No. 11-760

In The Supreme Court of the United States

CITY OF REDONDO BEACH,

Petitioner,

v.

COMITE DE JORNALEROS DE REDONDO BEACH, an unincorporated association; NATIONAL DAY LABORER ORGANIZING NETWORK, an unincorporated association,

Respondents.

On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* LEAGUE OF CALIFORNIA CITIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

The *amici* are public agencies located throughout the nation who join together through the League of California Cities, International Municipal Lawyers Association, and California State Association of Counties and ask this Court to grant the City of Redondo Beach's petition for *certiorari*.

The League of California Cities ("League") is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee ("Committee"), which is comprised of 24 city attorneys from all regions of the state. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance.

The International Municipal Lawyers Association ("IMLA") is a nonprofit, professional organization of over 2000 local government entities, including cities,

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[1] In accordance with Supreme Court Rule 37, the *amici* state that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than the *amici* and their counsel, contributed monetarily to the preparation or submission of this brief. The parties have received timely notice of the intent of *amici curiae* to file this brief, the parties have consented to the filing of this brief, and their consents have been filed with the Clerk.

counties, and special district entities, as represented by their chief legal officers, state municipal leagues, and individual attorneys. Since 1935, IMLA has served as a national, and now international, clearinghouse of legal information and cooperation on municipal legal matters. IMLA's mission is to advance the responsible development of municipal law through education and advocacy by providing the collective viewpoint of local governments around the country on legal issues before the United States Supreme Court, in the U.S. Courts of Appeals, and in state supreme and appellate courts.

The California State Association of Counties ("CSAC") is a nonprofit corporation whose membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The *amici* are acutely interested in this case because of conflicting court decisions and the uncertainty facing public agencies as they attempt to balance the interests of those using vehicular and pedestrian rights of way, those who seek to solicit employment, business or contributions from an occupied vehicle, and the public health, safety and welfare issues raised by these activities that impact all their

citizens. The lower court in *Comite de Jornaleros de Redondo, et al. v. City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011), overruled the long-standing and straightforward guidepost for public agencies articulated in *ACORN v City of Phoenix*, 798 F.2d 1260 (9th Cir. 1986). The court articulated instead a difficult and untenable standard that creates only uncertainty, at best, for local agencies seeking to address solicitation activities in a balanced and constitutional manner. Nationally, governmental entities are struggling with concerns that continuing to attempt to regulate solicitation will expose them to liability for purported First Amendment violations. They are equally concerned that establishing hiring centers will expose them to litigation from organizations concerned about expenditure of tax revenue to establish or support a hiring center.

The current legal environment for speech rights is juxtaposed with confusing and unpredictable interpretation and even oft-times inconsistent standards and application by state courts, district courts and U.S. Courts of Appeals, especially within the Ninth Circuit. Local governments can now only guess as to how courts will define the scope of "permissible regulation" – whether a court will find its regulation over- or under-inclusive, content-based or content-neutral, and tailored narrowly enough, etc. *Amici* fear that many public entities may simply opt out of regulating conduct which creates a true hazard, is difficult to regulate through alternative means, and continues to fuel disputes amongst advocates for solicitors and pedestrians, motorists and others who

use or reside at or near heavily traveled public rights of way. The U.S. Constitution does not compel an unmitigated retreat to a non-regulated environment, and *amici* should not have to make that choice.

The *amici* have a profound desire for this Court to impart a uniform standard for regulating street-side solicitation, rather than leaving this important issue in its current state of flux and uncertainty. This Court's decision on the merits of the instant action will guide all legislative bodies throughout the United States, by providing them with acceptable, clearly articulated, constitutional boundaries.

SUMMARY OF ARGUMENT

In this case, the Ninth Circuit has interpreted this Court's decisions in *Heffron v. International Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), and *Members of City Council of the City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) in a manner that creates significant confusion and ultimately chills the willingness of a public agency to continue enforcement of its anti-solicitation ordinance, or entertain its legislative prerogative to regulate street-side solicitation. The Ninth Circuit overruled its own long-standing and controlling precedent set in *ACORN v. City of Phoenix*, 789 F.2d 1260 (9th Cir. 1986), which upheld an ordinance very similar to the Redondo Beach ordinance at issue. Instead, the court has erected a substantial hurdle – one that

is constitutionally unnecessary and requires a governmental agency to enforce existing collateral regulations rather than use its police powers to address a local problem directly and reasonably. The court's directive in *Comite* is amorphous, and its application plainly problematic. Besides rejecting the local agency's narrowing interpretation of its own ordinance (contrary to this Court's clear directive in *Frisby v. Schultz,* 487 U.S. 474, 483 (1988) and *Ward v. Rock Against Racism*, 491 U.S. 781 (1989)) the Ninth Circuit did not provide any insight into what would be considered appropriate narrow tailoring other than to overrule *ACORN* and declare the necessity of enforcing other regulations. Meanwhile other Circuits have upheld very similar ordinances creating conflicts with the Ninth Circuit decision in *Comite*. This Court should eliminate the confusion and clearly delineate the constitutional borders for enforceable legislative regulation of street-side solicitation directed at occupied motor vehicles.

