Finally, the Court looked to its own Circuit precedent for the principle that it gives broad latitude to law enforcement officers in executing their duties, especially the management of subordinate officers. As to when the government as employer may act to avoid disruption of the workplace, the Court specifically cited U.S. Supreme Court case law for proposition that there is no need "for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action."

Although Nord's statements were made during a campaign and were putatively a matter of public concern, the Circuit Court noted that Wild challenged them as untrue. And even if the statements were matters of public concern they were not so weighty as to override the sheriff's substantial interest in maintaining the efficacy and reputation of his workplace. In sum, Wild was granted qualified immunity given that at least some of Nord's speech was not protected by the First Amendment, that it was not valuable enough to outweigh the sheriff's interest in the workplace, and because Wild had a reasonable belief that firing Nord was within his rights as a public official under North Dakota law and federal jurisprudence.

DISSENT: The dissent differed from the majority in its application of *Pickering/Connick.* It Given that Wild had conceded that Nord's speech was protected, the only issue was whether Nord's right to engage in protected speech was clearly established at the time of the firing. The dissent would have found Nord's right was clearly established, given it was political speech made during a campaign, and would have affirmed the lower court.

http://media.ca8.uscourts.gov/opndir/14/06/123249P.pdf (last accessed July 6, 2014).

Speech: Worcester, Massachusetts Panhandling Ordinances Are Content-Neutral and Do Not Violate Due Process or Equal Protection

Thayer v. City of Worcester, No. 13–2355 (1st Cir. June 19, 2014).

The First Circuit has affirmed the lower court's denial of injunctive relief against two panhandling ordinances—including a restriction against coming closer than 20 feet to solicit people in line at bus stops, ATM's and the like-- finding that the laws were content-neutral and survived rational basis scrutiny and that plaintiffs had failed to sustain their burden of demonstrating facial overbreadth and vagueness.

In 2013, the Worcester, Massachusetts City Council passed two ordinances aimed at panhandling. The first was "An Ordinance Prohibiting Aggressive Begging, Soliciting and Panhandling in Public Places" (Aggressive Panhandling Ordinance), which made it "unlawful for any person to beg, panhandle or solicit any other person in an aggressive manner." It would apply to "soliciting" in the form of using any means of communication with the purpose of obtaining an immediate donation and it defined "aggressive" conduct at two levels: obviously threatening behavior, as by soliciting someone "in a manner likely to cause a reasonable person to fear immediate bodily harm," using "violent or threatening language," or blocking a person's right of way. It also covered potentially coercive behaviors, including soliciting from someone waiting in line to buy tickets or enter a building; soliciting after dark, calculated as "the time from one-half hour before sunset to one-half hour after sunrise"; continuing to solicit from a person

after the receipt of a negative response; and soliciting anyone within 20 feet of an entrance or parking area of a bank, automated teller machine, public transportation stop, pay phone, theater, or any outdoor commercial seating area like a sidewalk café.

The ordinance was preceded by a proposed "Declaration of Findings and Policy," which detailed the City's concerns. In particular, the declaration stated that "[p]ersons approached by individuals asking for money, objects or other things of any value are particularly vulnerable to real, apparent or perceived coercion when such request is accompanied by [certain forms of] aggressive behavior."

The second law, "An Ordinance Relative to Pedestrian Safety" (Pedestrian Safety Ordinance), targeted distractions on public roads:

> No person shall, after having been given due notice warning by a police officer, persist in walking or standing on any traffic island or upon the roadway of any street or highway, except for the purpose of crossing the roadway at an intersection or designated crosswalk or for the purpose of entering or exiting a vehicle at the curb or for some other lawful purpose. Any police officer observing any person violating this provision may request or order such person the [sic] remove themselves from such roadway or traffic island and may arrest such person if they fail to comply with such request or order.

The ordinances were codified at ch. 9, § 16(d) and ch. 13, § 77(a), respectively, of the Worcester Revised Ordinances.

Two homeless people who solicited donations on the City's sidewalks and an elected member of the Worcester School Committee who displayed political signs on median strips and traffic circles during campaigns, brought suit under the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth. They sought declaratory and injunctive relief and monetary damages.

