CURBING DAY LABORERS: ANTI-SOLICITATION ORDINANCES, COMMERCIAL SPEECH, AND HIRING CENTERS. A USER'S GUIDE TO PROTECTING MUNICIPALITIES FROM DAY LABOR-RELATED LAWLESSNESS AND LITIGATION

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A USER’S GUIDE TO Protecting Municipalities FROM Day Labor-related Lawlessness and Litigation

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SPRING 2007

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INTRODUCTION

As Americans across the country become increasingly frustrated by continuous violations of immigration laws, many legal groups aimed at suing city, state, and federal governments have been created with the hope that increased pressure will result in increased enforcement. Laws not originally designed to specifically address immigration issues, such as the Racketeer Influenced and Corrupt Organizations Act (RICO), and basic laws of trespass are being used by the public to creatively fight immigration violations. At the same time, state and local governments are also discovering a need to act creatively in managing the massive increase of

1. See, e.g., For a series of polls conducted by various news agencies on the issue of immigration, see PollingReport.com at http://www.pollingreport.com/immigration.htm (As an example, in a CBS News poll conducted Oct. 3-5, 2005, a total of 75 percent of respondents answered “Not doing enough” to the following question: “Do you think the U.S. is doing enough along its borders to keep illegal immigrants from crossing into this country, doing too much, or not doing enough to keep illegal immigrants from crossing over into the U.S.?”); see also Donald L. Barlett and James B. Steele, Who Left the Door Open?, TIME MAG., Sept. 20, 2004 ("the number of illegal aliens flooding into the U.S. this year will total 3 million").


illegal immigrants moving into their communities.® Cities must walk a fine line for fear of being sued by a cornucopia of “immigrant rights” groups on one hand, and what might be considered “taxpayer rights” groups on the other.® From coast to coast, cities large and small are struggling with the question of how to manage day laborers and illegal immigration, more generally.® All of this occurs amid the United States federal government’s lax enforcement of immigration laws.®

Day laborers, individuals who line the streets across the country on a daily basis looking for work in low-paying, low-skill professions, are becoming increasingly visible throughout the United States and are perhaps the most vivid example of our government’s failure to adequately enforce immigration laws.® As municipalities continue to hear complaints about harassment, public drunkenness, and public urination attributable to day laborers, local governments have had

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5. See, e.g., H.B. 2592, 47th Leg., 1st Reg. Sess. (Ariz. 2005) (The State of Arizona has passed a law prohibiting taxpayer funds from being spent on hiring centers that might cater to illegal aliens out of concern that the State might be sued by a taxpayer rights group. It reads, in part: “A city or town shall not construct or maintain a work center if any part of the center is to facilitate the knowing employment of an alien who is not entitled to lawful residence in the United states...A county shall not construct or maintain a work center if any part of the center is to facilitate the knowing employment of an alien who is not entitled to lawful residence in the United states”).


7. Anna Gorman, Day Laborers, Cities Seek Way That Will Work, L.A. TIMES, Aug. 29, 2005 (quoting Project Director of the U.C.L.A. Downtown Labor Center: “Every major city, even smaller cities, are struggling with this...It’s become a national issue”).

8. See, e.g., Chris Strohm, Critics Cite Lax Efforts to Enforce Federal Worksite Immigration Laws, GOVEXEC.COM (D.C.), June 21, 2005 (“Between 1999 and 2004, the number of notices of intent to fine employers for improperly completing paperwork or knowingly hiring unauthorized workers decreased from 417 to three”).

9. See, e.g., Emily Bazar and Stephanie Armour, Cities Tackle Day Labor Dilemma, USA TODAY, Oct. 24, 2005 (“Day laborers that crowd intersections and parking lots are perhaps the most visible examples of illegal immigration”).
to act creatively to reduce conflict and lawlessness. Yet without direction from the federal government on how to regulate this largely illegal workforce, city governments are struggling to uphold the rule of law while avoiding lawsuits from all interested parties including business owners, immigrant rights groups, and taxpayers.

This paper suggests that current legal standards for regulating day labor solicitation are underdeveloped and are putting state and local governments in a liable position. This paper also details the legal issues that municipalities may come across in attempting to provide some regulation. Ultimately, this paper provides a guide that will likely reduce problems associated with illegal day labor while protecting municipalities from potential lawsuits. Part I defines day laborers and the problems generally associated with day labor solicitation. Part II briefly outlines laws that might be applicable to the hiring of day laborers. Part III describes how anti-solicitation ordinances have been used successfully and unsuccessfully in resolving some of the problems associated with day labor solicitation. This part argues that day labor solicitation should be defined as commercial speech and analyzed under the *Central Hudson* test in order to determine whether it should be constitutionally-protected, and ultimately concludes that most day labor solicitation is not constitutionally-protected. Part IV describes how day laborer hiring centers, often viewed as a solution to day laborer problems, may pose liabilities for local governments. Finally, Part V outlines various suggestions for municipalities looking to limit litigation as they


12. See generally, Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557, 566 (1980) (describing a four-part commercial speech test that contemplates the following: the lawfulness of the speech, the asserted governmental interest in regulating such speech, the regulation’s utility in directly advancing the governmental interest, and whether the regulation is not more extensive than is necessary to serve that interest).
work to resolve problems generally associated with day labor and concludes that a combination of carefully-crafted anti-solicitation ordinances premised on appropriate First Amendment analysis and day laborer hiring centers that do not benefit illegal immigrant labor may help to lessen the likelihood of a lawsuit while reducing most problems associated with day labor solicitation.

Because day labor problems are experienced on the local level, no cases on the subject have been heard at U.S. Supreme Court level. Consequently, cases analyzed in this paper are specific to various jurisdictions and courts and do not necessarily follow the same logical reasoning.

**BACKGROUND**

I. DEFINING DAY LABORERS AND PROBLEMS ASSOCIATED WITH DAY LABOR

Nearly every morning in hundreds of communities throughout the United States, day laborers line up along roadways or at hiring sites, waiting for someone to offer them a day’s worth of work.\(^{13}\) It is not uncommon to see hundreds of men standing on a sidewalk, each competing for the limited jobs offered by the casual employer.\(^{14}\) The Los Angeles metropolitan area alone has more than 27,000 day laborers on about 125 street corners on any given day.\(^ {15}\) The scene of day laborers standing along roads and swarming drivers is nearly identical across

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15. *Id.* (quoting an organizer for the Coalition for Humane Immigrant Rights of Los Angeles).
the country whether it occurs in California, Arizona, or Virginia. Experts estimate that there are more than 100,000 day laborers throughout the United States. Some business owners are attracted to the notion of hiring day laborers because they are available on a moment’s notice and are willing to work for low pay. The average day laborer is in his mid-thirties and has a low level of educational attainment.

Day labor work is very unstable; job availability is dependent on the market and whether or not any construction-related jobs are available at any given time. Even when day laborers are offered a job, they are not given health care and are usually paid “under-the-table;” taxes are not taken out of any paycheck. Wages are usually negotiated after a day laborer is selected for employment; further negotiation often occurs once the laborer reaches the job site. Sometimes


17. The NewsHour with Jim Lehrer: A Day’s Work (MacNeil/Lehrer Productions broadcast Aug. 18, 2003) (noting that some mornings 400 day laborers line up along one street in Phoenix).

18. Holly Yeager, Virginia Car Park on Front Line in Immigration Battle, FIN. TIMES (LONDON), Oct. 7, 2005 (“Immigrant men start gathering at about 6 a.m. each weekday outside a convenience store in Herndon, Virginia…In an hour or two there are usually more than 100, standing and waiting for work, then swarming around potential employers as they drive up…”).


21. Id. at pg. 5.

22. Id. at pg. 6.

23. Id. at pg. 9.

the employer will state a wage, continuously lowering the wage, until the “winner” of the job goes to the lowest bidder. Laborers are usually hired on a daily basis for a specific job.

A. Day Laborers and Citizenship Status

Day laborers are arguably the most visible examples of the federal government’s failure to enforce immigration laws. Day laborers are overwhelmingly illegal aliens, Hispanic, and recently-arrived. Little over one percent of day laborers are either U.S. born or of a non-Latino background. According to a recent study conducted by Fairfax County in Virginia, the location of a pending lawsuit on day laborer issues, nearly 85 percent of day labors in the area identified themselves as being illegal aliens.

B. Concerns About Traffic Safety, Loitering, Harassment

The method by which day laborers obtain jobs is somewhat chaotic. Quite often, swarms of men aggressively circle vehicles, pointing to themselves in an effort to be noticed, and

25. Id.

26. Id. at pg. 310.

27. See, e.g., Emily Bazar and Stephanie Armour, Cities Tackle Day Labor Dilemma, USA TODAY, Oct. 24, 2005 (“Day laborers that crowd intersections and parking lots are perhaps the most visible examples of illegal immigration”).


29. Id.

30. DEPARTMENT OF SYSTEMS MANAGEMENT, FAIRFAX COUNTY, VA. AN ACCOUNT OF DAY LABORERS IN FAIRFAX COUNTY (June 2004).

ultimately hired. Sometimes fights and arguments break out as the number of available jobs at any given time are often less than the amount of willing workers. When this process occurs along a busy street, the possibility for traffic accidents is real.

Day laborers often look for work near businesses that focus on home improvement in the hope that a customer will hire them to help with the project. But business owners frequently complain that loitering day laborers are scaring off customers resulting in a loss of business. Some businesses must continuously shoo day laborers off their private property, trying to stop solicitation around their buildings. Other business owners, trying to protect their customers from harassment, routinely call the police. Harassment by day laborers seems to be a common

32. Id. at pg. 6.

33. Id.

34. Id.

35. Id. at pg. 4.

36. See, e.g., Emily Bazar and Stephanie Armour, Cities Tackle Day Labor Dilemma, USA TODAY, Oct. 24, 2005 (quoting a business owner who says day laborers are hurting his motorcycle parts and accessories business: “I don’t have regular foot traffic anymore”); see, e.g., Steven Greenhouse, Front Line in Day Laborer Battle Runs Right Outside Home Depot, N.Y. TIMES, Oct. 10, 2005, at A1 (quoting the manager of a roofing supply store who claims to have lost customers because of loitering day laborers: “They don’t like these guys running up to them when they drive up to my store”); see, e.g., ATLANTA J.-CONST., Day Laborers: Sandy Springs Looks to Balance Needs of Businesses, Residents, Immigrants, Oct. 2, 2005 at IZH (quoting a gas station manager who claims that loitering day laborers have cost him business: “We don’t allow them in anymore...It bothers the customers, especially the ladies. They won’t come in, because they fear these crowds of men”).

37. Steven Greenhouse, Front Line in Day Laborer Battle Runs Right Outside Home Depot, N.Y. TIMES, Oct. 10, 2005, at A1 (quoting a Home Depot spokesman: “Like many businesses, we have a policy of nonsolicitation of our stores by individuals and organizations who aren’t affiliated with our company. The reason is for that is simple — our customers tell us they want a shopping experience that’s easy and comfortable”).

38. Conor Friedersdorf and Stephen Wallstaff, Cities Sued Over Day-Labor Law, INLAND VALLEY DAILY BULLETIN (ONTARIO, CALIF.), Sept. 20, 2002 (quoting a market manager who calls the police ‘three or four times’ a week: “They harass my customers...They jump on every truck trying to find a job. I have to come outside to chase them off my parking lot”).
occurrence throughout the United States. Complaints about public drunkenness and public urination directed at day laborers are also common.

C. Economic Concerns: Impact on Wages, Job Sector

The economic impact of illegal immigration likely plays a role in how cities respond to day laborers in their community. Illegal immigrants are largely undereducated and poor. As a subsection of illegal immigrants, day laborers tend to work in various construction-based jobs. While the large number of day laborers found in many communities makes it easy for employers to find people willing to work, employers seek day laborers largely because employers can offer wages lower than that which they would have to pay legal immigrants or citizens. While businesses may profit off this cheaper labor, the result is American citizens and legal immigrants losing jobs to illegally-employed day laborers who are willing to work for low, if not illegal, wages.

