No. 12-15688

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Friendly House; et al., Plaintiffs-Appellees, v. Michael B. Whiting; et al., Defendants, and State of Arizona and Janice K. Brewer, Intervenors-Appellants.	No. 12-15688 No. 2:10-cv-01061-PHX-SRB District of Arizona

APPELLANTS' OPENING BRIEF

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Introduction

In-street employment solicitation has caused substantial traffic, safety, economic, and aesthetic concerns in communities throughout Arizona for many years. After numerous unsuccessful efforts to address those problems (including through the enforcement of existing laws), the Arizona Legislature enacted Ariz. Rev. Stat. Ann. § 13-2928(A) and (B) to regulate such solicitation, but ***only*** when it is conducted in a manner that ***blocks or impedes the normal movement of traffic***. With or without Ariz. Rev. Stat. Ann. § 13-2928(A) and (B), it is undisputed that persons cannot solicit employment in Arizona in a manner that blocks or impedes the normal movement of traffic. Nevertheless, Plaintiffs moved for a preliminary injunction of Ariz. Rev. Stat. Ann. § 13-2928(A) and (B), arguing that Ariz. Rev. Stat. Ann. § 13-2928(A) and (B) violate their First Amendment rights by prohibiting them from soliciting employment in an illegal manner. This is a facial challenge with no as-applied allegations.

The only evidence Plaintiffs presented to support their extraordinary request for preliminary injunctive relief was the assertion that the threat of prosecution under Ariz. Rev. Stat. Ann. § 13-2928(A) and (B) was deterring persons in Arizona from soliciting employment. Plaintiffs make this claim even though the statute expressly applies only to in-street solicitation that impedes traffic.

Arizona, by contrast, presented evidence that:

(1) in-street employment solicitation has been causing problems in Arizona for years;

(2) in-street employment solicitation causes significant traffic safety concerns;

(3) the secondary effects of in-street employment solicitation include increased crime, property damage, economic harms, and aesthetic concerns;

(4) in-street employment solicitation causes significantly greater harm than other forms of solicitation;

(5) Arizona communities have made numerous, unsuccessful attempts to address these problems;

(6) existing laws have been and will continue to be ineffective in addressing these problems; and

(7) the legislative history demonstrates that the Arizona Legislature enacted Ariz. Rev. Stat. Ann. § 13-2928(A) and (B) to address the traffic safety concerns and secondary effects of in-street employment solicitation.

Notwithstanding Arizona's unrefuted evidence of a content-neutral purpose for enacting Ariz. Rev. Stat. Ann. § 13-2928(A) and (B) and the ineffectiveness of the available alternatives, the district court found that Ariz. Rev. Stat. Ann. § 13-2928(A) and (B) are likely unconstitutional under the *Central Hudson* test. In reaching this conclusion, the district court first found that Plaintiffs have a First

Amendment right to solicit employment in a manner that blocks or impedes the normal movement of traffic. The district court then found that Ariz. Rev. Stat. Ann. § 13-2928(A) and (B) are content based and, therefore, subject to "heightened scrutiny," relying solely on its ruling at the motion-to-dismiss stage and without addressing any of the evidence Arizona presented regarding the provisions' content-neutral purpose. The district court then found that Ariz. Rev. Stat. Ann. § 13-2928(A) and (B) fail the final prong of the *Central Hudson* test (again without addressing any of the evidence Arizona presented) based on its findings that Arizona has existing traffic laws to address its traffic concerns and that the provisions at issue were supposedly enacted to suppress day-labor speech.

The district court's findings are not supported by the evidence and cannot be sustained under the controlling precedent of the U.S. Supreme Court and the Ninth Circuit. The district court's preliminary injunction of Ariz. Rev. Stat. Ann. § 13-2928(A) and (B) should be vacated.

Statement of Jurisdiction

On May 17, 2010, fourteen Organizational Plaintiffs[1] and ten Individual Plaintiffs[2] (collectively, "Plaintiffs") commenced this action against each of the County Attorneys and County Sheriffs in Arizona, in their official capacities. ER 594. Arizona and Governor Brewer obtained leave to intervene on June 18, 2010. ER 615. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1345. On February 29, 2012, the district court entered a preliminary injunction enjoining the portions of S.B. 1070, as amended by H.B. 2162 ("S.B. 1070"), which are codified at Ariz. Rev. Stat. Ann. § 13-2928(A) and (B) ("Sections 5(A) and (B)"). ER 1-13. Arizona filed its preliminary injunction appeal on March 28, 2012. ER 14-24. This appeal is timely under Fed. R. App. P. 4(a)(1)(A). This Court has jurisdiction pursuant to 28 U.S.C. § 1292(a)(1).

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[1] The Organizational Plaintiffs are Friendly House, Service Employees International Union, Service Employees International Union Local 5, United Food and Commercial Workers International Union, Arizona South Asians for Safe Families, Southside Presbyterian Church, Arizona Hispanic Chamber of Commerce, Asian Chamber of Commerce, Border Action Network, Tonatierra Community Development Institute, Muslim American Society, Japanese American Citizens League, Valle del Sol, and Coalicion de Derechos Humanos. ER 594.

[2] The Individual Plaintiffs identified in the Complaint are Andrew Anderson, Vicki Gaubeca, C.M., a minor, Luz Santiago, Jim Shee, Jose Angel Vargas, Jesús Cuauhtémoc, John Doe #1, Jane Doe #1, and Jane Doe #2. ER 594.

Issue Presented

Whether the district court erred in finding that Sections 5(A) and (B) are content-based regulations on commercial speech and likely unconstitutional under the First Amendment notwithstanding that:

- Sections 5(A) and (B) regulate employment solicitation *only* when it is conducted in an indisputably illegal manner;
- The legislative history demonstrates that Sections 5(A) and (B) were enacted to address traffic concerns and the secondary effects of in-street employment solicitation; and
- Arizona presented unrefuted evidence that the existing traffic laws are inadequate to address Arizona's traffic safety concerns.

Attached at the end of this brief is an Addendum containing the text of the pertinent provisions of the Arizona statutes cited herein.

Statement of the Case

On June 21, 2010, Plaintiffs moved for a preliminary injunction of S.B. 1070 in its entirety ("Plaintiffs' First Motion"). ER 617. That same month, the Ninth Circuit held that Redondo Beach Municipal Code § 3-7.1601 (the "Redondo Beach Ordinance"), which imposes broad restrictions on roadside solicitations, was "a valid time, place, or manner restriction" under the First Amendment. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 607 F.3d 1178, 1180

(9th Cir. 2010) ("*Redondo Beach I*"). Based on *Redondo Beach I*, Plaintiffs withdrew their request for a preliminary injunction of Sections 5(A) and (B). ER 590.

After the Ninth Circuit granted a petition for rehearing *en banc* of *Redondo Beach I*, *see Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 623 F.3d 1054 (9th Cir. 2010), Plaintiffs renewed their request for a preliminary injunction of Sections 5(A) and (B) ("Plaintiffs' Second Motion"). ER 494-555. After full briefing, the Court denied Plaintiffs' Second Motion without addressing the merits of Plaintiffs' motion and without prejudice to Plaintiffs re asserting the motion after the *en banc* panel ruled on the Redondo Beach Ordinance's constitutionality. ER 214.

On September 16, 2011, this Court struck down the Redondo Beach Ordinance under the time, place, or manner test because it found that the ordinance "was not narrowly tailored to achieve the City's goals." *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 951 (9th Cir. 2011) (en banc) ("*Redondo Beach II*"). Plaintiffs then moved for a preliminary injunction of Sections 5(A) and (B) a third time, relying almost exclusively on *Redondo Beach II*. ER 108-211 ("Plaintiffs' Third Motion").

