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18 UNITED STATES DISTRICT COURT
19 DISTRICT OF ARIZONA

21 Friendly House, *et al.*,
22 Plaintiffs,
23 v.
24 Michael B. Whiting, *et al.*,
25 Defendants.

CASE NO. CV-10-01061-SRB
**PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION OF
A.R.S. §§ 13-2928 (A) AND (B) AND
MEMORANDUM IN SUPPORT
THEREOF**
(ORAL ARGUMENT REQUESTED)

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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

- I. Introduction 1
- II. Procedural History..... 1
- III. Standard..... 2
- IV. Argument..... 3
 - A. Plaintiffs Are Likely to Succeed on the Merits of Their Claim That Sections 13-2928 (A) and (B) Violate the First Amendment. 3
 - 1. Sections 13-2928 (A) and (B) are unconstitutional content-based regulations of protected speech. 3
 - 2. Sections 13-2928 (A) and (B) cannot survive strict scrutiny..... 7
 - 3. Sections 13-2928 (A) and (B) cannot meet intermediate scrutiny..... 8
 - B. Plaintiffs are Suffering Irreparable Harm 10
 - C. The Equities Tip Decidedly in Plaintiffs’ Favor 13
 - D. A Preliminary Injunction is in the Public Interest 13
- IV. Conclusion. 14

TABLE OF AUTHORITIES

1				PAGE(S)
2				
3	FEDERAL CASES			
4	<i>A.C.L.U. of Nevada v. City of Las Vegas,</i>			
5	466 F. 3d 784 (9th Cir. 2006)		passim	
6	<i>Ashcroft v. ACLU,</i>			
7	542 U.S. 656 (2004)		3	
8	<i>Berger v. City of Seattle,</i>			
9	569 F. 3d 1029 (9th Cir. 2009)		passim	
10	<i>Boos v. Barry,</i>			
11	485 U.S. 312 (1988)		7	
12	<i>Bronx Household of Faith v. Board of Educ. of City of New York,</i>			
13	331 F.3d 342 (2d Cir. 2003)		11	
14	<i>Burson v. Freeman,</i>			
15	504 U.S. 191 (1992)		3, 7	
16	<i>Carey v. Brown,</i>			
17	477 U.S. 455 (1980)		7	
18	<i>Cincinnati v. Discovery Network,</i>			
19	507 U.S. 410 (1993)		6	
20	<i>Coalition for Humane Immigrant Rights of Los Angeles v. Burke,</i>			
21	No. 98-cv-4863, 2000 WL 1481467 (C.D. Cal. Sept. 12, 2000).....		9	
22	<i>Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,</i>			
23	607 F.3d 1178 (9th Cir. 2010)		2	
24	<i>Comite de Jornaleros de Redondo Beach v. City of Redondo Beach,</i>			
25	623 F.3d 1054 (9th Cir. 2010)		2	
26	<i>Edenfield v. Fane,</i>			
27	507 U.S. 761 (1993)		9	
28	<i>Edwards v. City of Santa Barbara,</i>			
	150 F.3d 1213 (9th Cir. 1998)		8	
	<i>Elrod v. Burns,</i>			
	427 U.S. 347 (1976)		11	

TABLE OF AUTHORITIES
Continued

	PAGE(S)
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

<i>Friendly House v. Whiting</i> , No. 10-01061 (D. Ariz. Oct. 8, 2010)	2
<i>Frisby v. Schultz</i> , 478 U.S. 474 (1988)	8
<i>Ft. Funston Dog Walkers v. Babbitt</i> , 96 F. Supp. 2d 1021 (N.D. Cal. 2000).....	10
<i>Galvin v. Hay</i> , 374 F.3d 739 (9th Cir. 2004)	9
<i>Glendale Assocs., Ltd. V. NLRB</i> , 347 F.3d 1145 (9th Cir. 2003)	5
<i>Holder v. Humanitarian Law Project</i> , 130 S. Ct. 2705 (2010).....	5, 6
<i>Hunt v. Wash. State Apple Adver. Comm’n</i> , 432 U.S. 333 (1977)	10
<i>Klein v. City of Laguna Beach</i> , 381 F. App’x 723 (9th Cir. 2010).....	2
<i>Klein v. City of San Clemente</i> , 584 F.3d 1196 (9th Cir. 2009)	passim
<i>Kuba v. I-A Agr. Ass’n</i> , 387 F.3d 850 (9th Cir. 2004)	7
<i>Lopez v. Town of Cave Creek</i> , 559 F. Supp. 2d 1030 (D. Ariz. 2008)	12
<i>R.A.V. v. City of St. Paul, Minn.</i> , 505 U.S. 377 (1992)	6
<i>Sammartano v. First Judicial Dist. Court</i> , 303 F.3d 959 (9th Cir. 2002)	8, 10
<i>Satellite Television of New York Assoc. v. Finneran</i> , 579 F. Supp. 1552 (S.D.N.Y. 1984)	12, 13
<i>Sierra Forest Legacy v. Rey</i> , 577 F.3d 1015 (9th Cir. 2009)	2
<i>S.O.C. Inc. v. County of Clark</i> , 152 F.3d 1136 (9th Cir. 1998)	5, 8