39. See, e.g., Emily Bazar and Stephanie Armour, Cities Tackle Day Labor Dilemma, U.S.A. TODAY, Oct. 24, 2005 (quoting a New Jersey government official as saying “There’s been lots of problems with noise and some cat-calling”); Mary Beth Sheridan, Workers, Neighbors Begin Dialogue; Community Weighs Day-Labor Center, WASH. POST (D.C.), Sept. 22, 2005 (“Chris Kohatsu, 28, a representative of the Logan Circle Community Association, took the floor with a stern warning to the laborers: Neighbors are fed up with the harassment of passing women and gay men. ‘If you want us to be behind you and treat that corner, 15th and P, as a professional workplace, we must address the concern of sexual harassment’” she said. ‘It is not acceptable in any other workplace’).

40. See, e.g., Jotham Sederstrom, Day Labor Battle in B’hurst, N.Y. DAILY NEWS, Nov. 10, 2005 (quoting Representative Vito Fossella who plans to begin “working with police, Community Board 11 and the U.S. Labor Department to ‘educate’ the workers” whom he says have “drawn ire in the neighborhood for alleged public intoxication and urination”); Christina Bellantoni, Fairfax County, Va., Day-Laborer Center at Issue Again, WASH. TIMES (D.C.), Aug. 22, 2005 (“Eleven years later, day laborers still congregate at the same 7-Eleven, and officials say the attendant problems – public drinking and urination, litter and harassment of women – are worse”).


43. Id. (“the cost of hiring day labourers makes this market extremely attractive and suits employers hoping to cut labour costs”), available at http://www.sscnet.ucla.edu/issr/csup/pubs/papers/index.php, pg 6.
wages. In fact, between March 2000 and March 2004, the number of unemployed adult U.S. citizens increased by 2.3 million, while the number of employed adult immigrants increased by 2.3 million, half of the immigrant figure being made up of illegal aliens. Of the 900,000 net increase in jobs between March 2003 and March 2004, two-thirds went to immigrant workers, even though they account for only 15 percent of all adult workers. Citizens likely view day laborers as unwelcome, illegal competition in the job market.

II. LAWS APPLICABLE TO THE HIRING OF IMMIGRANTS

It is unlawful for a person or other entity to hire an alien, to recruit an alien, or to refer an alien for a fee, for employment in the United States knowing that the alien is unauthorized to work in the United States. The term ‘knowing’ includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. A newspaper article suggesting that most employees or laborers at a specific location are illegal aliens, for example, may provide enough knowledge for one to conclude that certain conditions

44. See, e.g., Sara A. Carter, Doing Battle with Cheap Labor: Longtime Workers Often Find Themselves Forced Out of the Market, INLAND VALLEY DAILY BULLETIN (Ontario, Cal.), Oct. 31, 2005 (quoting a legal immigrant saying, “The major construction companies don’t want to pay living wages to trained workers, so they hire illegals to do the job for cheaper”).


46. Id. (noting half the ‘immigrant’ population in the study is made up of illegal aliens).


leading to possible legal entanglement are present.\footnote{Seven Star, Inc. v. United States, 933 F.2d 791, 793 (9th Cir. 1991) (holding that a newspaper article stating that clubs like Seven Star “depend on the illegal immigrant workforce for their hostesses” provided a permissible reason for the I.N.S. to begin investigating the immigration status of Seven Star’s dancers).} An employer must verify that the individual he/she seeks to employ is not an unauthorized alien by examining documents such as a passport, alien registration card, or a combination of other documents such as a social security card and driver’s license.\footnote{8 U.S.C. § 1324b (2005).} The documents used for verification of employment eligibility must reasonably appear to be genuine.\footnote{8 U.S.C. § 1324b(1)(A)(ii) (2005).} It is unlawful for a person or other entity, once discovering that the employed alien is unauthorized to work, to continue to employ the alien.\footnote{8 U.S.C. § 1324a(2) (2005).} Additionally, it is unlawful for an employer to discriminate against any individual, other than an illegal alien, with respect to the hiring of the individual for employment or the firing of the individual from employment on the basis of the individual’s national origin or citizenship status.\footnote{8 U.S.C. § 1324b(a) (2005).}

An employer may be required to complete I-9 employment forms at the time of the hire for every individual hired if employment is expected to last less than three days.\footnote{Jenkins v. INS, 108 F.3d 195, 198 (9th Cir. 1997) (holding that 8 C.F.R. § 274a.2(b)(1)(iii) requires employers to complete the paperwork requirements of 8 U.S.C.S. § 1324a at the time of the hire when the employment is expected to last less than three days).}

Any person who knowingly or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place,
including any building or any means of transportation, or aids or abets the commission of any of these act, is acting in violation of the law.\textsuperscript{55}

\section*{ANALYSIS}

\section*{III. ANTI-SOLICITATION ORDINANCES AS A SOLUTION TO DAY LABOR PROBLEMS}

Many city governments have drafted anti-solicitation ordinances in an effort to limit some of the problems generally associated with day labor.\textsuperscript{56} The ordinances usually originate with residential and merchant complaints that day laborers are a public nuisance, eroding the customer base or driving down property value through their loitering, public drinking and urination, and harassment of the general public.\textsuperscript{57} City governments, in turn, craft ordinances, aimed at both day laborers and their potential employers, that prohibit the solicitation of labor with the hope that it will discourage employers from seeking out the day laborers while encouraging day laborers to go elsewhere.

Some legal groups question the constitutionality of such laws. Numerous cities have faced the threat of a lawsuit regarding anti-solicitation ordinances; many of these threats, however, were settled out of court.\textsuperscript{58} Cities have often chosen to drop their ordinances rather than

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\textsuperscript{56} See, e.g., \textit{Agora Hills, Cal., Code} 3208-3210 (1991) (prohibiting “any person, while standing in any portion of the public right-of-way...from solicit[ing], or attempt[ing] to solicit, employment, business or contributions...from any person traveling in a vehicle along a public right-of-way...”).
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\textsuperscript{58} See, e.g., Naush Boghossian, \textit{Laborers Sue City Over Solicitation Of Jobs Prohibition}, \textit{Daily News Los Angeles}, May 21, 2004, at N3 (explaining that suits filed against the cities of Los Altos, Upland, and Rancho Cucamonga, California resulted in settlements, where the cities agreed to cease barring day laborers from soliciting employment from public sidewalks).
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defend them in a costly legal battle against well-funded pressure groups.\textsuperscript{59} Nevertheless, some lawsuits have actually gone to trial. Two often-cited cases address anti-solicitation ordinances as they apply to day labor. In \textit{Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA) v. Burke}, the court struck down an anti-solicitation ordinance in Los Angeles County finding it an unconstitutional violation of the First and Fourteenth Amendments.\textsuperscript{60} Consequently, in \textit{Xiloj-Itzep v. City of Agoura Hills}, a court denied a request for preliminary injunction against a city’s anti-solicitation ordinance while finding the ordinance constitutional.\textsuperscript{61} Both courts determined the constitutionality of the ordinance in question by applying a Time, Place, and Manner test.\textsuperscript{62} Although the ordinances in each case were nearly identical, the courts came to opposite holdings – one court finding the ordinance unconstitutional, the other upholding it.

Day labor solicitation should be defined as commercial speech and the \textit{Central Hudson} test should be applied to ordinances designed to suppress such speech.\textsuperscript{63} Application of the test would determine the constitutionality of anti-solicitation ordinances by indicating whether or not the speech it seeks to suppress is protected by the First Amendment in the first place. Use of the \textit{Central Hudson} test would lead to more consistent holdings in day labor-related lawsuits. If the courts in both \textit{CHIRLA} and \textit{Xiloj-Itzep}, for example, analyzed day labor solicitation as

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  \item \textsuperscript{59} Id.
  \item \textsuperscript{60} Coalition for Humane Immigrant Rights v. Burke, No. CV 98-4863-GHK(CTx), 2000 U.S. Dist. LEXIS 16520, (C.D. Cal. Sept. 12, 2000). \textit{See also}, U.S. CONST. amend. I.; \textit{see also}, U.S. CONST. amend. XIV.
  \item \textsuperscript{61} Juan Xiloj-Itzep et al. v. City of Agoura Hills et al. 29 Cal. Rptr. 2d 879 (Cal. Ct. App. 1994).
  \item \textsuperscript{62} \textit{See generally}, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (holding that the government may impose reasonable restrictions in a public forum 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).
  \item \textsuperscript{63} \textit{See generally}, Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557, 566 (1980) (describing a four-part commercial speech test that contemplates the following: the lawfulness of the speech, the asserted governmental interest in regulating such speech, the regulation’s utility in directly advancing the governmental interest, and whether the regulation is not more extensive than is necessary to serve that interest).
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commercial speech and applied the *Central Hudson* test to the anti-solicitation ordinances in question, it is likely that day labor solicitation would never have been considered to be protected by the constitution in the first place, bringing both courts to the same holding. A consistent series of holdings on the issue of anti-solicitation ordinances would allow cities to craft better ordinances and more carefully manage and regulate problems associated with day labor.

The *CHIRLA* court’s and the *Xiloj-Itzep* court’s application of the Time, Place, and Manner test to ordinances designed to limit day labor solicitation are compared, below. An explanation of why day laborer solicitation should be considered commercial speech and the *Central Hudson* test as it might be applied to such speech, follows.

**A. Time, Place, and Manner Restrictions on Protected Speech**

In assuming that day labor speech aimed at solicitation of labor is constitutionally-protected speech, courts have applied the Time, Place, and Manner test as developed in *Ward v. Rock Against Racism*, in order to determine the constitutionality of ordinances designed to limit such speech.64 While the First Amendment protects most forms of speech, even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech.65 The restrictions must be made without reference to the content of the regulated speech, must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternative channels for communication of the information.66 Although the ordinances at issue in both *CHIRLA* and *Xiloj-Itzep* are nearly identical, the courts’ application of the Time,


66. *Id.*
Place, and Manner test led each court to different holdings on the constitutionality of the restrictions.\footnote{Compare Agoura Hills, Cal., Code 3208-3210 (1991) (“3208. Definitions: (b) ‘employment’ shall mean and include services, industry or labor performed by a person for wages or other compensation or under any contract of hire, written, oral, express or implied; (c) ‘solicit’ shall mean and include any request, offer, enticement, or action which announces the availability for or of employment, the sale of goods, or a request for money or other property; or any request, offer, enticement or action which seeks to purchase or secure goods or employment, or to make a contribution of money or other property. As defined herein, a solicitation shall be deemed complete when made whether or not an actual employment relationship is created, a transaction is completed, or an exchange of money or other property takes place;” “3209. Prohibition of solicitation in public right-of-way: (a) It shall be unlawful for any person, while standing in any portion of the public right-of-way, including by not limited to public streets, highways, sidewalks and driveways, to solicit, or attempt to solicit, employment, business or contributions of money or other property from any person traveling in a vehicle along a public right-of-way, including, but not limited to public streets, highways or driveways; (b) It shall be unlawful for any person, while the occupant of any vehicle, to solicit, or attempt to solicit, employment, business or contributions or money or other property from a person who is within the public right-of-way, including but not limited to a public street, highway, sidewalk or driveway;” “3210. Prohibition of solicitation in unauthorized locations within commercial parking areas: (a) No person shall solicit or attempt to solicit, employment, business or contributions of money or other property, from a location within a commercial, parking area other than an area within or served by such parking area which is authorized by the property owner or the property owner’s authorized representative for such solicitations. This section shall not apply to a solicitation to perform employment or business for the owner or lawful tenants of the subject premises; (b) For purposes of this section, ‘commercial parking area’ shall mean privately owned property which is designed or used primarily for the parking of vehicles and which adjoins one or more commercial establishments.”), with L.A. County, Cal., Code 13.15.011-13.15.012 (1994) (declared to violate U.S. Const. amend. I. and U.S. Const. amend. XIV in Coalition for Humane Immigrant Rights v. Burke; “13.15.011: It shall be unlawful for any person, while standing in any portion of the public right-of-way, including but not limited to public streets, highways, sidewalks and driveways, to solicit, or attempt to solicit, employment, business, or contributions or money or other property, from any person traveling in a vehicle along a public right-of-way, including, but not limited to, public streets, highways or driveways. The provisions of this Section shall only be operative in the unincorporated areas of the County;” “13.15.012: It shall be unlawful for any person, while the occupant of a moving vehicle, to solicit, or attempt to solicit, employment, business, or contributions of money or other property, from a person who is within the public right-of-way, including but not limited to a public street, highway, sidewalk, or driveway. The provisions of this Section shall only be operative in the unincorporated areas of the County”).} An explanation of the three elements of the Time, Place, and Manner test and their application to anti-solicitation ordinances, follows.

