No. 06-55750

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Plaintiffs - Appellees,

v.

CITY OF REDONDO BEACH,

Defendant - Appellant.

Appeal from the United States District Court
Central District of California
Honorable Consuelo B. Marshall

CASE NO. CV 04-9396 CBM

# ANSWERING BRIEF OF APPELLEES

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## INTRODUCTION

Day laborers stand on public street corners and sidewalks, asking for employment from willing listeners. The core of this speech is the unobtrusive statement: "I need work." Yet, the City of Redondo Beach threatens to remove day laborers from these public fora to appease disgruntled City residents, who dislike day laborers and what they represent. The City's Ordinance criminalizes day laborers for doing nothing more than speaking out about their lives, need for work, and desire to support themselves and their families. Redondo Beach's discriminatory restriction on such speech runs afoul of bedrock First Amendment principles.

## JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(a), and 2201 and 42 U.S.C. § 1983. This Court has jurisdiction under 28 U.S.C. § 1291. The district court granted summary judgment in favor of Plaintiffs on April 27, 2006 and entered a final judgment on June 2, 2006. The City filed a timely Notice of Appeal on May 22, 2006. Fed. R. App. P. 4(a)(2).

## STATEMENT OF ISSUES

**1**. Standing:

(a) Whether the frustration of NDLON's mission and diversion of its resources are sufficient to establish organizational standing;

(b) Whether Plaintiffs have associational standing, insofar as their members have been arrested under the Ordinance and deterred from seeking work on public streets and sidewalks; and

(c) Whether the violation of First Amendment rights of parties not before the court gives Plaintiffs standing under the overbreadth doctrine.

**2.** First Amendment:

(a) Whether Redondo Beach's sweeping, content-based restriction on the solicitation of employment, business, and contributions is the least restrictive means of accomplishing a compelling governmental interest; and

(b) Whether, alternatively, the Ordinance fails to satisfy intermediate scrutiny because it is not narrowly tailored and fails to leave open ample alternative channels of communication.

## STATEMENT OF THE CASE

In October 2004, Defendant City of Redondo Beach ("City" or "Redondo Beach") launched an undercover sting operation against day laborers. (ER 1439) Police officers, dressed as employers, offered work to and then arrested day laborers under section 3-7.1601 of the Redondo Beach Municipal Code ("Ordinance"), which prohibits solicitation of business, employment, and contributions on public streets and sidewalks. *Id*.

On November 16, 2004, Plaintiffs filed a complaint for injunctive and declaratory relief, challenging the Ordinance's constitutionality. (ER 1-6) On December 13, 2004, the district court granted Plaintiffs' motion for a preliminary injunction. (ER 31, 55-67) On January 13, 2005, the City filed an appeal of the preliminary injunction order. (ER 101-02) On May 11, 2005, the Ninth Circuit affirmed the district court's order. (ER 107)

The City served discovery on Plaintiffs, seeking the immigration status of their members. (ER 843-1096) On June 30, 2005, Plaintiffs moved for a protective order. (ER 611-642) The Magistrate Judge granted in part and denied in part Plaintiffs' motion, ordering Plaintiffs to reveal how many of their members were undocumented. (ER 108-112) Plaintiffs filed a motion for reconsideration, which the district court granted, barring discovery of the immigration status of Plaintiffs' members. (ER 113-122)

In October 2005, the parties filed cross-motions for summary judgment. (ER 123-52; 1385-1415) On April 27, 2006, the district court granted summary judgment to Plaintiffs. (ER 1817-44) Final judgment was entered on June 2, 2006. (ER 1904a) The City filed a timely Notice of Appeal on May 22, 2006. (ER 1845-46)

On August 18, 2006, the City filed an *ex parte* application for a stay with the district court (ER 1905-1909), which Plaintiffs opposed (ER 1925-1931). On September 25, 2006, the district court issued a tentative ruling denying the *ex parte* application for lack of jurisdiction. (ER 1949)

## STATEMENT OF FACTS

### I. The Plaintiffs

The Comite de Jornaleros de Redondo Beach ("Comite"), or Committee of Day Laborers of Redondo Beach, is an association comprised of day laborers that offers workers a support network. (ER 1431-32 ¶¶ 2, 5-6) Comite has between 40 and 50 members who regularly hold meetings and seek day labor in Redondo Beach; its members have been arrested under the City's Ordinance. (*Id.* ¶¶ 5-6; 1433 ¶¶ 11-12)

The National Day Laborer Organizing Network ("NDLON") is a nationwide coalition of day laborers and agencies that work with day laborers. (*Id*. ¶ 4) The mission of NDLON is to strengthen and expand the work of local day laborer organizing groups, advance the interests of low-wage and immigrant workers, and develop successful models for organizing workers. (ER 1620 ¶ 3) NDLON works on behalf of and includes day laborers in Redondo Beach who have been arrested by the City for seeking work on public streets and sidewalks. (ER 1431 ¶ 4; 1433 ¶¶ 11-12)

### II. Day Labor

Day laborers are hired on a temporary basis to perform casual labor, such as gardening, child care, house cleaning, and elder care. (ER 1432 ¶ 8) Since the employment is informal, day workers and employers do not find each other through advertising or door-to-door soliciting. (ER 1432 ¶ 9)

Rather, the workers announce their availability for work through the very act of gathering in a public area, making themselves visible, gesturing to potential employers, or otherwise expressing their desire to work. *Id*.

**III. The Redondo Beach Anti-Solicitation Ordinance.**

Section 3-7.1601 of the Redondo Beach Municipal Code provides:

> (a) 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 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.
>
> (b) It shall be unlawful for any person to stop, park or stand a motor vehicle on a street or highway from which any occupant attempts to hire or hires for employment another person or persons. (ER 1428)

The Ordinance proscribes solicitation directed at the occupant of "any motor vehicle," without regard to whether the vehicle is safely stopped or parked, or whether the solicitation calls for an immediate response or has any impact on traffic. (*Id*.) The Ordinance does not define the terms "solicit," "attempt to solicit," "business," or "contributions." (*Id*.)

The Ordinance was enacted to pacify local residents and businesses, who had a "problem" with the fact that day laborers were "gathering" in public forums, such as sidewalks, and "hoping to obtain work." (ER 231)

The Mayor of Redondo Beach urged the City council to "eliminate this problem of congregating day laborers." (ER 230)

Consistent with the Mayor's directive, Redondo Beach enforced the Ordinance against day workers and potential employers. (ER 1433 ¶ 11; ER 1439-40 ¶¶ 4, 9, 12) As a result, many of Plaintiffs' members have been deterred from exercising their expressive rights. (ER 1433-34 ¶ 13) When day laborers cannot exercise their lawful rights to solicit employment, they lose not only the opportunity for speech, but also the means to support themselves and their families. (ER 1432-33 ¶ 10)

## STANDARD OF REVIEW

The constitutionality of an ordinance is reviewed *de novo*. *ACLU v. City of Las Vegas ("ACLU II")*, 466 F.3d 784, 791-92 (9th Cir. 2006) . A district court's grant of summary judgment is also reviewed *de novo* and may be affirmed on any ground supported by the record. *ACLU v. City of Las Vegas ("ACLU I"*), 333 F.3d 1092, 1096-97 (9th Cir. 2003). Evidentiary rulings made in the context of summary judgment are reviewed for abuse of discretion. *Id*. at 1097. An order granting permanent injunctive relief is also for abuse of discretion. *Id*. A district court's ruling on a magistrate judge's discovery order is reviewed under the clearly erroneous or contrary to law standard. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004).

## SUMMARY OF ARGUMENT

Plaintiffs have standing on three independent grounds. First, NDLON has organizational standing because the Ordinance frustrates its mission of assisting workers in securing jobs and has diverted resources that would have otherwise been used to benefit its members. *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002). Second, Plaintiffs have associational standing because their individual members have been injured by being arrested and deprived of their First Amendment right to seek work in public forums. *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1159 (9th Cir. 1998). Third, Plaintiffs have overbreadth standing because the Ordinance inhibits the First Amendment rights of parties not before the Court and creates an unacceptable risk of the suppression of ideas. *Young v. City of Simi Valley*, 216 F.3d 807, 815 (9th Cir. 2000).

Redondo Beach's Ordinance violates the First Amendment. The Ordinance, which criminalizes speech by individuals on public streets and sidewalks, fails the reasonable time, place, and manner test. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The Ordinance is content-based because it singles out solicitation on the topics of business, employment, and contributions. *ACLU II*, 466 F.3d at 792-96. It is therefore presumptively unconstitutional and subject to strict

scrutiny. *Id*. at 792, 797. The secondary effects doctrine does not save the Ordinance from strict scrutiny. This doctrine has been applied to laws regulating sexual or pornographic speech, *Gammoh v. City of La Habra*, 395 F.3d 1114, 1123 (9th Cir. 2005), but not to restrictions on solicitation speech. *ACLU*, 466 F.3d at 793, 797.

Moreover, the City's "primary motivation" was not to control secondary effects. *Gammoh*, 395 F.3d at 1123. Rather, the Ordinance targets the primary effects of day laborers' speech – *i.e.*, its persuasive effect on drivers who pull over to listen, as well as its repellant effect on City residents who dislike what day laborers have to say. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 n.7 (1992). The City also fails to prove that the problems alleged by the City are uniquely attributable to the solicitation of employment, business, and contributions. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 430 (1993).

The Ordinance does not survive strict scrutiny because it is not the least restrictive means of achieving the City's stated interests. *ACLU II*, 466 F.3d at 797 (striking down anti-solicitation ordinance which, on its face, prohibited a broad range of speech, including the peaceful, unobstructive distribution of literature requesting future support of an organization).

