

## STUDENT WORKS

# STREETS OF WRATH: THE CONSTITUTIONALITY OF THE TOWN OF JUPITER'S NON-SOLICITATION ORDINANCE

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### I. INTRODUCTION

Whether it is discussed in the context of homeland security, economic implications, or allegations of racism, the issue of immigration is a perennial hot-button topic. Though much of the debate and discussion takes place at the national level<sup>1</sup> as various “talking heads” argue the merits of guest-worker programs versus fence-building initiatives, the task of actually dealing with immigration on a tangible scale most often falls to city and town governments.<sup>2</sup> Local officials, not federal immigration officers, bear

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1. Even though Congress continues to discuss the immigration issue, immigration laws are only “inconsistently and sporadically” enforced at the federal level. Jonathan Walters, *Toil and Trouble*, *Governing* 26 (Apr. 2006) (available at <http://www.governing.com/articles/0604immig.htm>).

2. States and counties are largely absent from the debate, either because they lack the governmental authority to deal with the problem, or because they simply lack the motivation. *See id.* (noting that states as a whole do not bear the burden of dealing with “local day-labor skirmishes”). As a result, problems stemming from an influx of illegal immigration are often left squarely in the hands of municipal governments. *Id.*; *see* Silla

the burden of dealing with the problems presented by an influx of undocumented workers.<sup>3</sup> While some local governments or citizens have attempted to “round up” illegal immigrants and report them to the nearest Immigration and Naturalization Service (INS) branch office,<sup>4</sup> or have simply tried to run illegal immigrants out of town,<sup>5</sup> not all municipalities choose such harsh tactics. Factors such as lack of adequate law enforcement,<sup>6</sup> feared economic disruption,<sup>7</sup> and simple human compassion<sup>8</sup> have com-

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Brush, *Local Labor Pains*, 139 U.S. News & World Rpt. 26 (Oct. 24, 2005) (available in Lexis, News library) (concluding that “until something happens in Washington, the immigration wars will continue to be fought around Main Street convenience stores and parking lots”).

3. Brush, *supra* n. 2; see e.g. *Jupiter Trying to Solve Problem Feds Created*, Palm Beach Post 12A (Jan. 3, 2005) (noting that federal gridlock required officials in Jupiter, Florida to either ignore the problems presented by illegal immigration or create an alternative solution).

4. See e.g. Terry McCarthy, *Stalking the Day Laborers*, 166 Time Mag. 36 (Nov. 28, 2005) (available at <http://www.time.com/time/magazine/article/0,9171,1134748,00.html>) (detailing the efforts of the Minutemen to take pictures of immigrants living in Phoenix, Arizona and to send their pictures to the Internal Revenue Service and to U.S. Immigration and Customs Enforcement).

5. The Village of Mount Kisco, New York, for example, employed methods such as “midnight raids,” in which local officials searched for violations of the municipal code (such as too many people residing in a single dwelling) before eventually switching tactics and opening up a day-labor center. Walters, *supra* n. 1. Jupiter, Florida, has intermittently employed similar tactics and has even taken to filing suit against landlords who allow too many tenants to reside in one dwelling. See e.g. Pamela Perez, *Landlord Accuses Jupiter of Race Bias in Code Raids*, Palm Beach Post 6B (Jan. 28, 2006) (detailing a landlord’s lawsuit against the Town of Jupiter); Pamela Perez, *Landlord Alleges Bias in Lawsuit against Jupiter*, Palm Beach Post 4B (Aug. 24, 2005) (also detailing a landlord’s lawsuit against the Town of Jupiter).

6. Local law-enforcement organizations may be ill-equipped to deal with illegal immigrants either because they lack the appropriate training, or even more simply, the manpower. See e.g. Keyonna Summers, *Area Police Stand Pat on Aliens*, Washington Times A01 (Aug. 5, 2006) (noting that Washington, D.C.-area local law-enforcement officials lacked both the authority and the manpower to detain illegal immigrants). Some local law-enforcement agencies are reluctant to take action against illegal immigrants for fear of damaging their relationship with the Hispanic community. *Id.* The federal government does, however, offer a program that allows the Department of Homeland Security to enter into agreements that permit certain local law-enforcement officers to act as immigration law-enforcement officers. 8 U.S.C. § 1357(g) (2006); U.S. Immig. & Cust. Enforcement, *Partners*, [http://www.ice.gov/partners/287g/Section287\\_g.htm](http://www.ice.gov/partners/287g/Section287_g.htm) (updated Mar. 10, 2008).

7. See *An Answer or a Problem?* Economist (July 26, 2003) (explaining that local trade unions often see illegal immigrants as potential recruits); Dick Foreman, *Illegals Lining Our Streets Because We Want Them Here to Use Their Labor*, Ariz. Republic 18 (June 9, 2006) (noting that the labor and services provided by illegal immigrants create an inexpensive “underground economy” for services such as car-washing, landscaping, and construction).

8. See *Morning Edition*, “Day Labor Centers Spark Immigration Debate” (NPR Aug.

pelled some municipalities to seek alternative methods of addressing the problems created by growing immigrant populations.

One of those problems is the emerging phenomena of day labor. Day laborers, or workers who solicit individual, unique employment on a daily basis, are overwhelmingly Latino men who enter the United States without documentation.<sup>9</sup> Day laborers often seek work by congregating on sidewalks and street corners, jockeying for a chance to be picked up in vehicles driven by independent contractors, landscape companies, and even private homeowners, who will provide them with a job and an hourly wage for the day.<sup>10</sup> This type of congregation, however, can often create a host of problems, such as traffic flow and safety issues<sup>11</sup> as well as aesthetic and health concerns, such as littering, unwanted noise, public intoxication, and public urination.<sup>12</sup>

One such municipality dealing with day labor and its resultant problems is the town of Jupiter, Florida. Located in north Palm Beach County, Jupiter boasts a Hispanic population of 2,881 people.<sup>13</sup> With such a high immigrant popula-

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19, 2005) (radio broad., transcr. available in Lexis, News library) (noting that for some, providing assistance to illegal immigrants is “pragmatic, humane[,] and the Christian thing to do”).

9. Abel Valenzuela Jr., Nik Theodore, Edwin Meléndez & Ana Luz Gonzalez, *On the Corner: Day Labor in the United States* 17 (Jan. 2006) (available at [http://www.sscnet.ucla.edu/issr/csup/uploaded\\_files/Natl\\_DayLabor-On\\_the\\_Corner1.pdf](http://www.sscnet.ucla.edu/issr/csup/uploaded_files/Natl_DayLabor-On_the_Corner1.pdf)).

10. See e.g. Walters, *supra* n. 1 (noting that in the roughly 500 communities nationwide dealing with day-laborer populations of 100,000 or more, around half work for private homeowners and about 43% work for independent contractors).

11. See e.g. *Assn. Community Orgs. Reform Now v. City of Phoenix*, 798 F.2d 1260, 1269 (9th Cir. 1986) (explaining that “distraction of motorists occasioned by solicitation not only threatens to impede the orderly flow of traffic, but also raises serious concerns of traffic and public safety”); *Xiloj-Itzep v. City of Agoura Hills*, 24 Cal. App. 4th 620, 631 (Cal. App. 2d Dist. 1994) (noting that congregation of day laborers—or any solicitors, for that matter—on streets and sidewalks poses a serious risk to traffic safety); Ana X. Cerón, *With Center for Laborers Open, Solicitation on Street Faces Ban*, Palm Beach Post 3C (Sept. 4, 2006) (noting that street-side solicitation-transactions clog the flow of traffic).

12. See e.g. *Lake Worth’s Labor Pains*, Palm Beach Post 22A (Feb. 15, 2007) (noting increasing complaints in Lake Worth, Florida, regarding the connection between day labor and unwanted noise, littering, and loitering); Sharon Pian Chan, *CASA Latina Finds a New Home*, Seattle Times B1 (Feb. 13, 2007) (describing complaints in Belltown, Washington about day laborers, public drunkenness, and urination); Libby Wells, *Day Labor Center Idea Discouraged*, Palm Beach Post 3C (Nov. 13, 2004) (detailing residents’ complaints of noise, trash, drunkenness, and public urination).

13. U.S. Census Bureau, *Fact Sheet: Jupiter Town, Florida*, <http://factfinder.census.gov> (search Jupiter, Florida, select Fact Sheet for a Race, Ethnic or Ancestry Group, select Hispanic or Latino) (data from 2000). Assuming that the census undercounts, the actual total may be closer to three thousand, or perhaps even as high as four thousand

tion,<sup>14</sup> however, comes a large number of day laborers vying for daily work. Before Jupiter's town council took action, day laborers most often congregate on the sidewalks adjacent to Center Street,<sup>15</sup> which primarily runs alongside residential neighborhoods. Potential employers would then pull their vehicles up to the curb and select a few laborers from the often hundreds who would line up alongside the street each morning.<sup>16</sup>

After receiving complaints from both residents and drivers, regarding issues of traffic flow and aesthetics,<sup>17</sup> Jupiter sought to alleviate the problems associated with this kind of street-side solicitation by containing it in a central day-labor center.<sup>18</sup> In September 2006, the El Sol Neighborhood Resource Center opened its doors to Jupiter laborers seeking daily employment.<sup>19</sup> In addition to the labor center, and in an effort to confine all solicitation by day laborers to the labor center, Jupiter enacted a non-solicitation ordinance to severely restrict the ability of day laborers to solicit work from particular locations.<sup>20</sup> Now a part of the official town code, the Ordinance forbids any individual from standing on a street, or any sidewalk, driveway, or roadway immediately adja-

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people. Timothy J. Steigenga & Irene Palma, *Religion, Transnationalism, and Public Action Among the Maya of Jupiter Florida: Recreated Images of Home and Collective Identity* 3 (cited with the authors' permission).

14. Some estimates put Jupiter's Hispanic population at as high as twenty percent of the town's total population in contrast to the approximately seven percent reported by the United States Census Bureau. Stephanie Smith, *Center Street Crowd Concerns Some Residents*, Palm Beach Post, Neighborhood Post 1A (June 27, 2001).

15. See *id.* (noting that Jupiter residents complained about traffic congestion and trampled plants).

16. See John Lantigua, *Suburbanites, Day Laborers at Odds in Jupiter*, Palm Beach Post 1A (Feb. 16, 2004) (stating that "as many as 300 unemployed Latin men line up along Center Street most mornings").

17. Smith, *supra* n. 14, at 1A.

18. Libby Wells, *Jupiter Officials Discuss Pickup Spot for Laborers*, Palm Beach Post 7B (Oct. 28, 2004).

19. Ana X. Cerón, *Opening Day Not So Sunny for El Sol*, Palm Beach Post 1B (Sept. 7, 2006). Months after its opening date, El Sol is experiencing a great deal of success. Ltr. to the Ed., *Jupiter's El Sol Also Rises*, Palm Beach Post 12A (Sept. 16, 2006). Not only does El Sol provide day laborers and potential employers a safe, central environment in which to contract, but the Center also offers courses in English, literacy, and immigration law. Cerón, *supra* n. 11, at 3C.

20. Jupiter Town Code (Fla.) §§ 7-90–7-93 (2006). The Ordinance was specifically enacted with day laborers in mind; in fact, the preamble to the ordinance (in its uncodified version) lays out the various problems associated with street-side solicitation by day laborers in Jupiter. Jupiter, Fla., Ordin. 29-05 (Sept. 5, 2006).

cent thereto, and from soliciting business<sup>21</sup> or employment<sup>22</sup> from any person traveling in a vehicle.<sup>23</sup> Likewise, anyone traveling in a vehicle is forbidden from soliciting the same from any individual standing in these throughways.<sup>24</sup> Street-side solicitation of business or employment is restricted exclusively to either the labor center or to certain commercial and residential parking lots unless the owner of the property has posted a sign stating otherwise.<sup>25</sup>

Jupiter is certainly not the first municipality to resort to legislating street-side solicitation.<sup>26</sup> What makes Jupiter different, however, is that it is one of the only municipalities to enact an ordinance restricting only street-side solicitation with certain content—namely, solicitation that requests business or employment.<sup>27</sup> A freedom-of-speech challenge to the Ordinance under the

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21. The Ordinance defines “business” as follows: “*Business* shall mean and include, any type of product, goods, services, performance[,] or activity which is provided or performed or offered to be provided or performed, in exchange for money, labor, goods, or any other form of consideration.” Jupiter Town Code at § 7-91(1) (emphasis in original).

22. The Ordinance defines “employment” as follows: “*Employment* shall mean and include, services, industry[,] or labor performed by a person for wages, or other compensation or under any contract of hire, written or oral, expressed or implied.” *Id.* at § 7-91(3) (emphasis in original).

23. *Id.* at § 7-92(a). The Ordinance also prohibits drivers from soliciting day laborers on the street. *Id.* at 7-92(b).