1. Is the Ordinance Justified without Reference to the Content of the Regulated Speech?

For a speech-regulating governmental ordinance to be constitutionally sound, the ordinance must be neutral regarding the specific content of the speech.\footnote{See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).} The principal issue in determining ordinance neutrality in Time, Place, and Manner cases is whether the government
has adopted a regulation of speech because of disagreement with the message it conveys. 69 If the government has crafted the regulation in order to stifle or prevent a specific message, then it is likely that the regulation will be found unconstitutional. 70 The government’s purpose in enacting the ordinance is the controlling consideration. 71 Even if the regulation has an incidental effect on some speakers or messages but not others, however, the regulation is deemed neutral so long as it serves a purpose unrelated to the actual content of the speech. 72

In Xiloj-Itzep, the court held that an anti-solicitation ordinance was content-neutral because the act specifically prohibited – vehicle-addressed solicitation – did not depend on the message of the solicitor. 73 The ordinance was designed to prevent “any person” from soliciting employment, monetary contributions, or other property while standing or driving in the public “right of way.” 74 The ordinance does not address the specifics of the message conveyed by the solicitations and is considered content-neutral. 75

Similarly, in CHIRLA the court held that an anti-solicitation ordinance was content-neutral because the government’s predominant purpose in writing the ordinance was to alleviate secondary effects of the solicitation such as traffic congestion and other hazards. 76 These effects

69. Id.
70. See id.
71. Id.
72. Id.
74. Id. at 628.
75. See id. at 637.
included day laborers running into traffic, harassing pedestrians, littering, and urinating in public. The ordinance was designed to prevent “any person” from soliciting employment, monetary contributions, or other property while standing or driving in the public “right-of-way.” Again, the ordinance did not address the specifics of the message conveyed by the solicitations and was, therefore, content-neutral.

Conversely, in *Loper v. New York City Police Dep’t*, an indirectly-related Second Circuit Court of Appeals case focusing on solicitation, a statute designed to prevent solicitation in the form of “begging” was found unconstitutional because it prohibited all speech related to begging while allowing “religious, educational and fraternal organizations” to solicit money. The statute was not content-neutral because it regulated solicitation based on the content of the message.

In order for a day labor-related ordinance to be considered content-neutral under a Time, Place, and Manner test, it must not address the specific content of the message conveyed by the solicitor. Nevertheless, it may be aimed at reducing unwanted secondary effects of day labor solicitation.

2. Is the Ordinance Narrowly Tailored to Serve a Significant Governmental Interest?

For a speech-regulating governmental ordinance to be constitutionally sound under the second prong of the Time, Place and Manner test, the ordinance must be narrowly tailored to

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78. *Id.* at *27.

79. *Id.* at *1.

80. See *id.* at *5.

81. Loper v. New York City Police Dep’t, 999 F.2d 699, 705 (2nd Cir. 1993).

82. See *id.*
serve a significant governmental interest. The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. A single governmental interest may be sufficient to sustain a content-neutral regulation. The regulation itself need not be the least restrictive or least intrusive means of achieving the governmental interest. Furthermore, a regulation should not be considered unconstitutional simply because the government’s interest could be adequately served by some less-speech-restrictive alternative. However, a regulation may not burden substantially more speech than is necessary to further the government’s interests.

In Xiloj-Itzep, the court held that limiting driver distraction from street-side solicitation in the interest of public safety is a significant governmental interest and that the ordinance in question, which prohibited solicitation on public roads, was narrowly tailored to that purpose.

The court referred to three cases, discussed below, as support for this holding.

83. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989); see generally Renton v. Playtime Theatres, Inc., 475 U.S. 41, 51 (1986) (holding that, in defining its substantial interests, a city is not required to conduct studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is “reasonably believed to be relevant to the problem that the city addresses”).

84. Id.

85. See, e.g., Heffron v. Int’l Soc’y for Krishna Consciousness, Inc., 452 U.S. 640, 650 n.13, (1981) (declining to consider additional governmental interests raised as justification for a time, place, and manner restriction after holding the first as adequate support for the regulation).


87. Id. at 800.

88. Id.


90. See generally ACORN v. City of Phoenix, 798 F.2d 1260 (9th Cir. 1986) (holding a roadside-based anti-solicitation ordinance constitutional under a Time, Place, and Manner test); International Soc. for Krishna Consciousness, Inc. v. Baton Rouge, 876 F.2d 494 (5th Cir. 1989) (holding a roadside-based anti-solicitation ordinance constitutional under a Time, Place, and Manner test); ACORN v. St. Louis County, 930 F.2d 591 (8th Cir. 1991) (holding a roadside-based anti-solicitation ordinance constitutional under a Time, Place, and Manner test).
concluded in its holding that limiting the prohibition on solicitation to vehicle-addressed solicitation satisfies the requirement that the regulation be narrowly tailored. 91

The Xiloj-Itzep court first referred to a Ninth Circuit Court of Appeals holding in ACORN v. City of Phoenix which found a similar anti-solicitation ordinance constitutional and narrowly tailored to serve a significant governmental interest under a Time, Place, and Manner test. 92 In this case, the court held that the “orderly flow of motorized traffic is a major concern” 93 and that soliciting drivers while standing along the roadway “not only threatens to impede the orderly flow of traffic, but also raises serious concerns of traffic and public safety.” 94 Specifically, the court held that soliciting drivers from roadways “distracts them from their primary duty to watch the traffic and potential hazards in the road” while requiring drivers to search for money, and, after the solicitor is gone, to “replace a wallet or close a purse.” 95 The court held that the ordinance was “aimed narrowly at the disruptive nature of fund solicitation” from motorists, and noted that “direct communication of ideas, including the distribution of literature to occupants in vehicles” was not restricted under the ordinance. 96 Consequently, the court found the anti-solicitation ordinance to be “narrowly tailored to address legitimate traffic safety concerns.” 97

The Xiloj-Itzep court also referred to a Fifth Circuit Court of Appeals holding in International Soc. for Krishna Consciousness, Inc. v. Baton Rouge which found another similar


92. Id.; see also, ACORN v. City of Phoenix, 798 F.2d 1260 (9th Cir. 1986) (holding an ordinance prohibiting solicitation on city streets to be constitutional under a Time, Place, and Manner test).

93. ACORN v. City of Phoenix, 798 F.2d 1260, 1268 (9th Cir. 1986).

94. Id. at 1269.

95. Id.

96. Id. at 1268.

97. Id. at 1270.
anti-solicitation ordinance constitutional and narrowly tailored to serve a significant governmental interest under a Time, Place, and Manner test.98 In this case, the court held that restrictions on solicitation are “particularly appropriate in the context of assuring the free movement of vehicles and promoting traffic safety on city streets.”99 The court also noted that the ordinance was aimed at “the disruptive nature of fund solicitation” from drivers and that the activity had resulted in traffic accidents.100 The court noted, however, that the ordinance did not restrict “direct communication of ideas, including the distribution of literature” to drivers.101 The court also found the ordinance sufficiently narrowly tailored based on testimony from a traffic engineer indicating that soliciting drivers was unsafe on all roads.102

Finally, the Xiloj-Itzep court also referred to an Eighth Circuit Court of Appeals holding in ACORN v. St. Louis County which found another similar anti-solicitation ordinance constitutional and narrowly tailored to serve a significant governmental interest under a Time, Place, and Manner test.103 The court in this case held that an ordinance’s validity is determined by its “relationship to the overall problem the government seeks to correct.”104 The court rejected

98. Xiloj-Itzep v. City of Agoura Hills, 24 Cal. App. 4th 620, 639 (1994); International Soc. for Krishna Consciousness, Inc. v. Baton Rouge, 876 F.2d 494, 498 (5th Cir. 1989); see BATON ROUGE, LA., CODE tit. 11, § 96(b)(1983) (providing that “No person shall be upon or go upon any street or roadway or shall be upon or go upon any shoulder of any street or roadway nor shall any such person be upon or go upon any neutral ground of any street or roadway for the purpose of soliciting employment, business or charitable contributions of any kind from the occupant of any vehicle”).


100. Id.

101. Id.

102. Id.

103. Xiloj-Itzep v. City of Agoura Hills, 24 Cal. App. 4th 620, 640 (1994); ACORN v. St. Louis County, 930 F.2d 591, 594 (8th Cir. 1991); see COUNTY OF ST. LOUIS, MO., CODE tit. 12, § 1209.090 (1985) (providing that “No person shall stand in a roadway for the purpose of soliciting a ride, employment, charitable contribution or business from the occupant of any vehicle”).

104. ACORN v. St. Louis County, 930 F.2d 591, 596 (8th Cir. 1991).
appellant ACORN’s argument that because they had not had an accident or injury in soliciting drivers the ordinance was unjustified and unnecessary.\textsuperscript{105} The court held that the government “need not wait for accidents to justify safety regulations.”\textsuperscript{106} The court also referred to experts called by both parties who described roadway solicitations as dangerous and a hindrance to traffic.\textsuperscript{107} Finally, the lower court on this case was cited by the court in its holding that “there can be no doubt from the evidence, as well as one’s own common sense, that soliciting in the streets is inherently dangerous.”\textsuperscript{108} This was enough for the court to hold that the relationship between the regulation and the government’s interest in safety and traffic efficiency was sound, and that the ordinance did not burden more speech than was necessary to further the government’s interests.\textsuperscript{109}

In \textit{CHIRLA} the court disagreed with the holding in \textit{Xiloj-Itzep} although it did acknowledge that the ordinance in question in that case is “nearly identical” to the ordinance at issue in \textit{CHIRLA}.\textsuperscript{110} However, the court was not bound by the \textit{Xiloj-Itzep} court’s holdings, and did “not find its reasoning persuasive.”\textsuperscript{111} Specifically, the \textit{CHIRLA} court felt that the nearly-

\begin{footnotesize}
\begin{enumerate}
\item[105.] \textit{Id.}
\item[106.] \textit{Id.} (citing United States Labor Party v. Oremus, 619 F.2d 683, 688 n.4 (7th Cir. 1980)).
\item[107.] \textit{Id.} at 596.
\item[108.] \textit{Id.} (citing ACORN v. St. Louis County, 726 F. Supp. 747, 753 (D. Mo. 1989)).
\item[109.] \textit{Id.}
\item[111.] \textit{Id.}
\end{enumerate}
\end{footnotesize}
identical ordinances in both Xiloj-Itzep and CHIRLA were much more “broad” and not as narrowly tailored as the ordinances in the three cases cited as support in Xiloj-Itzep.\textsuperscript{112}

The court held that the ordinances found constitutional in ACORN v. Phoenix, ACORN v. St. Louis County, and International Soc. for Krishna Consciousness, Inc. v. Baton Rouge, were based on “face-to-face appeals for on-the-spot contributions from motorists” and that it was this type of solicitation that led to the secondary effects such as traffic congestion.\textsuperscript{113} The CHIRLA court reasoned that the ordinance upheld in ACORN v. Phoenix allows for distribution of literature to motorists and that the ordinance prohibits only monetary solicitation occurring “in direct proximity to the street.”\textsuperscript{114} The court also reasoned that the ordinance upheld in International Soc. for Krishna Consciousness, Inc. v. Baton Rouge only prohibits donations from vehicles that are “temporarily stopped at traffic lights” and does not restrict the distribution of literature to drivers.\textsuperscript{115} The court noted that it is unclear whether this ordinance applies to sidewalks but that it likely only prohibits solicitors from soliciting while standing directly on the street, roadway, or shoulder.\textsuperscript{116} Finally, the CHIRLA court noted that the ordinance upheld in ACORN v. St. Louis County did not prohibit solicitors from soliciting drivers “as long as they stand off the roadway—on the curb, median or shoulder of the road.”\textsuperscript{117}

The CHIRLA court noted that the ordinance at issue before it defined “solicit” as “any request, offer, enticement, or action which announces the availability for or of employment, the

\textsuperscript{112} Id.

