
A Constitutional Dilemma for Cities Seeking to Regulate Day Labor Solicitation¹

by MONICA SMITH²

Introduction

On September 16, 2011, the Ninth Circuit Court of Appeals issued a decision in *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach* (“*Comite III*”) invalidating an ordinance that prohibited individuals from standing on streets or sidewalks and soliciting work, business, or contributions from passing vehicles.³ The ordinance was aimed, in large part, at preventing day laborers (“*jornaleros*”) from congregating along busy streets in search of ad hoc employment.⁴ The Court, sitting en banc, declared the law a facially unconstitutional restriction on speech because it was not narrowly tailored to achieve the city’s interest in traffic flow and safety.⁵ In so doing, the Court reversed a 2010 panel decision in the case⁶ and expressly overturned *ACORN v. City of Phoenix*, a 25-year-

1. A version of this note was first published in the *Public Law Journal of the State Bar of California*.

2. Juris Doctor Candidate 2013, University of California, Hastings College of the Law; B.A. University of Utah, Philosophy. The author wishes to thank Professor David Jung for his support and direction; Professor David Faigman for his guidance on constitutional jurisprudence; her family for their patient accommodation of her graduate work; and the editors of the *Hastings Constitutional Law Quarterly* for their care and skill in improving this note.

3. 657 F.3d 936 (9th Cir. 2011); REDONDO BEACH, CAL. MUN. CODE § 3-7.1601(a) (1989) (making it a violation to “stand on a street or highway and solicit, or attempt to solicit, employment, business, or contributions from an occupant of any motor vehicle” and defining “street or highway” to include sidewalks).

4. *Comite III*, 657 F.3d at 941 (citing City Attorney’s memorandum accompanying proposed ordinance as saying, “the City has had extreme difficulties with persons soliciting employment from the sidewalks along the Artesia corridor over the last several years”).

5. *Id.* at 940–41.

6. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach (Comite II)*, 607 F.3d 1178 (9th Cir. 2010), *rev’d en banc*, 657 F.3d 936 (9th Cir. 2011).

old decision that had upheld a nearly identical ordinance, to the extent that it was inconsistent with the Court's en banc decision.⁷ The following February, the Supreme Court denied *certiorari*, settling *Comite III* as the governing law in the Ninth Circuit.⁸

Although the decision is unquestionably a victory for day laborers in the Ninth Circuit, it leaves unsettling gaps in the law. First, in its reliance on First Amendment overbreadth doctrine, the decision sidesteps questions about possible underlying reasons for regulating day labor solicitation—reasons that may include race-based animus, implicating the Equal Protection Clause,⁹ or attempts to regulate immigration in violation of federal preemption doctrine.¹⁰ Second, the decision invites the question of what sort of city regulation would be permissible under *Comite III*.

This paper examines *Comite III* in light of these questions and in comparison to a successful equal protection challenge by day laborers in *Doe v. Village of Mamaroneck*.¹¹ Using the reasoning of *Doe*, I will show how a theoretical attempt to tailor the Redondo Beach ordinance more closely to the city's interests to avoid a First Amendment violation could instead give rise to a credible equal protection challenge. Thus, when cities attempt to regulate day laborers, they will often find themselves running afoul of either the First or Fourteenth Amendment. Cities can, however, avoid this constitutional dilemma through leadership and creativity, addressing legitimate community concerns without infringing on the constitutional rights of individuals.

7. *Comite III*, 657 F.3d at 942 (overturning *ACORN v. City of Phoenix*, 798 F.2d 1260 (9th Cir. 1986)).

8. *Comite III*, 657 F.3d 936, *cert. denied*, No. 11-760, 2012 WL 538394 (Feb. 21, 2012).

9. U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

10. U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land . . .”); U.S. CONST. art. I, § 8, cl. 4 (permitting Congress to “establish a uniform Rule of Naturalization . . . throughout the United States”). Federal preemption doctrine is beyond the scope of this note. For a discussion of federal preemption doctrine in the context of day labor solicitation ordinances, see Kristina M. Campbell, *The High Cost of Free Speech: Anti-Solicitation Ordinances, Day Laborers, and the Impact of “Backdoor” Local Immigration Regulations*, 25 GEO. IMMIGR. L.J. 1, 31-42 (2010), and Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008).

11. 462 F. Supp. 2d 520 (S.D.N.Y. 2006).

I. Day Labor Solicitation and the First Amendment

The term “day laborer,” or “*jornalero*,” describes an individual who accepts employment, usually manual labor, on an as-needed basis.¹² Day laborers often make their availability known by standing in groups along high-traffic streets in urban areas, although in some regions, day labor centers are available for this purpose.¹³ Day laborers are usually Latino men, and their employers are often construction or landscaping contractors.¹⁴ Although some members of the public often assume day laborers are all recently arrived illegal aliens, many are in fact present in the United States legally.¹⁵

The First Amendment’s guarantee of freedom of speech does not depend on the immigration status of the individual invoking it.¹⁶ Additionally, solicitation is considered “speech” within the meaning of the First Amendment.¹⁷ In *Village of Schaumburg v. Citizens for a Better Environment*, the Supreme Court articulated the basis for this holding, stating that solicitation “is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues,” and that “without solicitation the flow of such information and advocacy would likely cease.”¹⁸ Although soliciting

12. IMMIGR. RIGHTS/INT’L HUMAN RIGHTS CLINIC, CTR. FOR SOC. JUSTICE, SETON HALL UNIV. SCH. OF LAW, *ALL WORK AND NO PAY: DAY LABORERS, WAGE THEFT, AND WORKPLACE JUSTICE IN NEW JERSEY 1* (2011). See generally YOLANDA ALINDOR, ZELLERBACH FAMILY FOUND., *BAY AREA DAY LABOR PROGRAMS: SERVICES, POLITICAL ENVIRONMENT, AND PRIORITIES* (Lina Avidan, ed., Jan. 2007), available at http://www.zellerbachfamilyfoundation.org/pdfs/labor_report.pdf.

13. IMMIGR. RIGHTS/INT’L HUMAN RIGHTS CLINIC, *supra* note 12, at 1; ALINDOR, *supra* note 12.

14. Campbell, *supra* note 10, at 1, 22.

15. *Id.* at 22 (citing DAY LABOR RESEARCH INSTITUTE, FAQ, <http://daylaborinfo.org/FAQ.aspx> (last visited March 31, 2012) (“It is a misconception to think that all day laborers are ‘illegal aliens.’ We have found day labor corners where all the day laborers have legal papers . . . and have found everywhere that day laborers often have legal papers. It is impossible to look at a group of day laborers and discern which have papers and which don’t.”)).

16. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”). Aliens, whether undocumented or not, have been considered “persons” within the meaning of the Constitution. See, e.g., *Plyler v. Doe*, 457 U.S. 202, 214 (1982) (extending the equal protection clause of the Fourteenth Amendment to undocumented alien children for purposes of public education).