The district court rejected Plaintiffs' argument that *Redondo Beach II* controlled the constitutionality of Sections 5(A) and (B) because, unlike the

Redondo Beach Ordinance, Sections 5(A) and (B) regulate only commercial speech. ER 5 n.2. The district court nevertheless found that Sections 5(A) and (B) are likely unconstitutional regulations on commercial speech because Arizona's existing traffic laws shoul d be sufficien t to address Arizona's traffic safety concerns and because Sections 5(A) and (B) had been inserted into a bill that included several provisions designed to discourage illegal immigration and, therefore, were not "drawn to achieve" Arizona 's asserted interest in traffic safety. The district court granted the m otion on February 29, 2012 and entered an orde r preliminarily enjoining the enforcem ent of Sections 5(A) and (B). ER 1-13. Arizona filed this preliminary injunction appeal on March 28, 2012. ER 14-24.

Statement of Facts

A. In-Street Employment Solicitation Threatens Public Safety

In-street solicitation of em ployment poses a substantial and unique thre at to public safety. A physical interference with moving traffic—by either a pedestrian or a stopped vehicle—creates an obvious sa fety hazard. ER 95 (traffic engineer Dan Cleavenger stating that an intersection in Mesa "had a couple of crashes that appear to be related to the day labor folks"). That hazar d is particularly acute in the context of employment solicitation becau se prospective day laborers generally congregate by the roadside in l arge groups, flag down vehicles as they approach, and often swarm vehicles that stop. ER 326, 363, 363. Such conduct "creates a

dangerous situation for the pedestrian near the roadway, for the motorist interacting with the pedestrian, and for other motorists nearby." ER 322; *see also* ER 326 (stating that the situation is particularly dangerous because "day laborers typically wait on the side of busy roads, at busy intersections, and at the entrance of major businesses that attract lots of customers"); ER 411 (reflecting statements by business managers near a popular day labor site that "[t]hey've seen a few job-seekers get injured by cars stopping abruptly"). [3] Also, unlike a simple solicitation for monetary donations, day laborers and prospective employers must discuss the nature, duration, and location of the work to be performed and negotiate wages (oftentimes while dealing with language barriers), and then the day laborer must enter the vehicle to be transported to another location. ER 323-24.

Roadside solicitation of employment also results in increased criminal activities. ER 328-29, 343-44, 363. According to a Department of Justice report: (1) "[s]imple and aggravated assaults may take place at day laborer sites"; (2) "[l]aborers may be routinely robbed"; (3) "[l]aborers may drink and sell or use

[3] *See also ACORN v. City of Phoenix*, 798 F.2d 1260, 1270 (9th Cir. 1986), *overruled in part on other grounds by Redondo Beach II*, 657 F.3d 936 (9th Cir. 2011) (finding that "solicitation from motorists creates a potential safety hazard because the consequent distraction of the drivers poses a significant risk to motorist and pedestrian safety"). Traffic safety in general, and pedestrian safety in particular, are significant concerns for Arizona. Arizona has one of the highest per capita pedestrian fatality rates of any state in the nation. ER 413. In 2009, motor vehicle accidents injured over 138 people and killed more than two people each day. ER 427. These accidents also cost the State $2.757 billion. *Id.*

illicit drugs in public"; and (4) "[l]aborers may vandalize area property or deface property with graffiti." ER 363. "Laborers often leave discarded bottles, food wrappers, and other litter at day laborer sites" and "[l]aborers waiting all day for work may urinate in public." *Id*.

These problems exist in numerous Arizona cities, including Phoenix, Cave Creek, Chandler, Mesa, and Fountain Hills, causing business owners to complain to local officials about the harm day laborers have caused to their revenues. ER 95, 97, 99-100, 102, 328-30, 343-44, 410-11, 482-83, 485-86, 490-91. In particular, business owners and officials have observed assaults, trespassing, loitering, sexual harassment, theft, and property destruction. ER 328-30, 343-44. One local business owner even received death threats from day laborers. ER 343.

B. There Are No Readily Available Effective Alternatives to Address the Safety Concerns and Economic and Environmental Harms In-Street Employment Solicitation Causes

Local communities and business owners have spent years exploring options to address the secondary effects of in-street employment solicitation without success. For example, the City of Mesa tried increasing its enforcement of other laws. ER 483. The City of Cave Creek pushed for a crackdown on loitering laws. ER 97. The City of Chandler enacted a parking ban. ER 99. And business owners

in the City of Phoenix have hired off-duty police officers to patrol outside their businesses. ER 330, 343.[4]

Arizona's existing traffic laws do not adequately address the safety concerns arising out of in-street employment solicitation because such laws are too narrow and difficult to apply in the employment-solicitation context. ER 104-07. For example, Ariz. Rev. Stat. Ann. § 28-704 imposes minimum speed limits, but does not address stopping a vehicle in the midst of moving traffic. ER 105.[5] Ariz. Rev. Stat. Ann. § 13-2906, which provides criminal penalties for obstructing highways and thoroughfares, does not apply to a pedestrian who stands in the street to talk to a driver of a stopped vehicle unless the pedestrian (as opposed to the stopped vehicle) is interfering with the flow of traffic. ER 106. Applying Ariz. Rev. Stat. Ann. § 13-2906 to the driver of a vehicle who stops in the midst of traffic to solicit employees can also be difficult because of the statute's potential conflicts with other statutes, such as Ariz. Rev. Stat. Ann. §§ 28-871 and 28-873, that permit such stops in certain circumstances. ER 106-07. Parking laws address some

[4] Some cities commissioned studies to help identify ideas on how to solve these problems. *See*, *e.g.*, ER 102 ("To study the issue, commissioners hit the streets for months to question laborers, business owners and neighbors.").

[5] Even where Ariz. Rev. Stat. Ann. § 28-704 can be enforced against a driver who stops a vehicle in moving traffic, an officer who arrives on the scene after the vehicle is stopped may not know whether the driver stopped the vehicle to communicate with the prospective employee, or stopped the vehicle for safety reasons after the prospective employee entered the roadway. ER 105.

situations in which a driver improperly stops his or her car to communicate with a prospective employee, but not all situations, and the fines are fairly minor (as low as $25), so they do not have a deterrent effect. ER 106.

Plaintiffs' own evidence confirms that Arizona's existing laws have failed to deter these problems. ER 541 ("[B]efore Sections 5(a) and (b) of S.B. 1070 went into effect . . . the jornalero members sometimes . . . made their availability for work known by . . . signaling to drivers with their hands or calling out to them" and "[d]rivers who chose to hire jornaleros typically pulled over on the public street to negotiate the terms of employment."); ER 527 ("It is common practice for prospective employers to temporarily stop or park their vehicles on a public right-of-way while they communicate and negotiate the hiring of a day laborer.").

C. The Legislature Enacted Sections 5(A) and (B) to Address Public Safety Concerns

For many years before ultimately enacting the provisions in 2010, the Arizona Legislature considered several versions of the provisions codified in Ariz. Rev. Stat. Ann. § 13-2928(A) and (B). As summarized below, the legislative history of each bill reflects that the Legislature was concerned about the traffic safety, public safety, crime, occupational safety, quality of life, aesthetics, and commercial business problems created by unregulated employment solicitation along busy streets and roads throughout Arizona.