\textsuperscript{113} Id.

\textsuperscript{114} Id. at *15 (citing ACORN v. Phoenix 798 F.2d 1260, 1269 n.9 (1986)).

\textsuperscript{115} Id. at *16 (citing International Soc. for Krishna Consciousness, Inc. v. Baton Rouge, 876 F.2d 494, 496 (5th Cir. 1989)).

\textsuperscript{116} Id. at *17.

\textsuperscript{117} Id. (citing ACORN v. St. Louis County, 930 F.2d 591, 594 (8th Cir. 1991).
sale of goods, or a request for money or other property, or any request, offer, enticement or action which seeks to purchase or secure goods or employment, or to make a contribution of money or other property.”

The court noted that the ordinance criminalized not just a solicitation but also any “attempt to solicit.”

The court also noted that the ordinance included in the “public right-of-way” all sidewalks. These facts, the court reasoned, would ban a solicitor standing on the sidewalk from holding a sign reading ‘Looking for work’ or ‘Park at the curb if you need a worker.’

The court considered this “passive solicitation” and held that there was no evidence upon which the defendant County could have inferred that this type of solicitation could lead to traffic congestion or safety concerns that the County sought to prevent with the ordinance.

Additionally, the CHIRLA court held that the ordinance had a “propensity to chill speech.” The court noted that the ordinance prohibited a driver from announcing availability of employment, perhaps by “signaling with his hand that he intends to pull over” in order to engage in a business transaction, and that there was no indication the courts in ACORN v. Phoenix, ACORN v. St. Louis County, and International Soc. for Krishna Consciousness, Inc. v. Baton Rouge, would have upheld such a prohibition.

Additionally, the CHIRLA court noted

118.  Id. at *17; see L.A. COUNTY, CAL., CODE 13.15.010(B) (1994).


120. Id.


122. Id. at *19.

123. Id. at *22.

124. Id. at *20.
that because there was no intent requirement in the ordinance before it, a solicitor placing leaflets on legally parked cars “would risk prosecution if their actions inadvertently announced their availability for work to the occupants of traveling vehicles.” 125 Ultimately, the CHIRLA court held that the ordinance in question was not narrowly tailored to serve the County’s asserted interests in promoting traffic safety. 126

In addition to attempting to limit traffic hazards through application of the ordinance, the County also argued that the ordinance was necessary to prevent harmful secondary effects such as harassment, littering, and public urination and defecation. 127 Although the County showed concern that motorists not looking for labor were being harassed, the court held that the record did not contain a reasonable basis to conclude that the restricted solicitation speech was directed at “unwilling listeners.” 128 The ordinance, the court held, criminalized solicitation “regardless of whether or not the listener welcomes the message.” 129 The court held that the ordinance was not narrowly tailored to combat this harassment and that there was “nothing inherent in vehicle-addressed solicitation that causes littering, harassment, trespassing, or public urination or defecation.” 130 These effects, the court reasoned, were “not a result of vehicle-addressed solicitation” but were “at most a corollary to it.” 131 Additionally, the court suggested that these problems are best addressed by law enforcement officers who already have laws at their disposal.

125. Id. at *23.
126. Id. at *26.
127. Id. at *27.
128. Id.
129. Id.
130. Id. at *29-*32.
131. Id. at *32.
that directly target these harms.\textsuperscript{132} The court held that there was not a reasonable fit between the ordinance in question and the quality-of-life concerns the County identified.

In order for a day labor-related anti-solicitation ordinance to be narrowly tailored to serve a significant governmental interest under the Time, Place, and Manner test, it seems that the ordinance must carefully define the proscribed manner of solicitation. Direct, face-to-face solicitation of drivers may be more easily prohibited than passive announcements of labor availability from sidewalks. Preventing solicitors from standing on the roadway may be a legitimate public interest, while other harms such as harassment and public urination conducted by day laborers may not be as easily proscribed by anti-solicitation ordinances; other laws specific to these offenses as enforced by police power are likely more appropriate. A combination of anti-vehicle-addressed-solicitation ordinances and basic enforcement of laws directed at other social harms (i.e., harassment, public urination, littering) may be the most appropriate method for furthering governmental interests. An effective ordinance should also include an intent element in that it must be made clear that each liable solicitor have an actual intent to solicit.

\textit{3. Does the Ordinance Leave Open Ample Alternative Channels for Communication of the Regulated Information?}

For a speech-regulating governmental ordinance to be constitutionally sound under a Time, Place, and Manner test, it must leave open ample alternative channels for communication of the information being regulated.\textsuperscript{133} The determination of whether or not ample alternative

\textsuperscript{132} Id. at *31.

channels for communication exists seems to be considered on a factual basis and is left up largely to the court’s discretion.\textsuperscript{134}

In \textit{Xiloj-Itzep}, the court held that the ordinance in question leaves open alternative channels for communication because the ordinance does not prevent solicitation of pedestrians, businesses, and residences.\textsuperscript{135} The court also reasoned that it is unnecessary for solicitors to run out into the street or to hail drivers in order to announce their availability for work; prospective employers are generally aware that large congregations of men found along roadways are usually day laborers.\textsuperscript{136} Additionally, the court noted that the City of Agoura Hills had established a telephone hiring exchange that it held to provide an alternative channel for communicating laborer availability.\textsuperscript{137}

In \textit{ACORN v. City of Phoenix}, the court rejected the argument that solicitors could not find an alternative to soliciting drivers along the roadways.\textsuperscript{138} The court reasoned that there are “myriad and diverse methods of fund-raising available” and suggested soliciting pedestrians, canvassing door-to-door, making phone calls, or sending mail.\textsuperscript{139} The court also noted that the ordinance did not prevent solicitors from distributing literature to drivers that explained where they could send money at a later date.\textsuperscript{140}

\begin{itemize}
\item \textsuperscript{134} See, e.g., Renton v. Playtime Theatres, Inc., 475 U.S. 41, 53 (1986) (questioning whether or not 520 acres referred to by the government as an alternative forum was truly “available” land that would allow an adult-themed business an opportunity to relocate).
\item \textsuperscript{135} Xiloj-Itzep v. City of Agoura Hills, 24 Cal. App. 4th 620, 640 (1994).
\item \textsuperscript{136} \textit{Id.} at 641.
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{138} ACORN v. City of Phoenix, 798 F.2d 1260, 1271 (9th Cir. 1986).
\item \textsuperscript{139} \textit{Id.}
\item \textsuperscript{140} \textit{Id.}
\end{itemize}
Similarly, in *International Soc. for Krishna Consciousness, Inc. v. Baton Rouge*, the court held that an ordinance, by prohibiting only the solicitation of funds from occupants of motor vehicles, does not prohibit the solicitation of funds from pedestrians, door-to-door canvassing, or telephone solicitations.\(^{141}\)

The availability of ample alternative channels was not discussed in *ACORN v. St. Louis County* because appellants did not raise the issue.\(^{142}\)

In *CHIRLA*, however, the court rejected the County’s suggestion that alternatives such as door-to-door canvassing of businesses or residences and telephone solicitation were viable avenues of alternative communication of day labor availability.\(^{143}\) The court took issue with the fact that the County simply suggested these alternative channels for communication without actually offering proof that they were readily available to the day laborers.\(^{144}\) Specifically, the court noted that unlike the City of Agoura Hills in *Xiloj-Itzep*, the County, here, had not established a telephone hiring exchange.\(^{145}\) Even if it had, the court held that it is incorrect to assume that day laborers have the resources to operate a telephone exchange.\(^{146}\) Additionally, the court held that canvassing businesses and residences, while perhaps effective for fundraising, did not provide a useful channel for communicating the availability of day labor.\(^{147}\) Finally, the


\(^{142}\) *ACORN v. St. Louis County*, 930 F.2d 591, 594 (8th Cir. 1991) (stating that “ACORN makes no argument that ample alternative avenues of communication do not exist”).


\(^{144}\) *Id.*

\(^{145}\) *Id.* at *38.

\(^{146}\) *Id.* at *40.

\(^{147}\) *Id.* at *39.
CHIRLA court held that the County’s suggestion that day laborers can simply find other land to stand on while soliciting (including unspecified parcels of private property) was “meaningless” and that a government seeking to regulate day labor solicitation must “do more than merely speculate” that such land exists. 148 The court concludes that the Los Angeles County ordinance before it did not provide the necessary alternative channels for communication that are required for a speech-restricting ordinance to be constitutional under a Time, Place, and Manner test. 149

For an anti-solicitation ordinance aimed at regulating day labor to be considered to leave open ample alternative channels of communication, it seems that it must take into account both the type of solicitation it seeks to regulate and the actual opportunities, rather than simply speculative types of opportunities left open for communicating the availability of day labor. Unfortunately, this prong of the Time, Place, and Manner test seems to be somewhat underdeveloped; courts have largely interpreted this requirement on a case-by-case basis. The CHIRLA court, for example, suggests that merely “leaving open” alternative channels of communication as explained in Ward v. Rock Against Racism is not enough. 150 The CHIRLA court seems to suggest that governments regulating speech should actually provide alternative channels for communication in the case of day labor solicitation. 151 This is arguably somewhat of a departure from the “leaving open” requirement of the Time, Place, and Manner test.

148. Id. at *41.

149. Id. at *42.


Additionally, the CHIRLA court suggests that the economic status of those seeking to solicit labor must play a role in a court’s determination of whether ample alternative channels of communication exists. Specifically, the court notes that day laborers are “unlikely to possess the resources” necessary to open a phone bank or to obtain their own property on which to conduct solicitations. The U.S. Supreme Court holdings support this proposition, in part. The Court explained in *Members of City Council v. Taxpayers for Vincent*, a case which upheld an ordinance that prohibited the posting of signs on public land, that it has “shown special solicitude for forms of expression that are much less expensive than feasible alternatives.” However, the Court noted that just because people may find it easy to communicate their message via “sound trucks,” for example, constitutional protection may not be granted to what amounts to a “nuisance” when alternative channels “are open.” It is likely that the governments seeking to regulate day labor view day labor solicitation as a “nuisance” and that other courts may not require a city to tolerate roadside day labor solicitation simply because those wishing to communicate the availability of labor find it economically efficient to do so in that manner.

152. *Id.* at *40-*43.

153. *Id.*

154. *See, e.g.*, *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 n.30 (1984) (noting that “the Court has shown special solicitude for forms of expression that are much less expensive than feasible alternatives and hence may be important to a large segment of the citizenry” but that “this solicitude has practical boundaries”).