The Ordinance fails to survive even intermediate scrutiny, which governs content-neutral ordinances, because it impermissibly targets a substantial amount of constitutionally protected speech that is not the source of the "evils" it purports to combat. *Id.* at 796 n.13. The Ordinance is substantially overbroad because it prohibits solicitation, without regard to whether the speech calls for an immediate response or has any impact on traffic. It bans solicitation, even if directed at willing listeners in safely parked vehicles.

The Ordinance is also not narrowly tailored because the City could achieve its stated goals by enforcing existing laws regulating conduct, instead of speech. *Edwards v. City of Coeur D'Alene*, 262 F.3d 856, 865 (9th Cir. 2001); *Collins v. Jordan*, 110 F.3d 1363, 1371-72 (9th Cir. 1996).

The Ordinance's lack of narrow tailoring is further evidenced by its vagueness. The Ordinance, which does not define the key terms, "solicit," "attempt to solicit," "business," or "contributions," fails to provide adequate notice to residents about what is prohibited. The Ordinance also impermissibly delegates to police officers critical determinations for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir. 1998).

Finally, the City has not met its burden of demonstrating that there are ample alternative avenues for speech. The City seeks to force day laborers out of public forums and onto private property or out of the City entirely, thereby preventing day laborers from reaching their intended audience. *United States v. Baugh*, 187 F.3d 1037, 1044 (9th Cir. 1999); *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 93 (1977).

The Ordinance is not a reasonable time, place, manner regulation; rather, it is a content-based law that fails to survive strict scrutiny.

## ARGUMENT

### I. NDLON and Comite Have Standing to Challenge the Ordinance.

NDLON and Comite, whose members have been arrested under the Ordinance and deterred from seeking work in public forums, have been injured. As such, Plaintiffs have organizational standing, associational standing, and standing under the overbreadth doctrine.

#### A. NDLON Has Organizational Standing.

It is well-settled that an organizational plaintiff has standing when it has suffered injury-in-fact, such as the frustration of its mission and diversion of its resources. *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 379 (1982);[1] *Fair Hous. of Marin*, 285 F.3d at 905; *El Rescate Legal Services, Inc. v. Executive Office of Immigration Review*, 959 F.2d 742, 748 (9th Cir. 1992) (*en banc*). NDLON has suffered both types of injury.

NDLON is a nationwide coalition of day laborers and agencies that works with day laborers. (ER 1431 ¶ 4) NDLON's mission is to strengthen and expand the work of local day laborer organizing groups, advance the interests of low wage and immigrant workers, and develop successful

[1] The City attempts to distinguish *Havens Realty* by emphasizing that the plaintiff organization in that case had alleged injury in fact in its complaint. But, the City ignores the procedural context in which the standing issue arose in *Havens – i.e.*, in the context of a motion to dismiss, in which the court could only consider the complaint. *Id*. at 369. Of course, a court may consider more than the pleadings at the summary judgment stage.

models for organizing workers. (ER 1620 ¶ 3) NDLON's mission has been frustrated by the City's enforcement of its Ordinance, which has deterred day laborers from gathering in public forums and exercising their First Amendment right to seek work. (*Id*. ¶ 5; ER 1433-34 ¶¶ 11-13).

As a result of the Ordinance, NDLON has also been forced to divert its resources. (ER 1620-21 ¶¶ 5-6) Pablo Alvarado, NDLON's National Coordinator, testified that NDLON has expended resources in meeting with day laborers to address concerns regarding the status of the Ordinance, resources that would have otherwise been expended for the benefit of its members. (ER 1219:5-15)

In addition, Veronica Federovsky testified that after police began arresting day laborers, she met with Comite and its members to discuss the arrests, almost on a daily basis for several months, and went to the police department to look for arrested day laborers. (ER 1139:22-1140:11; 1142:4-1144:23; 1146:25-1147:23) These were not her job duties as NDLON's West Coast Coordinator; rather, her responsibilities were to coordinate the networking and activities of NDLON's West Coast members, assist with national activities such as conventions, and assist day laborers in securing jobs (ER 1105:25-1108:3) – not to intervene in the criminal justice system. *See El Rescate*, 959 F.2d at 748 (resources expended in representing clients

that would have otherwise been spent in other ways sufficient to establish organization's standing); *Vill. of Bellwood v. Dwivedi*, 895 F.2d 1521 (7th Cir. 1990) (deflection of agency's time and money from counseling to legal efforts was sufficient to confer standing on organization).

In the proceedings below, the City failed to present any evidence to rebut NDLON's evidence of injury. Rather, the City merely argued that Plaintiffs' evidence was insufficient. (ER 1799) Yet, the undisputed evidence establishes that NDLON's mission has been frustrated and that NDLON was required to divert resources as a result of the Ordinance.

Because NDLON has standing in its own right, this Court may turn to the merits of Plaintiffs' constitutional claims. *See Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263-264 (1977) (refusing to consider whether the other individual and corporate plaintiffs had standing since at least one plaintiff had demonstrated standing); *Bd. of Natural Res. v. Brown*, 992 F.2d 937, 943 (9th Cir. 1993) (same).

### B. Plaintiffs Have Standing to Sue on Behalf of Their Members Who Have Been Injured by the Ordinance.

Alternatively, Plaintiffs have associational standing. An organization bringing suit on behalf of its members establishes standing when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and

(c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Presidio Golf Club*, 155 F.3d at 1159 (quoting *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)) (internal quotation marks omitted).

### 1. NDLON Has Standing to Sue on Behalf of Members Who Have Been Arrested for Seeking Work.

NDLON's members include day laborers who have been arrested under the Ordinance for seeking work in Redondo Beach public forums and chilled from exercising their rights. (ER 1431 ¶ 4; 1433-34 ¶¶ 11-13). NDLON's members have clearly been injured by the Ordinance. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392 (1988) (risk of criminal prosecution and economic harm sufficient to confer standing); *S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1148 (9th Cir. 1998) ("the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury") (citations omitted).

The City does not dispute these injuries; rather, the City asserts that NDLON's members have no legally protected interest in seeking work and therefore lack standing to bring suit.[2] The City's argument is without merit.

[2] The City also characterizes its ordinance is "a municipal ban on an activity that is a violation of federal [immigration] law." Appellant's Br. at 20. However, federal law preempts state and local laws that seek to regulate the employment of undocumented immigrants. 8 U.S.C. § 1324a(h)(2).

The City is incorrect that individuals have no standing to bring a First Amendment challenge to a law, if they seek to engage in conduct that is otherwise unlawful. Appellant's Br. at 17. To the contrary, even individuals burning crosses in the fenced yard of an African-American family have standing to bring a First Amendment challenge, despite the fact that cross-burning violates "any of a number of laws." *R.A.V.*, 505 U.S. at 380. The Supreme Court entertained the cross-burners' First Amendment challenge and held that St. Paul's ordinance violated the First Amendment because the City had "sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *R.A.V.*, 505 U.S. at 396.

The City's contention that undocumented persons have no standing to sue under the First Amendment also contravenes the law of this Circuit. As this Court has held, the First Amendment protects individuals, regardless of their immigration status. *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1063-64 (9th Cir. 1995), *rev'd on other grounds*, 525 U.S. 471 (1999). *See also Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Aliens, 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.").

Furthermore, the record establishes that the work sought by NDLON's members is lawful. Chris Newman, NDLON's legal programs coordinator, submitted testimony that day laborers are hired on a temporary basis by homeowners to perform informal jobs such as gardening, child care, house cleaning, and elder care. (ER 1432 ¶¶ 8-9; ER 886:19-22) This type of casual labor is lawful, regardless of the immigration status of the individuals performing the labor. *See* 8 C.F.R. § 274a.1(h) (employment verification provisions of Immigration and Nationality Act do not apply to casual employment by individuals who provide domestic service in a private home that is sporadic, irregular, or intermittent).

In its brief, the City challenges Mr. Newman's qualifications to testify about the type of work performed by day laborers. Yet, the record demonstrates that Mr. Newman has extensive personal knowledge regarding day laborers and the type of work they do. (ER 1432 ¶ 8 – "I personally have worked with day workers for over three years, and have had personal conversations with hundreds of day laborers."). Further, Mr. Newman frequently meets with NDLON and Comite members in Redondo Beach, who are day laborers, discusses their concerns, and addresses issues affecting them. (ER 1431-32 ¶¶ 2, 5) He also testified that NDLON's member organizations keep detailed records on the types of employers who

frequent day worker centers and the types of work day laborers perform. (ER 1432 ¶ 8) This is more than sufficient to establish that Mr. Newman has the requisite personal knowledge to testify about the type of work day laborers perform. *Barthelemy v. Air Lines Pilots Ass'n*, 897 F.2d 999, 1018 (9th Cir. 1990) (personal knowledge can be inferred from declarant's position and the nature of declarant's participation in matters described in the declaration).

In sum, the record establishes that NDLON has standing to challenge the Ordinance.

### 2. Comite Has Standing to Sue on Behalf of Its Members Who Have Been Arrested for Seeking Work.

Comite similarly has standing to challenge the Ordinance on behalf of its members who have been arrested under the Ordinance and deterred from exercising their First Amendment rights. (ER 1431-34 ¶¶ 5, 8, 10-13).