TABLE OF AUTHORITIES
Continued

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PAGE(S)

Tollis, Inc. v. San Bernardino County,
 827 F.2d 1329 (9th Cir. 1987) 8

United States v. Grace,
 461 U.S. 171 (1983) 3, 9

United States v. Playboy Entertainment Group, Inc.,
 529 U.S. 803 (2000) 7

Ward v. Rock Against Racism,
 491 U.S. 781 (1989) 8

White v. Lee,
 277 F.3d 1214 (9th Cir. 2000) 11

WV Ass’n of Club Owners and Fraternal Services, Inc. v. Musgrave,
 553 F.3d 292 (4th Cir. 2009) 11

STATE STATUTES

A.R.S. § 13-707 10

A.R.S. § 13-2906 7, 10

A.R.S. § 13-2928 passim

A.R.S. § 28-905 7

A.R.S. § 28-704 7

A.R.S. § 28-871 7

A.R.S. § 28-873 7, 10

I. INTRODUCTION

1
2 Plaintiffs move the Court for a preliminary injunction as to §§ 13-2928 (A) and (B)
3 of the Arizona Revised Statutes in order to halt the ongoing deprivation of First
4 Amendment rights to individuals – day laborers and employers – at risk of prosecution
5 under these provisions.

6 The First Amendment guarantees all members of society the right to free
7 expression. Solicitation speech is expression entitled to full protection under the First
8 Amendment. Sections 13-2928 (A) and (B) of the Arizona Revised Statutes are content-
9 based speech restrictions because they impose statewide criminal liability on motorists
10 and individuals based on individuals' employment solicitation speech. Plaintiffs are likely
11 to succeed on the merits of their First Amendment claims against A.R.S. §§ 13-2928 (A)
12 and (B) because, as content-based restrictions, they are subject to strict scrutiny and
13 Defendants cannot show that they survive that test.

14 Preliminary injunctive relief is necessary to halt Plaintiffs' ongoing irreparable
15 injury due to the unconstitutional restriction of their right to free speech; the improper
16 chilling of their expressive activity; and these sections' effect on day laborers' livelihood
17 and their ability to support themselves and their families. Given the severity of these
18 harms to Plaintiffs, the balance of the equities tips sharply in their favor, especially
19 because Arizona has ample existing means at its disposal by which to address any
20 purported traffic safety interests. Finally, given the fundamental constitutional liberties at
21 stake, injunctive relief is in the public interest. For these reasons, immediate interim relief
22 is necessary during the pendency of this lawsuit.

II. PROCEDURAL HISTORY

23
24 Plaintiffs filed this action on May 17, 2010 challenging major provisions of
25 Arizona Senate Bill 1070, as amended ("SB 1070"), that together purport to create an
26 immigration policy of "attrition through enforcement" in the State of Arizona. Plaintiffs
27 assert in their Complaint that the provisions on their face violate the Constitution,
28 including the First Amendment right to freedom of speech. On June 4, 2010, Plaintiffs

1 moved for a preliminary injunction of the challenged provisions pursuant to a number of
2 their claims. At the Court's June 22, 2010 hearing, Plaintiffs withdrew their preliminary
3 injunction motion with respect to §§ 13-2928 (A) and (B) in light of the Ninth Circuit's
4 ruling in *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 607 F.3d
5 1178 (9th Cir. 2010). Since that time, however, the Ninth Circuit granted rehearing *en*
6 *banc* in that case and ordered the panel's ruling not citable within this Circuit. *See Comite*
7 *De Jornaleros De Redondo Beach v. City of Redondo Beach*, 623 F.3d 1054 (9th Cir.
8 2010). In addition, as this Court determined, the ordinance at issue in *Redondo Beach* is
9 distinguishable from §§ 13-2928 (A) and (B), which specifically target employment
10 solicitation speech. *Friendly House v. Whiting*, No. 10-01061 (D. Ariz. Oct. 8, 2010)
11 (order granting in part and den. in part defs.' motions to dismiss and den. plts' mot. for
12 prelim. inj.) (hereinafter "Oct. 8, 2010 Order"). Accordingly, Plaintiffs now seek a
13 preliminary injunction of §§ 13-2928 (A) and (B).