155. *Id.*

156. *Id.* (quoting *Kovacs v. Cooper*, 336 U.S. 77, 88 (1949) (“That more people may be more easily and cheaply reached by sound trucks, perhaps borrowed without cost from some zealous supporter, is not enough to call forth constitutional protection for what those charged with public welfare reasonably think is a nuisance when easy means of publicity are open”)).
The “ample alternative channels” prong of the Time, Place, and Manner test as it relates to day labor solicitation will continue to develop on a case-by-case basis. Specific details of city ordinances and day labor conduct will vary in all locales, resulting, perhaps, in different interpretations of the alternative channel requirement.

B. Day Labor as a Type of Commercial Speech

Defining day labor solicitation as “commercial speech” is not only legally accurate, but such a definition would allow the courts to decide day labor-related cases more efficiently and consistently. Although courts have not yet defined day labor solicitation as a specific type of “speech,” it should be considered commercial speech under a legal analysis.157 The U.S. Supreme Court has defined commercial speech as an expression related solely to the economic interest of the speaker and its audience.158 Commercial speech assists consumers and furthers society’s interest in the fullest possible dissemination of information.159 It may be defined as someone communicating ‘I will sell you X at the Y price.’160 Unlike most speech, however, the Constitution accords a lesser protection to commercial speech than to other constitutionally guaranteed expression.161 The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation.162


159. Id.


162. Id. at 563.
A day laborer is someone who sells their labor for the day, hour, or for a particular job.\textsuperscript{163} Day laborers, in offering labor, are seeking a transaction based on economic concerns of both the laborer and the potential employer.\textsuperscript{164} It would be difficult for a court to not consider day labor solicitation commercial in nature. Under appropriate First Amendment jurisprudence, a governmental ban on day labor commercial speech, specifically, that speech as spoken by illegal aliens, may be justified.

In order to determine whether a regulation or ordinance designed to limit commercial speech is constitutional, the courts apply the four-part test defined in \textit{Central Hudson}.\textsuperscript{165} The \textit{Central Hudson} test first requires the commercial speech that would be regulated by an ordinance to be aimed at lawful activity that is not misleading; speech that is aimed at unlawful activities is not constitutionally-protected, making a complete analysis under the \textit{Central Hudson} test unnecessary.\textsuperscript{166} If the speech is determined to aim towards a legal end, however, the court then must determine whether the asserted governmental interest in regulating the commercial speech is substantial.\textsuperscript{167} If the court does consider it a substantial interest, the court then determines whether the regulation directly advances the governmental interest asserted.\textsuperscript{168}

\begin{flushleft}
165. \textit{Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n}, 447 U.S. 557, 566 (1980) (describing a four-part commercial speech test that contemplates the following: the lawfulness of the commercial speech facing regulation, whether the asserted governmental interest in regulating such speech is substantial, the regulation’s utility in directly advancing the asserted governmental interest, and whether the regulation is not more extensive than is necessary to serve that interest).
166. \textit{Id}.
167. \textit{Id}.
168. \textit{Id}.
\end{flushleft}
Finally, the court determines whether or not the regulation is more extensive than is necessary to serve that interest. 169

The Central Hudson test is similar to the Time, Place, and Manner test as examined in Part III. 170 In applying the Time, Place, and Manner test to ordinances designed to regulate day labor solicitation, however, courts take the legal position that day labor solicitation is constitutionally-protected speech. 171 The Time, Place, and Manner test specifically applies to protected speech 172 while the Central Hudson test would appropriately bring into question the constitutional value of day labor solicitation; the test does not require an ordinance to be “content-neutral” and, in fact, questions the content of the speech facing regulation. 173

Day labor solicitation should be defined as commercial speech and the Central Hudson test should be applied to ordinances designed to suppress such speech. 174 City governments should re-write anti-solicitation ordinances overturned by the courts to be content-specific and request application of the Central Hudson test if they are again brought into question.

169. Id.

170. Compare Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (holding that the government may impose reasonable restrictions in a public forum 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), with Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557, 566 (1980) (describing a four-part commercial speech test that contemplates the following: the lawfulness of the commercial speech facing regulation, whether the asserted governmental interest in regulating such speech is substantial, the regulation’s utility in directly advancing the asserted governmental interest, and whether the regulation is not more extensive than is necessary to serve that interest).

171. See Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (explaining that “even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech” (emphasis added)).

172. Id.


174. Id.
Application of the test would determine the constitutionality of anti-solicitation ordinances while indicating whether or not the speech it seeks to suppress is protected by the First Amendment in the first place. 175

C. The Central Hudson 4-part Commercial Speech Test Applied

By applying the Central Hudson test to an anti-solicitation ordinance designed to regulate day labor solicitation, the legality of day labor solicitation is brought into question. At the time of this writing, no content-specific ordinance with an aim to prevent day labor solicitation has been written by any governmental entity; the ordinances examined in Part III were designed to prevent the physical manner in which the speech was conducted (i.e., on the street, sidewalks, right-of-ways).

Governments should call into question the act of illegal aliens soliciting labor. The analysis of ordinances designed to prevent constitutionally-questionable commercial speech appears under the first prong of the four-part Central Hudson test. The three remaining prongs address many of the same issues that arise under the Time, Place, and Manner test detailed, above. Consequently, this paper focuses largely on the first prong of the Central Hudson test and the legality of day labor solicitation.

1. To Be Protected, Speech Must be Aimed Towards a Legal Activity that is Not Misleading

The First Amendment’s concern for commercial speech is based on the informational function of advertising. 176 The First Amendment does not protect commercial speech about

175. See generally U.S. Const. amend. I. (“Congress shall make no law...abridging the freedom of speech”).

unlawful activities.\textsuperscript{177} There can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity.\textsuperscript{178} The government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity.\textsuperscript{179} The government has a legitimate and compelling interest in preventing those aspects of solicitation that involve fraud, undue influence, intimidation, or overreaching.\textsuperscript{180} When the government regulates commercial messages to protect consumers from misleading, deceptive, or aggressive sales practices, the purpose of its regulation is consistent with the reasons for according constitutional protection to commercial speech and therefore justifies less than strict review.\textsuperscript{181} Additionally, because commercial speakers have extensive knowledge of their product, they are well situated to evaluate the accuracy of their message and the lawfulness of the underlying activity.\textsuperscript{182} Ultimately, if there is a kind of commercial speech that lacks all First Amendment protection, it must be distinguished by its content.\textsuperscript{183}

The judicial system has provided numerous examples of commercial speech that rises to the level of what it holds to be unlawful, misleading, and/or deceptive. Each case is unique and specific to the totality of the circumstances at issue. In \textit{United States v. Schiff}, the Ninth Circuit Court of Appeals held that the sale of a book designed to instruct people on how to evade the

\begin{footnotes}
\item[179] \textit{Id}.
\item[181] \textit{Id}. at 501.
\end{footnotes}
Internal Revenue Service was unlawful and fraudulent commercial speech.\textsuperscript{184} In \textit{Novartis Corp.} \textit{v. FTC}, the United States Court of Appeals for the District of Columbia held that a company advertising its medication with the implication and unsubstantiated claims of superiority to other medications was deceptive.\textsuperscript{185} In \textit{Pittsburgh Press Co. v. Pittsburgh Com. on Human Relations}, the Court held that an advertisement for the sale of narcotics or the solicitation of prostitutes would likely be unconstitutional; speech that is related to illegal activity is unprotected.\textsuperscript{186}

The leading cases on anti-solicitation ordinances aimed at day laborers never questioned whether day laborer solicitation was protected under the \textit{Central Hudson} test and instead analyzed the anti-solicitation ordinances with a Time, Place, and Manner test, which assumes that day labor solicitation is afforded some constitutional protection.\textsuperscript{187} Application of the Time, Place, and Manner test to such anti-solicitation ordinances leaves a very fundamental question unanswered: Is day laborer commercial speech related to an illegal activity? If the answer is affirmative, then the \textit{Central Hudson} test need go no further; speech that is aimed at an illegal undertaking is not constitutionally protected.\textsuperscript{188}

\begin{itemize}
\item \textsuperscript{184} United States v. Schiff, 379 F.3d 621 (9th Cir. 2004).
\item \textsuperscript{185} Novartis Corp. \textit{v. FTC}, 343 U.S. App. D.C. 111 (D.C. Cir. 2000).
\item \textsuperscript{186} Pittsburgh Press Co. \textit{v. Pittsburgh Com. on Human Relations}, 413 U.S. 376 (1973) (holding in a pre-\textit{Central Hudson} case that “We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes”).
\item \textsuperscript{187} See, \textit{e.g.}, Coalition for Humane Immigrant Rights \textit{v. Burke}, No. CV 98-4863-GHK(CTx), 2000 U.S. Dist. LEXIS 16520 (C.D. Cal. Sept. 12, 2000).
\end{itemize}
Day laborers are predominately illegal aliens. Under United States law, it is illegal to knowingly hire illegal aliens for work. It is likely that illegal aliens are well aware that they are prohibited from working legally in the United States; illegal alien day laborers, therefore, are in a good position to understand the accuracy of their message and the “lawfulness of the underlying activity.” Because the hiring of illegal aliens is illegal, and because illegal alien day laborers are seeking to be hired, it is difficult to argue that day labor solicitation is not “commercial speech related to illegal activity” as defined in Central Hudson. Consequently, day labor solicitation seems very much the type of commercial speech the government can ban through ordinances.

In Ohralik v. Ohio State Bar Ass’n, the U.S. Supreme Court specifically addressed the issue of solicitation as applied to the Central Hudson test. The Court’s analysis indicates that day labor solicitation may create the influence, intimidation, or overreaching that the government


190. 8 U.S.C. § 1324(a) (2005) (making it illegal “to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien”); 8 U.S.C. § 1324(b) (2005) (requiring potential employers to verify that the potential employee “is not an unauthorized alien by examining” various documents that “reasonably appear...to be genuine”).

191. See generally Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n, 447 U.S. 557, 564 n.6 (1980) ("...commercial speakers have extensive knowledge of both the market and their products...[and] are well situated to evaluate the accuracy of their message and the lawfulness of the underlying activity").

192. Id. at 563.

193. Id.; cf. Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 496 (holding that where an ordinance is directed at commercial activity promoting or encouraging illegal drug use, and where that activity is deemed “speech,” then it is speech proposing an illegal transaction, which a government may regulate or ban entirely).

194. Ohralik v. Ohio State Bar Ass’n, 436 U.S. 447 (1978) (holding that, in the interest of protecting the public, aggressive soliciting on the part of attorneys is not constitutionally protected speech).
has a legitimate and compelling interest in preventing. The Court held that in-person solicitation may exert pressure and often demands an immediate response, without providing an opportunity for comparison or reflection. In fact, the aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking. The immediacy of a particular communication and the imminence of harm are factors that have made certain communications less protected than others. A government does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.

An employer looking for laborers, and having their vehicle swarmed with dozens of men who are more than likely prohibited from working legally may be put in such a situation. The employer may not have an opportunity to ask for evidence of worker eligibility (i.e. social security cards, valid worker visas, etc.) and may have to make an immediate decision on hiring if it takes place in the middle of a busy street. The workers may use this immediacy, hopping into the back of pickup trucks in order to give the false and “one-sided presentation” described in Ohralik, that they are authorized to work. Additionally, an employer not so knowledgeable on

195.    Id. at 462.
196.    Id. at 457.
197.    Id.
198.    Id. at 458 n.13.
199.    Id. at 456.
200.    See Xiloj-Itzep v. City of Agoura Hills, 24 Cal. App. 4th 620, 626 (1994) (explaining that the city defending its anti-solicitation ordinance received complaints of day laborers “running out into traffic, swarming cars, distracting motorists”); see, e.g., Emily Bazar and Stephanie Armour, Cities Tackle Day Labor Dilemma, U.S.A. TODAY, Oct. 24, 2005 (“Every day, laborers gather before dawn at several locations, including the busy intersection of Throckmorton and Main streets. When an employer drives up, the men swarm the vehicle”); Katie Nelson, Day Laborers Home In On New Tempe Home Depot, ARIZ. REPUBLIC, Oct. 27, 2005 (quoting a storeowner who “worries about day laborers causing car accidents, since he’s seen them swarm trucks carrying men who appear to be looking for workers. He’s also concerned about people coming to the store on foot being intimidated by a group of men outside his store”).
the issue of day labor, perhaps not knowing many day laborers are illegal aliens, may be making a decision to hire that is “speedy and uninformed.” Because the U.S. Supreme Court held in *Ohralik* that the government “has a strong interest in adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed,” it might be arguable that the government also has a similarly strong interest in regulating the conduct of illegal aliens it has allowed into the country by not adequately enforcing immigration laws. Ultimately, the constitutionality of an ordinance designed to prevent these problems will depend upon the identity of the parties and the precise circumstances of the solicitation.