In 2007, the Legislature considered H.B. 2589 as a means to address

problems related to "unsafe traffic conditions," trespassing, and "a black-market of day labor that is uncontrolled, unsafe and unwanted by most residents of Arizona." H.B. 2589, 48th Leg., 1st Reg. Sess. (Ariz. 2007). Dr. Melody Jafari urged the House Judiciary Committee to pass the Bill because businesses in her neighborhood were "being impacted . . . by vehicles stopping in the roadway in front of [the] businesses to negotiate contracts for labor" and because day laborer gatherings led to "trespass, littering and defecating on private property," causing "the overall deterioration of appearance of the community." *Minutes of Hearing on H.B. 2589 Before the H. Comm. on Judiciary*, 48th Leg., 1st Reg. Sess. (Ariz. 2007). As a Special Assistant County Attorney for Maricopa County testified, the Bill would treat day laborer solicitation differently than other trespasses because day laborer solicitation was "a specific problem that is calling out for more significant sanctions." *Id.*

In 2008, the Legislature considered H.B. 2412, "a traffic safety bill" to prevent street solicitation of day labor that "disrupt[ed] traffic, harm[ed] business, exploit[ed] workers and degrade[d] neighborhoods." *Minutes of Hearing on H.B. 2412 Before the H. Comm. on Homeland Sec. & Prop. Rights*, 48th Leg., 2d Reg. Sess. (Ariz. 2008).

In 2009, the Legislature considered H.B. 2533, a bill nearly identical in language to Sections 5(A) and (B) at issue in this case. *See* H.B. 2533, 49th Leg.,

1st Reg. Sess. (Ariz. 2009). H.B. 2533's purpose was to address the unsafe "disruption of traffic" created by both "day laborers who congregate on the street to solicit work [and by] the individual who pulls up and solicits the person to work." *Minutes of Hearing on H.B. 2533 Before the H. Comm. on Judiciary*, 49th Leg., 1st Reg. Sess. (Ariz. 2009).

In 2010, H.B. 2042 was presented to the House with the explanation that "the primary reason for the bill is public safety." *Hearing on H.B. 2042 Before the H. Comm. on Judiciary*, 49th Leg., 2d Reg. Sess. 5 (Ariz. 2010). Representative Kavanaugh, who introduced the Bill, further explained that H.B. 2042 was designed to address labor solicitations that "disrupt[] traffic and cause[] injuries or accidents" and issues concerning "large day laborer gatherings, crimes in the areas of those gatherings, occupational safety for day laborers, black market employment of day laborers, illegal immigration issues related to day labor, and tax issues created by unreported cash payments to day laborers by employers." *Id.* H.B. 2042 passed in the House in February 2010 and was then passed to the Senate where it ultimately became an amendment to S.B. 1070.

D. Sections 5(A) and (B) Are Narrow Regulations on Conduct That Raises Significant Safety, Economic, and Environmental Concerns

Sections 5(A) and (B) are very narrow regulations of in-street employment solicitation. Specifically, Section 5(A) makes it unlawful: "for an occupant of a motor vehicle that is stopped on a street, roadway or highway *to attempt to hire or*

hire and pick up passengers for work at a different location ***if the motor vehicle blocks or impedes the normal movement of traffic***." Ariz. Rev. Stat. Ann. § 13-2928(A) (emphasis added). Section 5(B) makes it unlawful "for a person *to enter a motor vehicle* that is stopped on a street, roadway or highway in order to be hired by an occupant of the motor vehicle and to be transported to work at a different location ***if the motor vehicle blocks or impedes the normal movement of traffic***." Ariz. Rev. Stat. Ann. § 13-2928(B) (emphasis added).

Nothing in Sections 5(A) or (B) prohibits any person from soliciting employment in any manner that does not involve (1) a motor vehicle stopping on a roadway, ***and*** (2) conduct that blocks or impedes the normal movement of traffic. Nothing in Sections 5(A) or (B), therefore, affects Plaintiffs' and their members' continued right to solicit, negotiate, and secure employment in parking lots, while vehicles are properly parked on the side of the street, in designated day labor centers, on sidewalks, and even on streets with little traffic—anywhere, for that matter, where the solicitations and negotiations do not interfere with traffic.

Summary of Argument

The district court erred in finding that Plaintiffs are likely to establish that Sections 5(A) and (B) violate the First Amendment and, therefore, also erred in finding that Plaintiffs' probable success on the merits entitles Plaintiffs to preliminary injunctive relief. Sections 5(A) and (B) do not violate the First

Amendment because they regulate conduct related to commercial speech (employment solicitation) *only* when the solicitation is performed in an illegal manner—blocking or impeding traffic. Even if the First Amendment somehow created a right to solicit employment in such a reckless and illegal manner, Sections 5(A) and (B) are constitutional regulations on commerce because they directly advance and are narrowly tailored to serve Arizona's substantial interest in traffic safety.

Legal Discussion

I

Standard of Review

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). "A preliminary injunction is an extraordinary remedy never awarded as of right. . . . In each case, courts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Id.* at 24 (citation omitted).

A "district court's grant of a preliminary injunction is reviewed for 'abuse of discretion' and should be reversed if the district court based 'its decision on a n

erroneous legal standard or on clearly erroneous findings of fact.'" *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1119 (9th Cir. 2009) (citation omitted); *see also Harris v. Bd. of Supervisors*, 366 F.3d 754, 760 (9th Cir. 2004). A district court's factual findings are subject to a clearly erroneous standard, but the district court's application of the applicable legal principles "is subject to de novo review." *Stormans*, 586 F.3d at 1119.

II

Sections 5(A) and (B) Are Subject to the *Central Hudson* Framework for Regulations on Commercial Speech

A. Sections 5(A) and (B) Regulate Commercial Speech

Sections 5(A) and (B) regulate only employment solicitation, which is a "classic example[] of commercial speech." *Pittsburgh Press Co. v. Pittsburgh Comm'n of Human Relations*, 413 U.S. 376, 385 (1973).[6] The district court agreed that Sections 5(A) and (B) govern commercial speech, properly rejecting Plaintiffs' argument that employment solicitation is "'inextricably intertwined' with core First Amendment speech." ER 4; *see also Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989) (rejecting the argument that Tupperware sales at Tupperware parties were "inextricably intertwined" with discussions regarding financial responsibility because "[n]o law of man or of nature makes it impossible

[6] *See also Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 472 (1988) (holding that lawyers' solicitation for pecuniary gain is commercial speech).

to sell housewares without teaching home economics, or to teach home economics without selling housewares"); *Hunt v. City of Los Angeles*, 638 F.3d 703, 716 (9th Cir. 2011) (finding that the plaintiffs' sales of shea butter and incense were not "inextricably intertwined" with noncommercial messages because the plaintiffs could "easily sell their wares without reference to any religious, philosophical, and/or ideological element.").

B. Regulations on Commercial Speech Are Subject to the *Central Hudson* Test

In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566 (1980), the Supreme Court established the framework for evaluating the constitutionality of regulations on commercial speech. The Supreme Court has since applied the *Central Hudson* test to regulations on commercial speech regardless of whether a challenged regulation was content based or content neutral. *See*, *e.g.*, *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367-68 (2002) (prohibitions on solicitations and advertising for compound drugs); *Greater New Orleans Broad. Ass'n Inc. v United States*, 527 U.S. 173, 184-96 (1999) (prohibitions on broadcast advertisements for private casino gambling); *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (rule prohibiting CPA's from engaging in direct, personal solicitation); *Cincinnati v. Discovery*

Network, Inc., 507 U.S. 410, 416 n.11 (1993) (ban on commercial newsracks);[7] *Fox*, 492 U.S. at 476 (ban on most private commercial enterprises); *Shapero*, 486 U.S. at 472 (prohibition on certain attorney solicitations); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 507-08 (1981) (plurality opinion) (regulations on outdoor advertising); *see also Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667-68 (2011) (applying the *Central Hudson* test to a prohibition on the use of prescriber information in prescription records for marketing purposes, which the Court found to be content-based, speaker-based "and, in practice, viewpoint discriminatory," but without actually deciding "whether all speech hampered by [the challenged statute] is commercial").

