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THE TIME, PLACE, AND MANNER OF SURVIVAL: AN ANALYSIS OF DAY LABORERS AND FIRST AMENDMENT LIMITS ON STATE ACTION TO EXCLUDE

Will Johnson*

INTRODUCTION

As the stalemate to pass comprehensive immigration reform continues, day laborers1 are caught in a precarious position as states and localities pass restrictive measures against immigrant populations,2

1. See LUNA YASUI ET AL., NAT’L EMPLOYMENT LAW PROJECT, DRAFTING DAY LABOR LEGISLATION: A GUIDE FOR ORGANIZERS AND ADVOCATES 8 (2004), available at http://nelp.3cdn.net/652823341dc1c5bf39_95m6ivpuz.pdf. “Day labor” is defined as:

[L]abor or employment that is occasional or irregular, in which an individual is employed for not longer than the period of time required to complete the assignment for which the individual was hired and in which wage payments are made directly or indirectly to the day laborer by the day labor service agency or by the third party employer, for work undertaken by the day laborer. Day labor does not include labor or employment of a professional or clerical nature.

Id.

including provisions meant to prevent day laborers soliciting employment in public spaces such as sidewalks. These measures implicate the First Amendment and bring up important questions regarding when and to what extent the government may restrict a day laborer's ability to solicit employment in public spaces. As many day laborers rely on access to public spaces to find work, the constitutionality of government efforts to restrict where a day laborer may seek employment directly affects whether day laborers in a particular area continue to find regular work. Recent cases have shown


3. See generally ARIZ. REV. STAT. ANN. § 13-2928(A)-(B) (2010) (making it a crime to hire someone as, or solicit employment from, the occupant of a motor vehicle); REDONDO BEACH, CAL., CODE § 3-7.1601 (2010), available at http://www.qcode.us/codes/redondobeach (making it “unlawful for any person to stand on a street or highway and solicit, or attempt to solicit, employment, business, or contributions from an occupant of any motor vehicle”).

4. U.S. CONST. amend. I (“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.”).


The vast majority (79 percent) of hiring sites are informal and include workers standing in front of businesses (24 percent), home improvement stores (22 percent), gas stations (10 percent) and on busy streets (8 percent). Most of these sites are near residential neighborhoods. One in five (21 percent) day laborers search for work at day-labor worker centers.

Id.

6. Day laborers rely almost completely on the ability to make themselves known and available to contractors because:

Fluctuations in the availability of work are endemic to the day-labor market. The day-labor workforce is an entirely contingent workforce; workers are hired only when employers need them and the duration of the employment “‘contract’” (which consists of nothing more than a verbal agreement) is unsecured and open-ended. In other words, day laborers are entirely at-will employees and employers are in no way bound to honor promises of continuing employment, whether from one day to the next or from one hour to the next.
that courts are divided as to the validity of state and local measures aimed at removing day laborers from public spaces.\footnote{Id. at 6.} This Note advocates two principal positions: first, that one recent Ninth Circuit case validating an anti-day laborer ordinance, \textit{Comité de Jornaleros de Redondo Beach v. City of Redondo Beach},\footnote{See discussion Parts II.B.1-2.} was incorrectly decided and on rehearing should be overturned; and second, that comprehensive immigration reform is the superior means to address concerns about the presence of immigrants, including many day laborers, in a way that promotes, rather than restricts, the rights of day laborers and other immigrant constituencies.

Although this Note provides a brief background of day laborers and why they are the target of exclusionary statutes and ordinances,\footnote{See Gregg W. Kettles, \textit{Day Labor Markets and Public Space}, 78 UMKC L. Rev. 139, 143 (2009) ("Policy responses by local government and civic-minded non-profit organizations toward day laborers] have tended to take one of two forms: exclusion or shelter.").} the Note primarily addresses how courts interpret and apply the First Amendment to government efforts restricting a day laborer's conduct in public spaces. This Note will also draw upon cases focusing on anti-panhandling statutes as they help to illuminate how courts determine the constitutionality of statutes limiting conduct in public spaces. Part I of this Note discusses day laborers generally and their association with immigration concerns nationwide and gives an overview of local statutes targeting day laborers and how they implicate the First Amendment. Part II describes how courts interpret the First Amendment and what tests are used to determine the constitutionality of efforts to restrict day laborers' conduct in public spaces. This section includes a discussion of cases addressing anti-panhandling statutes, as these cases help flesh out how courts view government action targeted at restricting activity in public spaces. Part II also reviews how the particular nature of day labor calls into question the validity of many court decisions affirming ordinances restricting a day laborer's ability to solicit employment. This section further addresses how a day laborer's solicitation of employment is both similar and distinct from other conduct commonly discussed in pertinent
categories of cases such as panhandling and public solicitation of donations. Part III focuses on how courts have decided whether "reasonable alternatives" exist for day laborers to find employment in lieu of using public spaces. It addresses why day laborers should be allowed to continue to solicit employment in public spaces as well as why the development of workers' centers meant to provide a more protected and structured system of employment for day laborers is a positive development but insufficient to meet the needs of many day laborers. Finally, Part IV presents the conclusion that although the constitutional viability of government efforts to exclude day laborers from public spaces is uncertain, such efforts are based on misconceptions of the public nuisance caused by day laborers and immigrants generally. Part IV also argues that comprehensive immigration reform at the federal level is preferable to state and local government bodies attempting to regulate their immigrant populations.

I. DAY LABORERS AND THE FIRST AMENDMENT

Before discussing the First Amendment analysis used by courts to address statutes targeted at day laborers, a brief background about day laborers generally and why they have drawn the attention of state and local governments is helpful. Day laborers often connote a group of Latino men gathered on a sidewalk, street corner, or in a parking lot, seeking employment from passing vehicles for various manual labor jobs. Although this conception is largely accurate on its face, the

10. For those affected by the restrictive statute in question, the existence of "reasonable alternatives" to achieve their stated goals is one of the considerations courts use to determine whether the statute is an acceptable limitation on First Amendment rights. See discussion infra Part II.A-B and Part III.

11. One of the most cited surveys on day laborer demographics found that two percent of day laborers are female. VALENZUELA, supra note 5, at 17. For an argument that the majority-female field of informal domestic services, such as house-cleaning and child care, should be considered a part of day labor generally, see Elizabeth J. Kennedy, The Invisible Corner: Expanding Workplace Rights for Female Day Laborers, 31 BERKELEY J. EMP. & LAB. L. 126 (2010).

12. See VALENZUELA, supra note 5, at i; see generally, DICK J. REAVIS, CATCHING OUT: THE SECRET WORLD OF DAY LABORERS 174-77 (2010) (discussing the similarities and differences between the informal market of most immigrant day laborers and the approximately 800,000 to 1.4 million temporary workers, including
association between day laborers and the Latino immigrant community has led to an assumption that all day laborers are undocumented resident aliens. In addition, the presence of day laborers also symbolizes significant demographic shifts that have resulted in major increases in the immigrant population, especially in many non-border states.

“specialized skill temps” and some day laborers, that find employment through agencies and labor halls).

13. See Valenzuela, supra note 5, at 18. The report states:

[Day laborers are] largely comprised of migrants from Mexico and Central America . . . . More than half (59 percent) of day laborers were born in Mexico, 14 percent were born in Guatemala and 8 percent were born in Honduras. United States-born workers comprise 7 percent of the day-labor workforce, though in the southern region of the country, almost one in five day laborers was born in the United States.

Id.

14. Although the available evidence shows that the majority of day laborers are unauthorized, more than a quarter of day laborers either have legal status or have a pending application to adjust their status. See Monica W. Varsanyi, Immigration Policing Through the Backdoor: City Ordinances, The “Right to the City,” and the Exclusion of Undocumented Day Laborers, 29 Urb. GeoG. 29, 31 (2008) (“[A]pproximately three-quarters of the day labor workforce is estimated to be unauthorized, and 60% have been in the United States for five years or less.”). Varsanyi goes as far as to say that “the term ‘day laborer’ has become synonymous with ‘illegal immigrant’ in popular discourse.” Id. at 32; see also Valenzuela, supra note 5, at 18. The report found that:

Three-quarters of the day-labor workforce are undocumented migrants . . . . [A]bout 11 percent of the undocumented day-labor workforce has a pending application for an adjustment of their immigration status. It was not possible to determine how many of these workers may indeed be eligible for temporary or permanent immigration relief.

Id.


16. See Varsanyi, supra note 14, at 31 (stating that, in regard to the specific increase in the Mexican immigrant community, “the Mexican immigrant population (both legal and undocumented) in “nongateway” states grew dramatically between 1990 and 2000, ranging from 200%–400% in New York, Washington, and Wisconsin to more than 1800% in North Carolina, Tennessee, and Alabama” (citation omitted)); see also Rodriguez, supra note 15, at 594 (“In the same way that immigrants often seek to insulate themselves from the challenges of life in a new
Due to fears that immigrant populations, such as those represented by gathered groups of day laborers, pose various problems to the community, some states and localities have used their police power to develop what law professor Juliet P. Stumpf termed “crimmigration law.” Stumpf observed that “criminal law has been a central locus for state and local attempts to curb unwanted immigration.” For day laborers, this means statutes and ordinances passed to remove them from public spaces. Statutes targeting day laborers add another to the host of challenges they already face, such as low rates of pay, dangerous work conditions, and job security challenges. Given the precarious economic position of day laborers, deciding the constitutionality under the First Amendment of state and local efforts to exclude day laborers from public spaces, and thus increasing the difficulty of finding employment, has grave consequences for day laborers and immigrant communities generally.

society by relying on networks of co-ethnics, local communities are attempting to insulate themselves from demographic changes that feel overwhelming.