24. *Id.* at § 7-92(b).

25. *Id.* at §§ 7-92–7-93. The Ordinance explicitly provides that no such portion shall apply to the labor center. Jupiter Town Code at § 7-93.

26. *E.g.* Cave Creek Town Code (Ariz.) § 72.17(C) (2007); Orange Mun. Code (Cal.) §§ 9.37.010–9.37.060 (2007); Agoura Hills Mun. Code (Cal.) §§ 3208–3210 (1991); Baton Rouge City Code (La.) § 11:96(b) (1983); St. Louis Co. Code (Mo.) § 1209.090 (1985). The American Civil Liberties Union and the Mexican-American Legal Defense Fund recently filed a lawsuit against the town of Cave Creek, alleging that the Cave Creek ordinance violates the First Amendment regardless of whether it is considered content-neutral or content-based. Compl. for Injunctive & Temp. Relief ¶¶ 3–4, *Lopez et al. v. Town of Cave Creek* (D. Ariz. Mar. 25, 2008); see also Lindsey Collom & Beth Duckett, *Day-Labor Measure Disputed*, Ariz. Republic Valley & St. 1 (Mar. 26, 2008) (quoting an American Civil Liberties Union attorney as stating that “[t]he town does not have the right to pick and choose who has free-speech rights”).

27. Recently, the newly incorporated municipality of Loxahatchee Groves, Florida, adopted a non-solicitation ordinance that is almost a word-for-word reproduction of the Jupiter Ordinance. Loxahatchee Groves, Fla., Ordin. 2008-01 (Feb. 19, 2008). Additionally, some cities have even more restrictive ordinances banning only the street-side solicitation of employment. *E.g.* Laguna Beach Mun. Code (Cal.) § 8.10.030 (1993). Marietta, Georgia, has enacted an even more restrictive ordinance that specifically outlaws the hiring of day laborers and the soliciting of “temporary employment as a day laborer.” Marietta Code Ordin. (Ga.) § 10-4-130 (1999). Marietta police appear to primarily enforce the ordinance against those who hire day laborers, not against those who solicit work as day laborers.

First Amendment, therefore, would likely yield different results than previous First Amendment challenges to similar but less restrictive ordinances.<sup>28</sup> Because Jupiter's ordinance affects only the street-side solicitation of business or employment, the Ordinance is likely a regulation on commercial speech,<sup>29</sup> which would

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See Jeremy Redmon, *Day Labor Dispute: Hiring Off the Curb? Not in Marietta*, Atlanta Journal-Constitution 1B (Sept. 20, 2007) (noting that for eight years, city police have ticketed "builders, landscapers[,] and even homeowners seeking help with lawn work"). To date, none of these ordinances appear to have been the subject of litigation.

28. Because the vast majority of similar ordinances have restricted *all* forms of street-side solicitation (i.e., the street-side solicitation of business, employment, and charitable contributions), these ordinances have been deemed "content-neutral" and have been subjected to a lower standard of constitutional review for non-commercial speech. See *infra* pt. II(B)(1) and accompanying text (detailing the standard of review for content-neutral regulations on speech); *infra* pt. II(A) (analyzing Jupiter's ordinance under the standard of review for commercial speech).

29. It is somewhat unclear what type of speech restriction Jupiter was trying to create. An early memorandum drafted by Jupiter's town attorney seems to view day-labor solicitation as commercial speech. See Memo. from Thomas J. Baird, Town Atty., Jupiter, Fla., to Karen Golonka, Mayor, Jupiter, Fla. & Members, Jupiter Town Council, Jupiter, Fla., *Street-Side Solicitation Ordinance 1* (Jan. 14, 2005) (copy on file with Author) (discussing a potential ordinance within the framework of commercial speech); Telephone Interview with Thomas J. Baird, Town Atty., Jupiter, Fla. (Apr. 27, 2007) (granting the Author permission to cite this memorandum). The memorandum combines the test for regulating commercial speech with the test for regulating non-commercial speech in a content-neutral fashion by stating the test as follows:

A restriction on commercial speech will be upheld, if: (1) it implements a substantial government interest; (2) the restriction directly advances that government interests; (3) it extends no further than necessary to achieve the government's objective; and (4) it leaves open ample alternative channels for communication.

Memo., *supra* n. 29, at 1. The memorandum cites to *Ward v. Rock Against Racism*, 491 U.S. 781, 798–799 (1989) and *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984), both of which concern the content-neutral regulation of speech. *Id.* However, the test articulated in the memorandum appears to combine principles from two separate constitutional formulas—one for assessing the constitutionality of a regulation on commercial speech and another for assessing the constitutionality of a content-neutral regulation on non-commercial speech. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm. of N.Y.*, 447 U.S. 557, 564 (1980); *Ward*, 491 U.S. at 798–799; *Clark*, 468 U.S. at 293. Furthermore, although the memorandum seems to definitively label day-labor solicitation as commercial speech, the Ordinance's preamble asserts that the Ordinance is a "reasonable time, place, and manner restriction" on speech, which suggests that Jupiter is intending to regulate not commercial speech, but non-commercial speech, albeit in a content-neutral manner. Jupiter, Fla. Ordin. 29-05. The memorandum also asserts that day-labor solicitation is commercial speech and that the Supreme Court has held that day-labor solicitation is a form of commercial speech. Memo., *supra* n. 29, at 1. (citing *Schaumburg v. Citizens for a Better Env.*, 444 U.S. 620 (1980) for the proposition that "[i]t has been held that day laborers who congregate along public rights-of-way, and attempt to make contact with potential employers to gain employment, are engaged in a form of commercial free speech"). However, *Schaumburg* did not deal with day laborers, or even with the solicitation of employment or business, but with charitable solicitations and held that such chari-

subject the Ordinance to an entirely different standard of constitutional review than its less restrictive counterparts.<sup>30</sup> In the alternative, should a court disagree that the Ordinance regulates commercial speech, the Ordinance would likely be subjected to stricter standards of review and would have extreme difficulty overcoming a constitutional challenge.<sup>31</sup>

Part II of this Article explores the historical development of caselaw regarding regulations on both commercial and non-commercial speech and the various tests and standards of review applied to both classes of speech. Part III analyzes a possible as-applied challenge to the Ordinance by day laborers and takes into account all potentially applicable standards of review, including standards for commercial speech, content-neutral non-commercial speech, and content-based non-commercial speech. Because this analysis will be limited to an as-applied challenge, vagueness and overbreadth issues will not be analyzed.<sup>32</sup> Finally, Part IV offers

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table solicitations were not commercial speech, but were non-commercial in nature. *Schaumburg*, 444 U.S. at 632, 634.

30. Compare *infra* pt. II(A) (detailing the standard of review for regulations on commercial speech) with *infra* pt. II(B) and accompanying text (laying out the standards of review for content-neutral and content-based regulations on speech, respectively).

31. See *infra* pt. II(B)(2) and accompanying text (laying out the standards of review for content-based regulations of speech); *infra* pt. III(D)(2) (analyzing the Ordinance under the standard of review for content-based regulations on speech).

32. The Ordinance does not appear to have substantial problems with either vagueness or overbreadth. The Ordinance quite clearly spells out what it intends to regulate—the solicitation of business or employment—and clearly defines its terms. Jupiter Town Code at § 7-91. These definitions clearly establish standards so that ordinary people can understand what is prohibited and so that the statute does not encourage arbitrary or discriminatory enforcement by the police or other government officials. *Kolender v. Lawson*, 461 U.S. 352, 357–358 (1983). Nor does the Ordinance face a substantial problem with overbreadth and the resultant possibility that lawful speech will be chilled. First, the Supreme Court has held that the overbreadth doctrine is inapplicable to commercial-speech regulations. *Village of Hoffman Ests. v. Flipside, Hoffman Ests.*, 455 U.S. 489, 497 (1982) (citing *Central Hudson*, 447 U.S. at 565 n. 8); *Schaumburg*, 444 U.S. at 634. Second, even if Jupiter’s ordinance is a regulation on non-commercial speech, the Court has held that, especially when conduct and speech are intertwined, “the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute’s plainly legitimate sweep.” *Broadrick v. Okla.*, 413 U.S. 601, 615 (1973). It is doubtful that Jupiter’s ordinance is substantially overbroad. The Ordinance’s terms make it clear that only the solicitation of business or employment is forbidden. Those who wish to stand in or adjacent to the streets and solicit charitable contributions, or to distribute literature, religious materials, free newspapers, political flyers, or manifestos may do so. While there may be some chance that someone wishing to provide free business services while soliciting charitable contributions may be “chilled,” such a possibility could hardly be deemed “substantial.”

some solutions for the Town of Jupiter and for other municipalities looking to adopt similar legislation.

## II. HISTORICAL OVERVIEW

The government's ability to regulate speech on government property is analyzed via a "forum-based" approach under which a court will ask whether the government's interest in restricting its property to its intended purpose outweighs the interests of persons wishing to use government property for another purpose.<sup>33</sup> The strength of the government's interests depends on the nature of the forum the speaker seeks to use<sup>34</sup> because some types of forums are entitled to more speech protection than others.<sup>35</sup> In a public forum, the government's power to regulate speech is severely limited because one of the major purposes of public forums has traditionally been to provide a ground for the free exchange of ideas.<sup>36</sup>

Included among these traditional public forums—in fact, recognized by the courts as "quintessential" public forums<sup>37</sup>—are streets and parks, which "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."<sup>38</sup> This "quintessential" designation applies just as forcefully to narrow streets or streets running through residential neighborhoods.<sup>39</sup> Speech on a narrow, resi-

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33. *Intl. Socy. Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992) (citing *Cornelius v. NAACP Leg. Def. & Educ. Fund*, 473 U.S. 788, 800 (1985)).

34. *Cornelius*, 473 U.S. at 800 (declaring that "the extent to which the [g]overnment can control access [to the forum] depends on the nature of the relevant forum").

35. While speech taking place in a "traditional" public forum, as well as forums that the government designates as public, is afforded the highest level of protection, other forums merit a less strict standard of review. For example, speech in a public forum where the government acts not merely as lawmaker, but as proprietor and manager, is subject to a lower standard of review than is speech in a traditional public forum. *Lee*, 505 U.S. at 678 (citing *U.S. v. Kolinda*, 497 U.S. 720, 725–726 (1990) (plurality opinion)). Similarly, speech in a nonpublic forum may be curtailed as long as the regulation is reasonable and has not been enacted merely because the legislature disagrees with the speaker's message. *Cornelius*, 473 U.S. at 800.

36. *Id.* (citing *Perry Educ. Assn. v. Perry Loc. Educators' Assn.*, 460 U.S. 37, 45 (1983)).

37. *Perry*, 460 U.S. at 45 (quoting *Hague v. Comm. Indus. Org.*, 307 U.S. 496, 515 (1939)).

38. *Hague*, 307 U.S. at 515.

39. *Frisby v. Schultz*, 487 U.S. 474, 480–481 (1988); see *United Elec., Radio & Machine Workers of Am. v. St. Employee Rel. Bd.*, 710 N.E.2d 358, 361 (Ohio App. 8th Dist. 1998)



dential street, therefore, is protected by the same level of scrutiny as is speech on a wider, more commercially traveled street.<sup>40</sup>

Once the court has identified the relevant forum and the level of protection afforded to the speech in question, the next step involves determining the type of speech with which the court is dealing. Speech can generally be classified into two basic and vastly broad categories—commercial speech and non-commercial speech.

### A. Commercial Speech

Commercial speech is speech that does no more than propose a business transaction and is limited to the promotion of goods or services.<sup>41</sup> While these fairly basic tenets underlie all commercial speech in theory, their practical application is much more complicated as speech can—and often does—contain both commercial and non-commercial elements. In some cases, the Supreme Court has held that such “mixed” speech will be treated as non-commercial speech.<sup>42</sup> For example, the solicitation of funds for charitable purposes, while primarily an economic transaction, involves inextricable non-commercial elements, such as the dissemination of information and the advocacy of ideas or causes, and thus has been treated as non-commercial speech.<sup>43</sup> Some courts have identified individual panhandling as non-commercial speech as the act of panhandling inevitably involves the communication of support for the panhandler’s cause in addition to the exchange of money.<sup>44</sup>

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(finding that a street that ran directly in front of an occupied home was still a public forum, regardless of its “physical narrowness [or] residential character”).

40. *Frisby*, 487 U.S. at 481 (emphasis added) (holding that “all public streets are held in the public trust and are properly considered traditional public for[ums;] . . . [t]he residential character of those streets may well inform the application of the relevant test, but it does not lead to a different test”).

41. *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 422 (1993); *Va. St. Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 762 (1976).

42. *Riley v. Natl. Fed. of the Blind of N.C.*, 487 U.S. 781, 796 (1988).