The District Court for the District of Massachusetts denied relief. It found that plaintiffs had failed to demonstrate a likelihood of success on the merits, because the ordinances prohibited all aggressive solicitations and roadside demonstrations, regardless of the speaker's message or ideology, and were therefore content-neutral time, place, or manner restrictions subject only to intermediate scrutiny. Given that the ordinances furthered a substantial interest in public safety and freedom from coercion, were narrowly tailored to prohibit only aggressive or distracting activity, and left open ample alternate spaces for solicitation, the court held that the appellants had shown no probability of demonstrating a violation. It also denied the Due Process claim, finding that both ordinances provided sufficient detail to constrain police discretion in enforcing the new rules. Nor was there evidence of uneven enforcement, resulting in a denial of the Equal Protection charge.

HELD: On appeal, the First Circuit affirmed the District Court's denial of injunctive relief and its finding of no Due Process or Equal Protection violations.

DISCUSSION: The Circuit Court reiterated the lower court's analysis. Given that the speech was occurring in a public forum, if the laws restricted specific content, then strict scrutiny would apply, and the government would have to show narrow tailoring to achieve a compelling state interest and the absence of any less restrictive alternatives. Here, the ordinances were not based on content—the City did not have a disagreement with any message being conveyed by

the appellants; therefore intermediate scrutiny applied. The laws did not have to be the "least restrictive" means of achieving the City's objectives.

> To begin with, the text of the ordinances does not identify or affect speech except by reference to the behavior, time or location of its delivery, identifying circumstances that raise a risk to safety or that compromise the volition of a person addressed to avoid solicitation: it is aggressive, particularly obtrusive or alarming or risky solicitation that is forbidden, along with distracting activity on traveled roadways and traffic islands.
>
> This is not to deny that certain subjects of speech and even certain messages are associated with the targeted behavior. Panhandling and solicitation of immediate donations convey messages of need, and waving placards at traffic islands may often be political expression. But if the mere association of certain behavior with certain subjects were to amount, in itself, to a content basis for First Amendment scrutiny, the point behind content discrimination would be lost. That point is to bar the government from suppressing speech because it disapproves the message, see *Playboy Entm't Group*, 529 U.S. at 812.

Given that these were content-neutral time, place, or manner regulations, intermediate scrutiny required only that they be narrowly tailored to serve a significant governmental purpose while leaving open adequate alternative channels of communication, and not burden substantially more speech than necessary.

The Circuit Court found that appellants had incorrectly assumed that merely by raising a facial overbreath challenge, the burden shifted to the City to demonstrate its bona fides. This was incorrect: "In a facial overbreadth challenge, the claimant has the initial burden to make at least a prima facie showing of such "substantial" overbreadth before any burden of justification, be it strict or intermediate, passes to the government. *Virginia v. Hicks*, 539 U.S. 113, 122 (2003)…. We do not think the appellants have made such a showing."

The First Circuit found that appellants had failed to provide support for even the most vulnerable of the ordinances' provisions—the requirement to stay at least 20 feet away from someone standing or waiting, such as at a bus stop or ATM machine. "Even the most intuitively appealing of all the appellants' claims, going to the ban on requests by using a sign within 20 feet of the listed lines and locations, does not prompt adequate support to meet their burden. Twenty feet is not very far, being within the range of audible conversation, and a sign request that close would reasonably give rise to discomfort to someone stuck at a bus stop, and could definitely produce apprehensiveness in someone obviously possessing fresh cash."

Appellants had also raised Equal Protection claims, arguing that the ordinances were facially invalid because they were motivated by the City's distaste for its poor and homeless. The court found nothing in the record to support this allegation, particularly under the applicable rational basis standard ("because neither wealth nor homelessness is a suspect class under the Equal Protection Clause, see *United States v. Myers*, 294 F.3d 203, 209 (1st Cir. 2002)).

Finally, the First Circuit denied appellants' Due Process vagueness claim, citing their "failure to identify any specific instance of uncertainty on their part about the status of a traffic island, or the lawfulness of continuing to hold a solicitation sign, or the likelihood of police action, or any other detriment that might be attributable to a failure of textual concreteness. A vagueness claim must be specific and as applied to a given plaintiff, not facial."

In sum, the Circuit Court affirmed the denial of a preliminary injunction as to all provisions of the challenged ordinances except for the Aggressive Panhandling Ordinance's proscription on nighttime solicitation, (see Worcester Revised Ordinances, ch. 9, § 16(e)(11)), and remanded to the District Court.

http://media.ca1.uscourts.gov/pdf.opinions/13-2355P-01A.pdf (last accessed July 6, 2014).