This Court's precedent confirms that the *Central Hudson* test applies in all commercial speech cases. *See Hunt*, 638 F.3d at 715 ("[W]here only commercial speech is at issue, the time, place, or manner framework does not apply and courts apply the framework articulated in [*Central Hudson*]."); *Metro Lights, LLC v. City of Los Angeles*, 551 F.3d 898, 903 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 1014 (2009) ("Whether or not the City's regulation is content-based, the *Central Hudson* test still applies because of the reduced protection given to commercial speech.");

[7] In *Discovery Networks*, the Court reserved the question of whether content-based restrictions on commercial speech may be subject to a heightened test. *See* 507 U.S. at 416 n.11 ("Because we conclude that Cincinnati's ban on commercial newsracks cannot withstand scrutiny under *Central Hudson* and *Fox*, we need not decide whether that policy should be subjected to more exacting review.").

Coyote Publ'g, Inc. v. Miller, 598 F.3d 592, 599 n.10 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1556 (2011) (holding that the *Central Hudson* test applies to all regulations of commercial speech, whether content based or content neutral).[8]

C. The District Court Erred In Concluding that *Sorrell* Modified the Test Applicable to Sections 5(A) and (B)

The district court erroneously found that *Sorrell* "modified the commercial speech test originally set forth in *Central Hudson*" for content-based regulations on commercial speech. ER 9. In *Sorrell*, the Court analyzed the First Amendment standard applicable to a Vermont statute that "burden[ed] disfavored speech by disfavored speakers" and "'[went] even beyond mere content discrimination to actual *viewpoint* discrimination." 131 S. Ct. at 2663 (emphasis added).[9] Although the Court noted that "heightened judicial scrutiny was warranted," *id.* at 2664, the *Sorrell* Court did not actually apply any form of heightened scrutiny or even articulate what "heightened scrutiny" test might apply in the circumstances. Instead, the Court applied its established *Central Hudson* test. *Id.* at 2667. The

[8] The *Central Hudson* test and the commercial speech doctrine were not addressed or at issue in *Redondo Beach II*. 657 F.3d at 945 n.2 (" The City does not argue that the Ordinance applies only to commercial solicitation, and its text does not limit its reach to the commercial context. Thus, we cannot, and do not, decide the Ordinance's validity under the Supreme Court's 'commercial speech' case law.").

[9] The Supreme Court has "implicitly distinguished between restrictions on expression based on subject matter and restrictions based on viewpoint, indicating that the latter are particularly pernicious. . . , and require[] particular scrutiny, in part because such regulation often indicates a legislative effort to skew public debate on an issue." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 430 (1992) (Stevens, J., concurring) (internal citations omitted)).

Sorrell Court thus did not establish any alternative framework[10] for lower courts to apply to content-based restrictions on commercial speech.

Until the Supreme Court modifies or rejects the *Central Hudson* test for content-based regulations on commercial speech, the *Central Hudson* framework remains applicable. *See, e.g.*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."); *Metro Lights*, 551 F.3d at 911 ("[W]e are bound to follow the Supreme Court precedent most directly on point.").

D. Even if *Sorrell* Somehow Modified the *Central Hudson* Test for Content-Based Regulations on Commercial Speech, Sections 5(A) and (B) Are Not Content Based

"Deciding whether a particular regulation is content based or content neutral is not always a simple task." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). "[T]he 'principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'" *Id.* (quoting *Ward v. Rock Against*

[10] The district court found that *Sorrell* modified the *Central Hudson* test for content-based regulations on commercial speech, but that is not correct. *Compare* ER 9 *with Sorrell*, 131 S. Ct. at 2667-68 (relying on *Fox* to support its articulation of the *Central Hudson* test).

Racism, 491 U.S. 781, 791 (1989)); *accord Sorrell*, 131 S. Ct. at 2664 (quoting *Ward*). Accordingly, the Supreme Court has consistently assessed the purpose of a challenged regulation in determining its content neutrality.

1. A Regulation Is Content Neutral If Enacted to Address the Secondary Effects of the Regulated Speech

A regulation is content neutral if it is justified by interests that are "unrelated to the suppression of free expression." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986)). In *Renton*, for example, the Supreme Court addressed a First Amendment challenge to an ordinance "prohibit[ing] adult motion picture theaters from locating within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school." 475 U.S. at 43. In determining the applicable standard, the Court recognized that the ordinance did not "appear to fit neatly into either the 'content-based' or the 'content-neutral' category" because "the ordinance treat[ed] theaters that specialize in adult films differently from other kinds of theaters." *Id.* at 47. The Court found, however, that the ordinance was "aimed not at the *content* of the films shown . . . but rather at the *secondary effects* of such theaters on the surrounding community" because the ordinance's primary purpose was to "prevent crime, protect the city's retail trade, maintain property values, and generally [protect] and [preserve] the quality of [the City's]

neighborhoods, commercial districts, and the quality of urban life.'" *Id.* at 47-48.[11] The fact that regulating the content of adult films may have been "*a motivating factor*" in enacting the ordinance did not control the Court's conclusion. *Id.* at 47 (emphasis in original). Instead, the Court found the ordinance "completely consistent with [its] definition of 'content-neutral' speech regulations" and "*justified* without reference to the content of the regulated speech." *Id.* at 48 (emphasis in original).

Similarly, in *Turner Broadcasting System*, 512 U.S. at 658, 661-62, the Supreme Court applied intermediate scrutiny to regulations that facially distinguished between broadcasters and cable programmers. The plaintiffs argued that the speaker-based distinction required strict scrutiny and even identified portions of the legislative history in which Congress noted the value of broadcast programming. The Court rejected the argument, however, because the legislative history demonstrated that Congress did not enact the statute because it "preferred broadcasters over cable programmers based on the content of programming each group offers." *Id.* at 658-59.[12]

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[11] The Court observed that had the City's purpose been to regulate First Amendment rights, the City "would have tried to close the [the adult theaters] or restrict their number rather than circumscribe their choice as to location." *Id.* at 48 (citation omitted).

[12] The Court also found that the challenged provisions were not content based on their face and were not intended to disfavor particular content.

This Court has also repeatedly recognized that a regulation aimed at addressing the secondary effects of regulated speech is content neutral. In *Colacurcio v. City of Kent*, 163 F.3d 545, 553 (9th Cir. 1998), for example, the Ninth Circuit held that a regulation on nude table dancing was content neutral because the City's predominant purpose in enacting the ordinance was to "control[] prostitution, drug dealing, and other criminal activity." Although the appellants had presented some evidence that City officials intended to discourage nude dancing generally, the court found the evidence inconsequential, holding that: "[a] finding that the restriction of First Amendment speech is a 'motivating factor' in enacting an ordinance is not of itself sufficient to hold the regulation presumptively invalid." *Id.* at 551. *See also Dish Network Corp. v. FCC*, 653 F.3d 771, 778 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1162 (2011) ("[E]ven a statute that facially distinguishes a category of speech or speakers is content-neutral if justified by interests that are 'unrelated to the suppression of free expression.'" (citation omitted)); *Tollis v. San Bernardino Cnty.*, 827 F.2d 1329, 1332 (9th Cir. 1987) (if "the predominant purpose of the [regulation] is the amelioration of secondary effects, then [it] is content-neutral").