14 III. STANDARD

15 Plaintiffs are entitled to a preliminary injunction to suspend enforcement of §§ 13-
16 2928 (A) and (B). A preliminary injunction should be granted when the moving party
17 establishes: (1) a likelihood of success on the merits; (2) that he is likely to suffer
18 irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips
19 in his favor; and (4) that an injunction is in the public interest. *See Sierra Forest Legacy*
20 *v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009) (citing *Winters v. Natural Resources Defense*
21 *Council, Inc.*, 129 S. Ct. 365, 374 (2008)). "The same standard applies regardless of
22 whether the movant seeks to maintain the status quo or to halt an ongoing deprivation of
23 rights." *Klein v. City of Laguna Beach*, 381 F. App'x 723, 725 (9th Cir. 2010) (citing
24 *Textile Unlimited, Inc. v. A..BMH & Co.*, 240 F.3d 781, 786 (9th Cir. 2001)). Plaintiffs
25 meet these elements here.

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IV. ARGUMENT

A. Plaintiffs Are Likely to Succeed on the Merits of Their Claim That Sections 13-2928 (A) and (B) Violate the First Amendment.

As this Court already observed in this case, §§ 13-2928 (A) and (B) are content-based regulations of speech that are subject to strict scrutiny. Oct. 8, 2010 Order at 20. *See also Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004). Sections 13-2928 (A) and (B) fail to survive strict scrutiny because Defendants cannot meet their burden of showing that the regulations “serve[] a compelling government interest in the least restrictive manner possible.” *See Berger v. City of Seattle*, 569 F.3d 1029, 1052 (9th Cir. 2009) (*en banc*). As such, Plaintiffs’ First Amendment claims are likely to succeed on the merits.

1. Sections 13-2928 (A) and (B) are unconstitutional content-based regulations of protected speech.

A.R.S. §§13-2928 (A) and (B), portions of SB 1070, unlawfully regulate protected speech in a public forum on the basis of its content. *See Burson v. Freeman*, 504 U.S. 191, 196-97 (1992). On their face, §§ 13-2928 (A) and (B) specifically suppress speech soliciting work – in particular day labor solicitation speech – which is entitled to full constitutional protection. *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784, 792 (9th Cir. 2006) (“*ACLU IP*”); *see also Berger*, 569 F.3d at 1050. These sections restrict persons from engaging in work solicitation speech on all streets throughout the State of Arizona, which are “quintessential public for[a]” that have ““by long tradition . . . been devoted to assembly and debate.”” *Burson*, 504 U.S. at 196-97 (citations omitted). In such public fora, the government’s ability to restrict speech is “very limited.” *United States v. Grace*, 461 U.S. 171, 177 (1983).

Sections 13-2928 (A) and (B) single out particular content of communication between a motorist and the person that he or she picks up for differential treatment. Section 13-2928 (A) applies only to drivers who “attempt to hire or hire” workers, and §

1 13-2928 (B) applies only to persons entering a car “in order to be hired.” A.R.S. §§ 13-
2 2928 (A) and (B). Thus, the regulations target individuals engaging in speech that solicits
3 work, and leave other speech – such as artistic, political, and religious speech –
4 completely unrestricted. *See* Oct. 8, 2010 Order at 20; *Berger*, 569 F.3d at 1051. Indeed,
5 as the Court explained in ruling that §§ 13-2928 (A) and (B) are content-based, the
6 provisions specifically target and “regulate[] only solicitation related to employment,” and
7 not political or other forms of solicitation. Oct. 8, 2010 Order at 20.

8 In its ruling issued on October 8, 2010, the Court correctly relied on *Berger* and
9 *ACLU II* in determining that §§ 13-2928 (A) and (B) “are content-based regulations of
10 speech because the provisions ‘differentiate[] based on the content of speech,’ prohibiting
11 only the solicitation of employment.” Oct. 8, 2010 Order at 20. In *ACLU II*, the Ninth
12 Circuit held that a prohibition on handbills requesting financial assistance, but permitting
13 those with other content, was a “content-based distinction because it single[d] out certain
14 speech for differential treatment based on the idea expressed.” 466 F.3d at 793-94.
15 Similarly, in *Berger*, the *en banc* Court of Appeals held that an ordinance prohibiting
16 street performers from soliciting donations, but not prohibiting the performers from
17 communicating other messages, was a content-based regulation of speech. *Berger*, 569
18 F.2d at 1051. The *Berger* court explained that “[a] regulation is content-based if either the
19 underlying purpose of the regulation is to suppress particular ideas, or if the regulation, *by*
20 *its very terms, singles out particular content for differential treatment.*” *Id.* (emphasis
21 added) (citation omitted).