17. *Int’l Soc’y for Krishna Consciousness, Inc., v. Lee*, 505 U.S. 672, 677–78 (1992) (citing *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981); see also, *United States v. Kokinda*, 497 U.S. 720, 725 (1990); *Riley v. Nat’l Fed’n of Blind of North Carolina, Inc.*, 487 U.S. 781, 788–89 (1988)).

18. 444 U.S. 620, 632 (1980).

day labor opportunities is not exactly similar to expressing “views” or “seeking support for causes,” it is “speech” in the sense that it involves an announcement of availability for work. This announcement is made, in part, by congregating in groups along streets and perhaps gesturing to attract the attention of employers.¹⁹ In many appellate cases challenging day labor solicitation regulation, and in most such cases in the Ninth Circuit, such solicitation has been held to constitute speech within the meaning of the First Amendment.²⁰

The public streets and sidewalks on which day laborers gather “occup[y] a ‘special position in terms of First Amendment protection’” as the “‘archetype of a traditional public forum’” for speech.²¹ When deciding the constitutionality of government restriction on speech in a public forum, a court must determine whether the restriction is content-based or content-neutral.²² A content-based restriction is one that “by [its] terms distinguish[es] favored speech from disfavored speech on the basis of the ideas or views expressed.”²³ A content-neutral restriction is one that is “justified without reference to the content of the regulated speech.”²⁴

19. See Answering Brief of Appellees at 7, *Comite II*, 607 F.3d 1178 (9th Cir. 2010), 2007 WL 2434115 (stating that “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”). The dissent in *Comite III* disputes whether soliciting work is speech. *Comite III*, 657 F.3d 936, 958 (9th Cir. 2011) (Kozinski, C.J., dissenting) (“Sure, it implicates speech, but almost everything implicates communication of some sort; governing would be impossible if price fixing, streetwalking, gambling, blackmail, employment discrimination, the sale of human organs, operating a retail business and the gazillion other activities that involve communication were all subject to strict scrutiny.”).

20. See, e.g., *ACLU v. City of Las Vegas*, 466 F.3d 784, 792 (9th Cir. 2006); *Lopez v. Town of Cave Creek*, 559 F. Supp. 2d 1030, 1031 (D. Ariz. 2008); *Berger v. City of Seattle*, 569 F.3d 1029, 1050 (9th Cir. 2009); *ACORN*, 798 F.2d 1260 (9th Cir. 1986); *Coal. for Human Immigrant Rights of L.A. v. Burke (CHIRLA)*, No. CV 98-4863-GHK(CTX), 2000 WL 1481467 (C.D. Cal. Sept. 12, 2000); *Comite de Jornaleros de Glendale v. City of Glendale*, 2005 U.S. Dist. LEXIS 46603 at 6 (C.D. Cal. May 13, 2005).

21. *Snyder v. Phelps*, 131 S. Ct. 1207, 1218 (2011) (quoting *United States v. Grace*, 461 U.S. 171, 180 (1983) and *Frisby v. Schultz*, 487 U.S. 474, 480 (1988)).

22. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

23. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994). Under certain circumstances a “content-based purpose” may be sufficient to find that a restriction is content based. *Id.* at 642 (emphasis added).

24. *Ward*, 491 U.S. at 791 (“The government’s purpose is the controlling consideration. 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 . . . Government regulation of expressive activity is content neutral so long as it is ‘justified without reference to the content of the regulated speech.’”) (internal citation

To support content-based restrictions, the government must show that the restriction is narrowly tailored to serve a compelling government interest.²⁵ For content-neutral restrictions, 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.’”²⁶ Thus, narrow tailoring is required for both content-neutral and content-based restrictions on speech. A “narrowly tailored” restriction is one that does not “burden substantially more speech than is necessary to further the government’s legitimate interests.”²⁷

A. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*

1. Background

In 1986, the Ninth Circuit Court of Appeals considered the constitutionality of a municipal ordinance in the city of Phoenix, Arizona, aimed at preventing a form of solicitation known as “tagging.”²⁸ Individuals associated with the nonprofit Association of Community Organizations for Reform Now (“ACORN”) approached cars stopped at red lights to provide literature and solicit donations.²⁹ The Phoenix ordinance in dispute in *ACORN v. City of Phoenix* read, “[n]o person shall stand on a street or highway and solicit, or attempt to solicit, employment, business or contributions from the occupants of any vehicle.”³⁰ In spite of the ordinance’s breadth, the court found it a reasonable time, place, and manner restriction consistent with

omitted). The rules announced in *Ward* leave considerable room for confusion. See *ACLU*, 466 F.3d at 794 & n.10 (holding that bans on *acts* of solicitation are content-neutral, while bans on *words* of solicitation are content-based.); see generally Campbell, *supra* note 10, at 3–20.

25. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

26. *Ward*, 491 U.S. at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

27. *Id.* at 799.

28. *ACORN v. City of Phoenix*, 798 F.2d 1260, 1262 (9th Cir. 1986).

29. *Id.*

30. *Id.* (quoting PHOENIX, ARIZ. CITY ORDINANCE § 36-131.01 (1984)).

Supreme Court jurisprudence regarding content-neutral exclusions on speech in public fora.³¹

By May 1987, the City of Redondo Beach adopted nearly identical language for an ordinance proposed by the city attorney as a response to “extreme difficulties with persons soliciting employment from the sidewalks.”³² The Redondo Beach ordinance additionally defined “street or highway” to include sidewalks, curbs, and other roadway structures.³³ In 1989, the City added a prohibition on stopping to hire workers.³⁴ Thus, the complete ordinance read as follows:

(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 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.

(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.³⁵

In 2004, fifteen years after adopting the ordinance in its final form, the City began an undercover operation to catch laborers in the act, arresting sixty day laborers and one employer over a 16-day period.³⁶ In response, two advocacy organizations, *Comite de Jornaleros de Redondo Beach* and the National Day Laborer

31. *Id.* at 1267–68 (relying on *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); *Perry v. Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981)).

32. Appellant’s Opening Brief at 35, *Comite II*, 607 F.3d 1178 (9th Cir. 2010), 2007 WL 1994704. Although the City Attorney’s memorandum cited in the decision refers to the selling of “certain products,” there is no mention of sales as an issue in the district court’s decision or in the City’s briefs on appeal; the case has focused on the City’s asserted interest in addressing traffic safety at day labor solicitation sites. *Id.*

33. *Comite III*, 657 F.3d at 941; REDONDO BEACH, CAL., MUN. CODE § 3-7.1601(a) (1989).

34. *Comite III*, 657 F.3d at 942; REDONDO BEACH, CAL., MUN. CODE § 3-7.1601(b) (1989).

35. REDONDO BEACH, CAL., MUN. CODE § 3-7.1601 (1989).

36. *Comite III*, 657 F.3d at 942.