17. See Kettles, supra note 9, at 143 (“The supposed harms [caused by day laborers] fall into three general categories: accidents, petty nuisance, and immigration.”).

18. See Stumpf, supra note 2, at 1587 (“[T]he most significant way in which federal immigration law has transformed itself into domestic law, accessible to the states, is through its expanding intersection with criminal law.”).

19. Id.

20. See Kettles, supra note 9, at 144 (“Localities have also attempted to avoid the public harms threatened by day laborers by enforcing against them ordinances restricting solicitation on streets, sidewalks, and parking lots.”).

21. See Valenzuela, supra note 5, at ii (finding that most day laborers make no more than $15,000 annually).

22. See id. at 12-13 (“One in five day laborers has suffered an injury while on the job . . . Among day laborers who have been injured on the job in the past year, more than half (54 percent) did not receive the medical care they needed for the injury . . .”).

23. See id. at 6 (“Fluctuations in the availability of work are endemic to the day-labor market . . . [because] day laborers are entirely at-will employees and employers are in no way bound to honor promises of continuing employment, whether from one day to the next or from one hour to the next.”).
A. Do First Amendment Protections Apply to Unauthorized Workers
Immigrants?

As many day laborers are unauthorized workers,\(^{24}\) one key threshold question is whether First Amendment protections apply to unauthorized workers. For over half-a-century, the Supreme Court has held that First Amendment protections apply to lawfully-admitted immigrants.\(^{25}\) However, the Court has also addressed constitutional protections applied to unauthorized workers, specifically in the language of the landmark Supreme Court case *Plyler v. Doe.*\(^{26}\) In *Plyler,* the Court stated that “[a]liens, even aliens whose presence in this country is unlawful, have long been recognized as ‘persons’ guaranteed due process of law by the Fifth and Fourteenth Amendments.”\(^{27}\) The critical issue appears to be that the First Amendment refers to “people” as opposed to “citizens,” thus supporting the contention that First Amendment protections apply to immigrants regardless of status.\(^{28}\) Most of the

\(^{24}\) Id. at 17 (“Three-quarters of the day-labor workforce are undocumented migrants.”).

\(^{25}\) See Chew v. Colding, 344 U.S. 590, 596 n.5 (1953). The Court stated:

\[\text{O}n\text{c}e\ an\ \text{a}l\text{i}en\ \text{law}\text{fully}\ \text{enters}\ \text{and}\ \text{resides}\ \text{in}\ \text{this}\ \text{c}ountry\ \text{h}e\ \text{be}comes\ \text{inv}ested\ \text{with}\ \text{the}\ \text{ri}ghts\ \text{guaranteed\ by}\ \text{the} \]
\text{Constitution\ to\ \text{a}l\text{l}\ \text{p}eople\ \text{within}\ \text{our}\ \text{borders}.\ \text{Su}ch\ \text{ri}ghts\ \text{i}nclude\ \text{th}ose\ \text{protected\ by}\ \text{the}\ \text{First\ and\ the\ Fifth}\ \text{Amendments}\ \text{and}\ \text{by}\ \text{the}\ \text{due}\ \text{process}\ \text{cla}use\ \text{of}\ \text{the}\ \text{Fourteenth}\ \text{Amendment}.\ \text{N}one\ \text{of}\ \text{these}\ \text{provisions}\ \text{acknowledges}\ \text{an}\ \text{distinction}\ \text{between}\ \text{citizens\ and\ resident}\ \text{aliens}.\]

\text{*Id.*; see also Bridges v. Wixon, 326 U.S. 135, 148 (1945) (“\text{F}reedom\ \text{of}\ \text{s}peech\ \text{and}\ \text{of}\ \text{press}\ \text{is\ acc}orded\ \text{aliens\ residing\ in\ this\ country.”}); Parcham v. Immigration & Naturalization Serv., 769 F.2d 1001, 1004 (4th Cir. 1985) (“\text{I}t\ \text{has\ long\ been\ held}\ \text{that}\ \text{aliens\ residing\ in\ this\ country\ enjoy\ the\ protection\ of\ the\ First}\ \text{Amendment.”}).

\(^{26}\) 457 U.S. 202 (1982).

\(^{27}\) Id. at 210.

\(^{28}\) See American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1063-64 (9th Cir. 1995). The court stated:

\[\text{The\ \text{Supreme}\ \text{C}ourt\ \text{has\ c}onsistent}ly\ \text{distinguished\ between}\ \text{aliens\ in\ the}\ \text{United}\ \text{States}\ \text{a}nd\ \text{those}\ \text{seeking\ to\ enter}\ \text{from}\ \text{outside}\ \text{the}\ \text{c}ountry,\ \text{a}nd\ \text{has\ c}o\text{nc}eded\ to\ \text{aliens\ l}iving\ \text{in}\ \text{the} \]
\text{United States those protections of the Bill of Rights that are\ n}ot,\ \text{by\ the\ t}ext\ \text{of\ the\ C}onstitution,\ \text{re}stricted\ \text{to}\ \text{citizens}.\]

\text{*Id.* (citation omitted); see also United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (stating, when deciding whether Fourth Amendment protections apply to
principal cases discussed in this Note do not address whether the First Amendment applies to unauthorized immigrant workers. However, one case that does touch on the issue held that regardless of whether the First Amendment applies to individual authorized immigrant workers, the plaintiff included an appropriate organization with valid organizational standing, and find that First Amendment protections apply to unauthorized workers.

B. Statutes and Ordinances Infringing on First Amendment Protections

As solicitation is a “communicative activity,” government attempts to prevent day laborers from soliciting employment in public forums implicate First Amendment protections. The number of states and localities drafting and passing such measures targeted at day laborers appears to be increasing. As localities within states like New York,

an undocumented immigrant, that constitutional protections apply to immigrants, regardless of status, “when they have come within the territory of the United States and developed substantial connections with the country”). If the ability of an unauthorized day laborer to bring a First Amendment claim was contested, one response could be to establish the voluntary presence of the party and describe the connection the day laborer has to community, such as parenting U.S. citizen children or membership in a local church or organization, in addition to the time spent living in the U.S. For a discussion of day laborers involvement in their local communities, see VALENZUELA, supra note 5, at iii (“Day laborers are active members of their communities. Half (52 percent) of all day laborers attend church regularly, one-fifth (22 percent) are involved in sports clubs and one-quarter (26 percent) participate in community worker centers.”); but cf. La Asociacion De Trabajadores De Lake v. City of Lake Forest, 624 F.3d 1083, 1088-89 (9th Cir. 2010) (addressing the issue of organizational standing and holding that for an organization to have standing it must either assert a valid claim on behalf of its members or show that its use of resources and its mission is affected by defendant’s conduct).

29. See Comité de Jornaleros de Redondo Beach v. City of Redondo Beach, 607 F.3d 1178, 1183 (9th Cir. 2010), reh’g granted en banc, 623 F.3d 1054 (9th Cir. 2010) (finding that as at least one of the plaintiff organizations has standing, there is no need to address the standing of other organizations).

30. See discussion infra Parts II.A-B, Part III.

31. See Kettles, supra note 9, at 144 (stating that as solicitation is a kind of “communicative activity, laws restricting it implicate the First Amendment”).

32. See Arturo Gonzalez, Day Labor in the Golden State, CAL. ECON. POL’Y, July 2007, at 13, available at http://www.ppic.org/content/pubs/cep /EP_707AGEP.pdf (“Nearly 60 California cities have ordinances that limit solicitation by workers or employers, and other cities are considering this strategy.”).
California, and Virginia adopt statutes limiting and, at times, criminalizing a day laborer’s use of public spaces to solicit employment, numerous lawsuits have been filed challenging the constitutionality of these statutes. The First Amendment inquiries advanced in these suits include the issue of when government action meant to promote a state interest, such as safety, may trump intrusion on traditionally protected activities, such as speech or assembly.

II. COMMERCIAL SPEECH, PUBLIC FORA, AND THE NATURE OF DAY LABOR: HOW SOME COURTS HAVE INTERPRETED ANTI-DAY LABORER RESTRICTIONS

A. Does a Day Laborer Soliciting Employment Constitute Commercial Speech?

A day laborer present on a street corner or sidewalk attempting to find employment raises important questions regarding the type of speech and conduct involved. This is because a court could hold that


34. See Gonzalez, supra note 32, at 13-14.

35. See generally Amy Pritchard, "We are Your Neighbors": How Communities Can Best Address a Growing Day-Labor Workforce, 7 SEATTLE J. FOR SOC. JUST. 371 (2008) (discussing an anti-solicitation ordinance passed by the town of Herndon, Virginia, and subsequent litigation that struck down the ordinance).

36. See Judge Blocks Law in Oyster Bay Aimed at Day Laborers, N.Y. TIMES, May 21, 2010, at A22 (discussing a temporary restraining order issued against an anti-solicitation ordinance passed by the city of Oyster Bay, New York, and stating that "[t]he law criminalized and provided a $250 fine for soliciting work on public streets").