22 “Importantly, [§§ 13-2928 (A) and (B)]’s provisions are directed only at
23 employment solicitation and not more broadly at the act of solicitation.” Oct. 8, 2010
24 Order at 20. The Court further noted that “[a]lthough courts have held that bans on the act
25 of solicitation are content-neutral, [they] have not found any case holding that a regulation
26 that separates out words of solicitation for differential treatment is content-neutral.” *Id.*
27 (citing *ACLU II*, 466 F.3d at 794). Like the solicitation restriction at issue in *Berger*, §§
28 13-2928 (A) and (B) restrict “the medium and manner of” soliciting “based on the content

1 of the [speaker's] message.” *Berger*, 569 F.3d at 1051. Indeed, “even though *some*
2 manner of communication on the subject is allowed[,]” “regulat[ing] the manner of speech
3 on the basis of content, tak[es] the regulation outside the time, place, and manner
4 rubric[.]” *Id.* Accordingly, §§ 13-2928 (A) and (B) are content-based speech restrictions
5 regardless of whether they “may be . . . directed at conduct, . . . [because] the conduct
6 triggering coverage under the statute consists of communicating a message.” *Holder v.*
7 *Humanitarian Law Project*, 130 S. Ct. 2705, 2724 (2010).¹

8 The Court’s conclusion that §§ 13-2928 (A) and (B) are content-based is further
9 supported “by the fact that an officer seeking to enforce [the solicitation restrictions]
10 ‘must necessarily examine the content of the message that is conveyed.’” *Berger*, 569
11 F.3d at 1052 (quoting *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134
12 (1992)). *See also S.O.C., Inc. v. County of Clark*, 152 F.3d 1136, 1145 (9th Cir. 1998)
13 (that an official must necessarily examine the content of the message that is conveyed in
14 order to enforce the regulation is the hallmark of a content-based regulation); *Glendale*
15 *Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1155 (9th Cir. 2003) (*same*). As the Supreme
16 Court recently explained, a law is a content-based regulation of speech where criminal
17 liability “depends on what [individuals] say.” *Humanitarian Law Project*, 130 S. Ct. at
18 2723-2724.

19 Here, enforcement of §§ 13-2928 (A) and (B) necessarily requires an examination
20 of the content of the communication between an individual and occupant of a vehicle.
21 Law enforcement officers are required to determine the content of the message conveyed,
22 since liability accrues only when individuals engage in speech about employment
23 solicitation. An enforcing officer must determine whether, for instance, a motorist
24 responded to a political solicitation (permitted), a homeless person soliciting alms
25 (permitted), or instead to a person soliciting employment (prohibited). *S.O.C.*, 152 F.3d at

26 ¹ Nor does the mere assertion of purported traffic and safety concerns lessen the
27 content-based nature of §§ 13-2928 (A) and (B). *See ACLU II*, 466 F.3d at 793 (“[T]he
28 mere assertion of a content-neutral purpose [is not] enough to save a law which, on its
face, discriminates based on content.”) (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 512
U.S. 622, 642-42 (1994)).

1 1145 (noting, in holding ordinance content-based, that enforcing officer “would need to
2 examine the contents of the handbill to determine whether its distribution was
3 prohibited”); *see also Cincinnati v. Discovery Network*, 507 U.S. 410, 429 (1993).

4 Similarly, pedestrians in Arizona can engage in any speech with motorists, and in any
5 manner, without running afoul of §§ 13-2928 (A) and (B), as long as the speech does not
6 constitute employment solicitation. Oct. 8, 2010 Order at 20. *Cf. ACLU II*, 466 F.3d at
7 794; *Humanitarian Law Project*, 130 S. Ct. at 2722-24.

8 This selective liability based on a particular subject of speech also evidences
9 Arizona’s attempt to chill the expression and communication of one particular set of
10 constitutionally protected ideas. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 394
11 (1992). “Selectivity of this sort creates the possibility that the [government] is seeking to
12 handicap the expression of particular ideas.” *Id.* While Arizona may enact legislation
13 aimed at ensuring traffic safety, it cannot do so in a way that is designed to impose
14 “special prohibitions on those speakers who express views on disfavored subjects”
15 without the regulation becoming a constitutionally suspect content-based restriction on
16 speech. *Id.* at 391.²

17 Because liability under §§ 13-2928 (A) and (B) “depends on what [individuals]
18 say” when they communicate with a motorist, *Humanitarian Law Project*, 130 S. Ct. at
19 2723-24, “the very basis for the regulation is the difference in content [.]” *Discovery*

20
21 ² The original bill, later codified as §§ 13-2928 (A) and (B), is HB 2042, titled
22 “unlawful roadside solicitation of employment.” HB 2042 was duplicated into and heard
23 concurrently with SB 1070. The testimony of HB 2042’s sponsor, State Representative
24 Kavanagh, evidences that these provisions sought to suppress day labor solicitation
25 speech. Boyd Decl., Ex. 24 (filed in support of Pls’ Mot. for Prelim. Inj. on June 21,
26 2010, Docket No. 235), Kavanagh testimony Feb. 24, 2010 (“No one benefits from
27 roadside solicitation of day labor” and there are “other ways decent people can get jobs,
28 and certainly standing on the street like a hooker isn’t one of them.”); *Id.* at Ex. 31, Jan.
21, 2010 House Judiciary Comm. hearing (Kavanagh testifying that the law is necessary
because “large congregations of almost exclusively men hang[] around in communities,
[and it] is a problem — it’s unsightly, it’s intimidating, especially to people on the street,
particularly women. . .”). The underlying purpose of §§ 13-2928 (A) and (B) is clearly
aimed at suppressing day labor solicitation speech.

