

ACLU of Virginia

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Via Electronic Mail

Members of Town Council
Town of Herndon
777 Lynn Street
Herndon, Virginia 20170
town.clerk@herndon-va.gov

Dear Council Members:

The ACLU of Virginia strongly opposes the proposed solicitation ordinance that is to be considered at your meeting tomorrow. The ordinance is unconstitutional and will be subject to legal challenge if enacted.

The ordinance prohibits a pedestrian from standing on a public sidewalk and distributing literature to, soliciting money from, or offering goods or services to the occupants of motor vehicles. It exempts any activity on behalf a “program of or supported by the town, county, the Commonwealth or the United States of America.”

Public sidewalks are “traditional public forums” that “have immemorially been 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.” *Hague v. C.I.O.*, 307 U.S. 496, 515-16 (1939). Speech in public forums may be limited only by “content-neutral and reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.” *Warren v. Fairfax County*, 196 F.3d 186 (4th Cir. 1999) (internal quotation marks and citation omitted).

The proposed ordinance fails to meet these criteria. First, the ordinance is not content-neutral, because it exempts government-supported activities. It is my understanding that this exemption is intended to permit such activities as firefighters soliciting for charitable causes and students holding car-wash fundraisers, while prohibiting day laborers seeking employment and individuals seeking monetary contributions for their own use. This is a classic content-based distinction, in which the government selects some speech for favored treatment and other speech for punishment. It therefore violates the First Amendment.

Second, the proposed ordinance is not narrowly tailored to serve a significant governmental interest. The ordinance recites “visual blight,” traffic flow, and traffic safety as the government interests supporting the prohibition of solicitation from vehicles. “Visual blight” is not a significant governmental interest supporting the prohibition of speech in a public forum. The sight of speakers expressing themselves on a public sidewalk is to be expected and celebrated in a free society, even if some viewers find it unpleasant.

Moreover, the ordinance is not narrowly tailored to serve the government's interests in traffic flow and traffic safety, because it prohibits a broad array of speech that does not implicate those concerns. For example, it prohibits speech directed to the occupants of lawfully parked vehicles, speech directed to vehicles that may lawfully pull over into a parking lane, and speech that invites drivers to pull into a parking lot to receive the speakers' information.

For these reasons, courts have repeatedly struck down ordinances similar to this one. For example, in *Lopez v. Town of Cave Creek, AZ*, 559 F.Supp.2d 1030 (D. Ariz. 2008), the court granted a preliminary injunction against an ordinance that made it unlawful "to stand on or adjacent to a street or highway and solicit, or attempt to solicit, employment, business or contributions from the occupant of any vehicle" because the "Town has provided no evidence that traffic safety is endangered by day laborers soliciting employment from vehicle occupants," 559 F. Supp. at 1034, and because any alleged traffic problems could be addressed by enforcing existing traffic and parking regulations. *Id.* at 1035.

Similarly, in *Comite De Jornaleros De Redondo Beach v. City of Redondo Beach*, 475 F.Supp.2d 952 (C.D. Cal. 2006), the court invalidated an ordinance prohibiting solicitation from vehicles, noting that "that the Ordinance would reach an individual standing well away from the flow of traffic and who merely holds up a sign inviting the occupants of vehicles to drive to a private location to confer." The ordinance would also apply "to solicitation of employment from occupants of *lawfully* parked vehicles or vehicles stopped on residential streets on which there may or may not be significant traffic." *Id.* at 965 (emphasis in original). The court further observed that the ordinance did not leave open adequate alternative means of communication: "While solicitation of pedestrians is not expressly precluded under the Ordinance, there is no evidence that such solicitation would be as effective as motor vehicle solicitation and, in fact, it is counterintuitive to assume so, as most individuals who set out seeking to hire day laborers do so in their cars." *See also Coalition for Humane Immigrant Rights of Los Angeles v. Burke*, 2000 WL 1481467 (C.D. Cal. 2000) (striking down similar ordinance.)

While the above cases deal specifically with solicitation of employment from the occupants of vehicles, their logic applies with equal force to the provisions in the proposed ordinance prohibiting leafleting and the solicitation of monetary contributions.

For all of these reasons, the proposed ordinance's prohibition of speech by day laborers and other disfavored speakers to the occupants of motor vehicles violates the First Amendment. If the ordinance passes, the ACLU of Virginia will not hesitate to represent such individuals in a court challenge.

Should you have any questions, please do not hesitate to call me at (804) 644-8022. Thank you for your attention to this matter.

Sincerely,

Rebecca K. Glenberg
Legal Director

cc: Richard B. Kaufman, Town Attorney (town.attorney@herndon-va.gov)