37. See, e.g., Lopez v. Town of Cave Creek, 559 F. Supp. 2d 1030, 1036 (D. Ariz. 2008) (striking down Section 72.17(C) of the Town Code of Cave Creek, Arizona, prohibiting standing on a street and soliciting employment from a passing vehicle on the grounds that this was a content-based restriction and did not pass strict scrutiny); Comité de Jornaleros de Glendale v. City of Glendale, No. CV 04-3521, 2005 U.S. Dist. LEXIS 46603 (C.D. Cal. May 13, 2005) (granting a permanent injunction against the City of Glendale regarding § 9.17.030 of the Glendale Municipal Code, an anti-solicitation ordinance targeted at day laborers).
such activity constitutes either commercial speech or non-commercial speech. 38 The distinction affects the level of scrutiny applied, as shown by City of Cincinnati v. Discovery Network.39 In that case, the Court stated that the "'Constitution . . . accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.'"40 To determine whether speech is commercial, courts use a three-factor test from Bolger v. Youngs Drug Products Corporation,41 which requires deciding "whether the speech is an advertisement, whether the speech refers to specific goods or services, and whether the speaker has an economic motivation for the speech."42 If speech is deemed commercial, restrictions on that speech are subjected to a form of intermediate scrutiny.43 The key case addressing commercial speech, Central Hudson Gas & Electric Corporation v. Public Service Commission of New York,44 formulated the test determining the constitutionality of restrictions on commercial speech as:

The State must assert a substantial interest to be achieved by restrictions on commercial speech . . . the regulatory technique must be in proportion to that interest . . . . Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it

38. See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65 (1983) ("[T]he degree of protection afforded by the First Amendment depends on whether the activity sought to be regulated constitutes commercial or non-commercial speech . . . ."); see also, Kathryn Nicole Lewis, Student Work, Streets of Wrath: The Constitutionality of the Town of Jupiter's Non-Solicitation Ordinance, 37 STETSON L. REV. 471, 479 (2008) ("Commercial speech is speech that does no more than propose a business transaction and is limited to the promotion of goods or services." (citation omitted)); Gabriela Garcia Kornzweig, Commercial Speech in the Street: Regulation of Day Labor Solicitation, 9 S. CAL. INTERDISC. L.J. 499, 506-07 (2000) ("Speech that does ‘no more than propose a commercial transaction’ is constitutionally protected as commercial speech.’ (citation omitted)).


42. See Lewis, supra note 38, at 497 (citing Bolger, 463 U.S. at 66-67).

43. Central Hudson, 447 U.S. at 564.

44. Id. at 563.
provides only ineffective or remote support for the government’s purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.\footnote{45}

There has been some debate regarding whether the final prong of this test requires the government to use the “least restrictive means” to achieve its substantial interest.\footnote{46} Although the Court has not explicitly applied the “least restrictive means test,” it has struck down restrictions on commercial speech by finding that the government could achieve its stated goals through less restrictive measures.\footnote{47} This trend has encouraged some commentators to advocate for finding that day labor solicitation constitutes commercial speech as the Court’s track record would indicate a practice of invalidating restrictions of commercial speech based on the availability of less restrictive alternatives.\footnote{48} However, courts have been reluctant to find that day laborer solicitation constitutes commercial speech.\footnote{49} Even if a day laborer soliciting

\footnote{45. Id. at 564. An important consideration for the Court is whether a less restrictive measure could achieve the government’s stated interest. Id.; see also Liquormart Inc. v. Rhode Island, 517 U.S. 484, 507 (1996) (“It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State’s goal . . . .”); Kornzweig, supra note 38, at 508-13 (discussing how the Court has applied and adapted the Central Hudson test as to the standard of review applied to commercial speech).

46. See Kornzweig, supra note 38, at 509; see also, e.g., City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 417 n.13 (1993) (“To repeat . . . while we have rejected the ‘least-restrictive-means’ test for judging restrictions on commercial speech, so too have we rejected mere rational-basis review.”).

47. See Liquormart, 517 U.S. at 507; Kornzweig, supra note 38, at 508-13 (discussing how the Court has applied and adapted the Central Hudson test as to the standard of review applied to commercial speech).

48. See Lewis, supra note 38, at 476 (discussing how an ordinance passed by the town of Jupiter, Florida is a “regulation on commercial speech”); Kornzweig, supra note 38, at 506 (stating that a day laborer’s solicitation of employment constitutes commercial speech).

49. See Comité de Jornaleros de Redondo Beach v. City of Redondo Beach, 607 F.3d 1178, 1184 n.3 (9th Cir. 2010), reh’g granted en banc, 623 F.3d 1054 (9th Cir. 2010) (finding that the ordinance at issue does not implicate commercial speech because: (1) the plaintiffs did not contend that the day laborers constituted commercial speech and (2) the ordinance was not expressly limited to regulate
employment is not considered commercial speech, there are other First Amendment inquiries to consider.

B. Time, Place, and Manner Restrictions: When May the Government Restrict a Day Laborer’s Ability to Solicit Employment in a Public Forum?

In some key cases addressing day laborer solicitation, there is a considerable difference of opinion among judges regarding what standard of review to apply to day laborer activity and how to apply the selected standard. If typical day laborer activity is not considered commercial speech, then the extent to which a government may regulate the activity depends in part on the area in which the day laborer conducts his activity.

The critical inquiry is determining in what type of forum a day laborer’s solicitation occurs. Perry Education Association v. Perry Local Educators’ Association established three different forums associated with different kinds of public property and specific factors to determine the validity of restrictions on speech and access to these different forums. The first category, of most importance to day laborers, is a traditional public forum, which includes most public streets, including residential streets, sidewalks and public parks. However,

“purely commercial expression” (quoting S.O.C., Inc. v. County of Clark, 152 F.3d 1136, 1143 (9th Cir. 1998)).

50. See discussion infra Part II.B.I.

51. See discussion supra Part II.A.


53. See Lee, 505 U.S. at 678 (stating that the Court’s treatment of restrictions on expression taking place on government owned property is subject to a “forum based” analysis).


55. See Frisby v. Schultz, 487 U.S. 474, 481 (1988) (“[A]ll public streets are held in the public trust and are properly considered traditional public fora.”).

56. Perry, 460 U.S. at 45.

In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to
the government's ability to restrict expressive activities extends to public spaces and traditional public forums.\textsuperscript{57} In addressing the issue of the extent to which the government may restrict speech activities, the Court in \textit{Clark v. Community for Creative Non-Violence}\textsuperscript{58} wrote that "[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions."\textsuperscript{59} Day laborers engage in expressive conduct when gathering in public spaces as a means to find employment. Such activity is a form of solicitation, as day laborers actively engage and negotiate with passing motorists or other parties to contract for a day's work.\textsuperscript{60} However, courts generally have found that solicitation is a type of expression that has the same protections as other forms of traditionally protected speech.\textsuperscript{61}

\begin{quote}
limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which '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.'
\end{quote}

\textit{Id.} (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)). Generally, \textit{Perry} finds that there are three general types of public property forums: (1) traditional public forums like streets and parks; (2) designated public forums like government buildings generally open for public use; and (3) non-public forums like government buildings not generally open to the public. \textit{Id.} at 45-46; \textit{but see United States v. Kokinda, 497 U.S. 720, 727-28 (1990)} (distinguishing a sidewalk leading to an entrance for post office employees from \textit{Schultz} in finding that the post office sidewalk did not constitute a traditional public forum as it was built for the unique purpose of allowing post office patrons to enter and not intended for general public use).

\textit{57. See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)} ("[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech . . ."); \textit{see also Lee, 505 U.S. at 678} ("Where the government is acting as a proprietor, managing its internal operations, rather than acting as lawmaker with the power to regulate or license, its action will not be subjected to the heightened review to which its actions as a lawmaker may be subject.").


\textit{59. Id.} at 293.

\textit{60. See VALENZUELA, supra note 5, at i-iii} (discussing the various aspects of the day laborer's life in America).

\textit{61. See United States v. Kokinda, 497 U.S. 720, 725 (1990)} ("Solicitation is a recognized form of speech protected by the First Amendment." (citation omitted)); \textit{ACLU v. City of Las Vegas, 466 F.3d 784, 792 (9th Cir. 2006)} ("It is beyond
this finding, the issue becomes when the government may enact a valid restriction on speech in a public forum.

First Amendment protections extend to action taken by both the federal government and state governments. In *First National Bank of Boston v. Bellotti,*\(^{62}\) the Supreme Court stated that the right to free speech “is within the liberty safeguarded by the Due Process Clause of the Fourteenth Amendment.”\(^{63}\) Thus, courts use the same “time, place, or manner” considerations for local, state, or federal action restricting speech in public areas. In *Ward v. Rock Against Racism,*\(^{64}\) the Court stated that:

> Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions “are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”\(^{65}\)

\(^{63}\) *Id.* at 779; *see also* City of Ladue v. Gilleo, 512 U.S. 43, 45 n.1 (1994) (“The Fourteenth Amendment makes this limitation applicable to the States.”).
\(^{64}\) 491 U.S. 781 (1989).
\(^{65}\) *Id.* at 791 (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984); *see also* Clark, 468 U.S. at 293 (“[R]estrictions are valid provided that they are justified without reference to the content of the regulated speech, that
Based on Ward, restrictions on the "time, place, or manner" of speech must first address whether the restriction is content-neutral or content-based. Here, "[t]he Government's purpose [for promulgating the restriction] is the controlling consideration." The inquiry at this stage is to understand whether the government has passed the restriction because it specifically opposes the content of the speech at issue or whether the restriction passed due to reasons unrelated to the content of the speech or expression. When a restriction is contested on First Amendment grounds the government, as the body restricting conduct generally protected by the First Amendment, bears the burden of showing why the restriction is valid.