2. A Regulation Is Content Based If It Is Designed to Suppress Disfavored Speech or Speech by Disfavored Speakers

A regulation is content based where clear evidence demonstrates that the government's intent was to suppress disfavored speech. In *Sorrell*, for example,

the Supreme Court held that "heightened scrutiny" applied to a regulation that "disfavor[ed] marketing" and "disfavor[ed] specific speakers, namely pharmaceutical manufacturers." 131 S. Ct. at 2663. The Court did not begin and end its analysis, however, with the statute's text. Instead, the Court evaluated the formal legislative findings accompanying the challenged provision and determined that the Vermont Legislature intended to single out certain speakers because they "convey messages that 'are often in conflict with the goals of the state.'" *Id.* (quoting 2007 Vt. No. 80 § 1(3)); *see also id.* at 2672 ("'The goals of marketing programs, the legislature said, 'are often in conflict with the goals of the state.' § 1(3). The text of § 4631(d), associated legislative findings, and the record developed in the District Court establish that Vermont enacted the law for this end. . . . At the same time, the State has left unburdened those speakers whose messages are in accord with its own views.").

In *Discovery Networks*, 507 U.S. at 429, the Supreme Court rejected the argument that a sweeping ban on commercial newsracks was content-neutral because (1) "the very basis for the regulation is the difference in content between ordinary newspapers and commercial speech," *and* (2) the City's only justification for singling out commercial publications was its "naked assertion that commercial speech has 'low value.'" *Id.* at 429. In other words, the Court did not find the ban content-based solely because of its facial distinction between newspapers and

commercial handbills; rather, it held that "[i]t is the absence of a neutral justification for its selective ban on newsracks that prevents the city from defending its newsrack policy as content-neutral." *Id.* at 429-30.[13]

In *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 811 (2000), the Court addressed a regulation that "applies only to channels primarily dedicated to 'sexually explicit adult programming or other programming that is indecent'" and found that the regulation was content based because:

> The overriding justification for the regulation is concern for the effect of the subject matter on young viewers. Section 505 is not "justified without reference to the content of the regulated speech." . . . It "focuses *only* on the content of the speech and the direct impact that speech has on its listeners." . . . This is the essence of content-based regulation.

Id. at 811-12 (internal citations omitted). As in *Discovery Networks*, therefore, it was the absence of a content-neutral justification for the challenged regulation that led the Court to apply strict scrutiny. *See also Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (regulation was content-based where it targeted speech by criminals and the State offered no content-neutral justification); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (a tax imposed on newspapers subjected to heightened scrutiny because "differential treatment, *unless justified by some*

[13] As stated in Section II(D)(2), *supra*, the *Discovery Networks* Court evaluated the constitutionality of the ban under the *Central Hudson* framework.

special characteristics of the press, suggests that the goal of the regulation is not unrelated to suppression of expression" (emphasis added)).

3. The Record Does Not Support a Finding that Sections 5(A) and (B) Were Enacted to Suppress Disfavored Speech

Sections 5(A) and (B) are content neutral because the legislative history and the statutes themselves demonstrate that the purpose of Sections 5(A) and (B) is to address the problematic direct effects of the prohibited conduct (impeding traffic) and the secondary effects created by and arising out of the solicitation of work in busy streets and roadways in Arizona. *See supra* pp. 7-14. The record contains no evidence that Sections 5(A) and (B) were primarily enacted to suppress the solicitation of employment. *See Renton*, 475 U.S. at 48.

The district court's finding that Sections 5(A) and (B) are content based was erroneous in three respects. First, the district court erred in relying on its ruling at the motion-to-dismiss stage that Sections 5(A) and (B) are content based. ER 6 ("The Court has previously found that [Ariz. Rev. Stat. Ann.] § 13-2928(A) and (B) are content-based because they apply only to speech soliciting employment and not to other types of solicitation speech."). Not only was the court's previous

ruling subject to a different legal standard,[14] but it did not (and could not) involve any evaluation of the Arizona Legislature's stated purpose for enacting Sections 5(A) and (B). ER 575. Accordingly, the district court's motion-to-dismiss ruling should not have controlled the court's ruling at the preliminary-injunction stage.

Second, the district court erred in disregarding Arizona's content-neutral justification for Sections 5(A) and (B). The content-neutral purpose for these provisions (traffic safety) is not subject to reasonable dispute because the provisions regulate employment solicitation *only* when such solicitation directly interferes with moving traffic. Arizona also presented unrefuted evidence that in-street employment solicitation causes significantly greater safety concerns than other forms of solicitation. ER 322-24, 326, 363, 363, 411. Arizona further presented evidence that the Arizona Legislature enacted Sections 5(A) and (B) to address public safety. All of this evidence is highly relevant to the content-neutrality of Sections 5(A) and (B). *See*, *e.g.*, *Sorrell*, 131 S. Ct. at 2672; *Renton*, 475 U.S. at 47. The district court, therefore, committed clear error by refusing to consider it.

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[14] In ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a court considers only what has been alleged in the complaint. In connection with Plaintiffs' motions for a preliminary injunction, however, the parties submitted hundreds of pages of evidence to the district court. *See* ER 92-107, 131-207, 234-96, 322-493, 523-55. The district court's finding that Plaintiffs' pleading passed muster under Fed. R. Civ. P. 12(b)(6) should not have precluded the court from considering that evidence or Arizona's argument regarding the Arizona Legislature's purpose for enacting Sections 5(A) and (B).

Third, the district court erred in relying on *Sorrell* because the Vermont statute at issue in *Sorrell* is worlds apart from Sections 5(A) and (B). As the *Sorrell* Court found, the challenged Vermont statute was intended to "burden[] disfavored speech by disfavored speakers" and "'goes even beyond mere content discrimination to actual *viewpoint* discrimination." *Id.* at 2663 (emphasis added). Here, by contrast, there is no evidence that Sections 5(A) and (B) were enacted to suppress employment solicitation, much less any particular viewpoint. *Sorrell* is therefore neither on point nor controlling.

For all these reasons, Sections 5(A) and (B) are subject to intermediate scrutiny under the *Central Hudson* test.

III

Sections 5(A) and (B) Are Constitutional Under *Central Hudson*

A. The Conduct Sections 5(A) and (B) Regulate Does Not Merit First Amendment Protection

For commercial speech to receive First Amendment protection, it "must concern lawful activity and not be misleading." *Fox*, 492 U.S. at 475. The First Amendment does not protect unlawful activity. *World Wide Rush, LLC v. City of Los Angeles*, 606 F.3d 676, 684 (9th Cir. 2010). In *Pittsburgh Press*, for example, the Supreme Court addressed a First Amendment challenge to an ordinance that sought to eliminate discriminatory help-wanted advertisements by prohibiting newspapers from "carry[ing] 'help-wanted' advertisements in sex-designated

columns except where the employer or advertiser is free to make hiring or employment referral decisions on the basis of sex." 413 U.S. at 378. The Court found the ordinance valid because: "Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal . . ." *Id.* at 388-89. Thus, the Supreme Court found that otherwise lawful speech (employment advertisements) lost its First Amendment protection when associated with unlawful activity (sex discrimination).

