No. 91827-9

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.

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

Mr. Robert Willis was found guilty in Lakewood Municipal Court of Begging in a Restricted Area for begging at an interstate off ramp intersection. The City of Lakewood has a city ordinance that prohibits begging in certain areas and during certain times. The ordinance does not prohibit other forms of solicitation. Mr. Willis appealed the conviction arguing that the ordinance was a violation of his constitutional rights to free speech, due process, and equal protection. Solicitation and begging are protected forms of speech. The ordinance is a facially content based prohibition on speech as it targets a specific form of speech as opposed to the behavior the ordinance attempts to protect against. The City of Lakewood must use the less restrictive means of accomplishing the stated purpose of the legislation if one is available, because it is a content based ordinance and strict scrutiny applies. Similarly, the ordinance is content based and it is a violation of Mr. Willis' right to due process and equal protection, as it prohibits people asking for help or money based on poverty.

II. 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.

A. The Lakewood Municipal Code is a content based prohibition on speech in a public forum, therefore strict scrutiny applies.

i. The Lakewood Municipal Code is regulating speech in a public forum.

ii. The Lakewood Municipal Code is content based.

iii. Because the Lakewood Municipal Code is content based, the Court must apply strict scrutiny which requires the City of Lakewood to use a less restrictive alternative if one is available.

B. If the ordinance is content neutral, the City of Lakewood did not demonstrate through evidence that the ordinance supports a compelling state interest or that it was narrowly tailored to support that interest.

2. The Superior Court erred when it determined that LMC 09.4.020A is not a violation of Mr. Willis' 14th Amendment right to Due Process for vagueness.

3. The Superior Court erred when it determined that LMC 09.4.020A is not a violation of Mr. Willis' 14th Amendment right to Equal Protection, because of poverty.

III. 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. *See* Exhibit 2, Chapter 9A.04 Aggressive Begging of the Lakewood Municipal Code (LMC), *in its entirety.*

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.

IV. 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 United States Supreme Court held that "solicitation to pay or contribute money" or more specifically, begging is "within the protections of the First Amendment." *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 633, 100 S.Ct. 826, 834 63 L.Ed.2d 73 (1980), *U.S. v. Kokinda*, 497 U.S. 720, 725, 110 S.Ct. 3115, 3118–19, 111 L.Ed.2d 571 (1990) ("Solicitation is a recognized form of speech protected by the First Amendment."), *Roulette v. City of Seattle,* 850 F.Supp. 1442 (1994). Begging constitutes communicative activity of some sort. *Loper v. New York City Police Dept.*, 999 F.2d 699, 704 (1993), *Riley v. National Federation of Blind, Inc.*, 487 U.S. 781, 108 S.Ct. 2667, 101 L.Ed.2d 669 (1988) (solicitation is protected First Amendment activity); *Secretary of Maryland v. Joseph H. Munson Co.,* 467 U.S. 947, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984) (solicitation is protected First Amendment activity);

Blair v. Shanahan, 775 F.Supp. 1315, 1322, 1324 (N.D.Cal.1991) (begging constitutes protected speech).

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.

A. The Lakewood Municipal Code is a content based prohibition on speech in a public forum, therefore strict scrutiny applies.

i. The Lakewood Municipal Code is regulating speech in a public forum.

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.

ii. <u>The Lakewood Municipal Code is content based.</u>

In a public forum, the government may only impose reasonable restrictions on the time, place, and manner of protected speech, provided the restrictions are content-neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication. *Ward v. Rock Against Racism*, 491 U.S. 781,

791, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989). The restriction "may not be based upon either the content or subject matter of speech." *Heffron v. International Soc. for Krishna Consciousness, Inc.,* 452 U.S. 640,648, 101 S.Ct. 2559, 2664 (1981); (quoting *Consolidated Edison Co. v. Public Serv. Comm'n,* 447 U.S. 530, 536, 100 S.Ct. 2326, 2336, 65 L.Ed.2d 319 (1980)).

"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 ordinance does not ban any other form of speech or other forms of solicitation in the listed areas. A person would still be able to enter into the areas listed and sell a product, collect signatures, promote a religion or political idea, or advertise a business without violating the ordinance. The language of the Ordinance is specifically targeted towards the content and type of speech in these public

places by banning "begging", as opposed to preventing the conduct that is allegedly the government interest, which is interfering with traffic.