Organizing Network (“NDLON”), filed suit in federal district court to challenge the law as a facially unconstitutional restriction on speech.³⁷ The district court, citing *ACORN*, found the ordinance content-neutral³⁸ but not narrowly tailored to achieve the City’s stated interests of traffic safety, crime prevention, and aesthetics.³⁹ Accordingly, the district court found for the plaintiffs, permanently enjoining the City from enforcing the ordinance.⁴⁰

On appeal, a Ninth Circuit panel reversed the district court’s decision, relying on *ACORN* as precedent, but also granted rehearing en banc.⁴¹ Since 1986, several decisions in Ninth Circuit cases had distinguished *ACORN*, so the day laborers’ case gave the court a chance to resolve confusion.⁴²

2. *The Court’s Analysis*

On rehearing, the court divided over several issues. Writing for a clear majority, Judge Milan Smith held that the ordinance was a facially unconstitutional restriction on speech because it was overbroad, burdening significantly more speech than necessary to achieve the city’s purpose.⁴³ The majority split, however, on whether the ordinance was content-neutral or content-based. Judge Smith argued in a special concurrence that it was a content-based restriction that failed strict scrutiny and failed to leave open ample alternative channels of communication.⁴⁴ Judge Ronald Gould concurred in the judgment but thought the ordinance needed only alternative channels

37. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach (Comite I)*, 475 F. Supp. 2d 952 (C.D. Cal. 2006).

38. *Id.* at 959–63 (disagreeing with plaintiffs’ assertion that the ordinance was content-based on its face, and arguing that even so, the “secondary effects” doctrine applied and allowed the court to analyze the statute as content-neutral because the City showed the purpose was to eliminate an undesirable effect—unsafe traffic—unrelated to the solicitation content of the speech).

39. *Id.* at 964–66.

40. *Id.* at 970 (granting plaintiffs’ motion for summary judgment because the ordinance, although content-neutral, was not narrowly tailored to achieve the City’s interests, and did not leave open ample alternative channels for solicitation speech).

41. *Comite II*, 607 F.3d 1178; *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 623 F.3d 1054 (9th Cir. 2010) (order granting rehearing en banc).

42. *See, supra*, note 20.

43. *Comite III*, 657 F.3d at 951.

44. *Comite III*, 657 F.3d at 951–57 (Smith, J., concurring; Thomas, J., joining; Graeber, J., joining as to content-neutrality but not alternative channels of communication).

of communication to withstand “time, place, and manner” scrutiny.⁴⁵ Chief Judge Alex Kozinski and Judge Carlos Bea joined together in “deep dissent,” arguing that the conduct regulated did not constitute speech,⁴⁶ and even if the conduct was speech, the ordinance was narrowly drawn and left open ample alternative channels of communication, making it a permissible restriction on speech.”⁴⁷

In the majority opinion, Judge Smith analyzed the Redondo Beach ordinance in light of the city’s asserted interest: “promoting traffic flow and safety.”⁴⁸ As to whether the ordinance was a “reasonable time, place, or manner” restriction, he found two sources of overbreadth.⁴⁹ First, the ordinance on its face prohibited forms of speech that “do not cause the types of problems that motivated the Ordinance.”⁵⁰ The majority held that the ordinance would prohibit many typical examples of ordinary speech: “Girl Scouts selling cookies on the sidewalk,” “signbearers on sidewalks seeking patronage,” “children shouting ‘carwash’ at passing vehicles,” and even “a motorist who stops, on a residential street, to inquire whether a neighbor’s teenage daughter or son would be interested in performing yard work or babysitting.”⁵¹

Second, the court found the ordinance “geographically overinclusive” because the city offered evidence of problems at only two locations.⁵² On its face, the ordinance applied to all roadways, prohibiting instances of solicitation speech even in locations where it would be unlikely to imperil traffic flow and safety.⁵³ As the majority pointed out, “the Ordinance does not even distinguish between lawfully parked cars and cars moving in traffic, and there is no reason

45. *Id.* at 951 (Gould, J., concurring) (“We err when we make it so hard for municipalities to satisfy the test for reasonable restraints on time, place, and manner of speech that these municipalities cannot achieve important public goals like traffic safety while preserving speech.”).

46. *See supra* note 19 and accompanying text.

47. *Comite III*, 657 F.3d at 959 (Kozinski, C. J., dissenting) (asserting that the ordinance regulates “a very narrow and finely drawn class of conduct: standing around on sidewalks and street corners in order to interact with passing motorists” and arguing that newspapers, Craigslist, and six established hiring centers in the Los Angeles area provide ample alternatives).

48. *Id.* at 947.

49. *Id.* at 948–51.

50. *Id.* at 948.

51. *Id.*

52. *Id.* at 949.

53. *Id.*

to believe . . . that a lawfully parked car would create the types of traffic problems described by the City.”⁵⁴

In addition to finding the ordinance over-inclusive, the majority found the ordinance unnecessary, noting that the city already had laws at its disposal that addressed traffic issues, including state statutes against jaywalking and stopping in a red zone, as well as city ordinances prohibiting standing in roads impeding traffic or standing closer to the curb than necessary on sidewalks in the business districts.⁵⁵ Drawing an analogy to commercial speech, the Court cited *City of Cincinnati v. Discovery Network, Inc.* for the proposition that the availability of “numerous and obvious less-burdensome alternatives” to the law being challenged was a relevant consideration to the question of narrow tailoring.⁵⁶ The majority concluded that the ordinance was facially invalid “[b]ecause [it] ‘suppress[es] a great quantity of speech that does not cause the evils that it seeks to eliminate.’”⁵⁷ Thus, the court overruled *ACORN* “to the extent that it construed a substantially identically worded ordinance as facially restricting only solicitation conduct.”⁵⁸

The opinions in *Comite III* reveal several key areas of dispute in the First Amendment analysis of anti-solicitation ordinances. First, as Chief Judge Kozinski asked in his dissent, in what respect is solicitation “speech”?⁵⁹ He argued that the “speech” in question was really conduct—“precisely the kind of conduct that’s regulated when we require retail establishments to obtain business licenses, maintain health standards, buy insurance and hire workers based on merit rather than race or sex.”⁶⁰ The conduct that drew the attention of employers and caused the purported traffic problems was simply standing in a group on a street with an apparent willingness to be

54. *Id. Contra ACORN*, 798 F.2d at 1262 (stating that “the mere presence of taggers on the roadway or intersection is a potential safety hazard”).

55. *Id.* at 949–50.

56. *Id.* at 950 (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993)). The majority is not arguing that the day laborers’ conduct is “commercial speech” that is subject to the test for commercial speech. First, the language of the statute is not confined to commercial solicitation. Second, even if day labor solicitation is commercial speech, the lawsuit is a facial challenge, so the burdening of speech other than the plaintiffs’ is at issue. *Id.* at 945 n.2.