In its brief, the City argues that Comite does not genuinely exist and therefore lacks standing. Yet, Braulio Gonzalez, a Comite member, and Mr. Newman, who meets with Comite three to five times a week, provided uncontroverted evidence of Comite's existence, membership, and activities, all of which are based on their personal knowledge. (ER 1351:4-6; ER 1431 ¶ 2)

As the record demonstrates, Comite was formed in fall 2004. (ER 1351:9-15) It is comprised of 40 to 50 Redondo Beach day laborers who hold regular informal meetings as a support network for day laborers. (ER 1431-32 ¶¶ 2, 6) Mr. Gonzalez testified about Comite's meetings and identified several of the day laborers who attended the meeting where Comite was created. (ER 1362:25–1363:8) Mr. Newman testified that he facilitates Comite meetings and helps Comite members develop leadership skills. (ER 1431 ¶ 2). Comite has participated in various events, including a march, soccer tournament, and dance. (ER 1366:7-17, 1368:23-1369:24) Mr. Gonzalez testified that he was planning to travel to New York as a representative of Comite to participate in an NDLON event. (ER 1370:18-23) Based on the ample evidence of Comite's existence, the district court properly held that Comite has standing.

On appeal, the City again argues that Comite does not exist because it has no corporate officers, by-laws, or minutes of its meetings. Appellant's Br. at 21.[3] Yet, these are not the defining characteristics of an unincorporated association. *See Law v. Crist*, 41 Cal. App. 2d 862, 865 (1940) (unincorporated association need not have officers, constitution, or

[3] The City incorrectly asserts in its brief that Comite holds no regular meetings. The uncontroverted testimony of Mr. Gonzalez and Newman refute this assertion. (ER 1362:25–1363:8; 1431-32 ¶¶ 2, 6)

by-laws; these characteristics are "not inclusive and exclusive" of an unincorporated association).

Rather, an unincorporated association is simply "a voluntary group of persons, without a charter, formed by mutual consent for the purpose of promoting a common objective." *Comm. for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 820 (9th Cir. 1996) (internal quotation marks and citation omitted). *See also* Cal. Corp. Code, § 18035(a) ("an unincorporated group of two or more persons joined by mutual consent for a common lawful purpose, whether organized for profit or not"). Comite meets this definition, as evidenced by the record.

C. **Plaintiffs Have Standing Under the Overbreadth Doctrine.**

Furthermore, Plaintiffs have standing under the overbreadth doctrine. "[A] plaintiff may challenge an overly-broad statute or regulation by showing that it may inhibit the First Amendment rights of parties not before the court, even if his own conduct is not protected." *Young v. City of Simi Valley*, 216 F.3d 807, 815 (9th Cir. 2000). *See also ACLU II*, 466 F.3d at 790 n.9 ("Facial challenges to overly broad statutes are allowed not primarily for the benefit of the litigant, but for the benefit of society….") (internal quotation marks and citation omitted). "In order to have standing to bring a facial challenge, [plaintiffs] must demonstrate only that the

ordinance 'creates an unacceptable risk of the suppression of ideas' and that [they have] suffered an injury." *Young*, 216 F.3d at 815 (citation omitted). As demonstrated above, Plaintiffs have suffered injury and therefore having standing to challenge the City's sweeping Ordinance, which also violates the First Amendment rights of parties not before the Court (*supra* Section II).

### D. Plaintiffs Have Standing to Challenge Subsection (b) of the Ordinance Because the First Amendment Right to Speak Is Meaningless Without An Audience.

As this Court has recognized, the right to free speech is a right to "reach the minds of willing listeners[,] and to do so there must be opportunity to win their attention." *Edwards*, 262 F.3d at 866 (internal quotation marks and citations omitted). The right to receive information is also accorded protection because the freedom to speak and the freedom to hear are flip sides of the same coin. *Clement v. Cal. Dep't of Corrections*, 364 F.3d 1148, 1151 (9th Cir. 2004).

Subsection (b) prohibits prospective employers from safely pulling over their cars and hiring day laborers, outside of the flow of traffic. (ER 1428) By chilling prospective employers from pulling over and engaging in

conversations with day laborers, the Ordinance infringes on workers' First Amendment right to speak with and hear from their intended audience.[4]

Moreover, as established above, traditional standing requirements are relaxed in the context of overbroad laws that chill constitutionally-protected speech. Such laws are subject to facial challenge, and litigants who have been injured may attack them on behalf of parties not before the court. *Young*, 216 F.3d at 815. Plaintiffs may challenge subdivision (b) of the Ordinance because it implicates motorists' First Amendment rights to impart and receive information. The "dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

In conclusion, Plaintiffs have standing to challenge the Ordinance.

[4] The City is incorrect that Plaintiffs have not alleged interference with their right to receive information. Appellant's Br. at 27. To the contrary, Plaintiffs alleged that its members were "harmed by the provision … that prohibits their prospective employers from receiving their communication and communicating to them in response." (ER 3 ¶ 8)

## II. The City's Content-Discriminatory Restriction on Solicitation Speech is Unconstitutional.

Redondo Beach's Ordinance criminalizes speech by individuals on public sidewalks and streets -- "quintessential traditional public forums." *ACLU I*, 333 F.3d at 1099. Under the Ordinance, individuals in these public forums must choose their words carefully, or else they can be arrested and jailed for saying the "wrong" words. As a result, the Ordinance violates core First Amendment principles. *See Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

In this appeal, Redondo Beach seeks to defend its selective restriction on speech as a reasonable time, place, and manner restriction. However, the City's ability to restrict speech in a public forum is "sharply circumscribed." *ACLU I*, 333 F.3d at 1098 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). Here, the City has not met its "extraordinarily heavy burden" of justifying its restriction on speech in public forums. *ACLU I*, 333 F.3d at 1098 (quoting *Grossman v. City of Portland*, 33 F.3d 1200, 1204 (9th Cir. 1994)). To the contrary, the City's Ordinance fails each and every prong of the reasonable time, place, and manner test. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)

(speech restrictions in public forums must be content-neutral, narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for communication of information); *Grossman*, 33 F.3d at 1205 (government's failure to satisfy any single prong of the test invalidates the speech restriction).

### A. Redondo Beach's Anti-Solicitation Ordinance is Content-Based and Therefore Presumptively Unconstitutional.[5]

If a law, on its face, differentiates based on the content of speech and requires officials to examine the content of messages, it is content-based. *ACLU II*, 466 F.3d at 795-96 (citing *Discovery Network*, 507 U.S. at 429-30 & *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134 (1992)). Content-based laws are "presumptively unconstitutional" and "pass constitutional muster only if they are the least restrictive means to further a compelling interest." *ACLU II*, 466 F.3d at 792 (quoting *S.O.C.*, 152 F.3d at 1145).

[5] The City asserts that because no cross-appeal was filed challenging the district court's holding of content neutrality, the issue is established in the City's favor. Appellant's Br. at 36. To the contrary, where a party seeks to affirm the judgment, even on an alternative ground, there is no need for a cross-appeal. *See, e.g.*, *Rivero v. City & County of S.F.*, 316 F.3d 857, 861-862 (9th Cir. 2002) . This Court may affirm a district court's decision on any ground supported by the record. *ACLU I*, 333 F.3d at 1096-97.

Redondo Beach's Ordinance is filled with content-based distinctions. The Ordinance carves out a particular category of speech – solicitation speech – for disfavored treatment, while permitting other, favored categories of speech, such as political oratory and religious sermons. It also proscribes solicitation on disfavored topics – *i.e.*, employment, business, or contributions – while allowing solicitation on other, favored topics.

### 1. The City's Ban on the Solicitation of Employment, Business, and Contributions is Content-Based.

Redondo Beach's Ordinance, on its face, selectively targets the category of solicitation speech, "a form of expression entitled to the same constitutional protections as traditional speech." *ACLU II*, 466 F.3d at 792 (citing *Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 628-32 (1980), and *Int'l Soc'y for Krishna Consciousness, Inc. ("ISKCON") v. Lee*, 505 U.S. 672, 677 (1992)).

In *ACLU II*, this Court held that a local ordinance, which prohibited solicitation of money, charity, business or patronage, or gifts of times of value for oneself of another person or organization, was content-based and therefore subject to strict scrutiny. 466 F.3d at 792-93. To enforce the ordinance, city officials were required to examine the content of messages to determine whether they fell within the proscribed category of solicitation speech. *Id*. at 794. "Handbills with certain content pass muster; those

requesting financial or other assistance do not. Even if this distinction is innocuous or eminently reasonable, it is still a content-based distinction because it 'singles out certain speech for differential treatment based on the idea expressed.'" *Id*. (quoting *Foti*, 146 F.3d at 636 n.7).

Redondo Beach's Ordinance is similarly content-based. On its face, the Ordinance prohibits individuals from engaging in solicitation speech in public forums, while permitting other categories of speech, such as political oratory, religious sermons, or artistic expression, to go unregulated in the same public forums. (ER 1428) To enforce the Ordinance, police officers must listen to the content of speech to determine whether it falls within a permissible category ("Many New Orleans residents are still homeless . . .") or veers into a proscribed speech category (" . . . Donate to Habitat for Humanity."). *See ACLU II*, 466 F.3d at 792 (noting that "solicitation is characteristically intertwined with informative and perhaps persuasive speech" and "without solicitation the flow of such information and advocacy would likely cease.") (quoting *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988); internal quotation marks omitted)).