The U.S. Supreme Court analyzed several separate city ordinances involving bans on solicitation. *See Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 649, 101 S.Ct. 2559, 2564, 69 L.Ed.2d 298 (1981) (State Fair regulation requiring that sales and solicitations take place at designated locations "applies evenhandedly to all who wish to distribute and sell written materials or to solicit funds"); *see also Kokinda,* 497 U.S. at 736 (statute regulating soliciting in front of post office is content neutral because it applies even handedly to all forms of solicitation and does not "suppress the views of any 'disfavored or unpopular political advocacy group'"); *in the alternative see A.C.L.U. of Nevada v. City of Las Vegas,* 466 F.3d 784, 793 (9th Cir. 2006) (finding a city ordinance prohibiting solicitation of handbills based on the content to be content based). The cases analyze solicitation broadly, which includes soliciting employment, business, or charitable contributions of any kind. *Id.* These same laws would not have been found to be constitutional if they only prohibited charitable solicitations but permitted other forms of solicitation.

The city of Lakewood's ordinance regulates protected speech and not the behavior. Further, Lakewood's code specifically prohibits one

class of solicitation and leaves other types of solicitation legal. The ordinance regulates begging. In fact, the behaviors regulated in the above cases are permissible under the Lakewood ordinance. One could sell girl scout cookies in front of the post office or one could hand out Krishna or other solicitations to cars and pedestrians and not be in violation of Lakewood's code. However, Mr. Willis' behavior would be prohibited by the ordinances addressed above, which is why Lakewood's code is not content neutral.

iii. <u>The Lakewood Municipal Code is content based, therefore the Court must apply strict scrutiny which requires the City of Lakewood to use a less restrictive alternative if one is available.</u>

If a City Ordinance regulates speech based on its content, it must be narrowly tailored to promote a compelling City interest. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816, 120 S.Ct. 1878, 1888, 146 L.Ed.2d 865 (2000). If a less restrictive alternative would serve the City's purpose, the legislature must use that alternative. It is the City's obligation to prove that any plausible alternatives will be ineffective to achieve its goals. *Id.*

There are several alternative methods the City of Lakewood could have adopted to accomplish the same effect which are less restrictive and would not violate Mr. Willis' constitutional rights. The City of Lakewood

could have prohibited people from approaching cars in these areas for the purpose of soliciting, which would be constitutional under similar Supreme Courts findings. *See Ass'n of Cmty. Organizations for Reform Now v. St. Louis Cnty.*, 930 F.2d 591, 593 (8th Cir. 1991), (Holding that a County ordinance prohibiting a person from standing "in a roadway for the purpose of soliciting a ride, employment, charitable contribution or business from the occupant of any vehicle" to be constitutional and not content based.) If the City were to adopt an ordinance similar to this, it would be content neutral since neither the law nor the purpose behind enforcing the law is prohibiting conduct based on content. Yet, the ordinance would still have an incidental but permissible effect of prohibiting constitutionally protected speech because it applies evenhandedly to everyone. That law is an example of constitutional legislation that on its face does not discriminate between different types of solicitation, by identifying the conduct and not the speech that it is trying to protect against. This is unlike the current Lakewood City ordinance which attacks the speech of the individual and not the conduct.

The City already has an ordinance which makes a person guilty of disorderly conduct "if he or she: ...(3) Intentionally obstructs vehicular or pedestrian travel or traffic without lawful authority." LMC 09A.8.010-Disorderly Conduct. The city also has ordinances which prohibit people

from loitering or trespassing which could be used to affectively prevent the conduct in this case.

Additionally, the Lakewood Municipal Code 09.4.010, which is a prohibition of aggressive begging, addresses the danger of intimidation or risk of danger to members of the community at ATMs or handicapped spaces. Case law allows prohibitions against threatening speech and permits laws that prevent aggressive begging. The City of Lakewood already has a statute that specifically addresses danger to members of the community by prohibiting aggressive begging.

Based on the numerous city ordinances and laws currently in effect that address this conduct and possible alternatives that exist, less restrictive alternatives to 9A.04.020A exist. As a result, this statute is unnecessary and clearly isn't for the purpose of safe guarding the community.