For day laborers, the question of whether a statutory restriction is content-neutral will often turn on whether the restriction focuses on day laborer solicitation of employment, specifically, or restricts all forms of solicitation generally. In the non-day laborer context, one example of where a court has found an anti-solicitation ordinance to be content-neutral is Association of Community Organizations for Reform Now v. Saint Louis County. This addressed a challenge to part of St. Louis County's traffic code that prohibited the solicitation of employment and charitable donations from occupants of vehicles. The court summarily stated with little analysis that the traffic code was "clearly neutral as to they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.

66. Ward, 491 U.S. at 791.
67. Id. The Ward Court stated:

The principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys . . . . 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.

Id.

68. See Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986) ("In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified.").
69. 930 F.2d 591, 594 (8th Cir. 1991).
70. Id. at 593.
the content of the regulated speech."\textsuperscript{71} However, in \textit{Lopez v. Town of Cave Creek}\textsuperscript{72} discussed in more detail \textit{infra}, the court found a similarly worded regulation to be content-based. The court found the regulation at issue "differentiat[ed] based on the content of speech on its face," because "[i]t prohibit[ed] solicitation speech, but not political, religious, artistic, or other categories of speech."\textsuperscript{73} Another factor that courts use to determine whether a restriction is content-neutral is whether the restriction serves some compelling government interest.\textsuperscript{74} One author notes that "[o]ver the years, the courts have identified a myriad of significant or substantial government interests, including crime prevention, fraud prevention, privacy protection, traffic safety, and the need to control traffic flow."\textsuperscript{75} In drafting restrictions, it seems that to pass constitutional muster local and state governments are encouraged to pass broader measures that ban all types of solicitation, as opposed to singling out specific efforts by day laborers.\textsuperscript{76} However, even when drafting broad anti-solicitation statutes, government entities must be mindful of the final prong of First Amendment test for "time, place, or manner" restrictions, which is to allow for sufficient alternative means of communication.\textsuperscript{77}

1. Comité de Jornaleros de Redondo Beach v. City of Redondo Beach

One of the most recent cases to address the First Amendment implications of ordinances intended to limit a day laborer's ability to solicit employment in public spaces was \textit{Comité de Jornaleros de

\textsuperscript{71} Id. at 594.
\textsuperscript{72} 559 F. Supp. 2d 1030 (D. Ariz. June 2, 2008).
\textsuperscript{73} Id. at 1032.
\textsuperscript{75} See \textit{Lewis}, supra note 38, at 489-90.
\textsuperscript{76} Id. at 511-12 (discussing how certain ordinances targeting day laborers are drafted so broadly in criminalizing public solicitation that they would likely not be considered "narrowly tailored" by reviewing courts).
\textsuperscript{77} See \textit{Ward}, 491 U.S. at 791 (quoting \textit{Clark}, 468 U.S. at 293).
Redondo Beach v. City of Redondo Beach. This case involved the constitutionality of Redondo Beach Municipal Code §37.1601, which makes it a crime to “stand[] on a street or highway and solicit[ ] employment, business, or contributions from the occupants of an automobile.” The Middle District Court of California found the ordinance to be content-neutral, but in the end held it as unconstitutional after finding that “the Ordinance [was] not narrowly tailored to address the City’s asserted interests nor did it leave open ample alternative channels for the speech it proscribes.” Afterward, the Ninth Circuit took the case on appeal and reversed the district court, finding the ordinance to be constitutional.

The Ninth Circuit’s decision to rehear Comité de Jornaleros en banc suggests that there is some disagreement over the outcome in

78. 607 F.3d 1178 (9th Cir. 2010). This case is of particular importance as it was cited in United States v. Arizona as the basis for disallowing First Amendment arguments to be heard in response to sections of Arizona’s controversial SB 1070 law, which made it a crime for day laborers to solicit employment. See United States v. Ariz., 703 F. Supp. 2d 980, 1000 n.16 (D. Ariz. 2010) (finding that Comité de Jornaleros “foreclose[d]” First Amendment challenges to parts of SB 1070 preventing day laborers from soliciting employment on public property).

79. The pertinent part of Redondo Beach Municipal Code § 3-7.1601 reads:
   It shall be unlawful for any person to stand on a street or highway and solicit, or attempt to solicit, employment, business, or contributions from an occupant of any motor vehicle. For purposes of this section, “street or highway” shall mean all of that area dedicated to public use for public street purposes and shall include, but not be limited to, roadways, parkways, medians, alleys, sidewalks, curbs, and public ways.

Comité de Jornaleros, 607 F.3d at 1181.

80. Id. at 1180.


82. Id. at 970.

83. Comité de Jornaleros, 607 F.3d at 1196 (“The district court erred . . . in holding that the Redondo Beach ordinance was not narrowly tailored and did not leave open ample alternative channels of communication. We also hold that the Redondo Beach ordinance is not unconstitutionally vague.”).

Comité de Jornaleros. In addition, Comité de Jornaleros provides insight on how courts decide whether a restriction on protected speech is content-based or content-neutral, whether a statute contains a valid time, place, and manner restriction, what other alternative means exist for those affected by restrictions, and what other First Amendment considerations should be considered.

Comité de Jornaleros centered on the city of Redondo Beach’s attempt to address problems allegedly associated with the ongoing presence of day laborers. In Comité de Jornaleros, the Ninth Circuit wrote that “[a] memorandum from the city attorney to the mayor explained that ‘the City has had extreme difficulties with persons soliciting employment from the sidewalks... over the last several years. There can be little question that traffic and safety hazards occur by this practice.’”85 After passing the full version of Redondo Beach Municipal Code §37.1601 in 1989,86 aimed at preventing groups of day laborers from gathering on public streets, the city “continued to experience traffic problems related to persons soliciting employment from automobiles at two of the city’s intersections.”87 Due to these persistent problems, the city decided to increase its enforcement of the ordinance. This included heightening the presence of city police officers “sometimes posing as potential employers.”88 After Redondo Beach police officers arrested multiple day laborers for violating the ordinance at issue, two groups, the Comité de Jornaleros de Redondo Beach (Committee of Redondo Beach Day Laborers) and the National Day Laborer Organizing Network (NDLON),89 filed suit “alleg[ing] that the Redondo Beach ordinance

85. Comité de Jornaleros, 607 F.3d at 1181. The court cites the city attorney as arguing that “the ‘ordinance was designed to alleviate sidewalk congestion and traffic hazards which occurred when large numbers of persons congregated on the sidewalks during the rush hours to obtain temporary employment.’” Id.

86. Id. Earlier in the 1980’s the City of Redondo Beach passed what is now subsection (a) of § 37.1601, addressing day laborers’ solicitation of employment from motorists. In 1989 the city added what is now subsection (b), which makes it a crime for a motorist to hire a day laborer while using or stopped on a public street. Id.

87. Id. at 1182.

88. Id.

89. Regarding the composition of these two groups, the court stated that the “Comité [de Jornaleros de Redondo Beach] identifie[d] itself as ‘an unincorporated association comprised of day laborers who... regularly seek work in the City of
deprived them and others of free speech rights guaranteed by the First and Fourteenth Amendments . . . "90

In Comité de Jornaleros, as well as other cases,91 the Ninth Circuit focused its analysis on the impact of restricting a person’s ability to solicit employment in a traditional public forum, such as city or town sidewalks.92 The Supreme Court has recognized that a traditional public forum invites special concern regarding government efforts to restrict First Amendment protections in those public forums.93 However, the Ninth Circuit in Comité de Jornaleros focused on the ability of government bodies to impose restrictions on the right to speak under certain circumstances. The majority reiterated that the Supreme Court carved out certain allowable restrictions on speech, even in public areas, based on the time, place, or manner of the speech.94

However, such restrictions must pass a form of intermediate scrutiny. This is because a court must find that the restrictions pass the following three key tests: the court must find that the restrictions “are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, Redondo Beach,” and NDLON identifie[d] itself as “a nationwide coalition of day laborers and the agencies that work with day laborers.”’ Id. at 1182.

90. Id.


92. See Comité de Jornaleros, 607 F.3d at 1184-85 (stating the “assum[ption] that the streets of Redondo Beach constitute a perpetual public forum, even when they are in use by vehicular traffic”). To support this assumption the court states “[a]ll public streets are held in the public trust and are properly considered traditional public fora.” Id. (quoting Frisby v. Schultz, 487 U.S. 474, 481 (1988)).

93. See Comité de Jornaleros, 607 F.3d at 1182, 1200 (citing Pleasant Grove City v. Summum, 555 U.S. ___ , ___, 129 S. Ct. 1125, 1132 (2009)) (finding that “[t]he government’s power to pass laws, regulations, or ordinances affecting speech in these areas [public fora] is . . . strictly limited”); see also Capitol Square Rev. & Advisory Bd. v. Pinette, 515 U.S. 753, 761 (1995) (stating that, in regards to a public fora, “a State’s right to limit protected expressive activity is sharply circumscribed . . . ”).

94. Comité de Jornaleros, 607 F.3d at 1184 (discussing that the government can make certain time, place, or manner restrictions provided such restrictions pass the tests articulated in Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).
and that they leave open ample alternative channels for communication
of the information."  