Certainly, even though the number of legally-employable day laborers is low, some day laborers are, in fact, legal immigrants or U.S. citizens and can be legally employed. However, the U.S. Supreme Court holds that where truthful and non-misleading expression will be snared along with fraudulent or deceptive commercial speech, an ordinance may still be upheld if the government can satisfy the remainder of the *Central Hudson* test by demonstrating that its restriction serves a substantial state interest and is designed in a reasonable way to accomplish

201. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 457 (1978); (While both the illegal alien and the employer might logically be considered “guilty” of failing to act in the best interests of the law, it is the employer who has the ultimate responsibility to verify worker eligibility.)

202. *Id.* at 464. (Certainly, the difference in power dynamics between a lawyer and potential client as compared to an employer and potential employee would be an issue in such an argument.); *see also*, e.g., Michelle Mittelstadt And David McLemore, *Porous Border Frustrates States: Saying U.S. Isn’t Doing Enough, States Taking Matters in Own Hands*, DALLAS MORNING NEWS, Aug. 18, 2005 (“[I]n recent days, the governors of Arizona and New Mexico – fed up with the failure of the federal government to control the border – have declared state emergencies in counties struggling with rising immigrant smuggling and violence;” and “[Texas Governor Rick Perry] is more concerned with reminding the federal government that securing the national borders is a federal, not a state, responsibility”).


that end.\footnote{205} Of course, if it wanted to, a government can assure that non-misleading commercial speech spoken by legal immigrants or U.S. citizens is not snared in a day labor solicitation-regulating ordinance by directing the ordinance only at illegal aliens and by allowing state and local officers who would be responsible for enforcing the ordinance to check the immigration status of those projecting commercial speech.\footnote{206} This would arguably allow a court to end application of the \textit{Central Hudson} test after the first prong, and conclude that illegal alien day labor solicitation is not constitutionally-protected speech.\footnote{207}

\section*{2. Is the Asserted Governmental Interest Substantial?}

The second prong of the \textit{Central Hudson} test requires the government to show why it seeks to regulate the speech and why the interest should be considered ‘substantial.’\footnote{208} This prong has no specific requirements; the court seems to decide whether or not an interest should be considered ‘substantial’ on a case-by-case basis.\footnote{209} Again, a court will likely only analyze a speech-regulating ordinance under this prong if there is a concern that the ordinance might

\footnote{205} Edenfield v. Fane, 507 U.S. 761, 768 (1993).

\footnote{206} Although day laborer advocates may oppose such an undertaking, state and local police officers are allowed to enforce federal immigration laws according to the U.S. Department of Justice; \textit{see} Memorandum from Teresa Wynn Roseborough, Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Dept. of Justice, Opinion For The United States Attorney Southern District Of California, Assistance By State And Local Police In Apprehending Illegal Aliens (Feb. 5, 1996), \textit{available at} http://www.usdoj.gov/olc/immstopo1a.htm. For analysis on how state and/or local police enforcement might enforce federal immigration status, \textit{see} LISA M. SEGGETTI, STEPHEN R. VÍÑA, KARMA ESTER, CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, \textit{Enforcing Immigration Law: The Role of State and Local Law Enforcement} (Mar. 11, 2004); \textit{see also}, KRIS W. KOBACH, CENTER FOR IMMIGRATION STUDIES, STATE AND LOCAL AUTHORITY TO ENFORCE IMMIGRATION LAW (June 2004).


\footnote{208} \textit{Id.} at 566.

\footnote{209} \textit{See, e.g., id.}
indirectly limit non-misleading and truthful speech in an effort to prohibit commercial speech aimed at an illegal or fraudulent activity.\textsuperscript{210}

In \textit{Xiloj-Itzep}, the court held that an ordinance prohibiting the methodology by which day laborers solicit labor, stopping automobile drivers in the street, was constitutional because a ban on such activity would protect traffic safety.\textsuperscript{211}

Similarly, the court in \textit{CHIRLA} held that the government’s interest in promoting the safety of pedestrians and motorists and combating traffic congestion is significant.\textsuperscript{212} The court also held that a government has a significant interest in “maintaining the quality of urban life” which the court held might translate into an interest in preventing “harassment, littering, trespassing, and public urination and defecation.”\textsuperscript{213}

In the context of a content-specific anti-solicitation ordinance aimed at illegal alien day laborers, however, the court will have to determine whether preventing the hiring of illegal aliens is a substantial governmental interest. Because U.S. federal law specifically prohibits the act of knowingly hiring of illegal aliens, it is likely that a court will find an ordinance prohibiting illegal alien day laborers from soliciting labor to be in furtherance of a substantial governmental interest.\textsuperscript{214} Additionally, the court will have to determine whether or not this interest is substantial enough to sustain a commercial speech-regulating ordinance that may “snare” legally-protected commercial speech (perhaps day labor solicitation on the part of legal

\textsuperscript{210} Edenfield v. Fane, 507 U.S. 761, 768 (1993).


\textsuperscript{213} Id.

\textsuperscript{214} 8 U.S.C. § 1324(a) (2005) (making it illegal “to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien”).
immigrants) when enforced.\textsuperscript{215} Because hiring illegal alien labor is prohibited under federal law,\textsuperscript{216} and because legal immigrants and U.S. citizens can likely find other ways to communicate their availability to work,\textsuperscript{217} it is likely that a court would allow a commercial speech-regulating ordinance that may “snare” legally-protected commercial speech to pass the second prong of the \textit{Central Hudson} test.

\textbf{3. Does the Regulation Directly Advance the Asserted Governmental Interest?}

In applying the third prong of the \textit{Central Hudson} test, the court questions whether the commercial speech-regulating ordinance directly advances the governmental interests asserted in the second prong.\textsuperscript{218} The burden is not satisfied by mere speculation or conjecture; a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that the restriction or ordinance will in fact alleviate the asserted harms to a material degree.\textsuperscript{219} The regulation may not be sustained if it provides only ineffective or remote support in advancing the government’s asserted interest.\textsuperscript{220} The court’s analysis is

\begin{itemize}
\item \textsuperscript{215} This assumes, of course, that state or local law enforcement officials have not been granted authority by the local or state governments to enforce immigration laws (i.e., check immigration status) in order to prevent “snaring” constitutionally-sound commercial speech.
\item \textsuperscript{216} 8 U.S.C. § 1324(a) (2005) (making it illegal “to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien”).
\item \textsuperscript{217} See, e.g., Labor Ready, available at: http://www.laborready.com (accessed, Oct. 31, 2005) (Labor Ready “dispatches approximately 600,000 temporary employees to jobs in construction, manufacturing, hospitality services, landscaping, warehousing, retail and more” and “We cover workers’ compensation and unemployment insurance and take care of all taxes and employment costs, along with all the necessary paperwork. We provide our customers with weekly certified payroll documentation on all Prevailing Wage jobs”).
\item \textsuperscript{219} Edenfield v. Fane, 507 U.S. 761, 770 (1993).
\end{itemize}
highly fact-specific and is considered on a case-by-case basis.\textsuperscript{221} Again, a court will likely only analyze an ordinance aimed at prohibiting fraudulent commercial speech under this prong if there is a concern that the ordinance might indirectly limit non-misleading and truthful speech as well.\textsuperscript{222}

In \textit{Greater New Orleans Broad. Ass’n v. United States}, the U.S. Supreme Court held that a federal regulation that limited casino advertising for the purpose of reducing social costs associated with gambling, such as financial ruin, did not directly or materially further the asserted governmental interest.\textsuperscript{223} The Court reasoned that more advertising did not necessarily result in more gambling; more advertising might simply channel gamblers to one casino rather than another.\textsuperscript{224}

In \textit{44 Liquormart v. Rhode Island}, the U.S. Supreme Court held that an alcohol price advertising ban did not significantly advance the government’s interest in promoting temperance.\textsuperscript{225} The Court noted a lower court’s holding that any impact on the level of consumption attributable to the absence of price advertisements would be “negligible.”\textsuperscript{226}

In the context of a content-specific anti-solicitation ordinance aimed at illegal alien day laborers, the court will have to determine whether prohibiting commercial speech projected by illegal aliens would result in furthering the governmental interest of preventing the hiring of illegal aliens. It is likely that such an ordinance would further the governmental interest, but only

\begin{flushleft}
221. \textit{See, e.g., id. at} 569.
224. \textit{Id.}
226. \textit{Id. at} 506 n.17.
\end{flushleft}
as much as the ordinance is enforced. If law enforcement were to only half-heartedly enforce the ordinance, those wishing to employ illegal aliens would likely find a way. Still, if an ordinance is aimed at prohibiting the commercial speech of illegal alien day laborers, and the asserted governmental interest is preventing the hiring of illegal alien day laborers, it is likely that a court would see a strong “cause and effect” relationship. It would be difficult to conclude that such an ordinance would not advance the governmental interest.

4. Is the Regulation More Extensive Than Necessary to Serve the Asserted Governmental Interest?

If it is obvious that alternative forms of regulation that would not involve any restriction on speech would be just as likely or more likely to achieve the asserted governmental interest, then a commercial speech-limiting ordinance may not be sustained.\(^{227}\) This prong is markedly different than the requirement of “narrow tailoring” under the Time, Place, and Manner test. The U.S. Supreme Court has held that a speech-regulating ordinance, when analyzed under the Time, Place, and Manner test, should not be considered unconstitutional simply because the government’s interest could be adequately served by some less-speech-restrictive alternative.\(^{228}\) Conversely, a regulation analyzed under the *Central Hudson* test can be found to be overly extensive if the entity seeking to invalidate the regulation provides an alternative and less intrusive method for achieving the same result.\(^{229}\) Again, a court will likely only analyze an

\(^{227}\) *Id.* at 507.


ordinance aimed at prohibiting fraudulent commercial speech under this prong if there is a concern that the ordinance might indirectly limit non-misleading and truthful speech as well.\textsuperscript{230}

As an example, in \textit{44 Liquormart v. Rhode Island}, the U.S. Supreme Court held that “it was perfectly obvious” that means other than the alcohol price advertising ban at issue could be used to achieve the government’s interest in promoting temperance; the court suggested “increased taxation” and “educational campaigns” that would not limit any speech at all.\textsuperscript{231}

In the case of an ordinance designed to limit the hiring of illegal aliens by prohibiting commercial speech spoken by illegal alien day laborers, it is a possibility that opponents of the ordinance will propose a way to limit illegal alien hiring without such an ordinance. Opponents may argue that because knowingly hiring illegal aliens is already illegal under federal law, requesting better enforcement from federal immigration authorities may be all that is needed.\textsuperscript{232} A court may also suggest that an educational campaign about the penalties applicable to illegal alien labor would lessen the hiring of illegal aliens.\textsuperscript{233} Of course, both of these proposals assume that the federal government will adequately enforce immigration laws; employers who realize that immigration laws pertaining to the hiring of illegal alien are rarely enforced will find little incentive to follow the law.\textsuperscript{234} As another example, a court may view the creation of a day labor

\begin{itemize}
\item \textsuperscript{230} Edenfield v. Fane, 507 U.S. 761, 770 (1993).
\item \textsuperscript{231} Id.
\item \textsuperscript{232} 8 U.S.C. § 1324(a) (2005) (making it illegal “to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien”).
\item \textsuperscript{233} See, e.g., Brynn Grimley, \textit{Next Steps in Site Process}, \textit{CONNECTION NEWSPAPERS} (HERNDON, VA.), Aug. 24, 2005 (explaining that Herndon, Virginia city officials, in addition to creating a day laborer hiring center, are “preparing an outreach and education component to reach business owners”).
\item \textsuperscript{234} See generally Louis Uchitelle, \textit{I.N.S. Is Looking the Other Way As Illegal Immigrants Fill Jobs}, \textit{N.Y. TIMES}, Mar. 9, 2000, at C1 (quoting Immigration and Naturalization Service’s Chicago director Brian R. Perryman: “The Immigration Service has never had the resources to arrest every illegal alien, and now there is a large number and a demand from many companies to employ them... Once they come into the Chicago metropolitan area, with its 6.5 million people, it is hard to stop the process”).
\end{itemize}
hiring center that allows only legal immigrants and U.S. citizens to use the facility as a viable alternative. This proposal may allow law enforcement to justifiably assume that individuals continuing to solicit labor on the streets after such a hiring center has been created are illegal aliens attempting to partake in an illegal activity. A content-specific ordinance aimed at reducing the hiring of illegal alien labor may then be unnecessary.