B. <u>If the ordinance is content neutral, the City of Lakewood did not demonstrate through evidence that the ordinance supports a compelling state interest or that it was narrowly tailored to support that interest.</u>

The Washington State Constitution diverges from the Supreme Court on the "significant state interest" element of the time, place, and manner test, where "restrictions on speech can be imposed consistent with Const. art. 1, § 5 only upon showing a compelling state interest." *Bering*

v. Share, 106 Wash.2d at 234. To constitute a compelling interest, the purpose must be a fundamental one and the legislation must bear a reasonable relation to the achievement of the purpose. *Adult Entertainment Center, Inc. v. Pierce Cy.*, 57 Wash.App. 435, 439, 788 P.2d 1102, *review denied*, 115 Wash.2d 1006, 796 P.2d 725 (1990). See *Bates v. Little Rock*, 361 U.S. 516, 524-25, 80 S.Ct. 412, 417-18, 4 L.Ed.2d 480 (1960).

The City of Lakewood is required to produce evidence to show that the purpose of the legislation is a fundamental one and that the legislation actually addresses the problem it purports to resolve. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51-52, 106 S. Ct. 925, 931, 89 L. Ed. 2d 29 (1986). The First Amendment does not require a city, before enacting the code, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses. *Id.*

In this case, the City presented no evidence to support how the City Council came to the conclusion that this was protecting a compelling government interest. The fundamental City interest stated by the City Council for enacting this Ordinance is that there is a "danger of collision or injury to motorists or pedestrians that is created when distracted drivers attempt to make contribution to people requesting assistance at highway

on and off ramps." Additionally, the City states: "when begging or panhandling takes place, near Automated Teller Machines (ATMS), Financial Institutions, and at public transportation facilities, or near disabled person parking spaces, or when following individuals for the purpose of soliciting, there is a risk of danger or intimidation to members of the community." Lakewood City Ordinance No. 532 (Ord. 532 § 1(part), 2011).

The city has the burden to show that evidence exists to support the ordinance. The City has provided no evidence that the ordinance actually resolves the proposed purpose for enacting the law, and the city provided no evidence that the proposed purpose was actually a compelling government interest. The city also made no effort to explain why begging is distinguished from other forms of conduct which would have the same effect on traffic, such as approaching a vehicle for the purpose of signing petitions, selling products, advertising, or proselytizing.

Additionally, the ordinance is not narrowly tailored. All speech regarding begging in these areas is affected regardless of the conduct of the individual. The stated purpose of the ordinance is to prohibit someone from entering the street and affecting traffic. However, the ordinance prohibits all "begging" in these areas regardless of whether the conduct requires them to enter the roadway or not. A person sitting with a sign

asking for help would be in violation of the ordinance even if it provided instructions on ways to help that did not involve entering the roadway.

Similarly, the ordinance affects speech in the other areas listed in the ordinance regardless of whether someone actually approaches an individual, or is just expressing a request for help. This means, a person wearing a shirt with a message of "help the homeless" would be in violation of this ordinance. Accordingly, the ordinance is not narrowly tailored to serve a compelling government interest, and far more effective and less constitutionally restrictive alternatives exist that would accomplish the same underlying purpose of the ordinance.

2. Lakewood Municipal Code 09.4.020A – Restrictive Areas is a violation of the 14th Amendment right to Due Process for vagueness.

In order to satisfy the Fourteenth Amendment guarantee of procedural due process, an ordinance must set forth clear legal standards so that citizens may know how to conduct themselves in conformity with the law, and law enforcement personnel may avoid enforcing the law in an arbitrary and discriminatory manner. *Kolender v. Lawson*, 461 U.S. 352, 357–58, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983). Under this analysis, the factual setting of this case is irrelevant and the court looks only to whether "any conviction under the statute could be constitutionally

upheld." *State v. Smith*, 111 Wash.2d 1, 17, 759 P.2d 372 (1988) (quoting *State v. Maciolek*, 101 Wash.2d 259, 262–63, 676 P.2d 996 (1984)).

When an ordinance is challenged on vagueness grounds, the issue is whether the two requirements of procedural due process are met: adequate notice to citizens and adequate standards to prevent arbitrary enforcement. *Kolender,* 461 U.S. at 358, 103 S.Ct. 1855. An ordinance violates due process principles if (1) it " 'does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed,' " or (2) it " 'does not provide ascertainable standards of guilt to protect against arbitrary enforcement.' " *State v. Williams*, 144 Wash.2d 197, 203, 26 P.3d 890 (2001) (internal quotation marks omitted) (quoting *City of Bellevue v. Lorang*, 140 Wash.2d 19, 30, 992 P.2d 496 (2000)). A ordinance "is void for vagueness if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability." *State v. Lee*, 135 Wash.2d 369, 393, 957 P.2d 741 (1998).