43. *Schaumburg*, 444 U.S. at 632 n. 7 (holding that “[t]o the extent that any of the Court’s past decisions discussed . . . hold or indicate that commercial speech is excluded from First Amendment protections, those decisions, to that extent, are no longer good law”).

44. See e.g. *Smith v. City of Ft. Lauderdale*, 177 F.3d 954, 956 n. 2 (11th Cir. 1999), cert. denied, 528 U.S. 966 (1999) (recognizing that begging is a form of speech protected under the First Amendment, but declining to rule on whether it is commercial speech);

However, not all mixed speech automatically merits recognition as non-commercial speech. In fact, the Supreme Court has explicitly held that a speaker may not avoid commercial-speech standards of review by couching commercial speech in speech pertaining to public debate.<sup>45</sup> In *Bolger v. Youngs Drugs Products Corp.*,<sup>46</sup> a pharmaceutical company sought to mail out unsolicited information regarding prophylactics.<sup>47</sup> The mailings contained not only an advertisement for the product, but also information regarding sexually transmitted diseases and human sexuality,<sup>48</sup> and, therefore, were inherent support for the very use of contraceptives themselves. Though the advertisements arguably contained a mix of both commercial and non-commercial elements, the Court found that the combination of the advertising nature of the pamphlets, the reference to a specific product, and the economic motivation behind the pamphlets supported the conclusion that the pamphlets were commercial speech.<sup>49</sup> After *Bolger*, courts have looked to those three questions—whether speech is an advertisement, whether speech refers to a particular product or service, and whether the speech contains an economic motivation—to determine whether the speech at issue is commercial.<sup>50</sup>

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*Loper v. N.Y. City Police Dept.*, 999 F.2d 699, 704 (2d Cir. 1993) (noting that “[e]ven without particularized speech, however, the presence of an unkempt and disheveled person holding out his or her hand . . . itself conveys a message of need for support and assistance”). The court found “little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed.” *Id.*

45. *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67–68 (1983) (citing *Central Hudson*, 447 U.S. at 563 n. 5 (1980)).

46. 463 U.S. 60.

47. *Id.* at 62.

48. *Id.* at 66 n. 13. In ruling that the contraceptive advertisements were commercial speech, the Court reasoned that “[a]dvertisers should not be permitted to immunize false or misleading product information from government regulation simply by including reference to public issues.” *Id.* at 68; *Bd. of Trustees St. Univ. N.Y. v. Fox*, 492 U.S. 469, 475 (1989) (quoting *Central Hudson*, 447 U.S. at 563 (holding that “advertising which ‘links a product to a current public debate’ is not thereby entitled to the constitutional protection afforded non-commercial speech”).

49. *Bolger*, 463 U.S. at 66–67. The Court also noted that while the presence of the three factors was enough to deem the pamphlets commercial speech, the presence of only one factor likely would not. *Id.* There is no rigid formula for drawing a bright line between commercial and non-commercial speech; in fact, the Supreme Court has phrased the distinction as sometimes being simply “a matter of degree.” See *Cincinnati*, 507 U.S. at 423 (referring to the distinction between commercial speech and editorial content found in print newspapers).

50. See e.g. *World Wrestling Fedn. Ent. v. Bozell*, 142 F. Supp. 2d 514, 526 (2001) (applying the *Bolger* factors and holding that defendant’s statements regarding the World

Speech that combines these three elements with elements of non-commercial speech is not automatically considered non-commercial speech;<sup>51</sup> however, commercial speech that is “inextricably intertwined” with non-commercial speech may be deemed holistically non-commercial.<sup>52</sup> As previously mentioned, the solicitation of charitable contributions, for example, is not considered commercial speech because it is inextricably intertwined with whatever message or ideology the charity supports.<sup>53</sup> The commercial act of transferring money from one possessor (the donor) to another (the charity) cannot be separated from the non-commercial act of aligning one’s self with a charitable goal—by making a charitable donation one inherently expresses support for the charity’s cause.<sup>54</sup>

Once speech has been deemed commercial, the government’s regulation is subjected to a four-prong test initially set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*<sup>55</sup> and later modified by *Board of Trustees of the University of New York v. Fox*.<sup>56</sup> The test requires that a regulation on (1) non-misleading, lawful commercial speech<sup>57</sup> must seek

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Wrestling Federation’s responsibility for the deaths of four children were commercial speech because they were made primarily to raise money); *Keimer v. Buena Vista Books*, 75 Cal. App. 4th 1220, 1229–1230 (Cal. App. 1st Dist. 1999) (applying *Bolger* factors and holding that covers of investment club books were commercial speech); *N.Y. Pub. Interest Research Group v. Ins. Info. Inst.*, 531 N.Y.S.2d 1002, 1011 (N.Y. 1988) (relying on the *Bolger* factors to hold that an advertisement intended to promote sales is commercial speech, whereas an advertisement that serves as a direct comment on a public issue is not).

51. *Supra* nn. 43–45 and accompanying text.

52. *Riley*, 487 U.S. at 796; *Schaumburg*, 444 U.S. at 632 (explaining that regulation of a solicitation “must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech . . . and for the reality that without solicitation the flow of such information and advocacy would likely cease”).

53. *Id.* at 632.

54. *Id.*; *supra* n. 45 and accompanying text.

55. 447 U.S. at 564–565 (non-commercial speech is subjected to different sets of regulations).

56. 492 U.S. at 475–476.

57. *Central Hudson*, 447 U.S. at 563–564, 566; *Va. Pharmacy*, 425 U.S. at 771–772 (noting that “[u]ntruthful speech, commercial or otherwise, has never been protected for its own sake . . . [w]e foresee no obstacle to a [s]tate’s dealing effectively with this problem”); see *id.* at 772 n. 24 (arguing that “the greater objectivity and hardiness of commercial speech may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker”).

to (2) further a substantial government interest;<sup>58</sup> (3) directly advance that interest;<sup>59</sup> and (4) be narrowly tailored to serve that interest.<sup>60</sup> In the context of commercial speech, narrow tailoring means only that there must be a reasonable fit between the government's objective and the regulation promulgated.<sup>61</sup>

Though the "reasonable fit" standard seems far more likely to favor the legislature than the speaker, in practice this is not always the case. In fact, though *Fox* articulated a less restrictive test for analyzing narrow tailoring, at times the Court still seems "stuck" on the old "no more extensive than necessary" language of *Central Hudson* and seems to weigh heavily the availability of less restrictive alternatives. In *Rubin v. Coors Brewing Co.*,<sup>62</sup> for example, the Supreme Court struck down a portion of the Federal Alcohol Administration Act (FAAA) banning beer labels from dis-

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58. *Central Hudson*, 447 U.S. at 564, 566; see e.g. *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 490–491 (1995) (striking down a law prohibiting the advertising of alcohol content on beer labels because the government had less restrictive alternative available, such as limiting the prohibition only to drinks with stronger alcohol contents or by prohibiting advertising campaigns emphasizing a high alcohol content).

59. *Central Hudson*, 447 U.S. at 564, 566. The government bears the burden of demonstrating that the regulation advances the substantial government interest "in a direct and material way." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). The burden is not satisfied by "speculation or conjecture;" the government must make a real showing that the harm to its interests is real and that the regulation will quell those harms to a substantial degree. *Id.* at 770–771.

60. *Fox*, 492 U.S. at 480. *Fox* modified the third prong of the *Central Hudson* test, which originally required the government regulation to be the least restrictive means possible; in other words, not more extensive than necessary to serve the government interest. *Central Hudson*, 447 U.S. 557 at 564, 566. In *Fox*, the Court articulated the new test as follows:

What our [prior] decisions require is a "fit" between the legislature's ends and the means chosen to accomplish those ends" . . . a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served," . . . that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

*Fox*, 492 U.S. at 480 (citations omitted). The Court specifically noted the difficulty of "establishing with precision the point at which restrictions become more extensive than their objective requires" and saw fit to "provide the Legislative and Executive Branches needed leeway in a field (commercial speech) 'traditionally subject to governmental regulation[.]'" *Id.* at 481 (quoting *Ohralik v. Oh. St. Bar. Assn.*, 436 U.S. 447, 455–456 (1978)).

61. *Id.* at 480.

62. 514 U.S. 476.

playing alcohol content.<sup>63</sup> Though the Court found the regulation unconstitutional because it did not directly advance the government's stated interest in preventing "strength wars" between breweries,<sup>64</sup> the Court also addressed the government's contention that its regulation was narrowly tailored to its stated interest.<sup>65</sup> The government argued that prohibiting the display of alcohol content on beer labels was a "reasonable fit" to its objective of preventing strength wars, but the Court was more persuaded by the respondent's suggested alternatives, all of which would have served the government's interest while burdening less speech than the FAAA.<sup>66</sup> The Court concluded that the availability of alternatives, "all of which could advance the [g]overnment's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that [the Act] is more extensive than necessary."<sup>67</sup>

Just one year later, a plurality of Supreme Court justices employed the same sort of analysis in *44 Liquormart, Inc. v. Rhode Island*.<sup>68</sup> Analyzing a Rhode Island law prohibiting the advertising of liquor prices, the plurality found that Rhode Island "[could not] satisfy the requirement that its restriction on speech be no more extensive than necessary"—a reference to the old *Central Hudson* prong that *Fox* purported to modify—because it was "perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the State's goal of promoting temperance."<sup>69</sup> Though the plurality ultimately used the *Fox* language in holding that Rhode Island's

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63. *Id.* at 491.

64. *Id.* at 490. The government argued that the threat of "strength wars," or marketing campaigns in which breweries compete against each other based almost exclusively on their alcohol content, was a substantial government interest. *Id.* The government also claimed that strength wars were already under way in the "malt liquor" segment of the beer market. *Id.* at 487. "Malt liquors" are those malt beverages with the highest of alcohol contents—approximately three percent of all malt beverages on the market. *Id.* at 487 n. 3 (quoting *Adolph Coors Co. v. Bentsen*, 2 F.3d 355, 358 n. 4 (10th Cir. 1993)).

65. *Rubin*, 514 U.S. at 490–491.

66. *Id.* The suggested alternatives included prohibiting advertising that emphasized alcohol content, limiting the regulation to malt liquors (per the government, the type of alcohol most likely to spawn a strength war), or directly limiting the alcohol content of beers. *Id.*

67. *Id.* at 491.

68. 517 U.S. 484 (1996).

69. *Id.* at 507.

ban was not a “reasonable fit” to its stated goals, the plurality supported its reasoning by citing to cases—including *Rubin*—that emphasized the availability of less restrictive alternatives.<sup>70</sup> It seems, then, that while the Court’s explicit language does not require a regulation on commercial speech to be the least restrictive means available,<sup>71</sup> the Court has, in its later cases, considered the availability of less restrictive alternatives in assessing whether or not the government’s regulation is, in fact, a “reasonable fit” for its stated objectives.

### B. Non-Commercial Speech

Non-commercial speech, or speech that *does* do more than propose a commercial transaction, may also be regulated by the government. Such regulations, however, will be subject to varying levels of scrutiny depending on whether they are content-neutral or content-based.<sup>72</sup>

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70. *Id.* at 507–508 (citing *Rubin*, 514 U.S. at 491, and *Linmark Assocs. v. Township of Willingboro*, 431 U.S. 85, 97 (1977)).

71. *Fox*, 492 U.S. at 480.

72. Commercial-speech regulations can also be subdivided into content-based and content-neutral categories. In *Cincinnati*, the Supreme Court struck down a regulation that banned commercial handbills from sidewalk news racks, but allowed the display of non-commercial newspapers. 507 U.S. at 430–431. The Court held that the city could not constitutionally favor non-commercial speech over commercial speech because “the very basis for the regulation [was] the difference in content between ordinary newspapers and commercial speech.” *Id.* at 429. Although the government asserted that its ban was justified by its substantial interests in safety and aesthetics, the Court found no justification for banning only commercial handbills from news racks other than “the city’s naked assertion that commercial speech has ‘low value.’” *Id.* Consequently, the Court found that “by any commonsense understanding of the term, the ban in this case is ‘content[-]based.’” *Id.* However, the Court still applied the *Central Hudson* and *Fox* standards and refrained from articulating a more stringent standard for content-based commercial-speech regulations because the city’s regulation failed the lower standard of scrutiny for lack of a “reasonable fit.” *Id.* at 416 n.11. At least one Justice has expressed the opinion that “[w]hatever power the [s]tate may have to regulate commercial speech, it may not use that power to limit the content of commercial speech, as it has done here . . . . Such content-discriminatory regulation—like all other content-based regulation of speech—must be subjected to strict scrutiny.” *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 577 (2001) (Thomas, J., concurring). However, the Court has apparently seen “no need to break new ground” in articulating a more stringent level of review for “content-based” commercial-speech regulations, and as it stands now, *Central Hudson* is still the standard for all commercial-speech cases. *Id.* at 554–555.