Many ordinances affecting day laborers, such as the one at issue
in Comité de Jornaleros, seek to prohibit and in some cases criminalize a
day laborer’s search for employment, which often occurs through
engaging in conversation with pedestrians or people in motor vehicles to
solicit employment.  

In considering statutory restrictions on solicitation
in public spaces, the majority in Comité de Jornaleros stated that “we
have long recognized [that solicitation] is a form of expression that
consists of both expressive content and associated conduct or acts.”
In finding that solicitation consists of both words and acts, the majority in
Comité de Jornaleros stated that “[t]he ‘words’ component of solicitation
includes both written and spoken communications.”

In regards to the “acts” aspect of solicitation, the majority focuses on the fusion of the act
of solicitation itself along with the act’s effect in stating “[t]he ‘acts’
component of solicitation includes the conduct of the person soliciting
... [and] also includes the effects of such conduct, such as impeding the
flow of traffic ...” The majority reasons that, although solicitation by
its very nature includes the combination of both content (words) and
conduct (acts), “[t]he dual nature of solicitation does not change the fact
that solicitation is a form of expression and ‘[e]xpression, whether oral or
written or symbolized by conduct, is subject to reasonable time, place, or
manner restrictions.’”

The majority in Comité de Jornaleros uses a holding from a
previous Ninth Circuit case, ACORN v. City of Phoenix, to support its
finding that the restriction at issue in the Redondo Beach ordinance is

95. Ward, 491 U.S. at 791 (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)) (validating a noise control measure enacted by New York City limiting the allowable noise level of an amphitheater in Central Park so as not to unduly disturb nearby residents).

96. VALENZUELA, supra note 5, at 4 (stating that “[m]ore than three-quarters of
day laborers (79 percent) congregate at informal hiring sites that have formed in
front of home improvement stores and gas stations, along busy thoroughfares and
near expressway onramps, and in parks and other public spaces”).

97. Comité de Jornaleros, 607 F.3d at 1184.
98. Id.
99. Id.
100. Id. (quoting Clark, 468 U.S. at 293).
101. 798 F.2d 1260, 1273 (9th Cir.1986).
“content neutral.” At issue in \textit{ACORN} was an ordinance passed by the city of Phoenix prohibiting people on public streets from soliciting donations from passing motorists in a practice known as “tagging.”

The Ninth Circuit in \textit{Comité de Jornaleros}, in its “content neutrality” analysis, found the ordinance, conduct restricted by the ordinance, the government interest involved, and the method of enforcement at issue in \textit{ACORN} sufficiently analogous to the City of Redondo Beach’s ordinance targeted at day laborers and, thus, held that \textit{ACORN} was controlling. One key reason that the Ninth Circuit found \textit{ACORN} controlling centered on the holding that dangers associated with “tagging” are similar to the dangers associated with day laborers soliciting employment from passing cars. However, Judge Wardlaw, the dissenting judge in \textit{Comité de Jornaleros}, made a compelling argument regarding the distinction between the ordinance at issue in

\textit{Comité de Jornaleros}, 607 F.3d at 1187 (holding that “[b]ecause there is no meaningful distinction between the Phoenix ordinance and the Redondo Beach ordinance as drafted, interpreted, and enforced, we conclude that the Redondo Beach ordinance is likewise aimed at acts, does not single out particular ideas for differential treatment, and is content neutral”).

\textit{ACORN}, 798 F.2d at 1262 (“Tagging” usually involves an individual stepping into the street and approaching an automobile when it is stopped at a red traffic light. The individual asks the occupants of the vehicle for a contribution to \textit{ACORN} and distributes a slip of paper, or ‘tag,’ providing information about \textit{ACORN} and its activities.”).

\textit{Comité de Jornaleros}, 607 F.3d at 1190. The court stated that: Redondo Beach, like Phoenix, contends that the key purposes of the ordinance are to avoid disruptions of traffic and to address safety concerns . . . . Our conclusion in \textit{ACORN} that solicitation demanding an immediate response from drivers increases the risks of traffic disruption and injury is equally applicable to Redondo Beach. Nothing in the record suggests that solicitation for employment raises a less significant risk of disruption in traffic flow than solicitation for contributions. And, as in \textit{ACORN}, we find that an ordinance prohibiting in-person demands requiring an immediate response from vehicle occupants, but allowing the distribution of literature to those same occupants, is narrowly tailored to meet traffic and safety concerns.

\textit{Id.}

\textit{Id.}
ACORN and that in Comité de Jornaleros. Judge Wardlaw found that, given the greater breadth and limiting effect of the ordinance passed by the city of Redondo Beach, the holding in ACORN should not be controlling. She focused on the fact that “[Redondo Beach’s] Ordinance ‘sweeps in a much larger amount of solicitation speech and speech-related conduct than the ordinance at issue in ACORN.’” Thus, Judge Wardlaw emphasized that as the Redondo Beach ordinance restricted all forms of solicitation in all public areas of the city, it had a far broader and more devastating impact than the limited anti-fundraising ordinance in ACORN and thus the majority erred in finding ACORN controlling.

On rehearing, the Ninth Circuit should follow the line of reasoning advocated in Judge Wardlaw’s dissent and thus find the Redondo Beach ordinance unconstitutional. This is for a number of reasons. First, on rehearing the Ninth Circuit should follow Judge Wardlaw’s reasoning that ACORN does not control for the reasons stated above. Because ACORN should not be controlling, the Ninth Circuit should find, as Judge Wardlaw did, that the Redondo Beach ordinance is not narrowly tailored and is instead over-inclusive. Second, the Ninth Circuit should follow Judge Wardlaw’s finding that “[t]he Ordinance effectively eliminates the only means by which day laborers can communicate their availability for employment.” Finally, Judge

106. Id. at 1999 (Wardlaw, J., dissenting) (stating that “[t]he district court specifically rejected the City’s contention that our opinion in ACORN v. City of Phoenix was controlling precedent, correctly determining that ACORN involved an ‘as-applied’ challenge and was otherwise distinguishable on its facts”).

107. Comité de Jornaleros, 607 F.3d at 1203 (Wardlaw, J., dissenting) (“The majority’s use of ACORN to justify the application of the Ordinance to their activities . . . is directly contrary to controlling precedent . . . ACORN did not address the broader question that we are now called to answer.”).

108. Id. at 1203 (quoting Comité de Jornaleros de Redondo Beach v. City of Redondo Beach, 475 F. Supp. 2d 952, 964-65 (C.D. Cal. 2006)).

109. Comité de Jornaleros, 607 F.3d at 1203 (Wardlaw, J., dissenting) (finding that as the Redondo Beach ordinance prohibits solicitation of employment in all public areas of the city, it sweeps more broadly than the ordinance at issue in ACORN and should be distinguished).

110. Id. at 1205-06 (Wardlaw, J., dissenting) (finding that the ordinance goes further than necessary to address the city’s interests “in traffic flow and safety” and thus is “overinclusive”).

111. Id. at 1209 (Wardlaw, J., dissenting).
Wardlaw correctly states the vital importance of access to public areas for people with limited resources by stating that "as places where individuals may express themselves without regard to the resources of the speaker or popularity of the message, traditional public fora serve as the main bulwark of the First Amendment." She also cites Justice Kennedy's concurrence in *International Society for Krishna Consciousness, Inc. v. Lee,* where he wrote that "[o]ne of the primary purposes of the public forum is to provide persons who lack access to more sophisticated media the opportunity to speak." By following Judge Wardlaw's approach in its decision on rehearing, the Ninth Circuit will make a decision that is both more accurate regarding First Amendment jurisprudence and mindful of the need for day laborers to have effective access to employment opportunities.

2. Lopez v. Town of Cave Creek, Arizona

*Lopez v. Town of Cave Creek, Arizona* is another case focusing on a local ordinance targeting day laborers. This district court case focused on a motion for preliminary injunction toward the ordinance at issue and provides a different conclusion than that of *Comité de Jornaleros* regarding the constitutionality of a similarly worded ordinance targeted at day laborers. The *Lopez* court found that the ordinance at issue is content-based and found that the ordinance does not pass strict scrutiny. Thus, the *Lopez* court provides a potential rationale as to why the Ninth Circuit, upon rehearing *Comité de Jornaleros.*

112. *Id.* at 1200 (Wardlaw, J., dissenting).
115. Judge Wardlaw analyzed the majority opinion by succinctly stating: "The majority tramples upon the right of free speech in the most traditional of public fora." *Id.* at 1212.
117. *Id.* at 1032.
118. *Id.* at 1034.
Jornaleros, should find the ordinance passed by Redondo Beach unconstitutional.\textsuperscript{119}

At issue in \textit{Lopez} is the fact that the town of Cave Creek “adopted Section 72.17(C) of the Town Code . . . Section 72.17(C) makes it unlawful for ‘[any] person [] 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.’”\textsuperscript{120} Regarding the plaintiffs who filed suit, the court wrote that “[p]laintiffs are day laborers who have obtained and desire to continue to obtain employment in ways prohibited by the Ordinance.”\textsuperscript{121}

Whereas the court in \textit{Comité de Jornaleros} found the ordinance at issue to be content-neutral, the court in \textit{Lopez} found a similarly worded ordinance, Section 72.17(C) of the Town Code, to be a “content-based” restriction, thus necessitating a strict scrutiny analysis and making the statute presumptively unconstitutional.\textsuperscript{122} The \textit{Lopez} court, citing \textit{ACLU of Nevada v. City of Las Vegas (ACLU II)},\textsuperscript{123} wrote that a “‘solicitation ordinance is content-based if either the main purpose in enacting it was to suppress or exalt speech of a certain content, or it differentiates based on the content of speech on its face.’”\textsuperscript{124} Thus, a court could find an ordinance to be content-based if the evidence showed

\textsuperscript{119} The language of Redondo Beach Municipal Code § 3-7.1601 (“It shall be unlawful for any person to stand on a street or highway and solicit, or attempt to solicit, employment, business, or contributions from an occupant of any motor vehicle . . .”) is almost the same as Section 72.17(C) of the Town Code of the Town of Cave Creek (making it unlawful for someone “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”). \textit{Lopez}, 559 F. Supp. 2d at 1031. Thus, the \textit{Lopez} court’s determination that Section 72.17(C) is a content-based restriction because it requires “an official . . . [to] examine the content of the message that is conveyed” could apply to the Redondo Beach ordinance as well. \textit{Id.} at 1032-33 (internal quotations omitted).