It is not disputed that LMC 09A.4.020(E)includes a definition for the term begging. However, the definition in and of itself is vague in that it can be applied differently depending on the person interpreting the language. The ordinance defines begging as "asking for money or goods as a charity, whether by words, bodily gestures, signs or other means."

This definition makes anyone that asks for "money or goods" as a charity in the designated areas in violation of the ordinance.

Proper application of this language would include all charities asking for contributions, such as March of Dimes, Goodwill, and the Salvation Army. It would also include people requesting donations in support of political campaigns or interest groups, such as firefighters holding out boots at these intersections. Also, the ordinance prevents people stranded on the side of a road after accidents or vehicular problems from requesting aid in these locations.

LMC 9A.4.020A is vague and not clear in its application or its enforcement. An ordinance must set forth clear legal standards so that citizens may know how to conduct themselves in conformity with the law, and law enforcement personnel may avoid enforcing the law in an arbitrary and discriminatory manner. This law prohibits everyday conduct in that a person cannot ask for any form of help in these restricted areas.

In this case, the police officers are either specifically discriminating by only applying the law to people "begging" under the common use definition where people are asking for money because of poverty or as the law is written it prohibits everyday conduct. The use of the term begging and its definition is vague resulting in a biased and discriminatory enforcement of the law.

3. **Whether Lakewood Municipal Code 09.4.020A – Restrictive Areas is a violation of the 14th Amendment right to Equal Protection, because of poverty.**

Content-based restrictions raise Fourteenth Amendment equal protection concerns because such restrictions differentiate between types of speech. *Collier,* 121 Wash.2d at *at 745.* Due process of law is not applicable unless one is being deprived of something to which he has a right. *Yantsin v. Aberdeen*, 54 Wash.2d 787, 345 P.2d 178 (1959).

The discrimination provisions of both the state and federal constitutions generally seek to secure equality of treatment for all persons similarly situated without favoritism. *Herriott v. Seattle,* 81 Wash.2d 48, 60, 500 P.2d 101 (1972). The question is "not whether all those within the classes defined by the state are treated equally but, rather, whether the classification itself is permissible." *Collier,* 121 Wash.2d at 750. Due process requires that "persons similarly situated with respect to the legitimate purpose of the law receive like treatment." *Harmon v. McNutt*, 91 Wash.2d 126, 130, 587 P.2d 537 (1978).

The City may not condition the exercise of a constitutional right upon financial ability or deny a basic legal right because of one's poverty. *State v. Lewis*, 55 Wash.2d 665, 670, 349 P.2d 438 (1960). The Supreme Court typically applies an "intermediate scrutiny" test when a defendant is part of a semi-suspect class such as poverty. *State v. Schaaf*, 109 Wash.2d

1, 17, 743 P.2d 240 (1987); see also *State v. Mills*, 85 Wn. App. 286, 291, 932 P.2d 192, 195 (1997) (Classifications based on wealth may form a semi-suspect class). The "intermediate scrutiny" test requires that the ordinance must further a substantial interest of the state. *Plyler v. Doe*, 457 U.S. 202, 217-18, 102 S.Ct. 2382, 2395, 72 L.Ed.2d 786 (1982). The Supreme Court has applied in certain cases the heightened scrutiny test "when a classification affected both an important right (the right to liberty) and a semi-suspect class not accountable for its status (the poor)." *Schaaf*, 109 Wash.2d at 17. Arguably, freedom of speech is an important right and a strict scrutiny test should be applied.

Mr. Willis "must first establish that the challenged act treats unequally two similarly situated classes of people" and also must establish that he is part of the affected class. *Miranda v. Sims*, 98 Wn. App. 898, 908, 991 P.2d 681, 687 (2000). As discussed previously, the Lakewood City ordinance is content based legislation that specifically targets individuals that need help or money. The ordinance does not prohibit other forms of solicitation.

The stated purpose of the law is to protect people from causing accidents in the streets from people approaching vehicles at intersections and to prevent people from being harassed at banks and handicapped parking stalls. The law does nothing to protect against other forms of

solicitation which would cause the same threats to people's safety. Therefore, only people who need financial help based on charity are targeted by this law. Mr. Willis has been found to be indigent in both the Lakewood Municipal Court and Pierce County Superior Court and is a member of this class of person. Even without considering Mr. Willis' financial situation, by being convicted of begging he is a member of this class.

In addition, for the very same reasons this law is vague it is also being administered by Lakewood in violation of the constitution for Equal Protections because it allows officers to discriminate based on poverty. Officers are not arresting charitable organizations or firefighters in violation of this law, only poor people.