Moreover, the Ordinance, on its face, singles out particular topics of solicitation. *See Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation

extends . . . to prohibition of public discussion of an entire topic."). The Ordinance prohibits solicitation of employment, business, or contributions, but allows solicitation on other topics, such as the solicitation of votes or ballot signatures. *See Burson v. Freeman*, 504 U.S. 191, 197 (1992) (statute that prohibited solicitation of votes near polling place was content-based because it differentiated between political solicitation and other types of solicitation, such as commercial solicitation). Here, police officers must listen to the speech to determine whether the solicitation involves a permissible topic ("I need your vote") or a proscribed topic ("I need work"). *See ACLU II*, 466 F.3d at 794; *S.O.C.*, 152 F.3d at 1145.

In its brief, the City asserts that the Ordinance is content-neutral because it proscribes "all solicitations" and "it is unconcerned with the literal content of the spoken words of the solicitation, or the subject or topic of the speech." Appellant's Br. at 33, 34. However, the City's assertion is contradicted by the plain language of the Ordinance, which singles out solicitation on the topics of employment, business, and contributions.

Moreover, the City's reliance on *ACORN v. City of Phoenix*, 798 F.2d 1260 (9th Cir. 1986), and *Los Angeles Alliance for Survival* v. *City of Los*

*Angeles*, 157 F.3d 1162 (9th Cir. 1998) is misplaced.[6] Notably missing from the City's brief is a single citation to this Court's *ACLU II* decision, which was issued after the district court's decision in this matter. *ACLU II* clarified the law in this area and explained why the cases relied on by the City and district court are distinguishable:

> Although courts have held that bans on the *act of solicitation* are content-neutral, we have not found any case holding that a regulation that separates out *words of solicitation* for differential treatment is content-neutral. *See, e.g.*, *United States v. Kokinda*, 497 U.S. 720, 736 (1990) (plurality opinion) (holding that a ban on in-hand solicitation of money is content-neutral based on "the inherent nature of solicitation itself"); *id*. at 738-39 (Kennedy, J., concurring) (emphasizing that the regulation permits the distribution of literature soliciting support); *ACORN v. City of Phoenix*, 798 F.2d 1260, 1267-68, 1271, (9th Cir. 1986) (holding that a ban on in-hand solicitation from automobiles, that does not cover distribution of literature requesting contributions, is content neutral).

466 F.3d at 794 (emphasis in original). This Court then cited Justice Kennedy's crucial concurring opinion in *ISKCON*, 505 U.S. 672 (1992):

> Justice Kennedy applied public forum analysis and found the regulation content-neutral because it prohibited only requests for in-hand donations. *See id*. at 693, 704-09 (Kennedy J., concurring). It was "directed only at the physical exchange of money, which is an element of conduct interwoven with otherwise expressive solicitation." *Id*. at

[6] The City also relies on cases outside this Circuit and state law precedent. Appellant's Br. at 33. These cases are not binding on this Court and are furthermore distinguishable for the reasons set forth in *ACLU II*.

> 705. Justice Kennedy was clear, however, that if the "solicitation regulation prohibited all speech that requested contribution of funds, [he] would conclude that it was a direct, content-based restriction of speech in clear violation of the First Amendment." *Id*. at 704.

*ACLU II*, 466 F.3d at 795. The *ACLU II* Court concluded that Las Vegas' restriction on solicitation was content-based because officers were required to examine the content of messages to determine whether they fell within the City's ban. *Id*. at 795-96.

Redondo Beach's Ordinance suffers from the same defects that doomed Las Vegas' ordinance. Redondo Beach prohibits not the manner of solicitation, such as in-hand solicitation or the physical exchange of money. Rather, the Ordinance targets particular messages of solicitation. Individuals are subject to arrest for saying the "wrong" words ("I need work"), distributing the "wrong" leaflets ("Donate to the Red Cross"), or carrying the "wrong" signs ("Lemonade for Sale").

Moreover, Redondo Beach's law, like Las Vegas' ordinance, cannot be enforced unless city officials listen to the words of solicitation. How is an officer to determine whether a resident is engaged in a permissible category of speech (expressive speech; religious oratory), a permissible solicitation topic (political solicitation; request for directions), or a proscribed subject (solicitation of employment, business, or contributions)?

The answer is clear. "In order to enforce the regulation, an official 'must necessarily examine the content of the message that is conveyed,'" which is the hallmark of a content-based regulation. *Id*. at 794 (quoting *Forsyth County*, 505 U.S. at 134).

On its face, Redondo Beach's Ordinance is content-discriminatory and therefore presumptively invalid.

### 2. The Secondary Effects Doctrine Does Not Allow The Ordinance to Escape Strict Scrutiny.

The City argues that its Ordinance is effectively "content-neutral" because the City's principal purpose in enacting the Ordinance was to target the secondary effects of solicitation speech. However, neither the law of this Circuit nor the factual record supports the City's argument.

The secondary effects doctrine originated in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), in which the Supreme Court held that a seemingly content-based ordinance could be considered content-neutral if it were predominately motivated by secondary effects, "at least with respect to businesses that purvey sexually explicit materials." *Id*. at 49. Consistent with *Renton*, this Court has applied the secondary effects doctrine in cases involving speech that is "sexual or pornographic in nature." *Gammoh*, 395 F.3d at 1123. As scholars have noted, sexually explicit speech is a "subordinate species" with "low-value" status under the First

Amendment. *See Colacurcio v. City of Kent*, 163 F.3d 545, 550 (9th Cir. 1998) (citing Professors Chemerinsky, Gunther, and Sullivan). Moreover, numerous scientific studies have documented a clear connection between sexually explicit speech and a multitude of secondary effects. *See, e.g.*, *Gammoh*, 395 F.3d at 1126 (citing seventeen studies documenting secondary effects of adult businesses, Attorney General Report on Pornography, numerous reports on AIDS and other sexually transmitted decisions, and thirty-nine judicial decisions in the area of regulation of adult businesses).

However, outside the adult business context, courts have struggled with how to apply the secondary effects doctrine without threatening core First Amendment values. *See, e.g., Boos v. Barry*, 485 U.S. 312, 335 (1988) (Brennan, J., concurring) ("[S]econdary effects offer countless excuses for content-based suppression of political speech."). This Court has suggested that speech that "no longer falls within the 'sexual or pornographic'" category ought to be subject to strict scrutiny. *Gammoh*, 395 F.3d at 1124. Scholars have similarly advocated that the doctrine be confined to the adult business context. *See, e.g.*, John Fee, *Speech Discrimination*, 85 B.U. L. Rev. 1103, 1135 (Oct. 2005) ("the Renton doctrine is better understood as an exception to the First Amendment rule against content discrimination - based on the unique aspects of sexually oriented businesses").

Even when the secondary effects doctrine has been raised by parties, the Supreme Court has been reluctant to uphold speech restrictions under the doctrine outside the adult business context. *See Boos*, 485 U.S. at 320-21 (plurality op.) (rejecting secondary effects argument and applying strict scrutiny); *Forsyth County*, 505 U.S. at 134 (rejecting secondary effects argument and striking down ordinance). Instead, the Court has articulated various principles that have limited the doctrine's scope.

The Supreme Court has held a law may be content-based on its face and therefore subject to strict scrutiny, even absent evidence of "an improper censorial motive." *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) ("[I]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.") (internal quotation marks and citations omitted). "'[T]he mere assertion of a content-neutral purpose [is not] enough to save a law which, on its face, discriminates based on content.'" *ACLU II*, 466 F.3d at 793 (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642-43 (1994)).

This Court has been particularly skeptical of laws that discriminate against speech categories, such as solicitation, which receive "the same constitutional protections as traditional speech." *ACLU II*, 466 F.3d at 792. In *ACLU II*, this Court held 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." *Id.* at 793 (emphasis added). Because Las Vegas' ordinance, on its face, singled out solicitation speech, this Court applied strict scrutiny, even though the ordinance was "enacted with the purpose of controlling the secondary effects of solicitation." *Id*. Similarly, Redondo Beach's Ordinance, which singles out the protected category of solicitation speech, is subject to strict scrutiny, despite the City's claim of secondary effects.

**a. The City Impermissibly Seeks to Regulate the Primary, Not Secondary, Effects of Speech.**

The record in this case also establishes that the Ordinance is not aimed at the secondary effects of day laborers' speech, but rather its primary effects -- *i.e.*, its persuasive and repellant effect on City residents. *See R.A.V.*, 505 U.S. at 394 n.7 (City could not justify selectively regulating speech based on primary effects). Redondo Beach passed the Ordinance because local residents and businesses had a "problem" with the fact that day laborers were "gathering" in public forums, such as sidewalks, and "hoping to obtain work." (ER 231 – letter from North Redondo Beach Business Association to City Council); (ER 230 – Mayor's recommendation that actions be taken to "eliminate this problem of congregating day laborers").

Yet, the First Amendment prohibits government from selectively restricting speech because community members have a "problem" with disfavored groups congregating in public forums. The Supreme Court has made clear that "[l]isteners' reaction to speech is not a content-neutral basis for regulation," even where speech is undeniably provocative. *Forsyth County*, 505 U.S. at 134 (public outrage did not justify limiting or burdening speech by the Nationalist Movement, a white supremacist group).

Nor can the City single out speech by day laborers under the guise of easing congestion or protecting day laborers' safety. The public's reaction to day laborers' speech – whether it comes in the form of angry residents, a crowded sidewalk, or a congested roadway – is a primary, not secondary, effect of speech. *See R.A.V.*, 505 U.S. at 394 n.7. Here, the City selectively restricts the solicitation of employment, business, and contributions because these particular topics of solicitation are deemed by the City to be most likely to trigger a reaction and result in congestion, as compared with other, unregulated topics of solicitation. *Id*. (holding that if the chain of causation necessarily runs through the persuasive effect of speech, then the law impermissibly regulates on the basis of speech's primary effects).