57. *Id.* at 950 (quoting *Ward*, 491 U.S. at 799 n.7).

58. *Id.* at 947 n.5.

59. *Id.* at 959 (Kozinski, C. J., dissenting).

60. *Id.* at 958–59 (Kozinski, C.J., dissenting).

hired.⁶¹ Cities are permitted to impose reasonable time, place, and manner restrictions on activities like loitering, which is almost indistinguishable from the conduct in dispute here. The dissent further supported its point by framing the phenomenon the city sought to abolish as an “impromptu labor market,” rather than as a set of individuals conveying a message about their interest in employment.⁶²

There is, however, rich precedent in the Ninth Circuit for analyzing solicitation conduct as speech.⁶³ Indeed, the holding in *ACORN* analyzed conduct as speech.⁶⁴ Furthermore, as the majority points out, this is a facial challenge; therefore, the speech of concern to the court was not solely that of the day laborers, but that of all persons whose protected speech could fall within the scope of the ordinance.⁶⁵

Another area of dispute is whether the restriction in *Comite III* was content-based or content-neutral. The majority was divided on this question, with three members writing that the restriction was content-based on its face because it expressly “prohibits certain subject matters—any solicitation related to ‘employment, business, or contributions’—and allows all other solicitation (such as political solicitation) to continue unabated.”⁶⁶ Nevertheless, there are two diverging lines of precedent in the Ninth Circuit—one finding restrictions on solicitation content-neutral and the other content-based.⁶⁷

A final area of dispute is the nature of the government interests at stake. The majority analyzed the ordinance as if the only government interest at stake was “promoting traffic flow and safety”—an undisputed government responsibility that can support

61. See *supra* note 19 and accompanying text.

62. *Comite III*, 657 F.3d at 958 (Kozinski, C.J., dissenting).

63. See *supra* note 20 and accompanying text.

64. See *ACORN*, 798 F.2d 1260.

65. See *supra* note 56 and accompanying text.

66. *Comite III*, 657 F.3d at 953 (Smith, J., concurring). Judge Smith finds the closest parallel in *Burson v. Freeman*, which held that an ordinance prohibiting the soliciting of votes near polling places on election day was a content-based restriction in that it did not prevent any other kind of speech near polling places on election day. *Id.* (citing *Burson v. Freeman*, 504 U.S. 191, 193–94 (1992)).

67. See Campbell, *supra* note 10, at 4–20 (separating the two lines of precedent in which the Ninth Circuit found restrictions on solicitation to be either content neutral or content based).

reasonable time, place, and manner restrictions on speech.⁶⁸ Indeed, this is the sole interest the plain language of the ordinance appears to address. But the dissent cites several additional ills: littering, vandalism, public urination, blocking the path for pedestrians, harassing women, and damaging property.⁶⁹ Although the City argued these interests in district court and included them in its opening brief on appeal,⁷⁰ the majority refused to consider them because the City failed to argue on appeal that its ordinance was narrowly tailored to address these ills.⁷¹ Even if it had, the City might have found it hard to carry this argument, since the ordinance on its face addresses only traffic concerns, and the City had available numerous other laws with which it could have addressed these other ills.⁷²

This quandary illustrates the problem with using a First Amendment theory to challenge municipal targeting of day laborers: technical distinctions often neglect the underlying reasons for such action, including racial animus and anti-immigrant attitudes. The following sections of this paper explore the underlying reasons more directly.

B. The Indirect Nature of First Amendment Overbreadth Challenges

Comite III is just one of several successful challenges to anti-solicitation ordinances based on the First Amendment.⁷³ But as successful as the First Amendment overbreadth doctrine was in *Comite III*, the decision is unsatisfying for a number of reasons. First,

68. *Comite III*, 657 F.3d at 947–48 (majority opinion) (citing *Cox v. Louisiana*, 379 U.S. 536, 554–55 (1965)).

69. *Id.* at 957 n.1 (Kozinski, C.J., dissenting).

70. Appellant’s Opening Brief at 7, 13, 34, 35, *Comite II*, 607 F.3d 1178 (9th Cir. 2010) (No. 06-55750), 2007 WL 1994704.

71. *Id.* at 947 n.6 (quoting *Dennis v. BEH-1, LLC*, 520 F.3d 1066, 1069 n.1 (9th Cir. 2008)) (“We will not manufacture arguments for an appellant, and a bare assertion does not preserve a claim.”).

72. In Answering Brief of Appellees at 47, *Comite II*, 607 F.3d 1178 (9th Cir. 2010) (No. 06-55750), 2007 WL 2434115, plaintiffs state: “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).”

73. See *supra* note 20.

while there is substantial precedent within the Ninth Circuit for using overbreadth arguments to strike down anti-solicitation ordinances, there is an absence of appellate decisions in other circuits applying the First Amendment overbreadth doctrine to such ordinances. Second, by focusing the debate on technical distinctions that are peculiar to First Amendment jurisprudence, such challenges sidestep the prejudice that can infect every stage of government action against day laborers—a traditionally politically powerless minority.⁷⁴ Most importantly, the very basis of an overbreadth challenge is that the law in question infringes on expression *other than that of the plaintiff* by encompassing more conduct than is necessary to address its legitimate aim, thus threatening to chill speech that would otherwise receive First Amendment protection.⁷⁵ For advocates who wish to change public attitudes and build support for the right of day laborers to seek honest work, free from race- or nationality-based harassment, First Amendment challenges fail to address the goal head-on. A challenge under the Equal Protection Clause of the Constitution addresses this goal directly. *Doe v. Village of Mamaroneck*, a Second Circuit case discussed in the following section, illustrates an effective use of equal protection doctrine on behalf of day laborers subjected to prejudice while seeking work.

II. Day Labor Solicitation and Equal Protection

The Equal Protection Clause states that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”⁷⁶ The Clause is “essentially a direction that all persons similarly situated should be treated alike.”⁷⁷ Its guarantee generally applies to all persons within the United States, including aliens, whether documented or not.⁷⁸

74. See generally Campbell, *supra* note 10.

75. See, e.g., *Virginia v. Black*, 538 U.S. 343 (2003) (invalidating a statute that prohibited the burning of a cross with intent to intimidate); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (invalidating an ordinance prohibiting certain acts, such as cross burning, when they are based on racial bias and other criteria); *Gooding v. Wilson*, 405 U.S. 518 (1972) (reversing conviction under a statute prohibiting the use of “opprobrious words of abusive language, tending to cause a breach of the peace”).

76. U.S. CONST. amend. XIV, § 1.

77. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985).

78. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 368 (1886) (“The rights of the petitioners, as affected by the proceedings of which they complain, are not less because they are aliens and subjects of the emperor of China.”).