### 1. Content-Neutral Regulations

The majority of non-solicitation ordinances going before the courts have been subjected to standards of review for content neutrality, primarily because the ordinances or statutes in question have banned *all* forms of solicitation<sup>73</sup> or because the aim of the ordinance has not been to suppress the speech itself, but rather to regulate the secondary effects of the speech.<sup>74</sup> A law is considered

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73. See e.g. *Heffron v. Intl. Socy. Krishna Consciousness*, 452 U.S. 640, 648–649 (1981) (applying content-neutral standards to a state-fair rule that restricted, inter alia, the sale or distribution of any written or printed material); *Intl. Socy. Krishna Consciousness of New Orleans v. City of Baton Rouge*, 876 F.2d 494, 497 (5th Cir. 1989) (applying content-neutral standards to an ordinance prohibiting the solicitation of employment, business, or charitable contributions from the occupants of any vehicle on a street or roadway); *Phoenix*, 798 F.2d at 1267–1268 (applying content-neutral standards to an ordinance banning all street-side solicitation); but see generally *Assn. Community Orgs. Reform Now v. City of New Orleans*, 606 F. Supp. 16 (E.D. La. 1984) (applying content-neutral standards to an ordinance outlawing only the street-side solicitation of funds, but failing to explicitly address whether or not the ordinance was, in fact, a content-neutral regulation); *Xiloj-Itzep*, 24 Cal. App. 4th Dist. at 629, 636 (applying content-neutral standards to an ordinance that prohibited *all* vehicle-addressed solicitation). It should be noted that the Supreme Court has never held the act of solicitation in and of itself to be a type of *content* of speech and, therefore, has never held that a regulation barring solicitation is in and of itself a content-based regulation. In upholding sanctions against an attorney for engaging in in-person solicitation, for example, the Court has stated that a proper analysis should focus on the attorney's *conduct*, *Ohralik*, 436 U.S. at 463, as opposed to the *content* of her speech. The Court has also noted that “[u]nlike the reader of an advertisement, who can ‘effectively avoid further bombardment of [his] sensibilities simply by averting [his] eyes,’ the target of the solicitation may have difficulty avoiding being importuned and distressed even if the lawyer seeking employment is entirely well meaning.” *Id.* at 465 n. 25 (citations omitted) (alterations in original). Such distress is apparently not limited to only lawyer solicitation, which the Court recognizes by noting that “[t]he detrimental aspects of face-to-face selling even of ordinary consumer products” have been noted by the Federal Trade Commission. *Id.* at 464 n. 23. A target of in-person solicitation, therefore, “has little interest in being coerced into a purchasing decision.” *Cincinnati*, 507 U.S. at 433 (Blackmun, J., concurring). Thus, it is the *conduct* associated with solicitation—the face-to-face mode of communication—that is being regulated in a content-neutral manner (so long as the regulation is not promulgated because of a disagreement *with the message itself*), for “effect on the listener” can never justify a regulation on *speech* as content-neutral. *Boos v. Barry*, 485 U.S. 312, 321 (1988).

74. See *Coalition for Humane Immigrant Rights Los Angeles v. Burke*, 2000 WL 1481467 at \*3 (C.D. Cal. Sept. 12, 2000) [hereinafter *CHIRLA II*] (applying the secondary-effects doctrine to an ordinance prohibiting the street-side solicitation of business, employment, or contributions because the purpose of the ordinance was to alleviate traffic-flow problems and accordingly applying content-neutral standards of review to the ordinance); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 475 F. Supp. 2d 952, 961–962 (C.D. Cal. 2006) (illustrating that even if the ordinance at issue appeared content-based on its face, it may require a secondary-effects-doctrine analysis because it was allegedly created to curtail the traffic flow and congestion problems on the road). In

content-neutral if it can be justified without reference to the content of the speech, if it is narrowly tailored to serve a significant governmental interest, and if it leaves open ample alternative channels for communication of the information.<sup>75</sup>

The principal inquiry in determining the content neutrality of a law is whether the government is regulating speech simply because it does not approve of the content or message of the speech.<sup>76</sup> An ordinance addressing a type of *conduct*, however, without regard to the type of *speech* embedded in that conduct, is often deemed content-neutral. In *Xiloj-Itzep v. City of Agoura Hills*,<sup>77</sup> for example, an ordinance prohibiting all forms of vehicle-addressed solicitation was held to be content-neutral on the grounds that a total ban on vehicle-addressed solicitation is a ban on a particular *conduct* (the vehicle-addressed solicitation) that

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*Redondo Beach*, the court relied partially on the secondary-effects doctrine to find an ordinance banning all forms of street-side solicitation content-neutral. 475 F. Supp. 2d at 961, 963. The *Redondo Beach* court claimed that the plurality in *Boos* “framed the holding in *Renton* in broad terms[.]” *Id.* (citing *Boos*, 485 U.S. at 320). The court went on to quote *Boos* as stating that “[s]o long as the justifications for the regulation have nothing to do with content . . . a regulation [is] properly analyzed as content-neutral.” *Id.* (alterations in original). The *Redondo Beach* opinion, however, omitted an important portion of the original quote. The full quote in *Boos* reads as follows: “So long as the justifications for the regulation have nothing to do with content, *i.e.*, *the desire to suppress crime has nothing to do with the actual films being shown inside adult movie theaters*, we concluded . . . that the regulation [is] properly analyzed as content-neutral.” *Boos*, 485 U.S. at 320 (emphasis added).

The inclusion of the omitted material suggests that the secondary-effects doctrine is still inextricably linked to sexually explicit speech, contrary to the *Redondo Beach* court’s analysis. For more on the history of the secondary-effects doctrine, see *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48–50 (1986), which held that a zoning ordinance used to prevent the widespread operation of adult theaters was content-neutral because the ordinance was intended to regulate not the speech itself, but the secondary effects associated with the speech. See also *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (suggesting that the secondary-effects doctrine is available generally to circumvent the application of content-based standards of review, but doing so only in the context of a discussion regarding already-proscribable speech); but see *Rappa v. New Castle County*, 813 F. Supp. 1074, 1081 (D. Del. 1992) (refusing to extend the secondary-effects doctrine to a ban on political campaign signs on the grounds that the Supreme Court limited application of the secondary-effects doctrine to speech that is “of a wholly different, and lesser, magnitude than . . . untrammelled political debate,” *i.e.*, sexually explicit speech).

75. *Ward*, 491 U.S. at 791; see *Heffron*, 452 U.S. at 648–649 (applying content-neutral standards to a state-fair rule that restricted, *inter alia*, the sale or distribution of *any* written or printed material).

76. *Ward*, 491 U.S. at 791.

77. 24 Cal. App. 4th Dist. at 636.



does not depend upon the message of the solicitor.<sup>78</sup> Similarly, in *International Society for Krishna Consciousness v. City of Baton Rouge*,<sup>79</sup> a ban on vehicle-addressed solicitation was found to be content-neutral because the ordinance “applie[d] even-handedly to every organization or individual, regardless of viewpoint” that engaged in vehicle-addressed solicitation.<sup>80</sup> Regulations that ban *all* forms of a particular type of conduct (e.g., vehicle-addressed solicitation) are, therefore, considered content-neutral because the government’s issue is with the *conduct*, irrespective of the particular message or messages conveyed by the conduct.

Having established that a regulation is, in fact, content-neutral, a court will next determine whether the regulation is narrowly tailored to serve a substantial government interest.<sup>81</sup> Narrow tailoring does not require the government to enact the least restrictive means of regulating speech; rather, this step of the content-neutral analysis merely requires that the regulation in question promote a significant government interest that would be achieved less effectively absent the regulation.<sup>82</sup> A time, place, and manner restriction on speech does not fail the narrow-tailoring test simply because there may exist some less intrusive burden on that speech.<sup>83</sup> However, legislation may not burden substantially more speech than is necessary to promote the government’s significant objectives, and the government may not regulate speech in such a way that burdens a sizeable portion of speech not implicated by the government’s interests.<sup>84</sup>

Accordingly, many non-solicitation ordinances have survived the narrow-tailoring test, even when their restrictions were more burdensome than necessary. In *Association of Community Organizations for Reform Now v. City of Phoenix*,<sup>85</sup> for example, a ban on all vehicle-addressed solicitation was upheld as appropriately narrowly tailored to promote the significant governmental interest in traffic safety even though the ordinance potentially

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78. *Id.*

79. 876 F.2d 494 (1989).

80. *Id.* at 497.

81. *Clark*, 468 U.S. at 293.

82. *Ward*, 491 U.S. at 798–799 (citing *Clark*, 468 U.S. at 297).

83. *Id.* at 797.

84. *Id.* at 799.

85. 798 F.2d 1260.

reached solicitation that did not particularly jeopardize that safety.<sup>86</sup> Similarly, in *Baton Rouge*, a ban on all vehicle-addressed solicitation was upheld as appropriately narrowly tailored even though the government could have lessened the burden on speech by restricting only solicitation on roads with heavy traffic flow or without stoplights.<sup>87</sup> *Xiloj-Itzep*, in turn, relied on *Phoenix*, *Baton Rouge*, and *Association of Community Organizations for Reform Now v. St. Louis County*<sup>88</sup> to find a California city's ordinance banning solicitation of business, employment, or charitable contributions narrowly tailored to improve traffic safety.<sup>89</sup>

Yet, some courts have held non-solicitation ordinances invalid on the grounds that they were not sufficiently narrowly tailored. In *Coalition for Humane Immigrant Rights of Los Angeles v. Burke*<sup>90</sup> (*CHIRLA II*), for example, the District Court for the Central District of California found a Los Angeles County ordinance banning vehicle-addressed solicitation of business, employment, or charitable contributions from any person within any public right-of-way invalid on narrow-tailoring grounds.<sup>91</sup> In addressing the seeming discrepancy between its holding and existing precedent, the *CHIRLA II* court explained that the Los Angeles County ordinance differed significantly from the ordinances in question in *Phoenix*, *Baton Rouge*, and *St. Louis County*.<sup>92</sup> The Phoenix and Baton Rouge ordinances were designed to prohibit "tagging," a practice where solicitors actually step into the street and engage in face-to-face communication with motorists temporarily stopped

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86. *Id.* at 1270. The Phoenix ordinance prohibited solicitation from persons standing on a street or highway within the flow of traffic. *Id.* at 1262. In holding that the ordinance was sufficiently narrowly tailored, the court cited evidence presented to the trial court that the mere *presence* of persons in a roadway or intersection presented a safety hazard; therefore, the ordinance did not need to be restricted to solicitation that *actually disrupted* traffic in order to be considered constitutional. *Id.* at 1270.

87. *Id.* at 498. As in *Phoenix*, the court relied on evidence admitted at trial that pointed to the potential safety hazards that solicitation could cause even on less-traveled routes. *Id.* Additionally, like in *Phoenix*, Baton Rouge's ordinance prohibited solicitors from stepping into the roadways or from standing on the "neutral ground" of any street or roadway. *Id.*

88. 930 F.2d 591, 596 (8th Cir. 1991).

89. *Xiloj-Itzep*, 24 Cal. App. 4th Dist. at 639–640 (citing *Phoenix*, 798 F.2d at 1270); *Baton Rouge*, 876 F.2d at 498; *St. Louis County*, 930 F.2d 591 at 596.

90. 2000 WL 1481467.

91. *Id.* at \*\*1, 9. The Los Angeles County ordinance defined a "public right-of-way" as "including but not limited to public streets, highways, sidewalks, and driveways." *Id.* at \*1.

92. *Id.* at \*5.

in the flow of traffic.<sup>93</sup> The St. Louis ordinance also applied only to solicitors who stepped into the roadway.<sup>94</sup> In contrast, the Los Angeles County ordinance at issue in *CHIRLA II* was far broader, reaching “even a solicitor who stands on the sidewalk, away from the curb, and unobtrusively attempts to make known to the occupants of vehicles his availability for work.”<sup>95</sup> Because Los Angeles County failed to present any evidence that such an “unobtrusive” solicitor would pose a threat to traffic safety, the *CHIRLA II* court concluded that the ordinance was not sufficiently narrowly tailored.<sup>96</sup>

Even if a non-solicitation ordinance does manage to pass the narrow-tailoring test, the ordinance must be so tailored to serve a significant government interest.<sup>97</sup> Over the years, the courts have identified a myriad of significant or substantial government interests, including crime prevention,<sup>98</sup> fraud prevention,<sup>99</sup> privacy protection,<sup>100</sup> traffic safety,<sup>101</sup> and the need to control traffic

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93. *Id.* For a discussion of the Phoenix ordinance and its narrow application, see *Phoenix*, 798 F.2d at 1269 n. 8, which recognized that “[i]t is much easier to ignore a billboard or a pedestrian along the roadway than an individual standing closely beside your car, peering in the window directly at you, and demanding a personal response.” See *CHIRLA II*, 2000 WL 1481467 at \*5 (emphasizing that “[i]n context, it is clear that the court was addressing ACORN’s face-to-face method of soliciting motorists while they were still in the flow of traffic and only temporarily stopped at a light”). For discussions of the Baton Rouge ordinance and its narrow application, see *Baton Rouge*, 876 F.2d at 498 (noting that the Baton Rouge ordinance was “narrowly aimed at the disruptive nature of fund solicitation from the occupants of vehicles”); *CHIRLA II*, 2000 WL 1481467 at \*6 (same). Moreover, the text of the Baton Rouge ordinance seemed to prohibit vehicle-addressed solicitation from any person standing in or on the street, roadway, or neutral grounds, but not necessarily on the sidewalk. *Baton Rouge*, 876 F.2d at 495–496; *CHIRLA II*, 2000 WL 1481467 at \*6.