However, the City cannot penalize speakers because their speech is more likely to attract the public's attention, or out of a paternalistic concern

with a speaker's safety. *See Forsyth County*, 505 U.S. at 134-35 (government cannot pass on higher costs associated with maintaining public order to high-profile speakers who are more likely to elicit public reaction). It cannot be said that the City's justification for regulating particular topics of solicitation "'ha[s] nothing to do with content.'" *Id*. at 134 (quoting *Ward*, 491 U.S. at 792, and *Boos*, 485 U.S. at 320). Rather, as the City acknowledged in the proceedings below, its Ordinance targets the primary, not secondary, effects of speech. (ER 30 – City disclaimed reliance on the secondary effects doctrine and admitted that "in the *ACORN* decision they talked about [traffic flow] being a primary effect"); (ER 61 n.4 – district court noted that the City was not relying on secondary effects doctrine).

Moreover, in seeking to justify its discriminatory restriction on speech by day laborers, the City devalues other types of speech, which it wrongly assumes to be of minimal interest to the public. For example, the Ordinance does not regulate demonstrations, marches, or picketing on streets and sidewalks, even when directed at vehicular traffic, because they are unlikely, in the City's view, to catch the attention of passing motorists and cause congestion. Yet, this Court has held that demonstrations, marches, and picketing on streets and sidewalks "induce[] a condition of unrest, create[] dissatisfaction with conditions as they are, or even stir[] people to anger."

*Collins*, 110 F.3d at 1371 (citation omitted). That is precisely why they are protected by the First Amendment. *Id*.

The City's claim that day laborers must be restricted because they alone cause traffic and sidewalk congestion defies common sense. Crowded sidewalks and streets are found wherever there is compelling speech, whether it is protestors marching in the street, missionaries preaching in public plazas, or street musicians dazzling sidewalk crowds. The City's secondary effects argument fails because it cannot establish that the alleged congestion is uniquely attributable to the restricted category and topics of speech. *See Discovery Network*, 507 U.S. at 430 (rejecting secondary effects argument because "there are no secondary effects attributable to respondent publishers' newsracks that distinguish them from the newsracks Cincinnati permits to remain on its sidewalks.").

**b. Secondary Effects Were Not the Primary Motivation Behind the Ordinance.**

Nor can the City now claim that other alleged secondary effects, such as vandalism, litter, urinating in public, and occasional fights, were the "primary motivation behind the regulation." *Gammoh*, 395 F.3d at 1123; *Crawford v. Lungren*, 96 F.3d 380, 385 (9th Cir. 1996) (government bears burden of showing that ordinance is justified by desire to eliminate secondary effects). The legislative record in this case contains no mention

of littering, vandalism, public urination, or fighting. (ER 228 & 233) Nor does the face of the Ordinance refer to any such secondary effects. (ER 1428) *Contrast with Gammoh*, 395 F.3d at 1125 (ordinance stated that it was aimed at secondary effects of adult businesses).

The City seeks to divert attention from the legislative record and face of the Ordinance by citing to two declarations. However, Officer Contreras' declaration refers only to complaints of vandalism, littering, and urination that were received *after* the passage of the Ordinance in 1987. (ER 168 ¶¶ 2-3 – describing the fifteen year period that preceded the 2004 launch of Day Labor Enforcement Project).[7] These after-the-fact complaints are hardly evidence of the City's motivation at the time of the Ordinance's 1987 enactment. *Contrast with Dream Palace v. County of Maricopa*, 384 F.3d 990, 1014 (9th Cir. 2004) (pre-enactment evidence before the county board of supervisors included a memo summarizing seventeen secondary effects studies). The declaration from City Attorney Michael Webb, who was not city attorney at the time of the Ordinance's passage, is also unavailing because, as the district court held, his statements lacked foundation. (ER

[7] It is clear from the declaration that he is referring to the fifteen-year period leading up to 2004. (ER 168 ¶ 2 – "Within the last year [*i.e.*, 2004], the number of people congregating at the intersections has doubled and citizen complaints have grown along with the size of these groups.")

1843-44 – holding that Webb's statements regarding alleged littering, urination, harassment, and property damage by day laborers lacked foundation; his statements were based on Exhibits R-T, which contained no such facts); (ER 175-77 – Webb declaration); (ER 227-33 – Exhibits R-T).

The City has simply not met its burden in this matter. *See Gammoh*, 395 F.3d at 1126 (government bears burden of producing evidence demonstrating a connection between speech restriction and alleged secondary effects). The City has offered no studies to document a connection between any of its postulated secondary effects and the solicitation of employment, business, or contributions. *Contrast with Gammoh*, 395 F.3d at 1124-25 (City Council was presented with several volumes of materials prior to enacting the ordinance, including secondary effect studies, reports on sexually transmitted diseases, and other evidence); *Colacurcio,* 163 F.3d at 553 (ordinance was based on City's comprehensive study of secondary effects associated with adult entertainment businesses).

Rather, the City admits that the "problems" of which it complains are "associated with having groups of individuals gathered in a particular place without facilities for handling waste or other issues." Appellant's Br. at 39. These problems occur in many settings where large numbers of individuals congregate, such as concerts, art festivals, and political rallies. *See, e.g,*

*United States v. Baugh*, 187 F.3d 1037, 1043 (9th Cir. 1999) ("Organizers of protests ordinarily cannot warrant in good faith that all the participants in a demonstration will comply with the law. Demonstrations are often robust.").

But, courts have rejected content-discriminatory speech restrictions on "hard rock" concerts, "controversial" art, or "robust" political demonstrations, which are ostensibly designed to protect the public and prevent social ills, such as crime, congestion, or dirty streets. *See Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 572 (9th Cir. 1984) (city could not single out "hard rock" concerts based on fear that laws would be violated by concert attendees; because ordinance was content-discriminatory, it was subject to strict scrutiny); *Collins v. Ainsworth*, 382 F.3d 529, 534, 544-45 (5th Cir. 2004) (Sheriff could not stop rock concert, based on past complaints about excessive noise, profanity, and trash complaints); *Hopper v. City of Pasco*, 241 F.3d 1067, 1073 n.4, 1081 (9th Cir. 2001) (city could not relegate art of a political, sexual, or controversial nature to area of City Hall with "very little traffic" so as to minimize distraction to employees, children, and citizens conducting business with the city; city's content-discriminatory art program was subject to strict scrutiny); *Collins v. Jordan*, 110 F.3d 1363, 1372 (9th Cir. 1997) (city could not ban a protest because past demonstrations involved instances of violence).

Redondo Beach's Ordinance, which discriminates on its face against the protected category of solicitation speech, is not saved by the secondary effects doctrine and is, therefore, subject to strict scrutiny.

### B. The Ordinance Does Not Survive Intermediate Scrutiny, Much Less Strict Scrutiny.

#### 1. The City Cannot Meet Strict Scrutiny.

A content-based restriction, such as Redondo Beach's Ordinance, is "presumptively unconstitutional" and will pass constitutional muster only if it satisfies strict scrutiny – *i.e.*, "only if [it is] the least restrictive means to further a compelling interest." *S.O.C.*, 152 F.3d at 1145.

Redondo Beach does not contend that it can meet strict scrutiny. That is because the Ordinance, on its face, suffers from the same defects that rendered the City of Las Vegas' ordinance facially unconstitutional. In *ACLU II*, this Court held that Las Vegas' ordinance did not survive strict scrutiny because it "prohibits even the peaceful, unobstructive distribution of handbills requesting future support of a charitable organization." 466 F.3d at 797. Redondo Beach's sweeping Ordinance similarly prohibits charitable organizations from peacefully distributing literature to the occupants of parked vehicles, which request future support of the organization. Under *ACLU II*, Redondo Beach's Ordinance is facially unconstitutional. *Id*. at

797 (declaring Las Vegas' anti-solicitation ordinance to be facially unconstitutional).

### 2. The City Cannot Survive Intermediate Scrutiny.

Nor does Redondo Beach's Ordinance survive even intermediate scrutiny, which governs content-neutral restrictions. *See Ward*, 491 U.S. at 791 (content-neutral restrictions in public forums must be narrowly tailored to serve a significant government interest and leave open alternative avenues for communication); *ACLU II*, 466 F.3d at 796 n.13 (holding, alternatively, that Las Vegas' anti-solicitation ordinance failed the *Ward* test because it targeted a substantial amount of constitutionally protected speech that was not the source of the "evils" it purported to combat).

#### a. The Ordinance is Not Narrowly Tailored.

"A time, place, or manner regulation must 'target[] and eliminate[] no more than the exact source of the 'evils' it seeks to remedy.'" *ACLU II*, 466 F.3d at 796 n.13 (citation omitted). In particular, a speech restriction may not "burden substantially more speech than is necessary to further the government's legitimate interests." *Ward*, 491 U.S. at 799. The City bears the burden of establishing a "reasonable fit" between its asserted interest and the terms of the Ordinance. *S.O.C*, 152 F.3d at 1148.

Here, Redondo Beach focuses on "traffic flow and safety" as the justification for its wide-ranging speech restriction. Appellant's Br. at 37. Yet, the Ordinance is fatally overbroad, restricting substantially more speech than is necessary to serve its declared interests. The Ordinance prohibits solicitation, without regard to whether the solicitation calls for an immediate response or has any impact on traffic. It criminalizes speech, even when no cars stop or when vehicles stop safely. Its proscription applies at any time of day, whether traffic is congested or not.