Ordinarily, where individuals within a group differ from one another in ways that are relevant to government interests, discrimination by the government on the basis of those characteristics is subject to “rational basis” scrutiny, in which the party challenging the action must show that the law has no rational relationship to a legitimate government purpose.⁷⁹ However, when the government discriminates against a “suspect class,” the government action is subject to heightened scrutiny when challenged; race and alienage are such suspect classifications.⁸⁰ Even a statute or policy that is not expressly drawn along racial lines may violate the Equal Protection Clause if the statute is motivated by intent to discriminate against a suspect class.⁸¹ Disparate impact on a suspect class may provide evidence of discriminatory intent.⁸² However, disparate impact alone is not sufficient; the government action must be taken with discriminatory intent.⁸³ Thus, a party challenging a government statute or policy that is facially nondiscriminatory must show both disparate impact and discriminatory intent.

A plaintiff who can show that the government action being challenged was motivated by racial animus does not need to show that a similarly situated group of a different race was treated differently; the very use of a policy against a group because of its race makes that group uniquely situated.⁸⁴

Once the plaintiff shows that the government action was “motivated at least in part by a racially discriminatory purpose,” defendants seeking to uphold their actions have the burden of

79. *Cleburne*, 473 U.S. at 441–42.

80. See *Washington v. Davis*, 426 U.S. 229 (1976); *Plyler v. Doe*, 457 U.S. 202, 214 (1982) (extending the equal protection clause of the Fourteenth Amendment to undocumented alien children for purposes of public education); *Yick Wo*, 118 U.S. at 368 (“The rights of the petitioners, as affected by the proceedings of which they complain, are not less because they are aliens and subjects of the emperor of China.”).

81. See generally *Yick Wo*, 118 U.S. 356.

82. *Washington*, 426 U.S. at 229–30.

83. *Washington*, 426 U.S. at 239–41.

84. *United States v. Duque-Nava*, 315 F. Supp. 2d 1144, 1153–54 (D. Kan. 2004) (allowing plaintiffs to show discriminatory impact through statistical evidence, rather than pointing to a similarly situated group); *Doe v. Village of Mamaroneck*, 462 F. Supp. 2d 520, 543 (S.D.N.Y. 2006) (“Once racially discriminatory intent infects the application of a neutral law or policy, the group that is singled out for discriminatory treatment is no longer similarly situated to any other in the eyes of the law, so adverse effects can be presumed. In effect, the law recognizes that a government that sets out to discriminate intentionally in its enforcement of some neutral law or policy will rarely if ever fail to achieve its purpose.”).

establishing that the same result would have been reached without consideration of race.⁸⁵

A. *Doe v. Village of Mamaroneck*

Doe v. Village of Mamaroneck is notable because it is an equal protection challenge taken on the part of day laborers. Several individual day laborers and the National Day Laborer Organizing Network (“NDLON”) sued the Village of Mamaroneck following a shift in the village’s policy regarding street-side day labor solicitation.⁸⁶ For several decades, men had gathered along streets in the Columbus Park neighborhood of the village to seek ad hoc employment from contractors.⁸⁷ Until the 1990s, most of the men were white; by 2004, nearly all were Latino.⁸⁸ In the early 2000s, the number of men seeking employment as day laborers increased from 20-30 per day to 60-80 per day, with 12-15 contractors per day stopping to hire workers.⁸⁹ In 2004, the village launched what the *Doe* court described as a targeted campaign of “harassment and intimidation against . . . Latino day laborers . . . effectuated through the discriminatory application of a neutral law.”⁹⁰ First, village officials, with the approval of the mayor, the traffic commission, and the village board of trustees, moved the solicitation site from the sidewalk to a designated parking lot some distance away.⁹¹ At about the same time, the mayor began making public statements exaggerating the number of day laborers and claiming, without foundation, that they were not residents of the village.⁹² These official acts were accompanied by an “unprecedented police presence” that included stationing numerous officers and police cars in the area during prime hiring hours and aggressively ticketing any contractors

85. *Doe*, 462 F. Supp. 2d at 546 (citing *United States v. City of Yonkers*, 96 F.3d 600, 612 (2d Cir. 1996)).

86. *Id.* at 524–26. The court dismissed NDLON from the suit for lack of injury in fact. *Id.* at 541.

87. *Id.* at 525.

88. *Id.*

89. *Id.* at 525–26.

90. *Id.* at 546.

91. *Id.* at 526.

92. *Id.* at 526–27 (finding that the police estimate was less than half the 200-225 claimed by the mayor, and noting that no study of residency was done until 2006, at which time it was found that by far most day laborers were actually residents of the village).

that stopped.⁹³ The court found that the mayor's public statements had been "designed to justify the law enforcement campaign that ensued."⁹⁴ The campaign was effective: within a month, the number of laborers at the site was cut in half and employers began avoiding the hiring site.⁹⁵

The police presence continued into 2006, with police arriving each day at about 7 a.m., when day laborers began to congregate at the hiring site, and departing at about 11 a.m., by which time the chances of employment had normally passed.⁹⁶ Before this campaign, no police vehicle had ever before been permanently stationed anywhere in the village.⁹⁷ While ticketing contractors at the day labor pick-up site, sometimes only for stopping, police often ignored traffic and parking infractions elsewhere, or even at the same location when not committed by a contractor.⁹⁸ A local store owner saw officers ticketing Latino drivers for seatbelt violations while allowing white drivers an opportunity to buckle up before being cited.⁹⁹ At a nearby childcare center, parents dropping off children were not ticketed or intimidated in the same manner.¹⁰⁰

The village justified its enforcement campaign by citing "quality of life" issues, such as prostitution, drug dealing, and other criminal activity.¹⁰¹ However, the court found that these issues were unrelated to the day laborers' presence, especially since no complaints had been made to the police or other officials regarding other purported problems like public intoxication and urination.¹⁰²

In December 2005, a neighboring city closed its day laborer hiring center for the winter.¹⁰³ The village board of trustees, claiming without foundation that the nearby closure had caused a local increase in day laborers in the village, voted to close the village hiring site.¹⁰⁴ When day laborers attempted to return to their old location

93. *Id.* at 527 (finding that in the four weeks after the move to the new site, 204 tickets were issued).

94. *Id.*

95. *Id.* at 527–28.

96. *Id.* at 528.

97. *Id.*

98. *Id.* at 529.

99. *Id.*

100. *Id.* at 530.

101. *Id.*

102. *Id.*

103. *Id.* at 531.