1 *Network*, 507 U.S. at 429. *See also* *Burson*, 504 U.S. at 197; *Carey v. Brown*, 447 U.S.
2 455, 462 (1980).

3 **2. Sections 13-2928 (A) and (B) cannot survive strict scrutiny.**

4 Strict scrutiny applies here, because, “[a]s . . . content-based regulation[s],
5 [Sections] 13-2928 (A) and (B) [are] only valid if [they] ‘serve[] a compelling
6 government interest in the least restrictive manner possible.’” Oct. 8, 2010 Order at 20
7 (quoting *Berger*, 569 F.3d at 1053). If a less restrictive alternative would achieve that
8 interest, the Defendants “must use that alternative.” *See United States v. Playboy*
9 *Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000). “A court should not assume a
10 plausible, less restrictive alternative would be ineffective.” *Id.* at 824.

11 Although traffic safety can be a recognized significant interest, *Kuba v. I-A Agr.*
12 *Ass’n*, 387 F.3d 850, 858 (9th Cir. 2004), here, there are numerous state and local laws
13 readily available to Defendants that address traffic flow and public safety issues caused by
14 the interference with traffic. *See e.g.*, A.R.S. § 28-905 (“A person shall not open a door
15 on a motor vehicle unless it . . . can be done without interfering with the movement of
16 other traffic.”); A.R.S. §§ 13-2906(A) (imposing a maximum 30-day jail sentence if
17 person “recklessly interferes with the passage of any highway or public thoroughfare by
18 creating an unreasonable inconvenience or hazard”); *see also* 28-871(A); 28-704(A); 28-
19 873(A). Accordingly, Defendants cannot show that §§13-2928 (A) and (B) are the least
20 restrictive means to achieve purported traffic safety interests because they could easily
21 rely on the myriad existing laws that directly regulate behavior by pedestrians or drivers
22 that disrupts traffic safety. *See Boos v. Barry*, 485 U.S. 312, 329 (1988) (holding statute
23 was not narrowly tailored because “a less restrictive alternative is readily available”).
24 Defendants may enforce these laws, which allow them to combat threats to traffic flow
25 and public safety that they may assert an interest in eliminating, without
26 unconstitutionally impinging on the protected speech that §§ 13-2928 (A) and (B)
27 prohibit.

28 Based on the foregoing reasons, and as further explained below, §§13-2928 (A)

1 and (B) cannot survive strict scrutiny.

2 **3. Sections 13-2928 (A) and (B) cannot meet intermediate scrutiny.**

3 While Defendants may argue that Sections 13-2928 (A) and (B) should be subject
4 to intermediate scrutiny, the restrictions fail even that test because Defendants cannot
5 show that they do not burden substantially more speech than is necessary to further
6 significant governmental interests. *Ward v. Rock Against Racism*, 491 U.S. 781, 799
7 (1989); *see Edwards v. City of Santa Barbara*, 150 F.3d 1213, 1216 (9th Cir. 1998).
8 Sections 13-2928 (A) and (B) must “target[] and eliminate[] no more than the exact source
9 of the ‘evil’ [they] seek[] to remedy.” *Frisby v. Schultz*, 487 U.S. 474, 485. *See also*
10 *Berger*, 569 F.3d at 1041. Thus, to meet their burden of establishing the constitutionality
11 of these laws, Defendants must show a “reasonable fit” between their asserted interest and
12 the terms of §§ 13-2928 (A) and (B). *See S.O.C.*, 152 F.3d at 1148. As part of this
13 showing, Defendants must demonstrate “that in enacting the particular limitations . . . [the
14 State] relied upon evidence permitting the reasonable inference that absent such
15 limitations,” the proscribed speech would cause harmful effects. *Tollis, Inc. v. San*
16 *Bernardino County*, 827 F.2d 1329, 1333 (9th Cir. 1987). “[T]he existence of obvious,
17 less burdensome alternatives is ‘a relevant consideration in determining whether the ‘fit’
18 between the ends and means is reasonable.’” *Berger*, 569 F.3d at 1041 (quoting *Discovery*
19 *Network*, 507 U.S. at 417 n. 13).