\textsuperscript{120} \textit{Lopez}, 559 F. Supp. 2d at 1031 (omissions in original). The violation of this ordinance “constitutes a civil traffic offense, which can result in a civil penalty not to exceed $250.” \textit{Id.}

\textsuperscript{121} \textit{Id.}

\textsuperscript{122} When a statute is found to be content-based, the court writes that “it is presumptively unconstitutional, and must satisfy strict scrutiny, i.e. be the least restrictive means to further a compelling interest.” \textit{Lopez}, 559 F. Supp. 2d at 1032.

\textsuperscript{123} 466 F.3d 784 (9th Cir. 2006).

\textsuperscript{124} \textit{Lopez}, 559 F. Supp. 2d. at 1032 (citing \textit{ACLU II}, 466 F.3d at 793).
that the government either wanted to patently censor certain conduct because it disagreed with the substance of the content, or if it seeks to selectively exclude certain kinds of conduct or speech. In describing the plaintiffs’ arguments, the court writes “[p]laintiffs do not argue that the Town enacted the Ordinance because of its disagreement with the message solicitation-speech conveys. Rather, Plaintiffs assert that the Ordinance is content-based because it bans only certain types of solicitation speech.”

The court agreed with the plaintiffs’ contention that Town Code Section 72.17(C) is content-based as it singles out solicitation, specifically the solicitation of employment, but not other forms of solicitation.

The critical point in the opinion is how the Lopez court distinguished the ordinance at issue, and its decision, from that in ACORN v. City of Phoenix, the main case that the Comité de Jornaleros court used to uphold the city of Redondo Beach’s ordinance targeted at day laborers. First, the Lopez court, making a similar point argued by Judge Wardlaw in Comité de Jornaleros, found that ACORN should only control in relation to its narrow facts, which focused on solicitation of funds from occupants of vehicles. The Lopez court

125. Id.
126. See id. at 1032-33. In supporting its argument that the ordinance is content-based, the court writes:

[T]he Ordinance differentiates based on the content of speech on its face. It prohibits solicitation speech, but not political, religious, artistic, or other categories of speech. It also prohibits solicitation on the topics of “employment, business or contributions,” while allowing solicitation of votes or ballot signatures. And, “[i]n order to enforce the regulation, an official “must necessarily examine the content of the message that is conveyed.”’

Id. (quoting ACLU II, 466 F.3d at 794).
127. 798 F.2d 1260 (9th Cir.1986).
128. Comité de Jornaleros v. Redondo Beach, 607 F.3d 1178, 1203 (9th Cir. 2010) (arguing that the Ninth Circuit’s decision in ACORN should be read narrowly as the opinion “focused entirely on the practice of in-person, immediate demands for funds in the street that actually disrupt the driver from continuing on,” as opposed to allowing bans on all kinds of solicitation speech).
129. Lopez, 559 F. Supp. 2d at 1033-34. In this part of the opinion, the court distinguishes between ACORN and ACLU II in deciding which case should apply. The court finds that ACORN banned a specific act of solicitation, seeking donations
stated that Town Code Section 72.17(C) "is an unconstitutional content-based restriction on free speech," as the ordinance seeks to repress specific verbal forms of solicitation for employment, not just the solicitation of funds like in *ACORN*. The *Lopez* court made an important finding, one that has also been advanced by some commentators: that the ordinance as written would also be unconstitutional under an intermediate scrutiny "time, place, and manner" analysis. The *Lopez* court found that "[e]ven if the [Town Creek] Ordinance was content-neutral, it would still be an impermissible time, place, and manner regulation because the Ordinance is not narrowly tailored to further the Town's interests." In structuring its argument, the *Lopez* court first focused on whether the Town established any significant interests served by the ordinance. The court wrote that "[i]f the Town's interests are substantial, the Court must determine whether the Ordinance 'burden[s] substantially more speech than is necessary to further the government's legitimate interests.'"

from occupants of vehicles, whereas *ACLU II* stood for the proposition that bans on verbal solicitation would be content-based. The court then stated that "[u]nlike the regulation at issue in *ACORN*, the Ordinance [passed by the town of Cave Creek] is not limited to in-hand solicitation of funds, but rather bans the words of solicitation-verbal appeals for employment. *ACLU II* therefore controls, not *ACORN*, and the Ordinance is content-based." *Id.* at 1034.

131. *Id.*
132. See Lewis, *supra* note 38, at 517-18. Lewis explains how ordinances targeted at day laborers will have to be drafted in order to pass constitutional review. She states that:

One possible approach would target only those types of solicitation that cause the most danger to traffic safety, such as solicitation requiring the solicited person to stop in the middle of the traffic flow, or solicitation involving pedestrians darting out into the street. An additional provision could focus on motorists, criminalizing the act of stopping a car in the flow of traffic . . . .

*Id.* at 519.

134. *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). Regarding how restrictive the ordinance may be in furthering the government's substantial interest, the *Lopez* court states: "Although the Ordinance need not be 'the least restrictive or intrusive means' of further the Town's interests, the Town 'may
The court found that the Town established a substantial interest in promoting traffic safety, yet found that the ordinance, in targeting a day laborer's ability to solicit employment which at times results in stopped vehicles, does not serve or promote the asserted interest of traffic safety but rather seems to serve the unasserted interest of traffic flow. Of particular interest is the court's finding that some of the Town's evidence, such as minutes from Town Council meetings, demonstrated that "[t]o the extent that people mentioned a 'safety' concern, it appears to be in reference to the safety of people from illegal immigrants, not traffic safety." The Lopez court also found that the ordinance was not narrowly tailored to an extent sufficient to pass intermediate scrutiny. The court appeared to find the ordinance an unnecessary regulation to promote the town's stated goal of traffic safety, because sufficient laws already

not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." Id. (quoting Ward, 491 U.S. at 798-99).

135. Lopez, 559 F. Supp. 2d at 1034 ("The Town asserts that it has a significant governmental interest in traffic safety. The Court agrees."); see also Lewis, supra note 38, at 490 ("Many cities enacting non-solicitation ordinances have in fact used the stated government interests of traffic safety and quality of urban life to support their regulations.").

136. Lopez, 559 F. Supp. 2d at 1034. Here, the Lopez court finds that in order for the Town to justify the ordinance, "[t]he Town must also provide evidence 'that is reasonably believed to be relevant' that the Ordinance advances the asserted interest in traffic safety." Id. (quoting City of Los Angeles v. Alameda Books, Inc., 535 U.S. 425, 438 (2002)). The court goes on to assert that "[t]he Town has provided no evidence that traffic safety is endangered by day laborers soliciting employment from vehicle occupants." Id.

137. Id. at 1034-35. This assertion reinforces the argument that laws targeted at day laborers are often more about addressing fears related to the presence of immigrants in communities as opposed to specific concerns about day laborers. See Rodriguez, supra note 15, at 575 ("Both the sheer scope and novel distribution of immigration today compound the extent to which immigration implicates the interests of localized political communities. State and local lawmakers are responding to this shifting demography by attempting to exert control over immigrant movement."); Stumpf, supra note 2, at 1566-69 (discussing the increase in state and local regulation of immigrant populations as partly a result of increasing immigration in the late 20th century and localities attempting to use their police power to address alleged deficiencies in federal immigration law).

138. Lopez, 559 F. Supp. 2d at 1035 ("Even assuming that the Town provided sufficient support that the Ordinance advances its asserted interest in traffic safety, though, the Ordinance is still not narrowly tailored.").
existed to provide the necessary means for the town to adequately promote the goal of traffic safety. This argument closely matched that presented by Judge Wardlaw in her Comité de Jornaleros dissent, in which she stated that “the City [of Redondo Beach] can simply enforce its existing traffic and safety ordinances to eliminate its articulated concerns [of promoting traffic safety and flow].”

When the Ninth Circuit rehears Comité de Jornaleros, one desirable outcome would be for the court to adopt Judge Wardlaw’s position and ask whether ordinances targeted at day laborers are truly necessary in light of pre-existing ordinances giving police latitude to promote the oft-cited interests of traffic safety and flow. On rehearing, the court should heed the words of Collins v. Jordan, cited by the Lopez court: “The generally accepted way of dealing with unlawful conduct that may be intertwined with First Amendment activity is to punish it after it occurs rather than to prevent the First Amendment activity from occurring in order to obviate the possible unlawful conduct.” The court should not allow an infringement on a day laborer’s First Amendment rights to stand if it is not truly necessary, especially since ordinances like Town Code Section 72.17(C) lead to “day laborers[ ] fac[ing] not only the loss of First Amendment freedoms, but also the loss of employment opportunities necessary to support themselves and their families.” To avoid this undesirable outcome, on rehearing Comité de Jornaleros the Ninth Circuit should apply the Lopez court’s interpretation of ACLU II to Redondo Beach Municipal Code § 3-7.1601 and find it a content-based restriction, as it requires authorities to discern the message conveyed by day laborers before enforcing the ordinance.