ARGUMENT

GRANTING *CERTIORARI* IS NECESSARY TO RESOLVE THE UNCERTAINTY ABOUT THE APPROPRIATE CONSTITUTIONAL STANDARDS FOR REGULATING STREET-SIDE SOLICITATION DIRECTED AT OCCUPANTS OF MOTOR VEHICLES, AND TO ABATE THE CHILLING EFFECT CREATED BY INCONSISTENT INTERPRETATIONS OF SUPREME COURT PRECEDENT BY THE NINTH CIRCUIT

In *Heffron,* this Court confirmed the constitutionality of regulations restricting distribution of materials to a fixed location and in so doing articulated that the state's interest in maintaining the orderly movement of crowds at a fair served a significant governmental interest. Further, the Ninth Circuit in *ACORN* approved the regulation of street-side solicitation directed at occupied motor vehicles, finding among other things that the government's interest in traffic safety was significant. Finally, in *Taxpayers for Vincent,* this Court upheld a ban on placement of materials on designated public property, finding that the city-wide proscription was not an over-inclusive response to traffic concerns. Now, under *Comite* the Ninth Circuit has determined that the means chosen by Redondo Beach to address traffic safety created by congregations of those who solicit employment, business, or contributions, were too imprecise and therefore overbroad as they could apply to children selling lemonade on the sidewalk and apply

to streets which had not been identified as problem areas (*Comite* at 948).[2]

Has the Ninth Circuit in *Comite* effectively established the untenable requirement that public agencies must study, analyze and essentially ensure that traffic safety and other nuisance activity is a documented concern at every single intersection in the community before embarking on a course to regulate solicitation directed toward occupied vehicles? *Amici* believe not. Under *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), this Court articulated the standard for examining a content neutral regulation which seeks to ameliorate secondary effects as one where the agency-enacted ordinance is based on evidence reasonably believed to be relevant to the problem it addressed. (*Id.* at 51-52). See also *Taxpayers for Vincent* – the mere fact that one can conceive of some impermissible application of a regulation is not sufficient to make it susceptible to an overbreadth challenge.

Unquestionably, the *Comite* decision will create confusion and uncertainty by its apparent creation of a much higher threshold for demonstrating an ordinance is narrowly tailored. *ACORN* has been overruled and agencies within the Ninth Circuit now have

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[2] Interestingly, the *Comite* Court rejects the City's other reasons for proffering the ordinance on the ground that these "public nuisances" were not argued on appeal as a further basis of narrow tailoring to achieve the City's goals. However, the City's brief articulates those problems numerous times.

little guidance on how to regulate solicitation activities directed to occupants of motor vehicles.

Decisions by other courts, both state and federal provide no better guidance, as many conflict with *Comite* or analyze the solicitation regulation under entirely different Constitutional standards. For example, in California, *Xiloj-Itzep v. City of Agoura Hills,* 24 Cal. App. 4th 620, 29 Cal. Rptr. 2d 879 (Cal. Ct. App. 1994), the court upheld an ordinance similar to *ACORN* which included within its ambit a prohibition against solicitations from sidewalks and driveways. However four years later, a district court struck down a similar ordinance in Los Angeles County as not being narrowly tailored and expressed disagreement with the *Xiloj* decision. (*Coalition for Humane Immigrant Rights of Los Angeles v. Burke,* CV 98-4863-GHK, 2000 WL 1481467 (C.D. Cal.), hereinafter *CHIRLA II*). In *Lopez v. Town of Cave Creek,* 559 F. Supp. 2d 1030 (D. Ariz. 2008), the district court struck down an *ACORN*-type ordinance finding the ordinance to be content based, relying on the analysis of the Ninth Circuit in *American Civil Liberties Union of Nevada v. City of Las Vegas*, 466 F.3d 784 (9th Cir. 2006).

The contrasting judicial approaches to free speech analysis in the context of regulating solicitation are also reflected in other court opinions and add to the tension between the *Comite* decision and those of other circuits, further exacerbating the nationwide confusion facing public agencies. The Fifth Circuit, in *Sun-Sentinel Co. v. City of Hollywood*, 274 F. Supp. 2d

1323 (S.D. Fla. 2003), upheld a city prohibition on in-roadway solicitation for rides, employment or business, finding that the regulation would not be invalid simply because a less speech-restrictive alternative exists or because there is some imaginable less restrictive alternative. Similarly, in *Alter v. Armstrong,* 961 F.2d 1224 (6th Cir. 1992), the court upheld a statute prohibiting general solicitation by persons standing in roadways. The statute included an exception for those seeking contributions. Notwithstanding that the regulation singled out contributions as an exception, the court still found the statute to be content neutral and narrowly tailored, stating so long as the means chosen are not substantially broader than necessary to achieve governmental interests, a regulation would not be invalid because a court concludes that the government's interest could be adequately served by some less speech-restrictive alternative. (*Id.* at 1229).