20 Defendants cannot meet this “evidentiary requirement” to prove that their interest
21 in protecting against traffic hazards justifies the prohibitions of §§ 13-2928 (A) and (B).
22 *See Klein v. City of San Clemente*, 584 F.3d 1196, 1202 (9th Cir. 2009). “As both [the
23 Ninth Circuit] and the Supreme Court have repeatedly emphasized, ‘merely invoking
24 interests . . . is insufficient.’” *Id.* (quoting *Kuba*, 387 F.3d at 859). Rather, “[t]he
25 Government must . . . show that the [prohibited] communicative activity endangers those
26 interests.” *Id.* “There must be evidence in the record to support a determination that the
27 restriction [on speech] is reasonable.” *Sammartano v. First Judicial Dist. Court*, 303 F.3d
28 959, 967 (9th Cir. 2002). *Cf.*, *S.O.C.*, 152 F.3d at 1146. Here, even if Defendants have

1 some evidence that in the past an individual solicitor and prospective employer obstructed
2 traffic and posed a safety threat somewhere in Arizona, it is not enough to justify the
3 extraordinary and unprecedented *statewide* blanket restriction on employment solicitation
4 speech imposed by §§ 13-2928 (A) and (B). *See Coalition for Humane Immigrant Rights*
5 *of Los Angeles v. Burke*, 2000 WL 1481467, *9 (C.D. Cal. 2000). “A governmental body
6 seeking to sustain a restriction must demonstrate that the harms it recites are real.” *See*
7 *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993); *see also Berger*, 569 F.3d at 1049.
8 Defendants cannot demonstrate that the speech prohibited by §§ 13-2928 (A) and (B)
9 actually endangers asserted traffic interests throughout the State of Arizona. Accordingly,
10 Defendants fail to meet their burden of proving that the challenged restrictions are
11 narrowly tailored.

12 Sections 13-2928 (A) and (B) further fail to pass constitutional muster under
13 intermediate scrutiny because there are “obvious, less burdensome alternatives” available
14 to meet Defendants’ purported interests. *See Berger*, 569 F.3d at 1041 (quoting *Discovery*
15 *Network*, 507 U.S. at 417 n. 13). As explained, Defendants have a number of existing,
16 conventional laws whose very purpose is to address traffic and other legitimate concerns,
17 further evidencing the overbreadth of the laws. “[T]he availability of [these] obvious less-
18 restrictive alternatives” demonstrates that these provisions “burden[] substantially more
19 speech than is necessary to achieve [their] purposes,” and are therefore not narrowly
20 tailored. *See Galvin v. Hay*, 374 F.3d 739, 753 (9th Cir. 2004).

21 Moreover, there is no credible argument that there is a governmental interest
22 sufficient to justify harsher penalties for individuals who impede traffic because they are
23 engaging in day labor solicitation than for other individuals who may cause a similar
24 impediment to traffic for other reasons. *Cf., Grace*, 461 U.S. at 182 (holding that a greater
25 restriction on speech on public sidewalks surrounding the Supreme Court but not other
26 public sidewalks could not be justified in the absence of a governmental interest
27 necessitating the increased regulation). Arizona state laws that already regulate conduct
28 that creates traffic hazards carry civil penalties and minimal jail sentences. *See e.g.,*

1 A.R.S. § 28-873(A) (imposing civil penalties for actions that may impede traffic); A.R.S.
2 § 13-2906(A) (imposing a maximum thirty-day jail sentence if person “recklessly
3 interferes with the passage of any highway or public thoroughfare by creating an
4 unreasonable inconvenience or hazard”); *see* A.R.S. § 13-707(A). In contrast, violations
5 of §§13-2928 (A) and (B) carry a potential six-month jail sentence for “impeding traffic.”
6 Thus, a person who recklessly interferes with traffic while proselytizing to a motorist
7 faces a jail sentence of thirty days. *See* A.R.S. § 13-2906(A). However, a person who
8 recklessly interferes with traffic while soliciting employment from a motorist faces a jail
9 sentence of six months. Defendants cannot justify the disproportionate criminal sanction
10 imposed by §§ 13-2928 (A) and (B) only on individuals who engage in employment
11 solicitation speech. Accordingly, §§ 13-2928 (A) and (B) burden substantially more
12 speech than is necessary to further significant governmental interests and necessarily fail
13 even under intermediate scrutiny.

14 For the foregoing reasons, Plaintiffs are likely to succeed in proving that §§ 13-
15 2928 (A)’s and (B)’s employment solicitation speech restrictions violate the First
16 Amendment.