For example, under the express terms of the Ordinance, an individual would be barred from soliciting, or attempting to solicit, contributions by standing on the sidewalk and holding a sign that reads, "Give to Greenpeace!" even though such speech has no measurable impact on traffic. *Contrast with ACORN*, 798 F.2d at 1269 (ordinance was targeted at individuals who walked into traffic and required drivers to respond immediately by searching for currency and passing it along to the solicitor).

Additionally, the Ordinance prohibits solicitation directed at "any motor vehicle," without regard to whether the vehicle is safely stopped or parked. (ER 1428) By its terms, the Ordinance applies to a day laborer approaching a safely parked vehicle, or the representative of a charitable organization placing a flyer on a parked car. The sweeping language of the

Ordinance would even prohibit a day laborer on the sidewalk from carrying a sign that reads, "Park Safely and Legally Around the Corner if You Need a Worker." The Ordinance furthermore prohibits drivers in safely parked vehicles from hiring day laborers. *Id.* § 3-7.1601(b) (Ordinance applies to drivers, without regard to whether the car is safely stopped or parked).

The Ordinance, as written, restricts a substantially overbroad range of speech with no measurable impact on traffic. By its terms, the Ordinance prohibits a pedestrian from hailing a taxi (even a taxi parked by the curb), a resident at a bus stop waving down a bus driver, or a valet parking attendant from gesturing to patrons where to pull over their cars. Moreover, the Ordinance prohibits teenagers on the sidewalk from holding "Car Wash" signs, children from selling lemonade or Girl Scout cookies on the sidewalk, or a motorist from stopping on a residential street to ask whether a neighbor would be interested in performing yard work or babysitting. (ER 1835-36 & n.8)

The Ordinance is also woefully underinclusive, failing to target the "exact source of the 'evil' it seeks to remedy." *ACLU II*, 466 F.3d at 796. n.13. The Ordinance prohibits not the manner of solicitation, such as in-hand solicitation or "tagging"; rather, it bans particular messages of solicitation, even if communicated in a peaceful, unobstructive way. Under

the Ordinance, day laborers are not permitted to stand on sidewalks and converse with willing listeners in parked cars about their need for work and desire to support their families. Yet, political activists are free to run into traffic to solicit votes or ballot signatures. Missionaries can walk up to cars temporarily stopped at red lights, inviting drivers to join their church. Environmental activists can flood the streets with dozens of signs that read, "Save our Planet – Stop Driving Now!," regardless of the resulting impact on traffic. Because there is a wide array of permissible speech under the Ordinance that would cause similar or more substantial traffic problems than day laborer solicitation, the City's prohibition on such solicitation is not narrowly tailored to achieve its asserted interest in controlling traffic congestion.

The Ordinance's lack of narrow tailoring is further highlighted by the ready availability of non-speech restrictions that would achieve the City's stated interests. *See Edwards*, 262 F.3d at 865 (for purposes of intermediate scrutiny, "'if there are numerous and obvious less-burdensome alternatives to the restriction on [protected] speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable.'") (quoting *Discovery Network*, 507 U.S. at 418 n.13).

For example, the City could enforce existing laws that regulate conduct, not speech, to achieve its stated goals. Under California law, pedestrians may be cited for walking outside a crosswalk and in the roadway in a manner that constitutes an immediate hazard, or for willfully and maliciously obstructing the free movement of any person on a street or sidewalk. Cal. Veh. Code § 21954; Cal. Penal Code § 647(c). California law also forbids drivers to stop or block traffic in specified places, including alongside a parked vehicle. Cal. Veh. Code § 22500. Littering, public urination, and fighting are all against the law. *See* Redondo Beach Mun. Code § 4-9.201 (littering); Cal. Penal Code § 594 (vandalism); *id*. § 415 (fighting); *People v. McDonald*, 137 Cal. App. 4th 521, 533-39 (2006) (public urination violates Cal. Penal Code §§ 370 & 372).

These laws, which regulate conduct rather than speech, are viable and concrete alternatives to banning speech. *See Collins*, 110 F.3d at 1371-72 ("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."); *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939) ("There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the

streets."). Yet, here, the City has impermissibly chosen to censor particular topics of speech, in lieu of enforcing existing laws that regulate the conduct of all pedestrians.

In its brief, the City seeks to divert attention from the sweeping language of its Ordinance and focus instead on how it currently construes the Ordinance. For example, the City argues that the Ordinance allegedly does not apply to individuals who hold signs,[8] approach cars that are legally parked, hail cabs, or wave down bus drivers. Appellant's Br. at 45-47. The City also claims that it only targets solicitation speech that causes a driver to stop in traffic. *Id*. at 42-49.

However, this is a facial challenge to Redondo Beach's sweeping Ordinance. *See ACLU II*, 466 F.3d at 790 n.9 (facial challenge may be brought to overly broad statute that creates an unacceptable risk of the suppression of ideas). The face of Redondo Beach's Ordinance contains neither the exceptions nor limiting language proffered by the City. The Ordinance unambiguously prohibits "any person" standing on a street or sidewalk from "solicit[ing], or attempt[ing] to solicit" from the "occupant of any motor vehicle." (ER 1428) The plain language of the Ordinance covers

[8] The City claims that the ordinance does not prohibit persons from holding signs that say, "Looking for work." Appellant's Br. at 46. Yet, the City took a contrary position in the proceedings below. (ER 33:16-17)

individuals carrying signs that are visible from the roadway, day laborers approaching safely parked vehicles, pedestrians hailing cabs or waving down buses, and children selling lemonade or cookies on sidewalks in residential areas. The Ordinance applies across the City and is not limited to particular intersections or locations within the City. *Contrast with* Appellant's Br. at 45-46, 48 (focusing on particular intersections).

As this Court has made clear, ordinances should be evaluated as they are plainly written. *See S.O.C.*, 152 F.3d at 1144 (noting that ordinance contained neither the limiting language nor the exceptions proffered by County on appeal). Courts are "not required to insert missing terms into the statute or adopt an interpretation precluded by the plain language of the ordinance." *Foti*, 146 F.3d at 639; *United States v. Sullivan*, 332 U.S. 689, 693 (1948) (courts are not authorized to depart from statute's clear meaning in interpreting a statute).

In its brief, the City also relies on *ACORN v. City of Phoenix*. Yet, the plaintiffs in *ACORN* were engaged in the disruptive practice of "tagging," in which solicitors sought in-hand donations from unwilling drivers that were stopped momentarily at red lights. 798 F.2d at 1269 (in-hand solicitation "requires the individual to respond by searching for currency and passing it along to the solicitor. Even after the solicitor has departed, the driver must

secure any change returned, replace a wallet or close a purse, and then return proper attention to the full responsibilities of a motor vehicle driver."). By contrast, day laborers are prohibited from approaching vehicles that are safely parked on the side of the road, and peacefully conversing with willing listeners. *See Hill*, 530 U.S. at 715-16 ("It is . . . important . . . to recognize the significant difference between state restrictions on a speaker's right to address a willing audience and those that protect listeners from unwanted communication.").

In addition, the plaintiffs in *ACORN* did not raise the specific arguments at issue here. This Court was not called upon to consider whether a city could criminalize peaceful, unobstructive speech between a solicitor and a willing listener in a parked vehicle. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952) (a decision is not binding precedent on an issue not raised by the parties or discussed in the court's opinion). Nor was the Court presented with the myriad examples of the ordinance's sweeping reach that are present in this case. Instead, ACORN claimed that the ordinance was overbroad because "it regulates tagging too broadly. It unnecessarily prohibits tagging everywhere in Phoenix." *ACORN*, 798 F.2d at 1272.

Years later, when this Court was called upon to rule on the constitutionality of an ordinance that prohibited peaceful, unobstructive solicitation, it did not hesitate in striking down the ordinance under both intermediate and strict scrutiny. *ACLU II*, 466 F.3d at 796 n.13, 797. Redondo Beach's Ordinance is similarly defective because it targets a "substantial amount of constitutionally protected speech that is not the source of the 'evils' it purports to combat." *Id*. at 796 n.13.

**b. The Ordinance Is So Vague that It Chills Protected Speech.**

The Ordinance also fails a narrow tailoring test because it is unconstitutionally vague, and therefore burdens more speech than is necessary to meet the City's declared interests. A statute with criminal penalties can be vague in two ways: (1) it fails to provide adequate notice to ordinary people of what conduct is prohibited; or (2) its lack of clarity allows for arbitrary and discriminatory enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). "[W]hen First Amendment freedoms are at stake, an even greater degree of specificity and clarity of laws is required." *Foti*, 146 F.3d at 638.

Redondo Beach's Ordinance is defective because it fails to provide adequate notice to residents about what is prohibited. The key terms, "solicit" and "attempt to solicit," are not defined in the Ordinance. The

Ordinance offers no guidance to day laborers as to whether they may stand in the same vicinity as other day laborers, stare at cars on the roadway, or approach safely stopped vehicles. Advocacy organizations are left to assume that leafleting parked cars, as well as carrying large signs that are directed at pedestrians but visible to passing drivers, runs afoul of the "solicitation" ban.

The Ordinance also fails to define the terms "contributions" or "business," creating further confusion. Can activists and charitable groups say the words, "Support Our Cause!" or "Volunteer for Our Organization!" Or, will these statements be deemed to be requests for "contributions" or "business"? Again, the Ordinance offers no guidance. As a result, individuals must watch what they say, or risk going to jail. *See Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) ("Uncertain meanings inevitably lead citizens to ' 'steer far wider of the unlawful zone' … than if the boundaries of the forbidden areas were clearly marked.'") (citations omitted).