As in *Pittsburgh Press*, Sections 5(A) and (B) regulate the location of the commercial speech (employment solicitation) ***only*** when it is associated with unlawful activity (blocking or impeding traffic). Because Plaintiffs have no right to block or impede traffic and Sections 5(A) and (B) do not regulate Plaintiffs' activities when they are *not* blocking traffic, Plaintiffs' activities are not protected under the First Amendment. *See Pittsburgh Press*, 413 U.S. at 385. The district court rejected this argument without addressing *Pittsburgh Press* or explaining why Plaintiffs have a First Amendment right to conduct the solicitation of employment *in a manner that blocks or impedes the normal movement of traffic*. The district court therefore erred in finding that Sections 5(A) and (B) concern otherwise lawful activity.

B. Even If Sections 5(A) and (B) Governed Protected Speech, the Regulations Satisfy the *Central Hudson* Test

Even if one were to assume that Sections 5(A) and (B) did regulate conduct that is somehow otherwise lawful, Sections 5(A) and (B) would still withstand scrutiny under *Central Hudson*. A regulation on commercial speech protected by the First Amendment must satisfy *Central Hudson's* three-part test. *Hunt*, 638 F.3d at 716. Under the first prong, "'[t]he State must assert a substantial interest to be achieved by restrictions on commercial speech.'" *Id*. (citation omitted). Sections 5(A) and (B) easily satisfy this prong because Arizona has identified several interests that these provisions serve—traffic safety, crime reduction, economic development, and protecting the aesthetics of its communities—all of which are well-established as substantial, if not compelling, interests.[15] The district court agreed "that Arizona has asserted several substantial governmental interests that animate [Ariz. Rev. Stat. Ann.] § 13-2928(A) and (B), including the one on which [Arizona] principally rel[ies], traffic safety." ER 7.

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[15] *See United States v. Salerno*, 481 U.S. 739, 749 (1987) (interest in crime prevention is compelling); *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*, 452 U.S. 640, 653 (1981) ("As a general matter, it is clear that a State's interest in protecting the 'safety and convenience' of persons using a public forum is a valid governmental objective."); *Reed v. Town of Gilbert*, 587 F.3d 966, 979 (9th Cir. 2009) (traffic and pedestrian safety are significant government interests); *Ctr. for Bio-Ethical Reform, Inc. v. City & Cnty. of Honolulu*, 455 F.3d 910, 922 (9th Cir. 2006) ("It is well established that regulation for purposes of preserving aesthetics and promoting safety falls within the legitimate and substantial interests of local governments.").

To satisfy the second prong of the *Central Hudson* test, "'the restriction must directly advance the interest involved.'" *Hunt*, 638 F.3d at 716 (citation omitted). In *Coyote Publishing*, 598 F.3d at 608, for example, the Ninth Circuit found that regulations on advertising by legal brothels "directly and materially advance Nevada's interest in limiting commodification [of sex] by reducing the market demand for, and thus the incidence of, the exchange of sex acts for money." And in *World Wide Rush*, the Ninth Circuit found that there was "no question that restrictions on billboards advance cities' substantial interests in aesthetics and safety." 606 F.3d at 685.

As the district court found, Sections 5(A) and (B) directly advance Arizona's interest in traffic safety by prohibiting in-street employment solicitation "only where that solicitation impedes traffic."[16] ER 9. Sections 5(A) and (B) also directly advance Arizona's interest in addressing the secondary effects of in-street employment solicitation because they reduce the incentive for persons to solicit employment along Arizona's roadways. The fact that Sections 5(A) and (B) do not regulate *all* forms of in-street solicitation does not alter the analysis because in-street employment solicitation is far more prevalent and harmful than other forms

[16] The identification of one substantial interest is sufficient to justify a regulation. *See, e.g., Bland v. Fessler*, 88 F.3d 729, 734 n.8 (9th Cir. 1996) ("Because we conclude that the protection of privacy is a sufficiently significant governmental interest to justify the statute, we need not address plaintiffs' arguments with respect to other rationales.").

of in-street solicitation. *See supra* pp. 7-9; *World Wide Rush*, 606 F.3d at 685 (rejecting the argument that exceptions to the City's billboard regulations "undermine the City's interests in aesthetics and safety," and holding that there must be "some judicial 'deference for a [governmental entity's] reasonably graduated response to different aspects of a problem" (citation omitted)). In fact, Plaintiffs' own evidence demonstrates the deterrent effect Sections 5(A) and (B) have had on the mass roadside congregations of prospective employees that caused the secondary effects. ER 135-37, 205-07.

To satisfy the final prong of the *Central Hudson* test, the regulation must be "not more extensive than is necessary to serve [the State's] interest." *Coyote Publ'g*, 598 F.3d at 602 (citation omitted). Arizona "is not required to employ the least restrictive means conceivable,' but 'it must demonstrate narrow tailoring of the challenged regulation to the asserted interest – a fit that is not necessarily perfect, but reasonable.'" *Id.* at 609 (citation omitted).[17]

In *Coyote Publishing*, for example, the Ninth Circuit found that the advertising regulations were narrowly tailored because "[e]very advertisement for prostitution that is not seen contributes to limiting the commodification of sex, both directly and by reducing demand." *Id.* In *Hunt*, the Ninth Circuit found that

[17] Unlike in noncommercial speech cases, "the overbreadth doctrine does not apply to commercial speech." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982).

vending regulations on the Venice Beach Boardwalk were narrowly tailored to serve the City's objectives in preserving "orderly movement on the Boardwalk, . . . the historic character of the Boardwalk, [and] Boardwalk commercial life," because "limiting the number of individuals that may set up booths and assigning individuals to particular spaces ensures that pathways and spaces will be open for both pedestrians and emergency personnel and prevents unregulated vending." 638 F.3d at 718.

As in *Hunt* and *Coyote Publishing*, Sections 5(A) and (B) are narrowly tailored to achieve Arizona's interests because Sections 5(A) and (B) regulate employment solicitation only when it blocks or impedes traffic, and because every time a prospective employer or employee blocks or impedes traffic, it creates an obvious safety hazard.

C. The District Court Erred In Finding that Sections 5(A) and (B) Failed the Final Prong of the *Central Hudson* Test

The district court found that Sections 5(A) and (B) failed the final prong of the *Central Hudson* test for two reasons. First, the district court found that "numerous other traffic regulations are already in place in Arizona to 'directly address traffic safety without restricting speech.'" ER 10. This finding was clearly erroneous because the record does not support a finding that Arizona's existing laws are sufficient to address the safety concerns arising out of in-street employment solicitation. The district court did not address the evidence Arizona

presented on this issue (which Plaintiffs failed to rebut), including: (1) a declaration from a veteran of the City of Phoenix Police Department explaining the difficulty in applying these other regulations to in-street employment situations, ER 105-07; (2) the unsuccessful efforts of various jurisdictions in Arizona to enforce the existing traffic laws as a means to combat in-street employment solicitations, ER 95, 97, 102, 483; and (3) the substantial evidence (*see, e.g.*, ER 95, 97, 99-100, 102, 328-30, 343-44, 410-11, 482-83, 485-86, 490-91), including Plaintiffs' own declarations (ER 135-37, 205-07), that the existing traffic laws had insufficient or no deterrent effect on in-street employment solicitation.

Even if the record could support a finding that existing traffic laws are sufficient to address Arizona's traffic safety concerns, the district court's finding would still be erroneous because it effectively requires Arizona to employ the least restrictive means available. That is not the standard under the prevailing precedent of the Supreme Court and Ninth Circuit. *See, e.g.*, *Coyote Publishing*, 598 F.3d at 609 ("[A]lmost all of the restrictions disallowed under *Central Hudson's* fourth prong have been substantially excessive, disregarding far less restrictive and more precise means.") (quoting *Fox*, 492 U.S. at 479).