94. *St. Louis County*, 930 F.2d at 594 (reflecting the parties’ stipulation that the ordinance did not forbid “solicitors from soliciting drivers as long as they stand off the roadway—on the curb, median or shoulder of the road”).

95. 2000 WL 1481467 at \*6.

96. *Id.* at \*9.

97. *Clark*, 468 U.S. at 293.

98. *Watchtower Bible & Tract Socy. N.Y. v. Village of Stratton*, 536 U.S. 150, 176 (2002).

99. *Id.*

100. *Id.*

101. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507–508 (1981) (plurality); see *Lorillard Tobacco*, 533 U.S. at 551 (reiterating that traffic safety and aesthetics have been held significant enough to justify zoning regulations for advertising); *St. Louis County*, 930 F.2d at 594 (stating that “the government interest in safety and traffic efficiency is ‘significant’”); *Phoenix*, 798 F.2d at 1268–1269 (recognizing traffic safety concerns as significant enough interests to justify a content-neutral regulation of charitable solicitations); *Redondo Beach*, 475 F. Supp. 2d at 964 (stating that “it is virtually axiomatic that [a city]

flow.<sup>102</sup> Many cities enacting non-solicitation ordinances have in fact used the stated government interests of traffic safety and quality of urban life to support their regulations.<sup>103</sup>

Finally, for a regulation to survive the content-neutral analysis, it must leave open ample alternative channels of communication.<sup>104</sup> Though an alternative channel of communication need not be the speaker's first choice in order to be adequate,<sup>105</sup> the mere existence of some alternative channel of communication does not necessarily prove its adequacy and, subsequently, the constitutionality of the regulation under content-neutral standards of review.<sup>106</sup> Nevertheless, the question of whether an alternative channel of communication is adequate should be considered from the point of view of the speaker<sup>107</sup> because an alternative cannot be said to be ample if the speaker's message is not allowed to reach the intended audience.<sup>108</sup>

In the context of non-solicitation ordinances, courts have been more likely to recognize an alternative avenue of communication as adequate when the government itself promotes or provides the alternative avenue, instead of merely suggesting other manners of communication that the speaker might employ.<sup>109</sup> In *Xiloj-*

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has a 'significant' interest in traffic flow and safety"); *Xiloj-Itzep*, 24 Cal. App. 4th Dist. at 639 (finding the public interest in safety and the free flow of traffic to significant enough to justify a content-neutral regulation on speech); see also *CHIRLA II*, 2000 WL 1481467 at \*9 (addressing the city's interest in quality of urban life, but ultimately holding that the non-solicitation ordinance was not narrowly tailored enough to serve that particular interest).

102. See *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) (noting that time, place, and manner restrictions on speech in public streets may be appropriate because "two parades cannot march on the same street simultaneously"); *Cox v. N.H.*, 312 U.S. 569, 574 (1941) (stating that "[t]he authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend").

103. E.g. Jupiter Town Code at § 7-92; Agoura Hills Code Ordin. (Cal.) at § 91-191(5).

104. *Clark*, 468 U.S. at 293.

105. *Weinberg v. City of Chicago*, 310 F.3d 1029, 1041 (7th Cir. 2002); see *Heffron*, 452 U.S. at 647 (stating that "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired").

106. *Weinberg*, 310 F.3d at 1041.

107. *Id.*; *State v. O'Daniels*, 911 So. 2d 247, 254 (Fla. 3d. Dist. App. 2005).

108. *Bay Area Peace Navy v. U.S.*, 914 F.2d 1224, 1229 (9th Cir. 1990).

109. Compare *Xiloj-Itzep*, 24 Cal. App. 4th Dist. at 640-641 (holding that where the city had established a telephone hiring exchange, the solicitation of funds, door-to-door canvassing, and telephone solicitations were all adequate alternative channels of communication) with *CHIRLA II*, 2000 WL 1481467 at \*\*12-13 (holding that the government's as-

*Itzep*, for example, the court held that the solicitation of funds from pedestrians, door-to-door canvassing, and telephone solicitations were all alternative available channels of communication, but these channels were supplemented by a city-established telephone hiring exchange.<sup>110</sup> In contrast, the government in *CHIRLA II* asserted that solicitors (in this case, day laborers) could communicate their message via door-to-door canvassing, telephone solicitation, or solicitation of legally parked cars, but the court ultimately found that those particular channels did not afford day laborers with an effectively concentrated target audience and were therefore inadequate.<sup>111</sup>

## 2. Content-Based Regulations

On the opposite end of the spectrum from content-neutral regulation is content-based regulation. A law is considered content-based if the government's issue is with the message, not the manner of communication,<sup>112</sup> or if the law cannot be justified

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suggested alternatives, such as door-to-door canvassing and telephone solicitation, were unlikely to provide ample alternatives for day laborers.) Unlike in *Xiloj-Itzep*, the city in *CHIRLA II* failed to provide a specific alternative channel for the communication. 2000 WL 1481467 at \*\*12–13.

110. 24 Cal. App. 4th Dist. at 640–641.

111. 2000 WL 1481467 at \*\*12–13. In finding that the county's stated alternatives were inadequate, the court first focused on the relatively small target audience at issue, recognizing that "the market for day labor is smaller and more discrete[.] Not everyone wants to or can use the services of day workers. As a result, employment solicitation has to be more targeted than political fundraising, [and] making canvassing and telephone solicitation [are] not reasonable alternative avenues of communication." *Id.* at \*12. For those reasons, the court concluded that telephone solicitation and door-to-door canvassing were inadequate alternatives since a day laborer would have no idea whether the person on the other end of the phone or behind the door would even require his or her services. *Id.* As to the soliciting of pedestrians and legally parked vehicles, the court expressed concern that the ordinance's broad terms would chill all solicitation occurring near streets or sidewalks, thus diluting the county's claim that such solicitation would be an adequate alternative. *Id.* at \*13. Finally, the court rejected the notion of general solicitation on private property as an adequate alternative, stating that "there always is some possibility that some property owner somewhere might open up her land to speakers who are restricted from using the public forum. The regulator must do more than merely speculate that such a possibility exists." *Id.*

112. *U.S. v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 811–812 (2000) (stating that the "essence" of content-based regulation is the government's focus on the message of the speech and the direct impact on the listener as well as the government's failure to justify the regulation without reference to the speech); see *Boos*, 485 U.S. at 321 (emphasis in original) (finding that a regulation was content-based when it was justified "only by the content of the speech and the direct impact that speech has on its listeners").

without reference to the content of the speech.<sup>113</sup> Content-based regulation must serve a compelling state interest and must be narrowly tailored to achieve that interest.<sup>114</sup> Compelling government interests have included protection of minors from exposure to (or involvement in) pornography,<sup>115</sup> but have not included traffic safety or aesthetics.<sup>116</sup> Further, unlike under a content-neutral standard of review, the narrow-tailoring test for content-based regulations requires that the regulation be, in fact, the least restrictive means available for serving the compelling interest.<sup>117</sup> If a less restrictive alternative is available, the government is obligated to use it.<sup>118</sup>

The courts have deemed very few non-solicitation laws content-based. Those regulations that *have* been held content-based have not dealt with the type of vehicle-addressed solicitation at issue in the Jupiter Ordinance, or in *Phoenix*, *Baton Rouge*, *Xiloj-Itzep*, *CHIRLA II*, and other similar cases. One exception to this general rule is *ACLU of Nevada v. City of Las Vegas*,<sup>119</sup> which concerned multiple non-solicitation ordinances. One ordinance prohibited the solicitation of money, charity, business, patronage, or gifts or other items of value in certain downtown areas; the other prohibited “vending, tabling, and leafleting.”<sup>120</sup> Both ordinances, however, contained an exception for labor-related activities.<sup>121</sup> Noting that the City’s content-neutral *purpose* (“cleaning up” the downtown areas of Las Vegas) did not automatically render the ordinances themselves content-neutral,<sup>122</sup> the court found

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113. *Ward*, 491 U.S. at 791.

114. *Playboy*, 529 U.S. at 813; *Perry*, 460 U.S. at 45, *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267 (11th Cir. 2005).

115. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 259 (2002) (Thomas, J., concurring).

116. *Solantic*, 410 F.3d at 1267.

117. *Playboy*, 529 U.S. at 813.

118. *Id.*

119. 466 F.3d 784 (9th Cir. 2006).

120. *Id.* at 788–789.

121. *Id.* at 789.

122. *Id.* at 793 (noting that the court was “not required to find a content-based purpose in order to hold that a regulation is content-based”). *Las Vegas* also recognized that while “bans on the *act of solicitation* [have been found] content-neutral, we have not found any case holding that a regulation that separates out *words of solicitation* for differential treatment is content-neutral.” *Id.* at 794 (emphasis in original) (citing *e.g. Phoenix*, 798 F.2d at 1267–1268).

the ordinances content-based because they permitted the distribution of handbills containing only one particular message (e.g., labor-related communications).<sup>123</sup>

### III. ANALYSIS OF THE JUPITER ORDINANCE

Whether Jupiter's non-solicitation ordinance can withstand scrutiny under the First Amendment is a complex, intricate question and necessitates a careful examination of the ordinance itself. Section A of this critical analysis will provide a detailed review of the Ordinance's text and legislative history. Section B will provide a brief overview of the application of the public-forum doctrine to the Ordinance. Section C, in turn, will argue that the Ordinance is a regulation on commercial speech under *Bolger*, and will analyze the ordinance under the commercial-speech standard of review set forth in *Central Hudson* and *Fox*. Section D, in the alternative, will address the possibility that the Ordinance could be found to regulate non-commercial speech and will subject the Ordinance to both content-neutral and content-based standards of review.

#### A. The Jupiter Ordinance

Jupiter first began seriously considering ways to alleviate the various problems associated with day labor in late 2004. The town council held a "workshop" on October 26 at which council members first publicly floated the idea of creating a labor center.<sup>124</sup> A few weeks later, the town council asked the town attorney to research the various issues surrounding a potential regulation of street-side solicitation.<sup>125</sup> In response, the town attorney prepared a memorandum that listed a day-labor center, "No Parking/Stopping or Standing Signs," non-solicitation ordinances, and a telephone hiring exchange as possible channels for consolidating

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123. *Id.* at 794.

124. Wells, *supra* n. 18.

125. Memo. from Karen E. Roselli & Thomas J. Baird, Town Atty., Jupiter, Fla., to Karen Golonka, Mayor, Jupiter, Fla. & Members, Jupiter Town Council, Jupiter, Fla., *Regulating the Solicitation of Day Laborers Within Public Rights-of-Way* 1 (Nov. 12, 2004) (copy on file with *Stetson Law Review*); Telephone Interview, *supra* n. 29 (granting the Author permission to cite this memorandum).

or regulating day labor in Jupiter.<sup>126</sup> The memorandum noted that a non-solicitation ordinance “[s]tanding alone” would be difficult to defend if challenged and also concluded that adoption of such an ordinance alone could very well provoke litigation against the town.<sup>127</sup> Attached to the memorandum was a short “draft ordinance” that regulated parking, stopping, and standing in various public rights-of-way.<sup>128</sup> Two months later, the town attorney issued a second memorandum, apparently to correct the misconception held by some council members that all non-solicitation ordinances are facially unconstitutional.<sup>129</sup> This second memorandum contained a brief summation<sup>130</sup> of the major points of law as well as a list of recommended ways for the town to preemptively strengthen its defense should the ordinance be challenged.<sup>131</sup>

The Town of Jupiter enacted its non-solicitation ordinance on September 5, 2006,<sup>132</sup> and officially codified it shortly thereafter.<sup>133</sup> The Ordinance’s “legislative purpose” reads as follows:

The purpose of this article is to reasonably regulate the time, place, and manner of the solicitation of employment involv-

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126. Memo., *supra* n. 125, at 1–2.