The *Alter* decision, like *Sun-Sentinel,* appeared to be following this Court's direction in *Ward* that regulation of speech-related activities, so long as content neutral, need not be the least intrusive means of doing so. Narrow tailoring is satisfied so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation.

There are numerous other state and federal decisions which exemplify the confusion which now face public agencies, particularly in the jurisdiction of the Ninth Circuit when assessing whether or to what

extent they can regulate street-side solicitation (See e.g., *State v. Dean*, 170 Ohio App. 3d 292, 866 N.E. 2d 1134 (Ohio Ct. App. 2007) – prohibition on improper solicitation in the form of seeking immediate grant of money, goods or other gratuity from the operator or occupant of motor vehicles held, content neutral and narrowly tailored; *City of Skagway v. Robertson*, 143 P.3d 965 (Alaska 2006) – limiting person-to-person solicitation in historic area to avoid aggressive tactics analyzed under standards for regulating commercial speech; *People v. Barton*, 8 N.Y. 3d 70, 861 N.E. 2d 75 (N.Y. Ct. App. 2006) – City of Rochester panhandling prohibition on seeking funds from occupants of motor vehicles found content neutral and narrowly tailored.)

The Court's opinions in *Heffron, Taxpayers* and *Ward,* all evince acknowledgment of a local agency's ability to regulate solicitation directed toward crowds or motorists. That deference should be given to the legislative body to narrowly tailor the regulation and to determine how best to address the competing interests involved without having to be second-guessed by a court unless the regulation truly over-burdens speech. We can uncover no retreat by this Court from the foregoing test. All of this seems to suggest that the City of Redondo Beach's practice of regulating street-side solicitors who stand in the street, on sidewalks and on parkways seeking to interrupt the flow of traffic, is constitutional. Nonetheless, the Ninth Circuit chose to interpret prior precedent as creating a more stringent standard or hurdle and gave no credence to the agency's narrowing interpretation

(*Comite*, Kozinski, J., dissenting, or as he put it, "If I could dissent twice, I would." *Id.* at 958).[3]

In so doing, the Ninth Circuit blended principles from other First Amendment jurisprudence that have no application to the regulation at issue here (cf. *Board of Airport Commissioners of L.A. v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) – absolute prohibition of constitutionally protected activities, not subject to narrowing interpretation).

Now, in addition to the analysis of a proposed regulation as articulated under *Renton,* must the City of Redondo Beach and all governmental bodies engage in more exacting scrutiny to ensure that it is not over-inclusive, under-inclusive or tailored as the absolutely least restrictive regulation? This course is not without danger as the Ninth Circuit has provided no guidance on the contours for such regulation in the

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[3] Justice Kozinski in his dissent, first questioned whether the regulation of street-side solicitation is even "a regulation of speech?" (*Id.* at 960). He apparently puts that issue on hold and charts a course down the path of a content neutral analysis of the Redondo Beach ordinance. The majority for some reason sidesteps the "content based" issue, assuming for sake of discussion that the Redondo Beach Ordinance was content neutral. Does this leave the door open in a future case to find that a street-side solicitation ordinance is a constitutionally impermissible content based regulation? Both raising the question and the "open door" provides another reason for this Court to establish the constitutional parameters for agencies seeking to regulate street-side solicitation.

solicitation context, putting agencies at risk of falling into the three bears syndrome of attempting to determine when a regulation is "just right." This is further exacerbated when contrasted with decisions in other courts. In the face of these conflicting and confusing decisions how does a public agency know if their particular case may be the one which results in reversing 20 years of precedent? If content-neutral, under *Comite* how sensitive and detailed must the evaluation of governmental interests be to satisfy the "narrow tailoring" prong of the content-neutrality test?

The *Comite* dissent puts the confusion in perspective, "[i]s this even a regulation of speech?" Assuming that it is, it is not the job of the courts to construe statutes broadly so as to imperil their constitutionality. (*Comite*, Kozinski, J., dissenting at 960). Having done so, cities like Redondo Beach are left to founder on the shoals of uncertainty without intervention by this Court.

CONCLUSION

The evident confusion in the law addressing this important First Amendment issue, and the chilling effect of the *Comite en banc* decision, have prompted *amici* to join Redondo Beach in urging this Court to enunciate the appropriate constitutional standards governing street-side solicitation regulations.

Accordingly, *amici* support the granting of a writ of *certiorari* in this matter.

Respectfully submitted,

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