V. CONCLUSION

By placing a ban on begging, the City of Lakewood Ordinance LMC 9A.04.020A prohibits constitutionally protected speech. The language of the Ordinance is not content neutral as it specifically targets "begging" which is a constitutional protected form of speech. Further, the Ordinance is not "narrowly tailored to serve a significant governmental interest".

In addition, LMC 9A.04.020A does not set forth clear legal standards so that citizens may know how to conduct themselves in

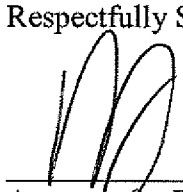
conformity with the law, and law enforcement personnel may avoid enforcing the law in an arbitrary and discriminatory manner. This ordinance violates defendant's due process rights as it is vague.

Finally, as applied, LMC 9A.04.020A violates Mr. Willis' equal protection rights in that, because of his poverty the Ordinance denies a constitutional right enjoyed by others similarly situated.

Consequently, the LMC 9A.04.020A is unconstitutional and the conviction of the Appellant, Mr. Willis must be vacated and dismissed.

DATED: January 9, 2014.

Respectfully Submitted,



Attorney for Robert Willis
David Iannotti – WSBA#37542
655 W. Smith Street, Suite 210
Kent, WA 98032
(253) 859-8840

VI. APPENDIX

Exhibit 1: Amended Complaint, dated September 9, 2011

Exhibit 2: Chapter 9A.04 Aggressive Begging of the Lakewood Municipal Code (LMC)

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.

Exhibit 1

IN THE MUNICIPAL COURT OF THE CITY OF LAKEWOOD
PIERCE COUNTY, STATE OF WASHINGTON

CITY OF LAKEWOOD, Plaintiff, Vs. WILLIS Robert Wayne DOB: 11/6/1949, Defendant.	No. CR 32174 **AMENDED COMPLAINT**

COMES NOW, the Plaintiff, City of Lakewood, by and through the undersigned attorney and hereby alleges that contrary to the form, force and effect of the ordinances and/or statutes in each case made and provided and against the peace and dignity of the City of Lakewood, that the above-named defendant did commit the following offense(s) –

Count I
Begging In Restrictive Areas – LMC 9A.04.020A

On or about 8/18/2011, within the corporate boundaries of the City of Lakewood, State of Washington, the above-named defendant did beg (1) at on and off ramps leading to and from state intersections from any City roadway or overpass; and/or (2) at an intersection of major/principal arterials (or islands on the principal arterials) in the City; and/or (3) within twenty five (25) feet of an ATM machine, or financial institution; and/or (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; and/or (5) before sunrise or after sunset at any public transportation facility or on any public transportation vehicle; and/or (6) while a person is under the influence of alcohol or controlled substances; all contrary to Section 9A.04.020A of the Lakewood Municipal Code.

(Maximum Penalty—Ninety (90) days in jail or $1,000 fine, or both pursuant to LMC 9A.04.030 and RCW 9A.20.021(3), plus restitution, assessments and court costs.)

The undersigned city attorney does certify, under penalty of perjury, that the city attorney has reasonable grounds to believe, and does believe that the above-named defendant committed

CITY OF LAKEWOOD
Legal Department
6000 Main Street
Lakewood, WA 98499
(253) 589-2489 FAX (253) 589-3774

the offense(s) described above, contrary to City Ordinance and law.

Dated this 7 day of September 2011.

☐ Heidi Ann Wachter, City Attorney, WSBA #18400
☐ Michael McKenzie, Asst. City Attorney, WSBA #23258
☐ Anita Booker-Hay, Asst. City Attorney, WSBA #23409
☒ Matthew S. Kaser, Assoc. City Attorney, WSBA# 32239

City of Lakewood

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No. 45034-8-II

COURT OF APPEALS, DIVISION II
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CITY OF LAKEWOOD,

Respondent/Cross-Petitioner

v.

ROBERT W. WILLIS,

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Exhibit 2

09A.4.000 - Aggressive Begging

Chapter 9A.04
Aggressive Begging

Sections:
9A.04.010 Aggressive begging.
9A.04.020 Definitions.
9A.04.020A Restrictive Areas
9A.04.030 Violation.

09A.4.010 - Aggressive Begging

It is unlawful for any person to engage in aggressive begging in any public place in the City, as those terms are defined by this section. (Ord. 526 § 2 (part), 2010.)