104. *Id.* at 531–33.

along a street, they were threatened with citation or arrest, and the village trustees voted to prohibit trucks from traveling through the area.¹⁰⁵ The chief of police ordered subordinate officers to subject contractors picking up day laborers to time-consuming “safety inspections.”¹⁰⁶ As the day laborers moved, the attention of the police and trustees followed them.¹⁰⁷ The police established checkpoints at which contractors’ trucks were stopped and the court found those checkpoints were “intended to intimidate contractors and prevent them from picking up the day laborers” in order to reduce the number of day laborers in the village.¹⁰⁸ The mayor also told the press that the village was “aggressively ticketing the day laborers and the contractors who hire them.”¹⁰⁹ Furthermore, the police approached individual laborers and told them that not only could they not stand in certain locations, despite not blocking traffic, but that they also could not sit on a bench because children played nearby.¹¹⁰ The campaign was effective—many contractors stopped picking up day laborers in the village, and many day laborers stopped seeking employment there.¹¹¹

Importantly, the court found no evidence that anyone other than day laborers and their potential employers were subject to this kind of enforcement, including drivers picking up passengers or parents dropping off children at school.¹¹² The court also determined that “[t]he complaints and purported fears of certain village residents were motivated, consciously or unconsciously, by racial animus towards the day laborers,”¹¹³ and “[t]he fact that the day laborers were Latinos and not whites was, at least in part, a motivating factor in [the village’s] actions.”¹¹⁴

Judge McMahon applied reasoning from a line of Second Circuit decisions about facially neutral laws applied with discriminatory intent and effect: “Where, as here, a particular group (day laborers and those who hire them) was specifically targeted for heightened

105. *Id.* at 533–35.

106. *Id.* at 535.

107. *Id.* at 534–35.

108. *Id.* at 536, 539.

109. *Id.* at 536–37.

110. *Id.* at 537.

111. *Id.* at 539.

112. *Id.* at 538–39.

113. *Id.* at 540.

114. *Id.* at 543.

enforcement of certain types of laws—like those involving traffic violations—it will be all but impossible to find a similarly situated group of persons. *Pyke* and *Brown* stand for the proposition that this is no bar to an equal protection claim.”¹¹⁵ Judge McMahon reasoned that the facts showed both racially discriminatory intent and disparate effect:

When the Mayor announces that the day laborers represent an “out of control problem,” and puts a plan in place to reduce the number of day laborers in the village through a campaign of “aggressively ticketing the day laborers and the contractors who hire them;” when the police chief directs his subordinates to subject the contractors who hire day laborers to rigorous and time-consuming inspections and orders a police officer to monitor the drop-off of day laborers in the afternoons to look for traffic violations; when a dissenting trustee candidly admits that, after chasing the day laborers out of the park, the police set up unprecedented checkpoints on Mamaroneck Ave. to get rid of them—on such a record, no doubt remains that defendants’ actions were intended precisely to harass and intimidate contractors and thereby to deter them from picking up day laborers in Mamaroneck.

Moreover, the record also demonstrates that, at least insofar as the targeted traffic ticketing campaign was concerned, the Village did not fail to achieve its purpose. Its campaign of harassment and intimidation against the Latino day laborers in Mamaroneck—effectuated through the discriminatory application of a neutral law . . . —has had precisely those adverse effects that were intended. The evidence adduced at trial proved beyond peradventure that the number of contractors who came to Mamaroneck to pick up day laborers in the Village of Mamaroneck in the wake of the targeted ticketing campaign was substantially reduced. This evidence of adverse and discriminatory effects means that, while plaintiffs’ relationship to the rest of the population of Mamaroneck may not be quite as idiosyncratic as that of the plaintiffs in *Pyke*, this is still a case in which the requirement of showing a similarly situated group should not

115. *Id.* at 544 (applying *Pyke v. Cuomo*, 258 F.3d 107 (2d Cir. 2001) and *Brown v. City of Oneonta*, 221 F.3d 329 (2d Cir. 1999)).

be erected as an insurmountable barrier to plaintiffs' equal protection claim.¹¹⁶

Judge McMahon subsequently determined that the enforcement campaign was aimed at a protected class—the day laborers who were almost entirely Latino¹¹⁷—and that the police failed to undertake a comparable effort when it ignored infractions of the same law by parents of schoolchildren and drivers picking up passengers in the area, even when drivers stopped in traffic.¹¹⁸ Most egregiously, the court found the campaign targeted Latino drivers for infractions when white drivers were merely given a warning.¹¹⁹

In deciding whether racial animus was behind the village's action, Judge McMahon also considered the factors suggested by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*: “(1) [T]he historical background of the decision, (2) the specific sequence of events leading up to the challenged decision, (3) whether there were any departures from the normal procedural sequence, and (4) contemporary statements made by the decision-making body . . .”¹²⁰ Mamaroneck was historically tolerant of day laborers; the dramatic shift in policy came only after the day labor population shifted to a Latino majority. The campaign of “unremitting hostility” was without precedent and was applied uniquely to the day laborers and their employers.¹²¹ Additionally, statements made publicly by village officials were “negative and stigmatizing” for the day laborers.¹²² Thus, all of the *Arlington Heights* factors weighed in favor of finding racial animus. The court dismissed the defendants' rationale—a sudden decrease in “quality of life” in the neighborhood—as “wholly pretextual.”¹²³ Police department records showed no appreciable increase in crime corresponding to day laborer presence.¹²⁴ Nor was there a relationship between the campaign—traffic enforcement from 7 a.m.

116. *Id.* at 546.

117. *Id.*

118. *Id.* at 547.

119. *Id.*

120. *Id.* (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977)).

121. *Id.* at 549.

122. *Id.*

123. *Id.* at 553.

124. *Id.*

to 11 a.m.—and purported problems like “urinating in public, defecation, catcalls, fighting, drinking, blocking sidewalks, littering, smoking marijuana and sleeping overnight.”¹²⁵ There was no evidence of a decrease in crime after the closure of the day labor site.¹²⁶ Consequently, the court found the village liable for violation of the Equal Protection Clause.¹²⁷

B. *Comite III* and *Doe* Compared

When these suits were filed, the Ninth Circuit had ample precedent for First Amendment overbreadth challenges of anti-solicitation ordinances, so it was natural for plaintiffs to argue, and for the court to apply, the overbreadth doctrine in *Comite III*.¹²⁸ Meanwhile, the Second Circuit had ample precedent for applying equal protection doctrine to anti-solicitation actions.¹²⁹ Had the precedents not diverged so dramatically, the factual differences between *Comite* and *Doe* would have been enough to explain why the plaintiffs in *Comite III* invoked overbreadth doctrine, while the plaintiffs in *Doe* invoked equal protection doctrine. The facts of *Doe* included a sudden shift in policy after a change in the racial composition of the day laborer population, a years-long pattern of targeted attention from law enforcement, contemporaneous negative statements by officials that cast groundless and stigmatizing aspersions on the day laborers, a stark mismatch between the purported government interests and the laws employed to address them, strong evidence of disproportionate enforcement against day laborers, and extensive documentation of the effects enforcement had on day laborers.¹³⁰

In Redondo Beach, on the other hand, the government action consisted of a law passed in 1987 to address day labor solicitation issues, yet not used against day laborers until 2004—and then only for four weeks.¹³¹ While *Comite III* provides its own proof of disparate impact under *Doe*—a “sting” operation specifically aimed at day laborers, without evidence of any similar enforcement against other groups—overall, the evidence of racial animus is much thinner than in

125. *Id.*

126. *Id.* at 554.