Section "b" of the Ordinance, which is directed at drivers, is also impermissibly vague. Under this provision, drivers are prohibited from stopping, parking, or standing their cars if they do so with the purpose of hiring, or attempting to hire, an individual for employment. (ER 1428) To

enforce the Ordinance, police officers must therefore determine whether a driver has stopped for a permissible purpose (*e.g.*, did the driver stop to ask for directions or to speak with a friend?) or a proscribed purpose (*i.e.*, did the driver stop in an attempt to hire an individual for employment?).

Yet, this Court has held that ordinances are unconstitutionally vague when they "'impermissibly delegate[] basic policy matters to police[] … for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.'" *Foti*, 146 F.3d at 639 (quoting *Grayned*, 408 U.S. at 108-09) (striking down ordinance that called upon officers to determine whether a car was parked for a permissible or proscribed purpose). Here, police officers are called upon to evaluate whether a driver "looks like" a prospective employer and whether individuals standing on the sidewalk "look like" persons seeking work. These subjective determinations are likely to result in discriminatory enforcement of the Ordinance against individuals of particular races, ethnicities, and genders.

In sum, the Ordinance is impermissibly vague because it allows police officers to decide whether individuals are looking the "wrong" way at passing cars, saying the "wrong words" (*e.g.*, "Support our Organization"), carrying signs that are the "wrong" size (because they are visible to passing

drivers and therefore construed as "solicitations"), or parking for the "wrong" reasons.

In response, the City argues that this Court should adopt a narrowing construction and read the Ordinance to apply only to solicitation aimed at stopping vehicles in traffic. However, the City's proffered rewriting of its Ordinance does not cure the vagueness problems identified above. Moreover, it raises serious constitutional concerns because, under the City's construction, an individual's criminal liability would depend upon the reactions of drivers (i.e., whether the solicitation "causes a driver to stop"). Thus, for example, residents who are hostile to day laborers could stop their vehicles, whenever day laborers were present, simply to catalyze an arrest or citation. This is akin to the kind of "heckler's veto" that is so repugnant under the First Amendment. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 880 (1997).[9]

[9] The City claims there is no such danger because a "heckler" could also be cited for violating the Ordinance. But, to be covered by the Ordinance, the "heckler" would need to hire or attempt to hire the day laborer for employment. (ER 1428) The "heckler" could avoid arrest by simply claiming that the stop was for another purpose. In addition, a "heckler" need not even stop in traffic to precipitate the arrest of a day laborer. Instead, the "heckler" could pull over to the side of the roadway and park. Under the Ordinance, day laborers could then be charged for approaching a parked car.

In sum, the chilling of permissible and protected speech means that, by definition, the Ordinance "burden[s] substantially more speech than is necessary to further the government's legitimate interests," and is therefore not narrowly tailored. *See Ward*, 491 U.S. at 799.

### c. The Ordinance Does Not Leave Open Ample Alternative Channels of Communication.

A content-neutral ordinance fails the reasonable time, place, and manner test if it does not leave open ample alternative channels for communication. *Ward*, 491 U.S. at 791. An ordinance must leave open ample alternatives, even if it does not foreclose an entire medium of expression, but merely shifts the time, place, or manner of speech. *City of Ladue v. Gilleo*, 512 U.S. 43, 56 (1994).[10] The government's proffered alternatives must be reasonably available to speakers, not merely hypothetical. *See Daily Herald Co. v. Munro*, 838 F.2d 380, 386 (9th Cir. 1988) (because alternate avenues were impractical, there were not ample alternatives). As the record demonstrates, the alternatives proffered by the City of Redondo Beach are hypothetical, not real.

[10] The City contends that ample alternatives are available, so long as a city does not completely preclude an entire category of speech. Appellant's Br. at 50. Yet, as *Ladue* makes clear, that is not the correct standard.

First, the City argues that day laborers can find work through means such as advertising or telephone solicitation. Yet, the very nature of day laborer work involves same-day hiring and contracting for work by laborers. (ER 1432 ¶ 9) It requires interaction between willing employers and available employees on the very day that the work is to be completed. *Id.* Thus, substitutes with lengthy lead times, such as advertising in phone books, by mail, on billboards, or through newspapers, are simply inconsistent with day labor. *Id. See Linmark Assocs.*, 431 U.S. at 93 (proffered alternatives, such as newspaper advertising, were inadequate because they were less likely to reach persons not deliberately seeking sales information).

Moreover, many day laborers do not have the financial resources to access these traditional methods of solicitation. (ER 1432 ¶ 7) *See Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 n.3 (9th Cir. 1990) ("[A]n alternative has been held not 'ample' or adequate … [if] it is 'more expensive' than the prohibited means of communication.") (citations omitted); *Grossman*, 33 F.3d at 1205 n.8 (holding that more democratic and cost-effective forms of communication must be "jealously protected"); *Ladue*, 512 U.S. at 57 ("Even for the affluent, the added costs in money or

time … may make the difference between participating and not participating in some public debate.").

Nor is the solicitation of pedestrians on sidewalks a viable alternative for day laborers who are subject to arrest for standing on the sidewalk, Appellant's Br. at 39 (day laborers must stand "behind the sidewalk" to avoid arrest), and are furthermore prevented from reaching their intended audience (ER 1432 ¶ 9). *See Baugh*, 187 F.3d at 1044 (proffered alternative must allow speakers to reach intended audience).

The City has provided no evidence to rebut these facts or satisfy its burden on this issue. *See Lim v. City of Long Beach*, 217 F.3d 1050, 1054 (9th Cir. 2000) (government bears burden of proving there are alternative channels). Instead, it cites cases that are clearly distinguishable on their facts. *See ACORN*, 798 F.2d at 1271 (ordinance did not prohibit ACORN from soliciting on the sidewalk or distributing literature to occupants of vehicle; door-to-door canvassing, telephone campaign, and direct mail campaigns were also available to ACORN to reach its intended audience); *ISKCON*, 876 F.2d at 498 (same); *Xiloj-Itzep v. City of Agoura Hills*, 24 Cal.App.4th 620, 631 (1994) (ordinance still permitted individuals "to congregate on the City's sidewalks and other public areas to wait for employers and to solicit work from employers who are legally parked").

Alternatively, the City, relying on *Robins v. Pruneyard Shopping Ctr.*, 23 Cal.3d 899 (1979), argues that day laborers may be forced out of public forums and onto privately-owned parking lots. But, this Court has been skeptical of attempts to distance speakers from their intended audience. *See Baugh*, 187 F.3d at 1044; *Hopper*, 241 F.3d at 1081 ("The city steadfastly maintains that its exclusion of plaintiffs' works was not 'censorship' since [plaintiffs] 'have been free to show their art throughout the City, *other than [at] city hall.'* The art, in [the City's] view, was merely ejected from the parlor, not thrown off the farm. But relegating the art to the barnyard does not pass First Amendment scrutiny.") (emphasis in original).

Furthermore, the right to engage in speech on the private property of others under the California Constitution is not without its limits. In recent years, California courts have limited speakers' access to privately-owned properties, even when these properties are generally open to the public. *See Trader Joe's Co. v. Progressive Campaigns, Inc.*, 73 Cal. App. 4th 425, 433-37 (1999) (no right to solicit in large grocery parking lot); *Albertson's, Inc. v. Young*, 107 Cal. App. 4th 106, 121 (2003) (no right to petition in front of grocery store located within shopping center); *Costco Cos., Inc. v. Gallant*, 96 Cal. App. 4th 740, 754-55 (2002) (no right to solicit voter signatures in front of large, warehouse-style retail store). Even where privately-owned

properties are deemed to be public forums, courts have evaluated restrictions by private property owners under the time, place, and manner test. *See Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980) (under California Constitution, shopping center may restrict expressive activity by adopting time, place, and manner restrictions to minimize interference with center's commercial functions).

In this case, the parking lots proffered as alternatives belong to businesses with small, individual proprietor-type operations, including a specialty retail store named "Sunny Sheep Skin," (ER 194), a "7-Eleven" convenience store (ER 196), a "Winchell's" doughnut shop (ER 204), and a "76" gas station (ER 212). *Contrast with Pruneyard,* 23 Cal.3d at 902, 910 (shopping complex sprawled over twenty-one acres and invited 25,000 patrons to congregate daily); *Glendale Assocs., Ltd. v. NLRB,* 347 F.3d 1145, 1148 (9th Cir. 2003) (shopping mall consisted of more than 1.3 million square feet with 65 stores).

This Court need not reach the question of whether the specific parking lots in the City's photographs constitute alternative "public forums," in light of the Ordinance's other first amendment defects, such as its content-discriminatory nature and lack of narrow tailoring. *See Culinary Workers Union, Local 226 v. Del Papa,* 200 F.3d 614, 617 (9th Cir. 1999) (declining

to address "interesting issue of state law" because it was unnecessary). It is sufficient to note that the City's scant evidentiary showing – namely, a handful of grainy photographs (ER 194-226) – is insufficient to meet its burden to prove the existence of ample alternatives. *Lim*, 217 F.3d at 1054.

Moreover, as the district court noted, day laborers would only be able to secure access to private parking lots through litigation against individual property owners, which would deny access to day laborers based on the same "problems" alleged by the City. (ER 1840, n.9 – "it is reasonable to infer that the businesses whose parking lots front the sidewalks *will* attempt to restrict solicitors, as these are the very same businesses that lodged the complaints about the day laborers' presence that prompted the City to pass the Ordinance in the first instance.") (emphasis in original); (ER 231).