127. *Id.* at 2. Again, the town’s position on the type of speech to be regulated seems somewhat unclear. The memorandum communicated that a challenge to the ordinance would likely be “based upon commercial free speech grounds.” *Id.* A second memorandum, sent two months later, appears to reiterate that position by asserting that day-labor solicitation has been deemed “commercial free speech” by the Supreme Court. Memo., *supra* n. 29, at 1. That second memorandum, however, appeared to combine the elements of the commercial-speech standard of review with elements of the content-neutral standard of review. *Supra* n. 29. The final draft of the Ordinance defines itself as a content-neutral time, place, and manner regulation, but also states that the Town had “balanced the First Amendment protections of commercial free speech, [*sic*] against the compelling government interests” of promoting safety on the Town’s public rights-of-way. Jupiter, Fla., Ordin. 29-05. The codified version of the Ordinance, on the other hand, contains no mention of commercial speech. Jupiter Town Code at §§ 7-90–7-93.

128. Memo., *supra* n. 125, at 2–6. Two interesting things regarding the “draft ordinance” stand out. First, the draft ordinance’s actual text (as opposed to the preamble) makes no distinction between the different types of solicitation. In fact, solicitation is not referenced at all—the proposed signs prohibit *anyone* from stopping their vehicles or entering the roadway on foot wherever a sign is posted. Jupiter, Fla., Ordin. 29-05. Second, the draft ordinance contains a severability clause; the final, codified version of the Ordinance does not. *Id.*

129. Memo., *supra* n. 29, at 1.

130. *Supra* nn. 29, 125 and accompanying text.

131. Memo., *supra* n. 125, at 4–5.

132. Jupiter, Fla., Ordin. 29-05.

133. Jupiter Town Code at §§ 7-90–7-93. The El Sol Center opened its doors that same month. Cerón, *supra* n. 19.



ing occupants of vehicles which are traveling down a public street or sidewalk, or from a sidewalk, alley or driveway immediately adjacent thereto. These regulations are content-neutral and are not intended, and do not restrict the rights of free speech or alternative channels of communication, and are intended to ensure the compelling state interest of protecting both pedestrians and the operators of vehicles, and generally furthering the public's health, safety and general welfare.<sup>134</sup>

The portion of the Ordinance prohibiting street-side, vehicle-addressed solicitation reads as follows:

- (a) It is unlawful for any person, while standing in or upon any portion of a public right-of-way, including, but not limited to public streets or highways, or a sidewalk, alley, or driveway, immediately adjacent thereto, to solicit, or attempt to solicit, employment or business from any person traveling in a vehicle along a public street or highway.
- (b) It is unlawful for any person, while the occupant of any vehicle traveling along a public street or highway, to solicit, or attempt to solicit, employment from a person who is standing within any street, or highway, or any sidewalk, alley or driveway, which is immediately adjacent thereto.<sup>135</sup>

The Ordinance's sweep is strikingly broad. While the ordinances at issue in *Phoenix*, *Baton Rouge*, and *St. Louis County* prohibited only vehicle-addressed solicitation from persons standing in or along a roadway,<sup>136</sup> Jupiter's ordinance affects not only solicitors who enter the street (like the "taggers" at issue in the three abovementioned cases), but also solicitors standing upon *any* public right-of-way, including roadways, sidewalks, alleyways, and driveways immediately adjacent to those roadways.<sup>137</sup> The Jupiter

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134. Jupiter Town Code at § 7-90.

135. *Id.* at § 7-92.

136. *Phoenix*, 798 F.2d at 1262; *Baton Rouge*, 876 F.2d at 495–496; *St. Louis County*, 930 F.2d at 593. The Phoenix and St. Louis ordinances are nearly identical to each other, whereas the Baton Rouge County ordinance includes the "neutral grounds" (presumably, a roadway median) within the bounds of its prohibition.

137. Jupiter Town Code at § 7-92(a).

Ordinance also goes a step further than the Phoenix, Baton Rouge, and St. Louis County ordinances by including a “mirror provision” that prohibits solicitation not only by pedestrians, but also by vehicle occupants.<sup>138</sup> In fact, the Jupiter Ordinance was copied almost word-for-word from the ordinance at issue in *Xiloj-Itzep*,<sup>139</sup> with the only major difference being that the ordinance in *Xiloj-Itzep* banned the street-side solicitation of charitable contributions, while the Jupiter Ordinance does not.<sup>140</sup>

### B. The Ordinance and the Public-Forum Doctrine

Streets and roads are considered “without more” to be traditional public forums<sup>141</sup> regardless of their narrow size or residential character.<sup>142</sup> In such traditional public forums, the government may only place reasonable restrictions on the time, place, and manner of speech or may promulgate additional restrictions that are narrowly tailored to serve compelling government interests.<sup>143</sup> Therefore, because the Ordinance applies to all public streets and rights-of-way, Jupiter’s power to regulate speech will be limited to either time, place, and manner restrictions or more stringent regulations if a compelling government interest is at issue.

### C. The Ordinance as a Regulation on Commercial Speech

It is the specific exclusion of charitable contributions from the Ordinance’s scope that moves the Ordinance into the category of commercial speech regulation. First, this Section will address why day-labor solicitation is commercial speech under the *Bolger* factors. Second, this Section will explain why the Ordinance cannot survive as a valid commercial-speech regulation under the modified *Central Hudson* test.

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138. *Id.* at § 7-92(b).

139. Jill Hanson, Panel Remarks, *Streets of Wrath: The Constitutionality of the Town of Jupiter’s Non-Solicitation Ordinance* (Gulfport, Fla., Mar. 5, 2007).

140. *Xiloj-Itzep*, 24 Cal. App. 4th Dist. at 629; Jupiter Town Code at § 7-92.

141. *U.S. v. Grace*, 461 U.S. 171, 177 (1983).

142. *Frisby*, 487 U.S. at 480–481.

143. *Grace*, 461 U.S. at 177.

1. *Day-Labor Solicitation Is Commercial  
Speech under Bolger*

Under *Bolger*, the factors to consider when determining the commercial or non-commercial character of speech are whether the speech is an advertisement, whether the speech refers to specific goods or services, and whether the speaker has an economic motivation for the speech.<sup>144</sup> Day-labor solicitation fits into all three categories.<sup>145</sup> First, day-labor solicitation is an advertisement. When day laborers stand on the street corner offering their labor, they are, essentially, advertising their availability as laborers.<sup>146</sup> Taken together, their location, the timing of their appearance at that location, and their clothing all unmistakably communicate their availability for hire.<sup>147</sup> An advertisement need not bear in writing or in spoken words an explicit message stating “this object is available for purchase” or “this service is available for hire”; if the product or service is recognizable enough, its simple depiction is often enough to constitute an effective advertisement.<sup>148</sup>

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144. *Bolger*, 463 U.S. at 66–67.

145. See *supra* n. 50 and accompanying text (noting that all three factors need not be present for speech to be deemed commercial).

146. See Gabriela Garcia Kornzweig, Student Author, *Commercial Speech in the Street: Regulation of Day Labor Solicitation*, 9 S. Cal. Interdisc. L.J. 499, 505 (2000) (asserting that “[d]ay laborers gather in groups on public sidewalks and other areas in order to express this message: *Hire me now for day work*”).

147. See *id.* at 499 (arguing that “laborers do not have to say or write anything to express this message [and that] [t]hey need only make themselves *visible* to the public in a particular context: in a public area . . . starting early in the morning, and dressed for manual work.”). This type of conduct is undeniably speech even if no actual spoken words are exchanged between the solicitor and the solicited. Even silent conduct is considered speech if it is “sufficiently imbued with elements of communication.” *Spence v. Wash.*, 418 U.S. 405, 409 (1974). *Spence* held that the display of a peace symbol on an upside-down American flag, while devoid of words, was sufficiently communicative so that “it would have been difficult for the great majority of citizens to miss the drift of [the speaker’s] point[.]” *Spence*, 418 U.S. at 410; Kornzweig, *supra* n. 146, at 505. In the context of advertising, the presence of a day laborer on a certain street at a certain time of the day dressed in certain attire unequivocally communicates the message “I am available for hire” just as a highway billboard carrying nothing but the image of a new-model Ford Mustang, a Louis Vuitton purse, or a can of Pepsi unequivocally communicates the message “I am available for purchase.”

148. See e.g. Ros Snowdon, *No Name—Just Images*, *The Times* (London, U.K.) (Sept. 30, 1997) (describing an effective “wordless marketing campaign” for British brewery Bodington’s). The article also recognizes effective “wordless” advertising campaigns by Nike and McDonald’s. *Id.*

Day-labor advertising also refers to a specific product or service. While day laborers do not necessarily identify themselves as landscapers, lawnmowers, roof-layers, or ditch-diggers,<sup>149</sup> all day laborers do, at a basic level, provide the same service—blue-collar work on a day-to-day basis at an often negotiated rate.<sup>150</sup> Though day-labor advertising may not refer to *individualized* services, it does refer to the *specific* service of daily, low-wage, odd-job labor. It is almost unthinkable that a court would fail to recognize an attorney's advertisement as commercial speech because the advertisement bore only the simple message "NEED A LAWYER? CALL ME NOW" without referring to the attorney's special or individualized services (such as will-writing, criminal defense, or contract-dispute litigation). If the practice of providing legal services to clients is a sufficiently specific service to be deemed commercial speech, so too, then, is the practice of providing daily, for-hire labor.

Finally, day laborers undoubtedly have an economic motivation for their speech, as do the potential employers who seek to hire them (and who are also subject to the Ordinance).<sup>151</sup> The entire aim of solicitation is to secure a day's employment and to earn a wage. Even if day-labor solicitation does invariably arise in the context of public issues such as immigration policy and enforcement, such issues are not "inextricably intertwined" with the proposed commercial transaction.<sup>152</sup> Communication between the solicitor and the solicited does not necessarily include any reference to either speaker's stance on immigration policy or the day laborer's right to seek employment, nor must the parties discuss or acknowledge such issues in order to successfully complete the solicitation.<sup>153</sup> In the absence of such an "inextricable" link, both the day laborer's and the potential employer's economic motivation clearly trumps any possible underlying allusions to larger

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149. Kornzweig, *supra* n. 146, at 505.

150. *Id.*

151. Jupiter Town Code at § 7-92(b).

152. *Riley*, 487 U.S. at 796.

153. Even assuming that discussion of these or similar issues was necessary to successfully complete the act of solicitation, solicitation need not be complete in order to fall under the scope of the Jupiter Ordinance. Jupiter Town Code at § 7-91(9) (emphasis added) (noting that "[s]olicitation as defined herein, shall be deemed complete when made, *whether or not an actual employment relationship is created, a transaction is completed, or an exchange of money takes place*").

public issues, and therefore day-labor solicitation satisfies the test for commercial speech under *Bolger*.

## 2. *The Ordinance Fails the Central Hudson Test*

The next step in the analysis is to determine whether Jupiter's ordinance is a permissible commercial-speech regulation under *Central Hudson* and *Fox*. Under *Central Hudson*, a regulation concerning lawful, non-misleading commercial speech must seek to further a substantial government interest, must directly advance that interest, and must be narrowly tailored to serve that interest.<sup>154</sup>

One pressing issue is whether day-labor solicitation is actually lawful speech. Under *Central Hudson*, commercial speech may not be prohibited outright unless it is misleading or related to an unlawful activity.<sup>155</sup> Because many day laborers are illegal aliens,<sup>156</sup> it could conceivably be argued that day-labor solicitation is related to an unlawful activity because such solicitation could not occur but for the laborer's act of entering or remaining in the country illegally. This rationale is invalid for three reasons.

First, interpreting the "related to unlawful activity" language of *Central Hudson* as necessitating a but-for causation analysis would likely lead to unintended results.<sup>157</sup> Consider, for example, a law student who falsifies important information on her bar application—information that, if reported correctly, could jeopardize her chances of being admitted to her state's bar. (For the sake of argument, assume that the student's falsification also carries a criminal penalty.) The student's falsification goes undiscovered, her application is approved, and after successfully passing the bar exam, she opens her own practice, for which she advertises. Years later, the falsification is discovered, and the student—now an attorney—is prosecuted. Do all of her advertisements automatically lose their protected status as commercial speech? After all, but for the student's criminal falsification, she would not have been able

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154. *Central Hudson*, 447 U.S. at 566.

155. *Id.* at 566 n. 9. There is very little caselaw interpreting or applying the "related to unlawful activity" clause of *Central Hudson* as most cases have dealt instead with the murkier question of when commercial speech is misleading.

156. Valenzuela et al., *supra* n. 9, at 17.

157. *Central Hudson*, 447 U.S. at 564.

to offer—and advertise—legal services. Is this the type of result that *Central Hudson* imagined?

