that he received disparate treatment because of membership in a class of similarly situated individuals and that the disparate treatment was the result of intentional or purposeful discrimination.” *Osman*, 157 Wn.2d at 484. Because Willis failed to raise the equal protection issue in the municipal court, the record is insufficient for us to adequately determine the City’s intent or purpose for passing LMC 09A.4.020A. Willis argues that the City failed to meet its burden; however, because he never raised it in the municipal court, neither the City nor Willis had the opportunity to present all of the facts necessary to decide this issue.

Evidence of the challenged statute’s disparate impact may establish the requisite discriminatory intent or purpose. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977). Absent a “clear pattern, unexplainable on grounds other than [the alleged class] . . . impact alone is not determinative.” *Arlington Heights*, 429 U.S. at 266. Here, nothing in the record speaks to the impact of LMC 09.4.020A, or how it is being applied in the field. Willis’s allegation that “[o]fficers are not arresting charitable organizations or firefighters in violation of this law, only poor people,” is without substantiation. Br. of Appellant at 22. On this record, we are unable to perform a disparate impact inquiry.

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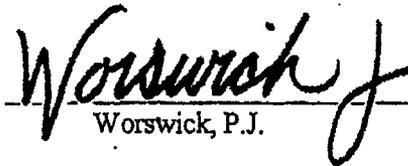
We dismiss Willis's equal protection claim as improvidently granted, and we affirm the superior court.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



Melnick, J.

I concur:



Worwick, P.J.

BJORGEN, A.C.J. (concurring) — The majority opinion holds, correctly, that the record is not adequate to properly analyze Willis's equal protection claims. The majority opinion also concludes, however, that as a matter of law a finding of indigency does not necessarily mean that Willis is below the poverty line for equal protection purposes. Whether correct or not, a conclusion this elemental to the law's treatment of the disadvantaged should not be made on an inadequate record and without thorough briefing.

In *Douglas v. California*, the Court held, using an equal protection analysis, that those who are indigent have the right to public counsel for their first appeal as a matter of right. The evil, Justice Douglas wrote, is

discrimination against the indigent. For there can be no equal justice where the kind of an appeal a man enjoys "depends on the amount of money he has."

372 U.S. 353, 355, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963) (quoting *Griffin v. Illinois*, 351 U.S. 12, 19, 76 S. Ct. 585, 100 L. Ed. 891 (1956)).⁵ With this opinion, the Supreme Court recognized that indigency, when coupled with the restriction of a right of sufficient stature, is a classification that triggers enhanced scrutiny under the equal protection clause. The result and reasoning of *Douglas* remain vital. In 2005 the United States Supreme Court, relying principally on *Douglas*, held that the due process and equal protection clauses also require the appointment of counsel for

⁵ The Supreme Court has recognized that due process and equal protection principles converge in the Court's analysis of this family of issues. *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983). The Court stated that "we generally analyze the fairness of relations between the criminal defendant and the State under the Due Process Clause, while we approach the question whether the State has invidiously denied one class of defendants a substantial benefit available to another class of defendants under the Equal Protection Clause." *Bearden*, 461 U.S. at 665.

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defendants, convicted on their pleas, who seek access to first-tier review in the Court of Appeals.

Halbert v. Michigan, 545 U.S. 605, 610, 125 S. Ct. 2582, 162 L. Ed. 2d 552 (2005).

The Supreme Court has also made clear that poverty, standing alone, is not a suspect classification. *Harris v. McRae*, 448 U.S. 297, 323, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980).

However,

a classification based on poverty or wealth can become a suspect classification, subject to more rigid scrutiny than other classifications, when such classification interferes with a fundamental constitutional right.

16B AM. JUR. 2d *Constitutional Law*, § 904. This recognition was at work in *Douglas* and is seen, although obliquely, in the *Carolene Products* footnote that laid one of the principal doctrinal footings for enhanced scrutiny under the constitution:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.

United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4, 58 S. Ct. 778, 82 L. Ed. 1234 (1938).

The analysis was further refined in *Bearden v. Georgia*, 461 U.S. 660, 661, 665, 103 S. Ct. 2064, 76 L. Ed. 2d 221 (1983), which held that an indigent defendant's probation may not be revoked for failure to pay a fine and restitution, absent findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate. The Court prefaced its Fourteenth Amendment analysis by stating that it has long been sensitive to the treatment of indigents in our criminal justice system and citing a list of its cases dealing with the deprivation of the rights of an indigent person to counsel, appeals, and liberty. *Bearden*, 461 U.S. at 664-65.

Our state Supreme Court has walked consistently with these precedents. In *State v. Phelan*, 100 Wn.2d 508, 514, 671 P.2d 1212 (1983), the court applied an intermediate level of scrutiny in determining that jail time must be credited against the discretionary minimum term imposed under state law in effect before adoption of the Sentencing Reform Act of 1981, chapter 9.94A RCW. Although our sentencing laws have changed, the court's rationale for imposing heightened scrutiny remains strong:

Physical liberty, while not recognized as "fundamental", is a basic human right and the poor, while not a suspect class, cannot be said to be fully accountable for their status. Since a denial of credit for presentence jail time involves both a deprivation of liberty in addition to that which would otherwise exist, and a classification based solely on wealth, we will apply an intermediate level of scrutiny in the present case.

Phelan, 100 Wn.2d at 514. Thus, neither the "fundamental" status of the right nor the "suspect" nature of the class are necessary for heightened scrutiny.

When one lacks the money to eat properly, the ability to effectively ask others for help becomes critical. When one is homeless or of fluctuating mental health, it may become effectively impossible to navigate the mazes of a social service system that at times would baffle a Theseus. Depending on one's circumstances, the law's restrictions on the ability to ask individuals for help may ultimately jeopardize life, a constitutional interest among the most fundamental. This is not to argue that government may not ban aggressive panhandling on freeway ramps. It is to argue that the courts should not make rulings touching on the scope of the class of the poor for equal protection or due process purposes without a penetrating eye for

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the facts of poverty in our nation and an acute review of what the case law requires in the world
as it is.

Bjorge, A.C.J.
Bjorge, A.C.J.

CERTIFICATE OF SERVICE

I certify that on the 4th day of June, 2015, I caused a true and correct copy of this Motion to be served on the following in the manner indicated below:

Matthew S. Kaser
6000 Main Street
Lakewood, WA 98499-5027

Via DELIVERY BY ELECTRONIC MAIL TO
mkaser@cityoflakewood.us

By: _____

David Cannotti

KENT ASSIGNED COUNSEL

June 04, 2015 - 12:23 PM

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