09A.4.020 - Definitions

A. Aggressive Begging means: (a) begging with intent to intimidate another person into giving money or goods by any means including repeated requests for money while approaching or following the person from whom funds are being requested; (b) continuing to solicit from a person or continuing to engage that person after the person has given a negative response to such soliciting; (c) soliciting from anyone who is waiting in line; (d) following a person with intent to solicit money or other things of value; (e) begging with use of false, misleading information, where the person knew or reasonably should have known of the falsity or misleading nature of the information; (f) (c) begging with or involving activities that are unsafe or dangerous to any person or property; (g) begging in a manner that exploits children; or (e) willfully providing or delivering, or attempting to provide or deliver unrequested or unsolicited services or products with a demand or exertion of pressure for payment in return.
B. "Automated Teller Machine" means a machine, other than a telephone: (1) that is capable of being operated by a customer of a financial institution; (2) by which the customer may communicate with the financial institution a request to withdraw, deposit, transfer funds, make payment, or otherwise conduct financial business for the customer or for another person directly from the customer's account or from the customer's account under a line of credit previously authorized by the financial institution for the customer; and (3) the use of which may or may not involve personnel of a financial institution;
C. Financial Institution means any banking corporation, credit union, foreign exchange office. For purposes of this section, it shall also include any check cashing business.
D. Major/Principal Arterial Intersections are the intersections of the principal arterials identified in Lakewood Municipal Code 12A.09.022 .
E. Begging means asking for money or goods as a charity, whether by words, bodily gestures, signs or other means.
F. To intimidate means to coerce or frighten into submission or obedience or to engage in conduct which would make a reasonable person fearful or feel compelled.
G. Public place means: (a) any public road, alley, lane, parking area, sidewalk, or other publicly-owned building, facility or structure; (b) any public playground, school ground, recreation ground, park, parkway, park drive, park path or rights-of-way open to the

use of the public; or (c) any privately-owned property adapted to and fitted for vehicular or pedestrian travel that is in common use by the public with the consent, expressed or implied, of the owner or owners;

H. "Public Transportation Facility" means a facility or designated location that is owned, operated, or maintained by a city, county, county transportation authority, public transportation benefit area, regional transit authority, or metropolitan municipal corporation within the state for the purpose of facilitating bus and other public transportation.

I. Exploit means using in an unethical, selfish or abusive manner or in any other manner that seeks an unfair advantage; and

J. On and Off Ramps refers to the areas commonly used to enter and exit public highways from any City roadway or overpass.

K. "Public Transportation Vehicle" means any vehicle that is owned by a City, County, County Transportation Authority, Public Transportation Benefit Area, Regional Transit Authority, or Metropolitan Municipal Corporation within the State for the purpose of facilitating bus and other public transportation.

(Ord. 532 § 1 (part), 2011; Ord. 526 § 2 (part), 2010.)

09A.4.020A - Restrictive Areas

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.)

09A.4.030 - Violation

Violation of this section shall be a misdemeanor, punishable by a fine up to $1000 or by a jail sentence of up to 90 days, or by both such fine and jail time. (Ord. 526 § 2 (part), 2010.)

CERTIFICATE OF SERVICE

I certify that on the 9 day of January, 2014, I caused a true and correct copy of this Brief 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 Iannotti

KENT ASSIGNED COUNSEL

January 09, 2014 - 1:12 PM

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Court of Appeals Case Number: 45034-8

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I, certify under penalty of perjury, that the following is true and correct under the laws of the State of Washington:

1. That I am an Attorney for Stewart MacNichols Harmell;

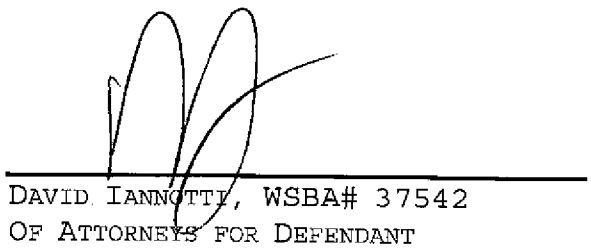
2. That on January 14, 2014, I caused to be delivered via first class U.S. Mail a copy of the following documents:

   (a) Opening Brief of Appellant

to the following:

Appellant
Robert Willis
12701 Pacific Hwy SW #26
Lakewood, WA 98499

Dated this 14 day of January, 2014 at Kent, WA.



DAVID IANNOTTI, WSBA# 37542
OF ATTORNEYS FOR DEFENDANT

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(253) 859-8840; fax (253) 859-2213

KENT ASSIGNED COUNSEL

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