139. Id. (citing other existing ordinances in the Town of Cave Creek that cover traffic, parking, and loitering regulations).
140. Comité de Jornaleros de Redondo Beach v. City of Redondo Beach, 607 F.3d 1178, 1209 (9th Cir. 2010) (Wardlaw, J., dissenting).
141. 110 F.3d 1363 (9th Cir. 1996).
142. Id. at 1035 (quoting Collins, 110 F.3d at 1371-72).
143. Lopez, 559 F. Supp. 2d at 1036.
C. Parallel Cases: Restricting Pan-Handling

Ordinances that target pan-handling and the ability for people facing homelessness to gather in public spaces provide additional insight regarding how courts interpret and test state action restricting the First Amendment activities of vulnerable groups. Similarly to day laborers, many people facing homelessness rely on the use of public spaces for important activities critical to their survival, such as finding a place to sleep or getting money through begging. It is noted that "[i]n the absence of effective federal legislation, state and city governments have been left largely to their own devices to manage the problems posed by local homeless populations.”

144. There is some overlap between ordinances targeted at day laborers and those targeted at the homeless. In some cases, states and localities use laws originally targeted at the homeless and vagrant to regulate the presence of day laborers on streets or other public places. See Kettles, supra note 9, at 144 (describing how certain localities have shifted the focus of vagrancy ordinances toward restricting the ability for day laborers to solicit employment in public spaces); Lewis, supra note 38, at 508 (“Homeless panhandlers are just as likely to harass, litter, publicly relieve themselves, and make ‘undesirable uses of public property’ as are day laborers.”). Lewis’ comments allude to another correlation between day laborers and pan-handlers, which is that in the eyes of some people they pose the similar problem of negatively affecting the attractiveness of certain city or town areas. See id. at 508-10 (describing the government’s argument that day laborers affect the “quality of urban life”); Andrew J. Liese, Note, We Can Do Better: Anti-Homeless Ordinances as Violations of State Substantive Due Process Law, 59 VAND. L. REV. 1413, 1415 (2006) (stating that proponents of a ordinance to ban begging in the downtown area of Nashville, Tennessee, argued that the ordinance was necessary because beggars made the downtown area less attractive to tourists and others).

145. See Liese, supra note 144, at 1444 (“[A] law prohibiting sleeping in public is arguably intended exclusively to protect a city’s aesthetic image.”).

146. See id. at 1418 (providing a detailed description of the causes of homelessness). “Homelessness is most commonly a consequence of unemployment, low wages, rising housing costs, or any combination thereof.” Id.

147. See id. at 1415 (stating that the only significant federal legislation targeting homelessness is the Stewart B. McKinney Homeless Assistance Act of 1987, 42 U.S.C. §§ 11301-11472 (2006), which focuses on promoting services for the homeless).

148. Id. at 1415; see Louis A. Modugno, Comment, Brother Can You Spare a Dime?: The Panhandler’s First Amendment Right to Beg, 5 SETON HALL CONST. L.J.
In describing how states and localities have addressed the issue of homelessness, one author noted that “[m]any local governments have responded to the problems caused by homelessness by criminalizing certain conduct commonly associated with homelessness, such as begging, sleeping or camping in public, and loitering.”

To pose a First Amendment challenge toward ordinances restricting begging, another commentator, Louis Modugno, wrote that “begging first must be classified as speech.”

Modugno identified a split among the courts regarding whether begging is classified as speech; this question is strikingly similar to the issue of whether solicitation amounts to commercial speech or expressive conduct in the day laborer cases. Modugno stated that: “Some courts have refused to classify begging as speech, determining that begging is more conduct than speech and, therefore, lacking expression. Conversely, other courts have categorized panhandling as speech because it conveys a message worthy of First Amendment protection.” In identifying when courts have found begging to equate to speech, one can possibly better predict whether that court would view a day laborer soliciting employment in a public space as commercial speech or expressive conduct.

One of the most prominent cases in which begging was found to be expressive conduct is *Loper v. New York City Police Department*. In this case, the Court of Appeals for the Second Circuit reviewed the Southern District Court of New York’s certification of “a plaintiff class consisting of all ‘needy persons who live in the State of New York, who

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681, 683 (1995) (“Over thirty-five states and many municipalities have enacted statutes prohibiting begging in public places.”).

149. Liese, supra note 144, at 1415-16; see Modugno, supra note 148, at 683.

150. Modugno, supra note 148, at 685-86.

151. See Comité de Jornerlos de Redondo Beach v. City of Redondo Beach, 607 F.3d 1178, 1184-85 (9th Cir. 2010) (discussing whether a day laborer’s solicitation of employment constitutes commercial speech or expressive conduct and finding that the solicitation at issue is expressive conduct); id. at 1199 (Wardlaw, J., dissenting) (arguing that the majority incorrectly states that the ordinance at issue only regulated conduct and discussing why the ordinance also regulates commercial speech).

152. Modugno, supra note 144, at 686 (citations omitted).

153. 999 F.2d 699 (2nd Cir. 1993).
beg on the public streets or in the public parks of New York City, and found that an anti-loitering law under the New York Penal Code was unconstitutional on First Amendment grounds. Specifically at issue in Loper was N.Y. PENAL LAW § 240.35(1), which stated that a person could be found guilty of loitering if he ‘‘[l]oiterers, remains or wanders about in a public place for the purpose of begging.’’ Although the New York Police Department argued that no speech interest was implicated in the statute, the Second Circuit found that the statute ‘‘prohibits speech as well as conduct of a communicative nature.’’

In an argument similar to that used by the court in Lopez and Judge Wardlaw in Comité de Jornaleros, the Second Circuit in Loper refuted the New York City Police Department’s argument that the ordinance was necessary to combat the alleged harms caused by begging because there existed numerous pre-existing statutes giving the police

154. Loper, 999 F.2d at 701 (quoting Loper v. N.Y. City Police Dep’t, 802 F. Supp. 1029, 1033 (S.D.N.Y.1992)). The district court defined a “needy person” as “someone who, because of poverty, is unable to pay for the necessities of life, such as food, shelter, clothing, medical care, and transportation.” Loper, 802 F.Supp. at 1033.

155. Loper, 999 F.2d at 701.

156. N.Y. PENAL LAW § 240.35(1) (McKinney 1989).

157. Loper, 999 F.2d at 701 (quoting N.Y. PENAL LAW § 240.35(1) (McKinney 1989)).

158. Id. at 701.

159. Id. at 702.


161. See Comité de Jornaleros de Redondo Beach v. City of Redondo Beach, 607 F.3d 1178, 1209 (9th Cir. 2010) (Wardlaw, J., dissenting).

162. See Loper, 999 F.2d at 701-02. In describing the other laws available to address any ill effects arising from begging, the court states:

[T]he crime of harassment in the first degree is committed by one who follows another person in or about a public place or places or repeatedly commits acts that place the other person in reasonable fear of physical injury. N.Y. PENAL LAW § 240.25 (McKinney Supp. 1993). If a panhandler, with intent to cause public inconvenience, annoyance or alarm, uses obscene or abusive language or obstructs pedestrian or vehicular traffic, he or she is guilty of disorderly conduct. N.Y. PENAL LAW §§ 240.20(3), (5) (McKinney 1989). A beggar who accosts a person in a public place with intent to defraud that person of
the necessary authority to adequately address any problems that might arise. The Loper court then distinguished the pre-existing statutes addressing possible problems arising from vagrancy with the statute at issue by finding that the pre-existing statutes focused on conduct while the statute at issue targets speech and "conduct of a communicative nature." The court then focused on the "alternative channels" analysis by distinguishing Loper from Young v. New York City Transit Authority, a case in which the Second Circuit upheld a ban on begging in the New York City subways as constitutional under the First Amendment. The Second Circuit distinguished the ordinance in Young from the ordinance in Loper because in Young there were sufficient alternative means of communicating needs. The Loper court explained that "[t]he case before us does prohibit begging throughout the City and does leave individual beggars without the means to communicate their individual wants and needs."

money is guilty of fraudulent accosting. Id. § 165.30(1). The crime of menacing in the third degree is committed by a panhandler who, by physical menace, intentionally places or attempts to place another person in fear of physical injury. N.Y. PENAL LAW § 120.15 (McKinney Supp. 1993).

Id.

163. Id. at 701 ("It is ludicrous, of course, to say that a statute that prohibits only loitering for the purpose of begging provides the only authority that is available to prevent and punish all the socially undesirable conduct incident to begging described by the City Police.").

164. Id. at 702.

165. 903 F.2d 146 (2d Cir. 1990), cert. denied, 498 U.S. 984 (1990).