Litigation would be costly for low-income day laborers, who would be forced to wait years before getting a final decision. *See, e.g., Kuba v. 1-A Agric. Ass'n,* 387 F.3d 850 (9th Cir. 2004) (final decision issued six years after plaintiff was denied access to property and forced to litigate case through Court of Appeals); *Carreras v. City of Anaheim*, 768 F.2d 1039 (9th Cir. 1985) (decision issued three years after plaintiffs were denied access to property and forced to litigate the case through Court of Appeals). *See also*

*Bay Area Peace Navy*, 914 F.2d at 1229 n.3 (high costs associated with proffered alternative are relevant consideration).

Ultimately, the City misunderstands free speech jurisprudence in arguing that individuals have an expansive right to speak on the private property of others, yet no right to speak on public sidewalks and streets. To the contrary, this Court has held that "'[a]s society becomes more insular in character, it becomes essential to protect *public* places where traditional modes of speech and forms of expression can take place.'" *ACLU I*, 333 F.3d at 1097 (quoting *Kokinda*, 497 U.S. at 737 (Kennedy, J., concurring)) (emphasis added). This Court has noted the growing, nationwide trend toward privatization of property, which poses a threat to free speech. *ACLU II*, 466 F.3d at 791. "If this trend of privatization continues – and we have no reason to doubt that it will – citizens will find it increasingly difficult to exercise their First Amendment rights to free speech, as the fora where expressive activities are protected dwindle." *Id.* These decisions recognize the urgency of preserving free speech in "quintessential traditional public forums," such as public streets and sidewalks. *ACLU I*, 333 F.3d at 1099.

Lastly, the City argues that day laborers can seek work in other locations that are outside of the City.[11] However, the City cannot exile day laborers from the City, thereby preventing workers from reaching their intended audience of Redondo Beach employers. *See Baugh*, 187 F.3d at 1044; *Bay Area Peace Navy*, 914 F.2d at 1229. In addition, workers who gather at private day laborer centers lose the opportunity to appeal to potential employers at large who do not actively seek out day laborers at these centers. *See Linmark Assocs.*, 431 U.S. at 93 (invalidating restriction on the posting of real estate signs because proffered alternatives – newspaper advertising and real estate listings – were less likely to reach persons not deliberately seeking sales information). The City's paternalistic suggestion that workers go to union halls or local and federal workplaces fails for the same reason. Appellant's Br. at 59. The City cannot dictate where and for whom day laborers must work. Under the First Amendment, workers have the right to select their intended audience. *Baugh*, 187 F.3d at 1044.

In sum, the City has not met its burden of showing that ample alternatives exist. Thus, even if deemed content-neutral, the Ordinance fails the time, place, and manner test, and is therefore unconstitutional.

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[11] As the district court noted, the City failed to offer any admissible evidence on this issue to satisfy its burden of proof. (ER 1841, n.10)

## III. The City Has Waived Its Objections to the District Court's Permanent Injunction.

On appeal, the City objects to the wording of the district court's permanent injunction. However, the City failed to preserve its objections by raising them in a timely fashion prior to the issuance of the permanent injunction, despite repeated opportunities to do so. *See United States v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999) (holding that party had waived objection to scope of relief where party did not raise objections until after district court had already entered its order).

The City should have raised its objections prior to the district court's issuance of the injunction. The precise relief ordered by the Court was contained in Plaintiffs' Proposed Order, which accompanied Plaintiffs' summary judgment motion. (ER 1943) The Proposed Order was served on the City. (ER 1945) Yet, the City failed to raise any objection to the language of Plaintiffs' requested relief in its answering brief (ER 1502-28), in its reply brief (ER 1792-1808), or at oral argument (ER 1878-1903). Moreover, the City failed to raise any of its objections through a Rule 59 motion. Instead, the City raised its objections in an *ex parte* application for a stay, months after filing this appeal. The City's objections are untimely and waived. *Bowen*, 172 F.3d at 689 (holding that party could not preserve objections by raising them in a motion to stay the order pending appeal).

Furthermore, the City's belated objections are without merit. For example, the City argues that the Court's order is vague as to the period of time governed by the Order. Yet, as is clear from the record, the City's enforcement campaign began in October 2004 and the City has detailed information about the individuals charged under the Ordinance and the disposition of those cases. (ER 169-70) In addition, the City could easily comply with the Court's order by petitioning the Superior Court for rescission of the fines or providing restitution itself. The district court acted well within its discretion in granting Plaintiffs' requested relief. *See ACLU I*, 333 F.3d at 1097 (permanent injunction reviewed for abuse of discretion).

## IV. The District Court's Order Limiting Discovery Was Not Contrary to Law.

The district court, consistent with this Circuit's precedent, properly limited discovery into the immigration status of Plaintiffs' members. *Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1063 (9th Cir. 2004) (district court's ruling on magistrate judge's discovery order will be overturned only if contrary to law).

This Court has recognized that inquiries regarding immigration status deter potential civil rights plaintiffs from bringing meritorious claims, which "unacceptably burdens the public interest." *Id*. at 1065. This chilling effect extends even to those with lawful status, who "may fear that their

immigration status would be changed, or that their status would reveal the immigration problems of their family or friends; similarly, new legal residents or citizens may feel intimidated by the prospect of having their immigration history examined in a public proceeding." *Id.* Forcing advocacy organizations to turn over their membership lists also infringes on fundamental privacy and associational rights. *See NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

The public's interest in a robust First Amendment, coupled with the harms faced by Plaintiffs and their members, outweighed any need claimed by the City. As the district court held, there was no need for the requested discovery because Plaintiffs' standing does not turn on the immigration status of their members (*supra* Section I(A) & (B)) and Plaintiffs, in any event, have overbreadth standing (*supra* Section I(C)). The district court's order was not contrary to law; rather, the court faithfully followed the law of this Circuit.

## V. Plaintiffs' Objections to the City's Evidence Were Proper.

The district court properly excluded the portions of Officer Contreras' declaration discussing the Ordinance's enforcement, since this is a facial challenge. (ER 1843) Officer Contreras' description of individuals in several photographs as "day laborers" (ER 171-72 ¶ 15, 18, 21) was also

properly excluded because Contreras failed to offer any facts to establish that he personally knew the individuals or their occupations. (ER 1843)

The district court erred, however, in allowing Officer Contreras' statements regarding "citizen complaints." (ER 1615:6-14) The district court held that the statements were admitted only for the purpose of showing their effect on the City Council. (ER 1842) But, these alleged complaints occurred during the fifteen-year period leading up to the 2004 launch of the Day Labor Enforcement Project (ER 168 ¶¶ 2-3); but, the Ordinance was passed in 1987 (ER 233). It was therefore improper for the district court to consider these post-enactment complaints as evidence of the City's motivation at the time of the Ordinance's passage.

The district court properly sustained Plaintiffs' objections to Michael Webb's summaries of documents in the legislative history file. (ER 1843-44; 176 ¶¶ 7-9) Mr. Webb's descriptions were unnecessary to authenticate the documents, and the documents themselves were available to establish their contents. Fed. R. Evid. 1002, 1003.

The district court also did not abuse its discretion in excluding Mr. Webb's testimony regarding alleged citizen complaints, based on his lack of personal knowledge. (ER 1843-44) The City's arguments to the contrary lack merit. First, a boilerplate statement in a declaration that the declarant

has personal knowledge of the facts therein is insufficient to establish such knowledge. *See, e.g.*, *Tei Yan Sun v. Governmental Auths. of Taiwan*, 2001 U.S. Dist. LEXIS 1160, at *12-13 (N.D. Cal. Jan. 23, 2001) (sustaining objection to testimony on the ground of lack of knowledge, despite language in declaration that declarant had personal knowledge of contents), *aff'd by Tei Yan Sun v. Taipei Econ. & Cultural Representative Office*, 34 Fed. Appx. 529 (9th Cir. 2002). Second, there is nothing in the exhibits to Mr. Webb's declaration that would give rise to the inference of personal knowledge. These exhibits were not authored by or addressed to Mr. Webb, who was not the City Attorney at the time. (*See* ER 227-33) Finally, the City's argument regarding hearsay is misplaced since the district court sustained the objection based on lack of foundation, not hearsay. (ER 1843-44)

## CONCLUSION

For all of these reasons, Plaintiffs respectfully request that this Court affirm the district court's judgment.

Dated: 7/9/07

Respectfully Submitted,

Philip Hwang

## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a type face of 14 points and contains 13,764 words.

DATED: 7/9/07 By:

Philip Hwang

## STATEMENT OF RELATED CASES

*Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 9th Cir. No. 06-56869, is a related case.

DATED: 7/9/07

Respectfully Submitted,

Philip Hwang

**CERTIFICATE OF SERVICE BY OVERNIGHT DELIVERY**

**(Fed. R. App. Proc. rule 25(d))**

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**ANSWERING BRIEF OF APPELLEES**

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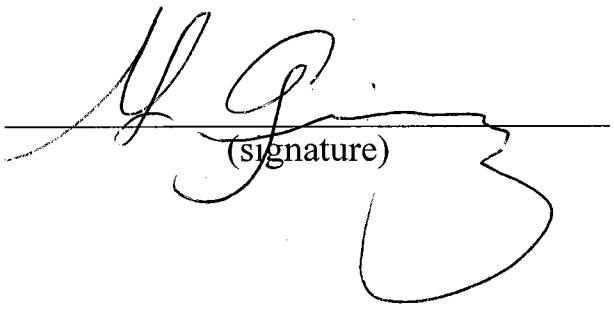
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