If a government were to assert that another reason for the ordinance was to prevent social problems such as littering, loitering, public urination and defecation, opponents of the ordinance may argue that basic enforcement of laws specific to these crimes may be more appropriate than an ordinance that prohibits commercial speech.

Day labor solicitation is a form of commercial speech. As such, it is appropriate for governments to write ordinances regulating such speech. An ordinance aimed at preventing illegal aliens from conducting commercial speech for the purposes of soliciting labor will pass the Central Hudson test if carefully written. It will be difficult for a court to conclude that illegal alien day labor solicitation is commercial speech aimed at a legal endeavor. Consequently, a government will likely be justified in prohibiting such speech.

IV. DAY LABOR HIRING CENTERS AS A SOLUTION TO DAY LABOR PROBLEMS

Many cities have created day labor hiring centers as a way to alleviate some of the problems discussed in Part I. Such centers might be viewed as “alternative channels” for communication discussed in Part III. Experts estimate that there are over 400 day laborer hiring centers.

235. Part IV of this paper analyzes the legal problems associated with day labor hiring centers.

236. See, e.g., Coalition for Humane Immigrant Rights v. Burke, No. CV 98-4863-GHK(CTx), 2000 U.S. Dist. LEXIS 16520, at *43 (C.D. Cal. Sept. 12, 2000) (holding that even after an anti-solicitation ordinance is invalidated, a government may still enforce laws prohibiting “jaywalking, reckless driving, illegal turns, littering, public urination and defecation, trespassing, or disorderly conduct”).
sites nationwide, some being designated locations or buildings, some being simply empty lots that have become a hiring ground by way-of-mouth.\textsuperscript{237} When counting only organized, staffed centers, experts estimate that there are over 60 such centers across the country.\textsuperscript{238} This paper largely focuses on organized and staffed centers.

Day laborer centers are usually constructed along with an anti-solicitation ordinance; without an ordinance prohibiting day labor solicitation, there is little incentive for employers and laborers to use a hiring center because it is very easy for an employer to find day laborers on the streets and bypass any paperwork required by a hiring center.\textsuperscript{239}

Although day labor centers are more frequently becoming the proposed solution to problems associated with day labor, there is a growing backlash against the idea.\textsuperscript{240} Proponents and opponents of day laborer hiring centers regularly protest one another outside city halls or in front of hiring centers.\textsuperscript{241} City residents concerned about potential lawbreaking have begun to


\textsuperscript{238} Juliet V. Casey, \textit{Day Laborers: Supply and Demand}, LAS VEGAS REVIEW-JOURNAL, Aug. 14, 2005 at 31A (quoting a research associate from the Center for the Study of Urban Poverty at the University of California, Los Angeles).

\textsuperscript{239} Anna Gorman, \textit{Day Laborers, Cities Seek Way That Will Work}, L.A. TIMES, Aug. 29, 2005 (“[P]artly because the pecking order for jobs is decided by lottery, some men still prefer to solicit work on the sidewalk, closer to Home Depot. Without an ordinance to keep workers off the streets and sidewalks, there is little incentive for them – or for prospective employers – to flock to the center”).

\textsuperscript{240} \textit{See, e.g.}, Emily Bazar and Stephanie Armour, \textit{Cities Tackle Day Labor Dilemma}, U.S.A. TODAY, Oct. 24, 2005 (quoting Director of the Center for Urban Economic Development at the University of Illinois at Chicago, Nikolas Theodore: “As the day laborer phenomenon has grown, worker centers have become the dominant strategy...[but] people are starting to question the strategy”).

\textsuperscript{241} \textit{See, e.g.}, Groups Spar Over Immigration Issues Outside Of LA-Area Home Depot, ASSOCIATED PRESS, Dec. 10, 2005 (“One person was arrested during a protest Saturday outside Home Depot as groups clashed over the placement of day laborer centers near some of the home improvement chain’s stores. About 200 people gathered outside the store, including members of the anti-illegal immigration group Save Our State, which has staged similar protests against Home Depot in other parts of Southern California”).
patrol day labor hiring centers, sending pictures of those hiring day laborers to federal immigration authorities. \textsuperscript{242} At least one lawsuit has been initiated against a city government on the issue of day labor hiring centers. A conservative, non-partisan governmental watchdog organization, Judicial Watch, recently initiated litigation on behalf of taxpayers against the City of Herndon, Virginia over its authorization of a taxpayer-subsidized day laborer hiring center. \textsuperscript{243} The organization argues that taxpayer dollars should not be used for day laborer centers that facilitate the hiring of illegal aliens. \textsuperscript{244} Litigation is pending.

\textbf{A. Defining Day Labor Hiring Centers}

Every day laborer hiring center is unique, making it difficult to establish one, concrete definition. Yet there are characteristics that are common throughout most day laborer hiring centers in the country. Most hiring centers have been established by municipal governments and are dependent on taxpayer dollars for day-to-day operations. \textsuperscript{245} Experts estimate that three-quarters of the day laborer hiring centers in California, for example, receive government

\textsuperscript{242} See, e.g., Emily Bazar and Stephanie Armour, \textit{Cities Tackle Day Labor Dilemma}, U.S.A. TODAY, Oct. 24, 2005 (“In Herndon, a group calling itself the Herndon Minutemen plans to begin patrolling day laborer hiring spots...snap photos of workers and employers who pick them up and send the information to immigration officials and federal and state tax bureaus”).

\textsuperscript{243} Detailed legal arguments specific to the Judicial Watch case are available at http://judicialwatch.org/herndon.shtml

\textsuperscript{244} See, e.g., Christina Bellantoni, \textit{Center Staff Won’t Check Legal Status of Laborers}, WASH. TIMES (D.C.), Aug. 19, 2005 (quoting Judicial Watch President Tom Fitton: “Essentially no governmental body has the right to use taxpayer funds for illegal purposes...They are facilitating the illegal hiring of illegal aliens”).

\textsuperscript{245} Abel Valenzuela, Jr., \textit{Controlling Day Labor: Government, Community and Worker Responses} (Center for the Study of Urban Poverty, University of California, Los Angeles, Working Paper, Jan. 2000), available at http://www.ssnet.ucla.edu/issr/csup/pubs/papers/index.php; see, e.g., Stephen Wall, \textit{SB Reluctant to Allow Day Labor Hiring Site}, SAN BERNARDINO SUN (CALIF.), Dec. 19, 2004 (noting that the Pomona, California Day Labor Center receives $105,000 a year from the city; noting that the Rialto, California City Council set aside $30,000 for setting up a center and plans to contribute $10,000 a year for its operation); see, e.g., Keyonna Summers, \textit{Prince George’s to Open Center For Day Laborers}, WASH. TIMES (D.C.), Dec. 10, 2005 (“Prince George’s County will contribute $91,000, said [the County’s] spokesman James Keary”).
funding.\textsuperscript{246} The City of Los Angeles funds eleven day laborer hiring centers, for example, spending $150,000 to $175,000 a year on each.\textsuperscript{247} Many more proposed centers are nearing completion, some costing into the millions of dollars.\textsuperscript{248} Although municipalities often put up the funds for establishing centers and paying the rent, hiring centers are often operated by non-profits.\textsuperscript{249}

Although day laborer hiring centers vary by location, many offer English classes, job training programs, and a place for laborers to congregate while waiting for employers.\textsuperscript{250} Many day laborer hiring centers are organized so that the limited jobs go to the laborers on a lottery system.\textsuperscript{251} Consequently, some day laborers prefer to solicit work on the street where the most aggressive usually gets the job.\textsuperscript{252}

Additionally, many day laborer hiring centers set a minimum wage and help to negotiate a specific wage between employer and employee before work begins.\textsuperscript{253} This process sometimes leads to employers avoiding the centers and hiring off the streets in order to undercut the wages


\textsuperscript{247} Rachana Rathi, \textit{Job Center’s End Won’t Still Debate}, L.A. TIMES, Mar. 17, 2005.

\textsuperscript{248} Pamela Perez, \textit{Jupiter Closer to Deal for Labor Center}, PALM BEACH POST (FLA.), Sept. 22, 2005 (a day labor hiring center “is expected to cost the town $1.95 million”).


\textsuperscript{251} Kelley Beaucar Vlahos, FOXNEWS.COM, Day Labor Centers Stir Controversy Throughout Country, Aug. 30, 2005 (“Typically in the day labor centers across the nation, workers sign in and are placed in a lottery”).


negotiated at the centers. Some hiring centers also charge laborers a fee (sometimes $5 to $15 a month) for using the center.

Centers that are not large enough to accommodate a significantly large day laborer population risk becoming ineffective; laborers unable to make use of the center on any given day flock to the streets, often taking jobs from those who did make it into the center.

Some cities, nevertheless, have reported that problems with day labor solicitation have lessened as a result of the creation of a day laborer hiring center.

B. Aiding and Abetting Issues

Most day laborer hiring centers do not check the legal status of those using the center to find work. Organizations that run the hiring centers take a ‘hands-off’ approach believing that they can help connect employers and laborers without suffering any liability should the laborers be illegal aliens. Some hiring centers openly admit that they are helping illegal aliens to get

254. Id.

255. Id. at 13.

256. See, e.g., Juliet V. Casey, Day Laborers: Supply and Demand, Las Vegas Review-Journal, Aug. 14, 2005, at 31A (quoting a day laborer center operator: “It was a very small space, made for 70 people, but we were holding more than 140 on some days. It got to the point where employers, who didn’t want to deal with the crowded parking lot and line, started telling workers again to start meeting them on the street corner”).

257. See, e.g., Stephen Wall, SB Reluctant to Allow Day Labor Hiring Site, San Bernardino Sun (Calif.), Dec. 19, 2004 (quoting San Bernardino Sheriff Sergeant Steve Smith as saying ‘problem calls have dropped about 80 percent’ since the creation of a hiring center: “We’ve had some success with it...It has organized the process in which the day laborers are obtaining work and it has made it a little safer on the streets”).

258. See, e.g., Christina Bellantoni, Center Staff Won’t Check Legal Status of Laborers, Washington (D.C.) Times, Aug. 19, 2005 (quoting Herndon, Virginia Mayor Michael O’Reilly: “[the day laborer center] didn’t have the capacity to enforce federal immigration law...It was clear they will not be checking legal documentation”).