17 **B. Plaintiffs Are Suffering Irreparable Harm.**

18 Sections 13-2928 (A) and (B) infringe on Plaintiffs’ free speech rights, causing
19 them irreparable injury and warranting issuance of a preliminary injunction.³ *See Klein,*
20 584 F.3d at 1207 (finding irreparable injury where plaintiff demonstrated a likelihood of
21 success on the merits of his claims “[g]iven the free speech protections at issue in th[e]
22 case”). “[A] party seeking preliminary injunctive relief in a First Amendment context can
23 establish irreparable injury sufficient to merit the grant of relief by demonstrating the
24 existence of a colorable First Amendment claim.” *Sammartano*, 303 F.3d at 973 (internal

25 _____
26 ³ Because Plaintiffs Southside and Tonatierra have filed this lawsuit, in part, on
27 behalf of their members, the irreparable injury suffered by their members may be
28 considered. *See Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 342-43 (1977)
(discussing associational standing); *see also Ft. Funston Dog Walkers v. Babbitt*, 96 F.
Supp. 2d 1021, 1040 (N.D. Cal. 2000) (determining irreparable harm based in part on
injury suffered by members of plaintiff group).

1 quotation marks and citation omitted). It is well-established that the infringement of First
2 Amendment rights – even for minimal periods of time – “*unquestionably* constitutes
3 irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (emphasis added).
4 Government speech regulations violate the First Amendment when they “would chill or
5 silence a person of ordinary firmness from future First Amendment activities[.]” *White v.*
6 *Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (citation omitted) (quoting *Mendocino*
7 *Environmental Ctr. v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999)). *See also*
8 *Bronx Household of Faith v. Board of Educ. of City of New York*, 331 F.3d 342, 349 (2d
9 Cir. 2003) (“Where a plaintiff alleges injury from a rule or regulation that directly limits
10 speech, the irreparable nature of the harm may be presumed.”); *WV Ass’n of Club Owners*
11 *and Fraternal Services, Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (“[I]n the
12 context of an alleged violation of First Amendment rights, a plaintiff’s claimed irreparable
13 harm is ‘inseparably linked’ to the likelihood of success on the merits of plaintiff’s First
14 Amendment claim.”). Plaintiffs’ likely success on the merits of their First Amendment
15 challenge to §§ 13-2928 (A) and (B) alone is sufficient to establish irreparable injury. *See*
16 *Klein*, 584 F.3d at 1207.

17 Furthermore, Plaintiffs’ day laborer members and individual day laborers are
18 chilled and are refraining from soliciting employment in the manner proscribed by §§ 13-
19 2928 (A) and (B) to avoid enforcement against them. *See* Declaration of Alison
20 Harrington in Supp. of Pls’ Mot. for Prelim. Inj. of A.R.S. §§ 13-2928 (A) and (B)
21 (“Harrington Decl.”) at ¶¶ 10, 11; Declaration of Tupac Enrique in Supp. of Pls’ Mot. for
22 Prelim. Inj. of A.R.S. §§ 13-2928 (A) and (B) (“Enrique Decl.”) at ¶¶ 10-14. Some day
23 laborer members have altogether ceased soliciting work in public rights-of-way, and
24 others are decreasing the number of days and the manner in which they do so. Harrington
25 Decl. at ¶¶ 10-12; Enrique Decl. at ¶ 10 (Since these provisions took effect, “[s]ome
26 jornalero members have ceased soliciting work in public entirely and others have cut
27 down on the number of days that they solicit work in public because they are afraid of
28 being arrested under Section 5(b) of S.B. 1070.”).

1 The day laborers fear being subjected to criminal sanctions, including
2 imprisonment, imposed by §§ 13-2928 (A) and (B), further evidencing irreparable harm
3 under First Amendment doctrine. *See* Harrington Decl. ¶¶ 10, 12; Enrique Decl. ¶¶ 10-14.
4 This fear has exacerbated among Plaintiff Tonatierra’s day laborer members following the
5 publication of a news article reporting Maricopa County Sheriff Joe Arpaio’s intent to
6 enforce § 13-2928. Enrique Decl. ¶¶ 12-14. On November 7, 2010, the Arizona Republic
7 published an article quoting Sheriff Arapio as stating that he “[is] going to enforce one
8 part of [S.B. 1070] about picking up laborers [because] [t]hat part wasn’t thrown out.” *Id.*
9 at ¶12, Exh. A. Plaintiff Tonatierra’s day laborer members soon thereafter learned about
10 Sheriff Arpaio’s reported threat to enforce § 13-2928, causing even greater fear that they
11 will be arrested if they solicit work in the manner proscribed by §§ 13-2928 (A) and (B).
12 *Id.* at ¶ 13. Indeed, another Arizona District Court has previously found irreparable injury
13 with respect to a similar ban on speech related to day labor adopted by the town of Cave
14 Creek, Arizona. *Lopez v. Town of Cave Creek*, 559 F. Supp. 2d 1030, 1036 (D. Ariz.
15 2008) (enjoining city ordinance that prohibited standing on a street to solicit employment
16 from the occupant of any vehicle). The result should be no different here.