Though no case explicitly answers that question, the Supreme Court has implied that the answer would be no. In *Thompson v. Western States Medical Center*,<sup>158</sup> for example, the Court addressed the “threshold matter” of relation to an unlawful activity by noting that the government “[did] not attempt to defend the . . . speech-related provisions [of the regulation at issue] under the first prong of the *Central Hudson* test; i.e., [the government did] not argue that the prohibited advertisements would *be about unlawful activity* or would be misleading.”<sup>159</sup> By phrasing its interpretation of *Central Hudson*’s first prong in terms of what commercial speech is *about*, not how it *came to be*, the Court assumes that commercial speech must do more than be the but-for result of some removed illegal activity. Commercial speech, the Court implies, must be *about* illegal activity—in other words, must advertise an illegal activity or service (or perhaps advertise an item that is produced via illegal means).

The second argument is that it is illegal to hire an illegal alien, and therefore, day-labor solicitation (at least where the day laborer is in this country illegally) is related to an unlawful activity, even under the construct imagined by the Court in *Thompson*. Further examination, however, reveals this notion to be somewhat inaccurate. In Florida, two relevant laws govern the hiring and employment of illegal aliens. Florida Statute section 448.09(1) prohibits any person from knowingly employing, hiring, recruiting, or referring any alien “not duly authorized to work by the immigration laws or the Attorney General of the United States.”<sup>160</sup>

Federal law, on the other hand, imposes criminal sanctions only on those employers who, within any twelve-month period, knowingly hire for employment ten or more unauthorized

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158. 535 U.S. 357 (2002).

159. *Id.* at 367, 368 (emphasis added).

160. Fla. Stat. § 448.09(1) (2006). The Florida Statutes do define several of the terms used in section 448.09(1); however, by the statute’s own language, these definitions appear to apply only to sections 448.101 through 448.105. *Id.* at § 448.101. Per section 448.09(1), domestic workers are not exempt from the statute’s language, whereas independent contractors are. *Id.* at § 448.09(1). Under federal law, the reverse is true. *Infra* n. 159 and accompanying text.

aliens.<sup>161</sup> The term “employment,” however, specifically excludes “casual employment by individuals who provide domestic service in a private home that is sporadic, irregular or intermittent.”<sup>162</sup> The two sets of regulations can be difficult to reconcile. For example, an employer who hires an illegal alien to do independent contracting is likely engaged in criminal activity under federal law, but may not be engaged in criminal activity under Florida law.<sup>163</sup> On the other hand, an employer who hires an illegal alien for domestic work—roughly half of all day-laborer employers<sup>164</sup>—is not criminally liable under federal law, but he may be charged under Florida law if he had knowledge of the laborer’s illegal status.<sup>165</sup>

Though these laws make clear that *some* employment of illegal aliens is itself illegal, they also illustrate the inaccuracy of the mantra that “it is illegal to hire an illegal alien.” Under the combination of Florida and federal law, no doubt some day-labor solicitation will be viewed as “related to unlawful activity,” but the Town of Jupiter cannot simply argue that *all* day-labor solicitation is related to an unlawful activity. Even more simply, the Ordinance cannot be said to be “related to unlawful activity” for the simple fact that United States citizens and legal resident aliens may choose to engage in street-side solicitation alongside illegal or undocumented workers. For these reasons, a facial challenge to the Ordinance is likely to fail the first prong of *Central Hudson*, and each as-applied challenge to the Ordinance must be examined on a case-by-case basis.

For those cases where the solicitation is unrelated to unlawful activity, the next steps in the *Central Hudson* analysis involve determining whether the regulation seeks to further a substantial government interest and whether the regulation directly advances that interest.<sup>166</sup> Because courts have routinely held that traffic safety and quality of urban life are legitimate substantial

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161. 8 U.S.C. § 1324(a)(3)(A)–(B) (2006). Federal law mandates that the “knowingly” requirement may only be satisfied by *actual* knowledge of the worker’s status as an illegal alien. *Id.*

162. 8 C.F.R. §§ 1274a.1(f), (h) (1991). While independent contractors are excluded from “employment” under 8 C.F.R. §§ 1274a.1(f) and (j), their hiring via contract, subcontract, or exchange entered into after November 1986 is illegal. 8 C.F.R. § 1274a.5.

163. *Supra* n. 160.

164. Walters, *supra* n. 1.

165. *Supra* n. 160 and accompanying text.

166. 447 U.S. at 564.

government interests,<sup>167</sup> the Jupiter Ordinance undoubtedly passes the second *Central Hudson* prong. However, to pass the third prong, Jupiter must prove that the Ordinance directly advances the substantial government interests of traffic safety and quality of urban life “in a direct and material way.”<sup>168</sup> Jupiter must also be able to prove that the harms it seeks to alleviate are real, not the product of mere speculation or conjecture, and that the Ordinance will in fact alleviate those harms “to a material degree.”<sup>169</sup>

It is likely that Jupiter will be able to pass this prong as well. Prior to enacting the Ordinance, Jupiter received numerous complaints about traffic flow and aesthetic issues on and along Center Street.<sup>170</sup> Many of these complaints specifically pointed to day laborers as the cause of Center Street’s problems.<sup>171</sup> After the Ordinance’s passage, however, those complaints have markedly diminished.<sup>172</sup> It seems that the Ordinance does advance Jupiter’s substantial government interests in a direct and material way by simply removing (or at least relocating) the threat to those interests.

Finally, Jupiter must prove that the Ordinance is narrowly tailored to serve its substantial interests in traffic safety and quality of urban life. It is here that the Ordinance runs into trouble. Though *Fox* established that the narrow-tailoring requirement of *Central Hudson* no longer requires a regulation on commercial speech to be the least restrictive means available,<sup>173</sup> courts will still consider the availability of less restrictive alternatives in determining whether the regulation at issue is a reasonable “fit” for the government’s stated interests.<sup>174</sup>

In *Rubin*, for example, the Supreme Court declined to find the government’s regulation narrowly tailored because the gov-

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167. *Metromedia*, 453 U.S. at 507; *Grayned*, 408 U.S. at 115, 116; *Cox*, 312 U.S. at 574.

168. *Edenfield*, 507 U.S. at 767.

169. *Id.* at 771.

170. Smith, *supra* n. 14, at 1A.

171. *Id.*

172. Telephone Interview with Frank Melillo, Code Supervisor, Dept. Code Compliance, Jupiter, Fla. (May 8, 2007). Additionally, the reduction in complaints—evidence of the Ordinance’s effectiveness—is likely due not only to the Ordinance, but also to the establishment of the labor center. *Id.*

173. *Fox*, 492 U.S. at 480.

174. *Supra* nn. 63–71 and accompanying text.



ernment could have undertaken a number of different alternatives, including enacting narrower legislation.<sup>175</sup> The Court viewed the availability of less restrictive alternatives as de facto proof that the government's regulation was more extensive than necessary.<sup>176</sup> Here, too, Jupiter could have enacted narrower, less restrictive legislation, such as prohibiting only that commercial solicitation which involves a pedestrian stepping into the street, to directly and materially advance its goal of maintaining traffic safety.

In fact, much as the Court in *Rubin* suggested that the government could pass a regulation simply prohibiting *any* advertising of alcohol content,<sup>177</sup> Jupiter could have simply passed an ordinance prohibiting *any pedestrian* from stepping into the flow of traffic. As the Ordinance stands right now, pedestrians who stand on the sidewalk and announce their availability for hire at some remote location are acting illegally even though their conduct does no more to impede traffic safety than does a billboard imploring drivers to shop at Target or to eat at Joe's.<sup>178</sup> As far as the quality of urban life is concerned, Jupiter could have simply stepped up its enforcement of existing nuisance ordinances or state statutes.<sup>179</sup> Such a move would have encompassed the much-complained-about noise, fighting, public intoxication, urination, and littering caused not only by day laborers, but by teenagers, local gangs, and other persons who contribute occasional aesthetic unpleasantness.

In any event, Jupiter had several less restrictive alternatives available, some of which could have been enforced without infringing on any speech whatsoever. The availability of these alternatives—especially alternatives that would have directly ad-

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175. *Rubin*, 514 U.S. at 490–491.

176. *Id.*

177. *Id.*

178. Though it can be argued that a day laborer's presence on the sidewalk may impede the flow of traffic by causing a driver to slow down her vehicle and pull over to the curb, the same can be said for signs erected by McDonald's, Burger King, and Taco Bell—the aim is to catch the driver's eye and to cause her to pull over almost immediately. Both the day laborer and the sign, then, can impede the flow of traffic (and potentially cause accidents) by encouraging vehicles to slow down.

179. Jupiter Town Code at §§ 13-27–13-32 (nuisances including litter, trash, junk, and debris), 13-81–13-98 (noise), 17-1–17-2 (littering); Fla. Stat. §§ 856.011 (disorderly intoxication), 856.021 (loitering).

vanced the government's interests without burdening commercial speech not affecting traffic safety or the quality of urban life—strongly suggests that the Ordinance is a more extensive regulation than necessary. Therefore, under the reasoning articulated in *Fox, Rubin*, and *44 Liquormart*, the Ordinance would likely not pass the fourth prong of the *Central Hudson* test.

#### D. The Ordinance as a Regulation of Non-Commercial Speech

Should a court disagree that the Ordinance is, in fact, a regulation on commercial speech, that same court will have to determine whether the Ordinance is a content-neutral or a content-based regulation. Jupiter's ordinance can be held content-neutral only if it prohibits a type of conduct regardless of what type of message the conduct conveys<sup>180</sup> or if the regulation is intended to alleviate the secondary effects exclusively associated with a particular type of speech.<sup>181</sup> In addressing challenges to non-solicitation ordinances, most courts have held that a non-solicitation ordinance banning the vehicle-addressed solicitation of business, employment, or contributions does not discriminate against any particular type of speaker and therefore is content-neutral under *Clark* and *Ward*.<sup>182</sup>

In *Baton Rouge*, for example, the Court of Appeals for the Fifth Circuit emphasized that an ordinance banning the street-side solicitation of business, employment, or charitable contributions “applie[d] even-handedly to every organization or individual, regardless of viewpoint.”<sup>183</sup> The ordinance singled out a type of *conduct*—namely, the act of solicitation—but not any particular

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180. *Clark*, 468 U.S. at 293.

181. *Supra* n. 74 and accompanying text.

182. See e.g. *Heffron*, 452 U.S. at 649 (finding content-neutral a state-fair rule restricting all types of solicitation because it “applie[d] even-handedly to all who wish to distribute and sell written materials or to solicit funds”); *Baton Rouge*, 876 F.2d at 497 (holding that an ordinance banning vehicle-addressed solicitation of business, employment, or charitable contributions “applie[d] even-handedly to every organization or individual, regardless of viewpoint”); *St. Louis County*, 930 F.2d 594–595 (assuming, without deciding, the content neutrality of a regulation prohibiting the street-side solicitation of rides, employment, charitable contributions, or business); *Phoenix*, 798 F.2d at 1267 (adopting *Heffron*'s position on content neutrality and applying it to an ordinance banning the street-side solicitation of employment, business, or charitable contributions).

183. *Baton Rouge*, 876 F.2d at 497.

type of *content or message* associated with the conduct.<sup>184</sup> Under the ordinance, *all* forms of solicitation were prohibited. In *Phoenix*, the Court of Appeals for the Ninth Circuit agreed, finding a similar ordinance content-neutral for the same reasons.<sup>185</sup>

Jupiter's Ordinance, on the other hand, does *not* impose a blanket ban on the act of street-side solicitation regardless of its content; rather, the Ordinance specifically singles out solicitation that contains particularized messages conveying the speaker's availability to provide employment or to conduct business.<sup>186</sup> Under Jupiter's Ordinance, two individuals may stand side-by-side together on a sidewalk, holding signs conveying a written message; the individual whose sign says "day laborer available for work" violates the Ordinance, while the individual whose sign says "hungry, homeless, please donate" does not.<sup>187</sup> Likewise, two individuals may enter the street and approach a vehicle stopped in the flow of traffic. The individual who approaches the vehicle to negotiate a daily wage violates the Ordinance, while the individual who approaches the vehicle to hold out a fireman's boot for donations does not.<sup>188</sup>

The Town of Jupiter has chosen to single out solicitation incorporating speech that it has deemed "not okay" (speech seeking business or employment), but continues to permit solicitation incorporating speech that it has deemed "okay" (contributions of funds). Jupiter received numerous complaints regarding traffic flow and safety caused by pedestrians stepping out into the street to approach vehicles, but it chose not to ban all pedestrians from entering the roadway or otherwise impeding traffic flow. The town chose only to ban those pedestrians who did so *in order to convey certain messages*.<sup>189</sup> For example, the Ordinance forbids a

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184. *Id.* at 496.

185. *Phoenix*, 798 F.2d at 1267–1268.

186. Jupiter Town Code at § 7-91(9), 7-92.

187. *Id.* at §§ 7-91(9) (identifying sign-holding as an impermissible means of soliciting employment), 7-92 (excluding solicitation of business or employment, but not charitable contributions).