259. See, e.g., Atlanta J.-Const., Day Laborers: Sandy Springs Looks to Balance Needs of Businesses, Residents, Immigrants, Oct. 2, 2005, at IZH (quoting the executive director of a Duluth, Georgia day laborer center: “We don’t interfere with the workers and contractors...We serve as a liaison; we help translate and negotiate. Once they have what they feel is a good deal, we put it in writing, and we expect them to follow through”).
While this specific employment process has not been directly challenged in court, the hiring laws detailed in Part II of this paper suggest the possibility that an organization or individual knowingly assisting with the “recruitment” or the “referring for a fee” of illegal aliens for the purposes of securing employment, could be found liable. This will, of course, depend largely on how an individual hiring center is operated. It will also depend on how the judicial system defines “recruit” and “refer for a fee.” Again, it is important to note that no case specific to this issue has yet made its way through the courts. Consequently, it is difficult to assess how a court might rule on the potential legal issues surrounding day labor hiring centers that assist employers in hiring people who are unauthorized to work.

With these concerns in mind, however, city officials have questioned the appropriateness and legality of taxpayer-subsidized day laborer hiring centers. Some argue that there are private temp agencies and other job-placement organizations that already provide the service of linking workers with employers, and that using taxpayer dollars for creating hiring centers is redundant and unnecessary. Of course, legitimately-run temp agencies require proof of worker eligibility which alienates illegal alien day laborers who are prohibited from working in the

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260. Kelley Beaucar Vlahos, FOXNEWS.COM, Day Labor Centers Stir Controversy Throughout Country, Aug. 30, 2005 (quoting supervisor Silvia Navas of the CASA of the Maryland Employment Rights Project in Silver Spring, Maryland: “We do have undocumented workers...They are people who have a right to find a job”);

261. 8 U.S.C. § 1324a(a)(1)(A) (2005) (“It is unlawful for a person or other entity...to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien”).

262. Bart Jones, Farmingville Day Laborers, NEWSDAY (N.Y.), Aug. 10, 2004, at A8 (quoting Suffolk County Executive Steve Levy: “It’s a matter of principle...The government should not be facilitating an illegal, underground economy”).

263. See, e.g., Rachana Rathi, Job Center’s End Won’t Still Debate, L.A. TIMES, Mar. 17, 2005, (quoting Costa Mesa, California Mayor Allan Mansoor: “I don’t see why [employers] can’t use Labor Ready. I think it’s more appropriate that individuals pay a fee for what they are using instead of the taxpayers paying that fee”).
United States. While it seems that illegal aliens make up the only sector of society actually in “need” of day laborer hiring centers (due to their inability to find work through agencies that require proof of documentation), it is likely that there are locales where hiring day laborers (of both legal and illegal status) from a day labor center is easier than going through a temp agency (due perhaps to the fact that no agency exists in the area). Nevertheless, city officials often question whether they are promoting the hiring of illegal aliens by facilitating the creation of day laborer hiring centers in the first place.

Some governments are taking steps to assure that they are not sued for facilitating potentially-illegal activities related to the employment of illegal aliens. The State of Arizona, for example, recently passed a law banning municipalities from building or maintaining centers that might facilitate the employment of illegal aliens. In another example, the City of Los Angeles is considering an ordinance that would require large home-improvement stores – rather than the city – to create day laborer shelters on their privately-owned property.

V. SUGGESTIONS FOR REGULATING DAY LABOR AND LIMITING LITIGATION

264. See, e.g., Labor Ready, http://www.laborready.com (accessed, Oct. 31, 2005) (Labor Ready provides “approximately 600,000 temporary workers to our more than 300,000 customers in a diverse range of industries, including construction, transportation, warehousing, hospitality, landscaping, light manufacturing” and adheres to “national and state laws regarding wages and work hours”).

265. Cf. Conor Friedersdorf and Stephen Wallstaff, Cities Sued Over Day-Labor Law, INLAND VALLEY DAILY BULLETIN (ONTARIO, CALIF.), Sept. 20, 2002 (“Some workers say they have used false documents to find work through temporary agencies. But with improved technology and increased enforcement of immigration laws after Sept. 11, [illegal aliens] have had to become more resourceful in their job search”).

266. See, e.g., Emily Bazar and Stephanie Armour, Cities Tackle Day Labor Dilemma, U.S.A. TODAY, Oct. 24, 2005 (quoting Hoover, Alaska’s Mayor Tony Petelos: “When you have different individuals and companies coming by in their trucks and picking up laborers and taking them to jobs – knowing they’re illegal and paying them cash – we’re promoting black market activity”).


While basic enforcement of immigration laws would likely persuade many illegal aliens to leave the United States, over time, through a process of attrition, the immediate problems associated with illegal immigration are largely perceptible on the state and local level forcing municipalities to grapple with the issue on a daily basis. Solving problems generally associated with day laborer solicitation can partially be solved through a combination of carefully-crafted anti-solicitation ordinances and appropriately-regulated day labor hiring centers.

A. Cities should Draft Anti-Solicitation Ordinances that Pass Time, Place, and Manner Requirements

Municipalities looking to limit some of the dangers associated with street-side day laborer solicitation should craft anti-solicitation ordinances that focus largely on the physical dangers of soliciting labor from passing vehicles. An ordinance of this nature must be neutral regarding the specific content of the speech, and must not put a value judgment on the message day laborers are trying to convey. Additionally, the ordinance should be narrowly tailored to suit a significant governmental interest. It seems that the ordinance must carefully define the proscribed manner of solicitation and should not attempt to prevent other social ills (i.e., public urination, harassment) that could be prevented through enforcement of other laws. Finally, an ordinance should leave open specifically defined channels for communication of the information that day laborers are seeking to convey. A city may meet this criteria by allowing day labor

269. See generally, MARK KRIKORIAN, CENTER FOR IMMIGRATION STUDIES, DOWNSIZING ILLEGAL IMMIGRATION: A STRATEGY OF ATTRITION THROUGH ENFORCEMENT (May 2005).

solicitation to take place at a location that does not risk traffic-related harms. A city may also point to existing hiring centers or temp agencies as alternative channels for communication of day labor solicitation.

Most importantly, municipalities should raise the issue of whether or not day labor speech is protected in the first place. Government officials may wish to craft anti-solicitation ordinances that specifically prohibit illegal alien day laborers from soliciting their labor. City attorneys should ask the court to recognize day labor solicitation as commercial speech, then request application of the *Central Hudson* test. This should prove that day labor solicitation on the part of illegal aliens is not protected speech because of the fact that it is aimed towards an illegal end: the hiring of individuals not authorized to work in the United States. While studies have shown that an overwhelming majority of day laborers across the country are illegal aliens, a geographically-specific survey may be more persuasive in furthering this type of an ordinance.271 Even still, a city wishing to craft an anti-solicitation ordinance that specifically prohibits illegal alien day laborers from soliciting labor would likely have to limit the reach of the ordinance in some way to ensure that legal immigrants and citizens are not regularly prevented from exchanging labor for money. This may also require local law enforcement to verify the legal status of people soliciting labor.272 Many local law enforcement agencies are beginning to receive necessary training to do just this under Section 287(g) of the Immigration and Nationality Act.273

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271. See, e.g., COUNTY OF FAIRFAX, VA., DEPARTMENT OF SYSTEMS MANAGEMENT FOR HUMAN SERVICES, AN ACCOUNT OF DAY LABORERS IN FAIRFAX COUNTY (June 2004).

272. See generally, KRIS W. KOBACH, CENTER FOR IMMIGRATION STUDIES, STATE AND LOCAL AUTHORITY TO ENFORCE IMMIGRATION LAW (June 2004); see also n. 206, above.

273. Many city police departments have become “partners” with Immigration and Customs Enforcement (ICE) under Section 287(g), including cities in Florida, Alabama, Arizona, North Carolina, and California. See, “Partners:
B. Day Labor Centers, as an Alternative Channel for Communication, Should Be Privately Funded and Open to Only Legal Immigrants and U.S. Citizens

Because it is still not clear how the courts will rule on the issue day labor hiring centers that do not check the legal status of those using them, it is important that municipalities looking to limit liability deny use of taxpayer dollars for the construction and operating of such hiring centers. This will put any liabilities in the hands of private entities wishing to run such a center. The State of Arizona’s recent law which bans municipalities from building or maintaining centers that facilitate the employment of illegal aliens is an appropriate strategy for preventing taxpayer lawsuits.274

A municipality wishing to take a more proactive and unique approach may wish to operate a taxpayer-subsidized hiring center that requires proof of employment eligibility upon entering. This would halt any litigation that questions the use of taxpayer monies for an illegal activity. If a city were to, in conjunction with the center, pass an ordinance that specifically prohibits illegal aliens from soliciting labor in public, and successfully defended it under a *Central Hudson* test, a city could then argue that any individuals not using a hiring center (one that verifies worker eligibility) are presumably illegal aliens. Of course, the city would have to show that the center was easily accessible to all laborers, and that there wouldn’t be any reason for legal day laborers to remain on the streets. If the center were too small, or if day laborers were more successful at securing work from the street, for example, then it would be difficult for a city to make such an argument. Either way, should local law enforcement be directed to arrest

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individuals on the grounds that they are illegal aliens, officers would, of course, be first required to have probable cause that the individuals in question are breaking the law, and then be required to ask for proof of legal status.275

C. After Center is Constructed, Cities Should Vigorously Enforce Anti-Solicitation Laws and Other Laws Aimed at Protecting Quality of Life Issues

The existence of a day laborer hiring center, whether privately or publicly funded, would provide the alternative channel for communication required in a Time, Place, and Manner test. Once this requirement is met, provided that the ordinance meets all other requirements of the test, local law enforcement should feel justified in enforcing the ordinance vigorously. If the hiring center is adequate in size to assure that laborers are not remaining on streets, then there would be no reason for legitimate workers to solicit labor on the streets. The City of Herndon, Virginia, for example, recently approved an ordinance that would make it illegal to solicit work anywhere other than the proposed day laborer hiring center.276

Additionally, local law enforcement should vigorously enforce all laws on the books pertaining to social problems routinely associated with day laborers (i.e. public urination, harassment, public drunkenness). The court in CHIRLA suggested that local police enforcement do just that.277 The court in CHIRLA also noted that day labor solicitation on private property

275. This would bring more legal issues into the debate; see notes 205, 271. Cities would have to determine whether a potential increase in litigation from taking such an action would be worth the opportunity to potentially reduce problems with day labor solicitation.


without the owner’s permission amounted to trespass. Small businesses and large companies that have had problems with large congregations of day laborers scaring away customers are justified, it seems, in filing a trespass complaint against any or all individuals soliciting day labor without permission on their property. While it may be a large undertaking, enforcement of ‘quality of life’ laws may go a long way to limiting some of the problems the public routinely attributes to day labor solicitation.

**CONCLUSION**

The growth of day labor and illegal immigration has created new problems for many municipalities throughout the United States. As a result of having no clear method for dealing with day laborers, local government officials are finding themselves in a situation that may lead to lawsuits. Because very few lawsuits have made it though the legal system, however, there is no real ‘policy guide’ that might help city officials to resolve some of the problems associated with day labor. Consequently, city governments must take a cautious approach when writing policy and enforcing laws pertaining to day laborer solicitation.

A combination of anti-solicitation ordinances, appropriately-organized day laborer hiring centers, and local law enforcement trained in immigration law under Section 287(g) of the Immigration and Nationality Act may help to alleviate some of the problems city governments are facing. Any ordinances designed to limit day labor activity, however, should adhere to the Time, Place, and Manner test set forth by the U.S. Supreme Court, but city attorneys should ask the courts to interpret the ordinance under a *Central Hudson* analysis. Finally, should a city decide to operate a day labor hiring center as a way to supplement the anti-solicitation ordinance,

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278. *Id.* at *41.
it would be wise to ensure that the center’s hiring processes do not conflict with federal law, opening up a city to new lawsuits as it attempts to limit lawsuits elsewhere.