127. *Id.* at 560.

128. See *supra* note 20 and accompanying text.

129. *Doe*, 462 F. Supp. 2d at 543.

130. See section II.A above.

131. See text accompanying notes 32 through 36.

Doe. The only contemporaneous public statement by a city official in the record is the mayor of Redondo Beach urging the city council to “eliminate this problem of congregating day laborers.”¹³² Echoing the facts of *Doe*, in *Comite III*, one of the locations where day laborers gathered was “just four blocks from Madison Elementary School,”¹³³ suggesting that the day laborers down the street posed some special danger to schoolchildren. However, the presence of schoolchildren could also be interpreted as a legitimate reason for extra traffic enforcement.

In contrast to the Village of Mamaroneck’s policy, the Redondo Beach ordinance bore a relationship to at least one of the city’s stated purposes, promoting traffic flow and safety.¹³⁴ The ordinance furthermore only targeted solicitation aimed at drivers of vehicles, not those persons standing on the street.¹³⁵ In *Doe*, the court declined to find a plausible relationship between any of the village’s purported interests and their campaign of traffic enforcement.

The important differences in the actions taken by these two cities dictated that different theories be used in each case. Suppose, however, the City of Redondo Beach attempts to change its ordinance to make it consistent with the First Amendment. In what follows, I will show that the result would be an ordinance that could expose the city to an equal protection-based challenge along the lines of *Doe*.

III. The Dilemma for Cities

The majority in *Comite III* confidently asserts, “[w]e do not doubt that a properly drawn ordinance could achieve the City’s goals; however, *this* Ordinance does not pass the test.”¹³⁶ What ordinance would receive majority approval? The opinions in *Comite III* suggest several possibilities. One is to sever section (a), the prohibition on solicitation conduct, from the ordinance leaving only section (b), which prohibits drivers from stopping in the roadway to hire

132. Answering Brief of Appellees at 8, *Comite II*, 607 F.3d 1178 (9th Cir. 2010) (No. 06-55750) 2007 WL 2434115.

133. Appellant’s Opening Brief at 10, *Comite II*, 607 F.3d 1178 (9th Cir. 2010) (No. 06-55750) 2007 WL 1994704.

134. REDONDO BEACH, CAL., MUN. CODE § 3-7.1601 (1989) (prohibiting individuals from soliciting work, business, or contributions from passing vehicles, and prohibiting motorists from stopping in traffic to make a hire).

135. *Id.*

136. *Comite III*, 657 F.3d 936 at 950–51 (9th Cir. 2011).

workers.¹³⁷ The majority rejected this approach, but only for procedural, not substantive, reasons.¹³⁸ By severing (a), the ordinance would not burden solicitation speech at all and would more closely fit the city's real interest in preventing traffic snarls. The problem is that the resulting ordinance would still target those seeking to hire day laborers and not those who stop for other reasons. In *Doe*, the village's use of traffic laws against the employers of day laborers helped persuade the court of the village's hostility toward the day laborers themselves.¹³⁹ Furthermore, section (b) would still be unnecessary because of the availability of a narrowly tailored state law against stopping a vehicle "so as to obstruct the normal movement of traffic."¹⁴⁰ Depending on the other evidence available, the city ordinance's redundancy could weigh against the city in an equal protection challenge. Finally, the resulting ordinance would still be broad, sweeping in "a motorist who stops, on a residential street, to inquire whether a neighbor's teenage daughter or son would be interested in performing yard work or babysitting."¹⁴¹ While enforcement against such a driver seems unlikely—as the dissent points out—that unlikelihood itself suggests that the city had a specific use in mind for the law, intending to use it only against employers of day laborers.¹⁴² For these reasons, severing section (a) from the Redondo Beach ordinance would fail to solve the overbreadth problem and would further invite accusations of racial animus in violation of the Equal Protection Clause.

Another possible approach is to narrow section (a) to prohibit only solicitation of *work*—not solicitation of business or contributions—while providing alternative channels of communication for work solicitation. This approach would avoid sweeping in most of the examples of protected speech covered by an

137. REDONDO BEACH, CAL., MUN. CODE § 3-7.1601 (1989).

138. *Comite III*, 657 F.3d at 951 (citing *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 549 (2001); *United States v. City of Arcata*, 629 F.3d 986, 992 (9th Cir.2010)) ("Because the City has waived any argument regarding severability by failing to raise it in its briefs or at oral argument, we do not consider it here.").

139. *Doe*, 462 F. Supp. 2d at 544–49 (holding that, as to the ticketing campaign, "plaintiffs have met their burden of going forward on the issue of intentional racism").

140. CAL. VEH. CODE § 22651(b) (West 2012).

141. *Comite III*, 657 F.3d at 948 (citing *Comite I*, 475 F.Supp.2d at 965).

142. *Id.* at 959, 962. (Kozinski, C.J., dissenting) (calling the majority's scenario "unlikely and contrived" and pointing out the absence of any "'Girl Scout Cookie Enforcement Project,' 'Lemonade Stand Enforcement Project,' 'Push-Cart Vendor Enforcement Project' or any other of the horrible abuses the majority fears the ordinance will be subject to").

overbroad ordinance: Girl Scouts selling cookies, children selling lemonade, children advertising a carwash fundraiser, leaving only the babysitter example to worry about.¹⁴³ It would also address Judge Smith's concern, expressed in his concurrence, that the ordinance fails not just for lack of narrow tailoring but also for the absence of alternative channels for the day laborers to communicate their availability for work.¹⁴⁴ Such alternatives might include the designation of less congested streets or the establishment of a hiring center.¹⁴⁵ But even with alternative channels, the resulting ordinance could provide evidence of animus toward day laborers if the city allows other groups' solicitation conduct to go unabated. Narrowing the ordinance to employment solicitation is especially suspicious considering that traffic issues can and do arise when, for example, students stand on a busy street directing drivers to a fundraising carwash around the corner.¹⁴⁶

The majority flatly dismissed other efforts to narrow the Redondo Beach ordinance. For example, the city argued that the ordinance should be construed to apply only to solicitors who actually cause drivers to stop because they are the only solicitors against whom the ordinance has been enforced so far.¹⁴⁷ But the ordinance's plain language refers to all solicitors, regardless of their actual effect on motorists, and the court is "not required to insert missing terms into the statute."¹⁴⁸ The more selectively the city enforces the law, the likelier its conduct may draw a credible equal protection challenge. Fortunately, there are proven ways for cities to address community

143. *Id.* at 948. Judge Kozinski dismisses these examples as the majority's "parade of horrors." *Id.* at 959.

144. *Id.* at 955–57 (Smith, J., concurring).