Second, the district court erroneously found that because Sections 5(A) and (B) were enacted as part of S.B. 1070, they were "not drawn to achieve Arizona's goal of promoting traffic safety." ER 11. Again, the district court did not address

the evidence Arizona provided regarding the several years of legislative history that preceded the enactment of Sections 5(A) and (B). In fact, Sections 5(A) and (B) passed in the House as a *separate* bill, H.B. 2042, before S.B. 1070 was even introduced. When H.B. 2042 went to the Senate, it became an amendment to S.B. 1070.[18] That Sections 5(A) and (B) were ultimately included within a larger statute as part of legislative compromise and efficiency should not be a basis for disregarding the totality of legislative history, and it certainly should not be *the* basis upon which Sections 5(A) and (B) are held to violate the First Amendment.

IV

Sections 5(A) and (B) Are Also Valid Time, Place, or Manner Regulations

Although they need not do so, Sections 5(A) and (B) also withstand intermediate scrutiny under the test for fully protected speech because they are valid time, place, or manner regulations.[19] A State may "impose reasonable

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[18] *See* Bill Status Overview (H.B. 2042), http://www.azleg.gov//FormatDocument.asp?inDoc=/legtext/49leg/2r/bills/hb2042o.asp&Session_ID=93 (last visited May 8, 2012).

[19] The time, place, or manner test applies to regulations on speech in a public forum. Regulations on speech in a nonpublic forum, however, need only be reasonable and not viewpoint-based. *See Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 979 (9th Cir. 1998). Although streets are generally considered public fora, "courts should 'focus[] on the access sought by the speaker' and not the [character of the forum] in general." *Currier v. Potter*, 379 F.3d 716, 727 (9th Cir. 2004) (citation omitted); *see also United States v. Kokinda*, 497 U.S. 720, 727 (1990). Here, Plaintiffs seek to enter Arizona's streets in a manner that "*blocks or impedes* the normal movement of traffic." Streets "are not designated as forums for public communication while in use by vehicular traffic." *ACORN v. City of Phoenix*, 603 F. Supp. 869, 871 (D. Ariz. 1985).

restrictions on the time, place, or manner of protected speech," where the regulations are content-neutral. *Ward*, 491 U.S. at 791. Sections 5(A) and (B) are reasonable time, place, and manner regulations for the same reasons they are sufficiently tailored under the *Central Hudson* test. *See* Section III, *supra*; *see also Moser v. FCC*, 46 F.3d 970, 973 (9th Cir. 1995) (noting the similarity between the *Central Hudson* test and the time, place, or manner test). Moreover, Sections 5(A) and (B) do not prohibit people from soliciting or negotiating employment, they "merely regulate[] the places where communications may occur." *Colorado v. Hill*, 530 U.S. 703, 731 (2000); *see also Dish Network*, 653 F.3d at 780 ("The question is not whether [the Legislature] was correct to determine that a particular statute was necessary, but whether its determination was reasonable and based on substantial evidence."). Sections 5(A) and (B) leave open numerous alternative channels of communication because they do not in any way restrict Plaintiffs and their members from soliciting, negotiating, and securing day labor anywhere where the solicitations and negotiations do not physically interfere with moving traffic.

V

The District Court's Errors With Respect to Plaintiffs' Likelihood of Success on the Merits Requires Reversal of the District Court's Conclusions with Respect to the Non-Merits Factors

The district court found that each of the non-merits factors weighed in favor of granting the injunction because "Plaintiffs are likely to succeed on the merits of

their First Amendment challenge to [Sections 5(A) and (B)]"[20] and "the individual day laborer Plaintiffs and day laborer members of some of the organizational Plaintiffs are being chilled from soliciting day labor." ER 11-12. Plaintiffs are not likely to suffer irreparable harm. Plaintiffs' members are not prohibited from soliciting employment—they need only do so in a manner that does not disrupt the flow of traffic. *See Hale v. Dep't of Energy*, 806 F.2d 910, 918 (9th Cir. 1986) ("The First Amendment does not guarantee an optimal setting for speech at all times and places.").

Moreover, Sections 5(A) and (B) regulate conduct that is already unlawful (entering the street and blocking or impeding traffic). *See* ER 10 (citing Ariz. Rev. Stat. Ann. §§ 13-2906(A), 28-871(A), 28-7 04(A), 28-873(A), 28-905). Plaintiffs cannot be "harmed" by being prohibited from engaging in conduct (*i.e.*, interfering with traffic) that Plaintiffs themselves concede is illegal, even if their purpose for doing so is to solicit employment. The First Amendment does not grant Plaintiffs the right to engage in unlawful conduct. As the Supreme Court held in *Cox v. Louisiana*,

> The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. ***The constitutional guarantee of liberty implies the existence of***

[20] A finding that the Plaintiffs are likely to establish an alleged First Amendment violation does not automatically justify a finding of irreparable harm. *See Dish*, 653 F.3d at 776 ("[P]roving the likelihood of [a First Amendment] claim is not enough to satisfy *Winter*.").

> ***an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order***. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection. One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. *Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly*. Governmental authorities have the duty and responsibility to keep their streets open and available for movement.

379 U.S. 536, 554 (1965) (emphasis added).

To the extent Plaintiffs argue that their members are "chilled" from soliciting employment in a manner that does *not* require them to enter a stopped vehicle on a traffic-filled street because they "fear" they will be arrested under Sections 5(A) and (B), such fears cannot provide a basis for Plaintiffs to challenge—much less for a court to enjoin—these provisions. Sections 5(A) and (B) do not authorize a law enforcement officer to arrest a day laborer ***unless*** the day laborer enters a motor vehicle that is stopped on a roadway and blocking or impeding traffic. Because this is a pre-enforcement facial challenge, the Court must presume that Arizona's law enforcement officers will enforce the provisions in accordance with their terms and in a constitutional manner. *See, e.g., Panama Refining Co. v. Ryan*, 293 U.S. 388, 446 (1935) ("Every public officer is presumed to act in obedience to his duty…"). Moreover, a preliminary injunction "will not

be granted against something merely feared as liable to occur at some indefinite time in the future." *Connecticut v. Massachusetts*, 282 U.S. 660, 674 (1931); *Continental Baking Co. v. Woodring*, 286 U.S. 352, 369 (1932) ("[A]ppellants had no right to resort to equity merely because of an anticipation of improper or invalid action in administration.").

In contrast to Plaintiffs' speculative allegations of harm, Arizona has a substantial interest in the safety of its streets and reducing the crime, intimidation, and property destruction that results when large groups of day laborers congregate in and along busy roadsides and engage in conduct that interferes with traffic. *See supra* pp. 7-9. The balance of equities therefore tips sharply in Arizona's favor.

Conclusion

For the foregoing reasons, the Court should vacate the preliminary injunction of Sections 5(A) and (B).

Dated: May 9, 2012

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Certificate of Compliance

The undersigned certifies under Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure and Ninth Circuit Rule 32-1, that the attached opening brief is proportionally spaced, has a type face of 14 points or more and, pursuant to the word-count feature of the word processing program used to prepare this brief, contains 9,270 words, exclusive of the matters that may be omitted under Rule 32(a)(7)(B)(iii).

Pursuant to Ninth Circuit Rule 28-2.6, Appellants confirm that they are not aware of any related cases pending in this Court.