166. See Loper, 999 F.2d at 702 (discussing the Second Circuit's analysis and findings in Young).

167. Id. Here, the Loper court discusses the Second Circuit's decision in Young:

Most pertinent to our analysis in the case at bar, we stated: "Under the regulation, begging is prohibited only in the subway, not throughout all of New York City. It is untenable to suggest, as do the plaintiffs, that absent the opportunity to beg and panhandle in the subway system, they are left with no means to communicate to the public about needy persons."

Id. (quoting Young, 903 F.2d at 160).

168. Loper, 999 F.2d at 702.
In reaching this conclusion, the Loper court made a similar analysis to that made in *Town of Herndon v. Thomas*, a case dealing with an ordinance affecting day laborers. The court in *Town of Herndon* found that the effect of an ordinance banning the solicitation of employment on public streets effectively prevented day laborers from seeking employment and that no “ample alternative channels” existed where day laborers could find employment. Thus, both the Loper and *Town of Herndon* decisions shed light on the need for “ample alternative channels” for those affected by statutes restricting conduct protected by the First Amendment. Individuals engaging in such conduct, whether begging or soliciting employment, must still be permitted to effectively engage in their desired speech activity with sufficiently similar success as was achieved in the now restricted channel.

III. REASONABLE ALTERNATIVES: THE STATE OF THE LAW AND AFFIRMING THE RIGHT OF DAY LABORERS TO SOLICIT EMPLOYMENT

For day laborers, one potentially effective reasonable alternative to soliciting employment on sidewalks and street corners is going to a labor or worker center. Worker centers have the potential to provide a number of protections and services to day laborers. However, there are also concerns about the limits of worker centers, as evidenced by Kettles who writes: “Tying aid in the form of food, education, and referral services to occupation seems unduly narrow and likely to lead to inconsistent levels of service being delivered to otherwise similarly situated claimants.”

This is not to say that attempts to form worker centers should be abandoned but only that they cannot serve as a complete solution to problems facing day laborers.

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170. *Town of Herndon*, 2007 Va. Cir. LEXIS, at *15-18 (discussing how the ordinance at issue left day laborers with no sufficient alternative means to find employment, which they had been able to do prior to the enforcement of the ordinance).
Some cases have addressed the issue of whether a worker center constitutes a sufficient reasonable alternative when an ordinance prevents a day laborer from soliciting employment in a public forum. The Town of Herndon decision established that a temporary site where day laborers could solicit employment is not sufficient as an “alternative channel.” The court found that “[b]y specifically describing the assembly site as temporary, the Town clearly intends for the site to exist for an uncertain period of time. However, the Ordinance regulating vehicular employment solicitation except at its temporary assembly site does not have a similar temporal element.” As some commentators described, day laborers need access to hiring sites where they can negotiate employment possibilities with willing contractors. As discussed in Town of Herndon, a temporary hiring site would be considered an insufficient “alternative channel” as it does not constitute a longer-term solution for day laborers to continue to have access to contractors looking to hire them. Thus, day laborers must rely on their First Amendment rights to allow them access to sufficient employment opportunities, either by prohibiting ordinances that bar their ability to solicit employment or by granting them access to hiring sites that provide similar employment opportunities as would be available to a day laborer in an informal market.

For day laborers, one of most common “alternative channels” is a day labor agency that serves the same purpose as informal hiring sites. The situational background of Town of Herndon demonstrates some of the limitations posed by day labor agencies as an alternative channel. Town officials initially responded to the presence of day laborers by creating a center where day laborers could congregate and be hired by contractors. However, “[m]any local residents opposed the center, primarily because it did not verify the immigration status of workers and

173. Town of Herndon, 2007 Va. Cir. LEXIS, at *15 (“[T]his temporary assembly site is insufficient to show that the Ordinance leaves open ‘ample alternative channels.’”).
174. Id.
175. VALENZUELA, supra note 5, at 1.
177. Pritchard, supra note 35, at 371-73 (discussing various community reactions to day laborers and a day labor agency in the town of Herndon).
178. Id. at 371.
ultimately voted to unseat the mayor and city council members who created it.”

Given that many day laborers are unauthorized workers, the situation surrounding the Town of Herndon provides an example of the difficulties facing day laborers and their ability to have effective access to employment opportunities. In some instances, day labor agencies are realistic options in communities that support them. Law professor Cristina Rodriguez stated that day labor “centers have arisen as a response to a public safety need, and to facilitate a form of labor that has benefits for everyone involved. They also help prevent worker exploitation by bringing hiring activity into a public and regularized setting.” This argument highlights the many benefits of day labor agencies. However, as another law professor, Gregg Kettles, observed:

Recent experience with indoor day labor work centers operated by government and nonprofit organizations demonstrates that they do a poor job helping day laborers find work. Offering fewer work opportunities than the street, they are shunned by many workers. Their institutionalization and formalization of work makes them eerily similar to public homeless shelters, which promised independence and hope but delivered dependence and despair.

Both Kettles’ observations and the closing of the day labor center at issue in the Town of Herndon case highlight the limitations of day labor agencies as a comprehensively effective “alternative channel” for day laborers to solicit employment. To fully safeguard day laborers’ ability to find sufficient employment opportunities, courts should be hesitant to find worker centers, whether temporary or permanent, as effective alternative means for day laborers to solicit employment.

179. Id.; see also Rodriguez, supra note 15, at 599 (describing the situation regarding the Town of Herndon and day laborers).
180. See VALENZUELA, supra note 5, at 17.
181. See Rodriguez, supra note 15, at 596-600 (discussing how day labor agencies can be one effective response for local governments to help day laborers and immigrant communities generally to better integrate into the community).
182. Id. at 600.
183. Kettles, supra note 9, at 141.
Although worker centers can help day laborers in many ways, courts should not allow the presence of a worker center to justify prohibitions on a day laborer’s ability to solicit employment in public fora.

IV. CONCLUSION

Even with the economic downturn, day laborers will continue to play an important role in the economy.184 The ongoing need for day laborers and the lack of comprehensive immigration reform creates a difficult situation for immigrant day laborers who may want to join the formal economy. But with few, if any, realistic options, they will have to rely on the unpredictable day labor market. For day laborers to find work, they must be able to make themselves known to willing contractors who need to hire temporary workers.185 In the communities where day labor markets exist, city and municipal officials and planners face balancing the need for day laborers to have realistic employment options along with the government’s interests in promoting public safety and avoiding alleged nuisances brought about by informal day labor hiring sites.

The presence and practices of day laborers draw attention to First Amendment concerns by raising questions such as to what extent do day laborers have the right to gather and solicit employment in public spaces and especially when state or local governments may impose restrictions on that right. As this Note has discussed, there have been mixed results when courts have validated or invalidated different statutory regimes meant to exclude day laborers from public spaces. Governments face challenges in drafting legislation broad enough as to be considered “content-neutral” but not so broad as to infringe or affect unintended parties, which could also lead to selective enforcement or overbreadth challenges to the statutes.186 More importantly for day laborers, this Note

184. REAVIS, supra note 12, at 173-74 (discussing the ongoing need for temporary work arrangements).
185. See Lopez v. Town of Cave Creek, Ariz., 559 F. Supp. 2d 1030, 1036 (D. Ariz. 2008) (“Plaintiffs, as day laborers, face not only the loss of First Amendment freedoms, but also the loss of employment opportunities necessary to support themselves and their families.”).
186. See Kettles, supra note 9, at 144-45 (discussing the various challenges facing the viability of ordinances targeted at day laborers such as First Amendment
addresses the benefits, and limitations, of day labor agencies. Although agencies have in many cases benefited day laborers, the instances of community backlash due to concerns about facilitating the hiring of unauthorized workers presents challenges to policy-makers and advocates seeking to work together with day laborers to improve employment options and worker protections.\footnote{187}

Without comprehensive immigration reform, it will be difficult to adequately addresses the needs of day laborers and help states and localities address issues raised by the presence of unauthorized workers.\footnote{188} Any comprehensive immigration reform package should include provisions that allow immigrant day laborers to take advantage of services offered by employment agencies and encourage local governments to fund and support such centers. In the absence of such centers, day laborers should be allowed to continue using public places to solicit employment. Instead of creating new statutory regimes directed at day laborers, local governments can use existing laws to address any intermittent problems such as excessive noise or littering.\footnote{189}

Those concerned about day laborers and First Amendment protections should watch closely for the result of the en banc rehearing of...
Comité de Jornaleros, as this decision will likely impact the viability of other ordinances targeted at day laborers. On rehearing, the Ninth Circuit should find Redondo Beach Municipal Code §37.1601 unconstitutional. One option is for the Ninth Circuit to make a finding similar to that of Lopez and hold that the ordinance is content-based and must pass strict scrutiny. In the alternative, the Ninth Circuit should adopt the approach advocated in Judge Wardlaw's dissent and find the ordinance unconstitutional due to not being narrowly tailored or not allowing sufficient alternative means for day laborers to seek employment. Such a decision could go a long way toward discouraging other states and localities from passing restrictive anti-day laborer measures, and allow day laborers an effective opportunity to make themselves known to employers and have a greater opportunity to find adequate employment.190

190. Although the ability of day laborers to solicit employment is important to economic livelihood, there are still many other issues to address regarding the treatment of day laborers. See, e.g., VALENZUELA, supra note 5, at ii, 6, 12 (noting problems such as lack of workplace protections, wage theft, and low rates of pay). As these abuses can be attributed, at least in part, to the fact that many day laborers are unauthorized workers, comprehensive immigration reform providing a viable path to citizenship would be one significant measure to help reduce employment difficulties faced by day laborers. Id. at 26.