17 The solicitation prohibitions imposed by §§ 13-2928 (A) and (B) also subject day
18 laborers to severe economic hardship. *Cf. Satellite Television of New York Assoc. v.*
19 *Finneran*, 579 F. Supp. 1546, 1551-52 (S.D.N.Y. 1984) (considering economic burden on
20 party moving for preliminary injunction in evaluating irreparable harm and balance of
21 hardships). Most of Plaintiffs’ member day laborers rely on day work to sustain
22 themselves and their families. *See* Harrington Decl. ¶ 12; Enrique Decl. ¶ 15. Day work
23 is oftentimes the only available means for Plaintiffs’ member day laborers to obtain work
24 and is critical to their livelihood. *Id.* Due to the restrictions and sanctions imposed by §§
25 13-2928 (A) and (B), the day laborer members have refrained from soliciting or modified
26 the manner in which they solicit work in public rights-of-way, resulting in the reduction of
27 income from their day labor and in severe economic hardship. *Id.* In addition, individuals
28 who hire day laborers have indicated that they are reluctant to communicate publicly with

1 day laborers about their need for day work due to fear they will be subjected to fines
2 under §§ 13-2928 (A) and (B). Harrington Decl. ¶¶ 12-13. This reticence by employers
3 has led to “less day work” and, as a result, “day laborer members are struggling to provide
4 for themselves and their families.” *Id.* at ¶13.

5 **C. The Equities Tip Decidedly in Plaintiffs’ Favor.**

6 The equities tip decidedly in Plaintiffs’ favor. The hardship that Plaintiffs would
7 suffer without injunctive relief is substantial. *See* Harrington Decl. ¶ 12; Enrique Decl. ¶¶
8 15, 16. Plaintiffs face the option of either refraining from exercising their free speech
9 rights or risking criminal sanctions. *See* Harrington Decl. ¶¶ 10, 12; Enrique Decl. ¶¶ 15,
10 16. If, despite their best efforts, they are arrested for violation of the law, they would
11 suffer, at a minimum, the indignity and financial burden of arrest and incarceration. *Cf.*
12 *Satellite Television of New York Assoc.*, 579 F. Supp. at 1552 (S.D.N.Y. 1984).

13 In contrast, the hardship to Defendants if the preliminary injunction were to issue is
14 negligible at best. If Defendants are preliminarily enjoined from enforcing §§13-2928 (A)
15 and (B), they will continue to have the right to control traffic and pedestrian safety and
16 protect public and private property by enforcing state statutes and municipal codes that
17 regulate these matters. Given these existing laws, Defendants are fully capable of
18 addressing any problems allegedly caused by employment solicitors even if the Court
19 enjoins §§13-2928 (A) and (B). The balance of hardships, therefore, tips decidedly in
20 favor of Plaintiffs, and an injunction should issue.

21 **D. A Preliminary Injunction is in the Public Interest.**

22 The Ninth Circuit has “consistently recognized the significant public interest in
23 upholding free speech principles.” *Klein*, 584 F.3d at 1208 (quoting *Sammartano*, 303
24 F.3d at 974 (collecting cases) (internal quotation marks omitted)). Indeed, §§13-2928 (A)
25 and (B) “would infringe not only the free expression interests of [Plaintiffs], but also the
26 interests of other people subjected to the same restrictions.” *Id.* (internal quotation marks
27 omitted). Here, §§ 13-2928 (A) and (B) restrict the ability of any potential speaker from
28 expressing his need and availability to work or hire day labor, and thus infringe on the

1 free speech rights of anyone seeking to engage in speech in the manner prohibited by the
2 laws. Thus, issuing the preliminary injunction here would advance the public interest in
3 upholding free speech.

4 **V. CONCLUSION**

5 Sections 13-2928 (A) and (B) unconstitutionally infringe upon the right of day
6 laborers to express their need and availability to work in a public forum. Because “[t]he
7 balance of equities and the public interest . . . tip sharply in favor of enjoining [Sections
8 13-2928 (A) and (B),]” and Ninth Circuit “caselaw clearly favors granting preliminary
9 injunctions” where the plaintiffs are “likely to succeed on the merits of [their] First
10 Amendment claim[,]” the Court should grant Plaintiffs’ motion. *Klein*, 584 F.3d at 1208.

11 Accordingly, Plaintiffs respectfully request that the Court enjoin Defendants from
12 enforcing A.R.S. Sections 13-2928 (A) and (B).

13
14 Dated: January 07, 2011

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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18 COPY was also sent with Notice of Electronic Filing via Courier on January 7, 2010 to:

19
20 The Honorable Susan R. Bolton
21 United States District Court
22 Sandra Day O'Connor U.S. Courthouse, Suite 522
23 401 W. Washington Street, SPC 50
24 Phoenix, AZ 85003-2153

25
26
27
28
/s/ Anna Godinez