Dated: May 9, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 201 2, I electronically transm itted the foregoing document to the Clerk's Office us ing the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants on record.

s/John J. Bouma

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No. 12-15688

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Friendly House; et al., Plaintiffs-Appellees, v. Michael B. Whiting; et al., Defendants, and State of Arizona and Janice K. Brewer, Intervenors-Appellants.	No. 12-15688 No. 2:10-cv-01061-PHX-SRB District of Arizona

ADDENDUM TO APPELLANTS' OPENING BRIEF

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Pertinent Provisions of the Statute at Issue
A.R.S. § 13-2928 (2012)

§ 13-2928. Unlawful stopping to hire and pick up passengers for work; unlawful application, solicitation or employment; classification; definitions

A. It is unlawful for an occupant of a motor vehicle that is stopped on a street, roadway or highway to attempt to hire or hire and pick up passengers for work at a different location if the motor vehicle blocks or impedes the normal movement of traffic.

B. It is unlawful for a person to enter a motor vehicle that is stopped on a street, roadway or highway in order to be hired by an occupant of the motor vehicle and to be transported to work at a different location if the motor vehicle blocks or impedes the normal movement of traffic.

…

F. A violation of this section is a class 1 misdemeanor.

Other Arizona Traffic Statutes Cited in the Opening Brief

A.R.S. § 13-2906 (2012)

§ 13-2906. Obstructing a highway or other public thoroughfare; classification

A. A person commits obstructing a highway or other public thoroughfare if, having no legal privilege to do so, such person, alone or with other persons, recklessly interferes with the passage of any highway or public thoroughfare by creating an unreasonable inconvenience or hazard.

B. Obstructing a highway or other public thoroughfare is a class 3 misdemeanor.

A.R.S. § 28-704 (2012)

§ 28-704. Minimum speed limits; requirement to turn off roadway

A. A person shall not drive a motor vehicle at such a slow speed as to impede or block the normal and reasonable movement of traffic except when either of the following applies:

1. Reduced speed is necessary for safe operation or in compliance with law.

2. The reasonable flow of traffic exceeds the maximum safe operating speed of the lawfully operated implement of husbandry.

B. If the director or local authorities within their respective jurisdictions determine on the basis of an engineering and traffic investigation that slow speeds on any part of a highway consistently impede the normal and reasonable movement of traffic, the director or local authority may determine and declare a minimum speed limit below which a person shall not drive a vehicle except when necessary for safe operation or in compliance with law.

C. If a person is driving a vehicle at a speed less than the normal flow of traffic at the particular time and place on a two-lane highway where passing is unsafe, and if five or more vehicles are formed in a line behind the vehicle, the person shall turn the vehicle off the roadway at the nearest place designated as a turnout by signs erected by the director or a local authority, or wherever sufficient area for a safe turnout exists, in order to permit the vehicles following to proceed.

A.R.S. § 28-871 (2012)

§ 28-871. Stopping, standing or parking outside business or residence district

A. On a highway outside of a business or residence district, a person shall not stop, park or leave standing a vehicle, whether attended or unattended, on the paved or main traveled part of the highway if it is practicable to stop, park or leave the vehicle off that part of the highway. If a person stops, parks or leaves standing a vehicle, the person shall leave an unobstructed width of the highway opposite the standing vehicle for the free passage of other vehicles and a clear view of the standing vehicle shall be available from a distance of two hundred feet in each direction on the highway.

B. This section does not apply to:

1. The driver of a vehicle that is disabled while on the paved or main traveled portion of a highway in a manner and to an extent that it is impossible to avoid stopping and temporarily leaving the disabled vehicle in that position.

2. A vehicle or the driver of a vehicle engaged in the official delivery of the United States mail that stops on the right-hand side of the highway for the purpose of picking up or delivering mail if the following conditions are met:

(a) A clear view of the vehicle is available from a distance of three hundred feet in each direction on the highway or a flashing amber light at least four inches in diameter with the letters "stop" printed on the light is attached to the rear of the vehicle.

(b) The vehicle has a uniform sign that:

(i) Is at least fourteen inches in diameter.

(ii) Is approved by the department.

(iii) Has the words "U.S. mail" printed on the sign.

(iv) Is attached to the rear of the vehicle.

A.R.S. § 28-873 (2012)

§ 28-873. Stopping, standing or parking prohibitions; exceptions; definition

A. Except if necessary to avoid conflict with other traffic or if in compliance with law or the directions of a police officer or traffic control device, a person shall not stop, stand or park a vehicle in any of the following places:

1. On a sidewalk.

2. In front of a public or private driveway, except that this paragraph does not apply to a vehicle or the driver of a vehicle engaged in the official delivery of the United States mail if both of the following apply:

(a) The driver does not leave the vehicle.

(b) The vehicle is stopped only momentarily.

3. Within an intersection.

4. Within fifteen feet of a fire hydrant.

5. On a crosswalk.

6. Within twenty feet of a crosswalk at an intersection.

7. Within thirty feet on the approach to any flashing beacon, stop sign, yield sign or traffic control signal located at the side of a roadway.

8. Between a safety zone and the adjacent curb or within thirty feet of points on the curb immediately opposite the ends of a safety zone, unless the director or a local authority indicates a different length by signs or markings.

9. Within fifty feet of the nearest rail or a railroad crossing or within eight feet six inches of the center of any railroad track, except while a motor vehicle with motive power attached is loading or unloading railroad cars.

10. Within twenty feet of the driveway entrance to a fire station and on the side of a street opposite the entrance to any fire station within seventy-five feet of the entrance when properly posted.

11. Alongside or opposite a street excavation or obstruction when stopping, standing or parking would obstruct traffic.

12. On the roadway side of a vehicle stopped or parked at the edge or curb of a street.

13. On a bridge or other elevated structure on a highway or within a highway tunnel.

14. At any place where official signs prohibit standing or stopping.

15. On a controlled access highway except:

(a) For emergency reasons.

(b) In areas specifically designated for parking such as rest areas.

B. A local authority may allow motor vehicles providing a public entity's public transportation service to stop on a state highway or state route for the purpose of allowing passengers to enter or exit if all of the following apply:

1. The local authority that has jurisdiction over the location of the proposed stopping point conducts a traffic and engineering investigation to determine whether passengers are able to safely enter or exit public transportation vehicles at the proposed stopping point.

2. The local authority that conducts the traffic and engineering investigation pursuant to paragraph 1 of this subsection submits the results of the investigation to the director for review and approval of the proposed stopping point.

3. The driver does not leave the vehicle.

4. The vehicle is stopped only long enough to load and unload passengers.

5. The vehicle engages four-way hazard flashers.

6. The roadway has a posted speed limit that does not exceed fifty-five miles per hour.

7. The roadway has signed or signalized intersection controls within a jurisdictionally confined boundary.

8. The vehicle is clearly marked as a public transportation vehicle.

9. As determined by the director in conjunction with the local authority, the driver drives the vehicle into a pullout or uses any other available method that limits the vehicle from interfering with traffic on the roadway.

C. For the purposes of this section, "public transportation vehicle" means any vehicle that either:

1. Is owned or operated by a public entity.

2. Is operated under a contract with a public entity.

A.R.S. § 28-905 (2012)

§ 28-905. Opening vehicle door

A person shall not open a door on a motor vehicle unless it is reasonably safe to do so and can be done without interfering with the movement of other traffic. A person shall not leave a door open on a side of a motor vehicle exposed to moving traffic for a period of time longer than necessary to load or unload a passenger.

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