145. The latter is a successful approach employed by many cities. *See infra* Part IV. An adequate alternative channel for communication would have been enough to satisfy Judge Gould that the ordinance itself was constitutional. *Comite III*, 657 F.3d at 951 (Gould, J., concurring). Judge Kozinski points out the availability of "six day-laborer centers in Southern California," saying "there is a crucial difference between having no alternatives and having slightly inconvenient alternatives." *Id.* at 967 (Kozinski, C.J., dissenting). He is perhaps underestimating the difficulty of getting around in Los Angeles, especially for day laborers who don't have vehicles.

146. The author recently observed traffic and pedestrians struggling to move around a Girl Scout Cookie sales booth set up next to the curb on a busy corner of her city's central business district.

147. *Comite III*, 657 F.3d at 946.

148. *Id.* (citing *Foti v. City of Menlo Park*, 146 F.3d 629, 639 (9th Cir.1998)). *See also* *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988) ("This presumes the mayor will act in good faith and adhere to standards absent from the ordinance's face.").

concerns about day labor solicitation without infringing on the constitutional rights of day laborers.

IV. Models for Cooperation

Instead of enacting prohibitions, cities can take positive actions to improve circumstances for all community members. As communities across the country have grappled over the last two decades with the need for residents to make themselves available for day labor, numerous ideas and reforms have surfaced. Often, local conflict and legal challenges motivate communities to revisit their assumptions and make lasting change in the relationship between day laborers and city government.

Day labor employment centers have developed a record of success in giving workers and employers a way to connect while avoiding traffic problems and harassment of day laborers.¹⁴⁹ Such centers offer many advantages. Giving workers a place gather other than on sidewalks can reduce traffic complaints. Centers can increase the employer pool to include individual homeowners, who might be less reluctant to come to a center than to pull up alongside a curb. A day labor center can also feel safer for employers as well as workers, since both parties are typically required to give the center some information about themselves before using the services. Such registration can discourage dishonest employers from taking advantage of day laborers.¹⁵⁰

There are less obvious advantages as well. A day labor center can maintain a database of skills and equipment, matching a worker to the needs of the employer. Unlike the street corner, a center can implement a rotation to spread the jobs equally among workers. Such systems can promote camaraderie among laborers and allow newcomers to benefit from the support of more experienced day laborers. A day labor center can provide classes in English and computer skills, and bring in professionals to provide medical care or legal advice. A center can also maintain detailed records and statistics, as in *Doe v. Village of Mamaroneck*, where the Hispanic

149. For a broad discussion of the benefits and uses of day labor centers, see INSTITUTE FOR LOCAL GOVERNMENT, COLLABORATIVE STRATEGIES FOR DAY LABOR CENTERS (2011), available at <http://www.ca-ilg.org/collaborativestrategiesfordaylaborcenters>; see also ALINDOR, *supra* note 12 (detailing the services provided at day labor centers throughout the San Francisco Bay Area).

150. See generally CENTER FOR SOCIAL JUSTICE, SETON HALL UNIVERSITY SCHOOL OF LAW, *supra* note 12.

Resource Center's daily records composed much of the basis for the court's factual findings.¹⁵¹

In the California city of Mountain View, the Day Worker Center (*Centro Obrero de los Trabajadores*) has had a number of unexpected benefits resulting from close collaboration with community leaders in Mountain View and other nearby cities.¹⁵² For example, the center hosts a sizable community of women, who find it a safe place to find domestic jobs. The center also provides an organized means for day laborers to serve the local community, through blood drives, community clean-up days, and special projects. Volunteers from the surrounding communities go on-site to teach classes, and the center has become a forum for educating civic leaders and students on the lives of immigrant day laborers.

The availability of a center does not change everything, however. The most common way for day laborers and employers to connect remains gathering along streets, and the case law strongly supports the right of day laborers to do so.¹⁵³ A San Francisco area study from 2007 identified one approach a center can take as working directly with day laborers on the streets, rather than attempting to steer them and their employers to central offices.¹⁵⁴ This model also gives organizers a chance to prevent community conflict by educating laborers on behavioral norms affecting local perceptions of them.¹⁵⁵ Thus, positive education can circumvent the need for enforcement. A first-of-its kind Los Angeles ordinance passed in 2009 is a codification

151. *Doe v. Village of Mamaroneck*, 462 F. Supp. 2d 520 at 527 (S.D.N.Y. 2006) (finding that “[f]or the 15 months of the site’s operation, the Hispanic Resource Center employed a site coordinator, Janet Rolon, who was present at the site on a daily basis, and kept notes of each day’s activities,” and that her records were “the only contemporaneous records reflecting the daily activity of the day laborers since November 2004”).

152. See THE DAY WORKER CENTER OF MOUNTAIN VIEW, <http://www.dayworkercentermv.org/> (last visited March 30, 2012).

153. See *Comite III*, 657 F.3d 936 (9th Cir. 2011); *Coal. for Humane Immigrant Rights of Los Angeles v. Burke (CHIRLA)*, No. CV 98-4863-GHK(CTX), 2000 WL 1481467 (C.D. Cal. Sept. 12, 2000) (invalidating an ordinance against soliciting “employment, business, or contributions”). See also *Campbell*, *supra* note 10 (discussing *Jornaleros Unidos de Baldwin Park v. City of Baldwin Park*, No. 07-CV-4135-ER (C.D. Cal. July 17, 2007) (granting preliminary injunction against ordinance prohibiting any solicitation on a sidewalk without a three-foot pedestrian buffer zone)).

154. ALINDOR, *supra* note 12 at Regional Summary 5.

155. *Id.* at Regional Summary 9 (noting that many centers work with newer day laborers to “openly address behavioral issues that negatively affect how day laborers are perceived by residents and merchants. These include public urination, drunkenness, fighting, and drug dealing. Most programs have formal rules and/or codes of conduct concerning these matters.”).

of these principles: it allows the city to require new “big box” stores to provide on-site centers for day laborers as a means of providing opportunity, requiring the industry that benefits from day labor to share in the costs, and preventing the negative perceptions that put day laborers in the crosshairs of anti-immigrant groups.¹⁵⁶

Conclusion

Day laborers’ rights reside at the junction of many quintessentially American values: opportunity, hard work, economic development, community cohesion, and constitutional protection. Unfortunately, in many cities and towns, the presence of day laborers is also a flashpoint for rancorous debate over community preservation, civil rights, and immigration policy. City leaders can protect their communities from constitutional challenges and improve the tenor of the debate through good-faith efforts to solve real problems while safeguarding the constitutional rights of all residents.

156. LOS ANGELES, CAL., MUN. CODE, ch. 1, art. 2, § 12.24(U)(14) (permitting the City Planning Commission to require any new home improvement store to supply “written Day Laborer operating standards,” including a “suitable area located on site for Day Laborers seeking employment with customers at the Home Improvement Store,” and establishing certain requirements for such a center). *See also* Catherine L. Fisk, *The Anti-Subordination Principle of Labor and Employment Law Preemption*, 5 HARV. L. & POL’Y REV. 17 (2011).

* * *