188. *Id.* at § 7-92.

189. Jupiter does not attempt to hide the fact that the Ordinance is specifically aimed at suppressing day-labor speech—the preamble to the Ordinance specifically singles out those "individuals who frequently congregate on a daily basis in areas of the Town . . . to solicit and attempt to solicit employment from the occupants of vehicles on Town streets." Jupiter, Fla. Ordin. 29-05.

pedestrian from standing on the sidewalk, wearing a sandwich board that reads “Eat at Joe’s,” but permits another pedestrian to stand in the same location and to wear a sandwich board reading “JOHN 3:16.” Even signs advertising essentially the same service can be differentiated under the terms of the ordinance—holding a sign reading “Car Wash, \$5” is clearly prohibited, whereas holding a sign reading “Free Car Wash—Donations Welcome,” if construed as a solicitation for charitable contributions, might not be. Clearly, then, the Ordinance distinguishes between identical types of *conduct* based upon the expressive *content* of that conduct—in flagrant contravention of the principle set forth in *Ward* that a government may not simply ban speech that it does not like.<sup>190</sup>

Even though the Ordinance cannot be sustained as content-neutral on its face, Jupiter may argue that the Ordinance is content-neutral under the secondary-effects doctrine. However, the Supreme Court has been unwilling to expand the secondary-effects doctrine beyond sexually explicit speech;<sup>191</sup> in fact, the Court has never issued a majority opinion articulating a bright-line secondary-effects test. Accordingly, several lower courts have emphatically refused to apply it to any other type of speech as well.<sup>192</sup> One lower court has, however, applied the secondary-effects test in some way, shape, or form to non-solicitation ordinances.

In *CHILRA I v. Burke*,<sup>193</sup> the District Court for the Central District of California argued that the secondary-effects doctrine was not limited to sexually explicit speech but applied in fact to all forms of speech.<sup>194</sup> *CHILRA I* listed several Supreme Court decisions that “assumed” that the secondary-effects doctrine was not limited to proscribable speech such as obscenity,<sup>195</sup> and that it applied, for example, to picketing foreign embassies<sup>196</sup> and to commercial speech.<sup>197</sup> *CHILRA I* went on to—somewhat unneces-

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190. *Ward*, 491 U.S. at 791.

191. *Phoenix*, 798 F.2d at 1267–1268.

192. *Id.*

193. 1999 WL 33288183 (C.D. Cal. Oct. 29, 1999).

194. *Id.* at \*\*3–4.

195. *Id.* at \*4 (citing *R.A.V.*, 505 U.S. at 388–389).

196. *Id.* at \*3 (citing *Boos*, 485 U.S. at 318).

197. *Id.* at \*4 (citing *Cincinnati*, 507 U.S. at 430).

sarily<sup>198</sup>—apply the secondary-effects doctrine to a non-solicitation ordinance banning the vehicle-addressed solicitation of business, employment, or charitable contributions.<sup>199</sup> Picking up on *CHIRLA I*'s reasoning, *Redondo Beach* (also a Central District of California case) applied the secondary-effects test to a non-solicitation ordinance banning vehicle-addressed solicitation of business, employment, or contributions.<sup>200</sup>

The Central District of California's reasoning, however, is flawed in both *CHIRLA I* and in *Redondo Beach*. While the *CHIRLA I* court reads the Supreme Court's plurality opinion in *Boos v. Barry*<sup>201</sup> as suggesting that the secondary-effects doctrine could be applied to picketing,<sup>202</sup> in actuality, the Court's holding was far simpler and narrower. All the plurality did in *Boos* was refuse to acknowledge effect on the listener as a valid secondary effect, categorizing a listener's reaction instead as a direct and primary effect of speech.<sup>203</sup> In fact, in articulating the secondary-effects doctrine, the Court took great pains to phrase it in the context of sexually explicit speech.<sup>204</sup> Therefore, in dismissing effect on the listener as a valid secondary effect, the *Boos* plurality made no implicit declarations regarding the scope of the secondary-effects doctrine, but rather sidestepped a decision either way

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198. Despite a plethora of precedent indicating otherwise, the *CHIRLA I* court chose to view the ordinance at issue as content-based because it singled out speech concerning *solicitation*, but not speech concerning political protests, religious proselytizing, or complaints against other drivers. *Id.* at \*2. In support of its position, the *CHIRLA I* court curiously cited to *Lee*, 505 U.S. at 705–706, and *Carreras v. City of Anaheim*, 768 F.2d 1039, 1048 (9th Cir. 1985), *rev'd on other grounds*, 2004 WL 2677091 (Cal. App. 1st Dist. Nov. 24, 2004), which struck down as content-based ordinances that banned only the solicitation of funds, instead of the more analogous and on-point *Heffron*, *Baton Rouge*, *Phoenix*, and *St. Louis County*, all of which upheld similar ordinances as *facially* content-neutral.

199. *CHIRLA I*, 1999 WL 33288183 at \*1 (reciting the ordinance in question), \*5 (concluding that the secondary-effects doctrine applied).

200. *Redondo Beach*, 475 F. Supp. 2d at 961–962.

201. 485 U.S. 312.

202. To its credit, the *CHIRLA I* court did recognize the Supreme Court's language in *Boos* as non-controlling dicta. *CHIRLA I*, 1999 WL 33288183 at \*3.

203. *Boos*, 485 U.S. at 320–321.

204. *Id.* at 320 (emphasis added) (reiterating that “[s]o long as the justifications for regulation have nothing to do with content, i.e., *the desire to suppress crime has nothing to do with the actual films being shown inside adult movie theaters*, we concluded that the regulation was properly analyzed as content neutral”).

on the issue by finding the doctrine inapplicable because there were no secondary effects to begin with.<sup>205</sup>

Similarly, *CHIRLA I* reads the Supreme Court's holding in *R.A.V. v. City of St. Paul*<sup>206</sup> as "stat[ing] that the secondary effects doctrine applies to proscribable speech [such as obscenity, fighting words, or defamation], not that it does *not* apply to any other speech."<sup>207</sup> While this is technically a correct interpretation of *R.A.V.*, again, *CHIRLA I* reads too much into the Supreme Court's language. *R.A.V.* did discuss the secondary-effects doctrine as a permissible way of regulating only certain types of generally *proscribable* speech,<sup>208</sup> but not once did the Court suggest that that the secondary-effects doctrine might be expanded to generally protected speech. Again, the Court carefully constructed its hypothetical example in terms of sexually explicit speech,<sup>209</sup> suggesting that the doctrine is in fact limited to that type of speech. No grand proclamations regarding the scope and application of the secondary-effects doctrine can be divined from these two cases, and the Central District of California was wrong to assume otherwise.

Finally, even if the secondary-effects doctrine were theoretically applicable in this case, the Ordinance still would likely not be held content-neutral. In *Boos*, the Supreme Court strongly suggested that a speech-restrictive law is valid under the secondary-effects doctrine only if the secondary effects *intended* for regulation are "almost unique" to the speech that is actually regulated.<sup>210</sup> In describing the proper application of the secondary-effects doctrine to a zoning ordinance that regulated adult theaters, the *Boos* plurality explained that "the ordinance was aimed at the 'secondary effects of such theaters in the surrounding community' . . . effects that are almost unique to theaters featuring sexually explicit films, i.e., prevention of crime, maintenance of property values, and protection of residential neighbor-

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205. *Id.* at 320–321.

206. 505 U.S. 377.

207. *CHIRLA I*, 1999 WL 33288183 at \*4.

208. *R.A.V.*, 505 U.S. at 389.

209. *Id.* (stating that a "[s]tate could, for example, permit all obscene live performances except those involving minors").

210. *Boos*, 485 U.S. at 320.

hoods.”<sup>211</sup> In *CHIRLA II*, even the Central District of California recognized that secondary effects must be “almost unique” to the restricted speech.<sup>212</sup>

In Jupiter, the “secondary effects” the Town purports to regulate—namely, traffic flow, traffic safety, and quality of urban life issues—are certainly not “almost unique” to the solicitation of business or employment. A pedestrian who steps into the roadway to solicit a charitable contribution from the occupant of a vehicle threatens traffic safety just as much as the pedestrian who enters the roadway to solicit business or employment, and a driver who decides to make a contribution is no more distracted from his or her duties as a diligent motorist than is the driver who quickly selects three or four day laborers for employment and allows them time to scramble into the back of his truck.<sup>213</sup>

Likewise, the threats to quality of urban life articulated in the Ordinance (harassment of motorists and passers-by, littering, public urination and defecation, and “undesirable uses of public space”) are hardly unique to the solicitation of business or employment. Homeless panhandlers are just as likely to harass, litter, publicly relieve themselves, and make “undesirable uses of public property” as are day laborers, but so long as the homeless confine their solicitation to asking for contributions and not work, their solicitation is not prohibited by the Ordinance. Elementary-school children who set up a lemonade stand on the side of the road are likely to create loud noise levels and to litter, but so long as the sign on the booth reads “Free Lemonade: Donations Welcome” instead of “Lemonade: Ten Cents,” the children’s solicitation does not violate the Ordinance. Perhaps most disturbingly,

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211. *Id.* (emphasis added) (quoting *Renton*, 475 U.S. at 47).

212. *CHIRLA II*, 2000 WL 1481467 at \*9 (citing *Boos*, 485 U.S. at 320).

213. *See Phoenix*, 798 F.2d at 1269 (describing the process of soliciting charitable contributions from motor vehicles). In explaining the threat to traffic safety posed by pedestrians entering the roadway to solicit funds, the court offered the following analysis:

[S]uccessful solicitation requires the individual to respond by searching for currency and passing it along to the solicitor. Even after the solicitor has departed, the driver must secure any change returned, replace a wallet or close a purse, and then return proper attention to the full responsibilities of a motor vehicle driver. The direct personal solicitation from drivers distracts them from their primary duty to watch the traffic and potential hazards in the road, observe all traffic control signals or warnings, and prepare to move through the intersection.

*Id.*

even if the type of disorderly conduct described above could accurately be deemed a “secondary effect,” it is not an inherent secondary effect of *solicitation*, but of the congregation of any large group of people,<sup>214</sup> whether they have congregated to solicit employment, throw a party, or engage in protest. Simply put, Jupiter cannot demonstrate that any of its stated threats to the quality of urban life are “almost unique” or inherent to the solicitation of business or employment, and therefore, the secondary-effects doctrine is inapplicable.

Nevertheless, there does exist the remote possibility that a court would apply a content-neutral standard of review to Jupiter’s ordinance. For that reason, the next two Sections will analyze the ordinance under both content-neutral and content-based standards of review.

### 1. *The Ordinance as a Content-Neutral Regulation*

A content-neutral ordinance will be sustained as a valid time, place, and manner regulation on speech if it is narrowly tailored to serve a substantial government interest and if it leaves open ample alternative channels of communication.<sup>215</sup> Traffic flow and safety issues, as well as quality of urban life issues, are undoubtedly substantial government interests;<sup>216</sup> therefore, the only remaining questions are whether Jupiter’s ordinance is sufficiently narrowly tailored and whether Jupiter leaves open ample alternative channels of communication.<sup>217</sup> While Jupiter’s Ordinance need not be the least restrictive means available to be considered narrowly tailored, it may not, on the other hand, substantially burden more speech than necessary to serve its interests.<sup>218</sup>

#### a. Narrow Tailoring

Though several courts have found content-neutral non-solicitation ordinances to be narrowly tailored, most of those ordinances have been substantially less restrictive than the Jupiter

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214. *CHIRLA II*, 2000 WL 1481467 at \*\*11–12 (noting that cases employing the secondary-effects doctrine have done so to “cut off the secondary effects at their source”).

215. *Clark*, 468 U.S. at 293.

216. *Supra* nn. 107–109 and accompanying text.

217. *Clark*, 468 U.S. at 293.

218. *Ward*, 491 U.S. at 799.



Ordinance and have banned street-side solicitation only where solicitors entered into, or stood upon, the streets, roadways, or medians.<sup>219</sup> The ordinances in *Xiloj-Itzep*, *CHIRLA II*, and *Redondo Beach*, on the other hand, are more analogous to Jupiter's ordinance because they ban solicitation not only in the streets or roadways, but also on sidewalks, alleyways, and driveways.<sup>220</sup>

While the *Xiloj-Itzep* court did find the ordinance at issue there to be appropriately narrowly tailored, it reached that holding by merely adopting, with little input of its own, the analyses put forth in *Phoenix*, *Baton Rouge*, and *St. Louis County*.<sup>221</sup> The court in *CHIRLA II*, however, did examine the differences between the ordinances at issue in prior non-solicitation cases and an ordinance (such as the one it ultimately struck down) that banned substantially more speech. The *CHIRLA II* court first noted that the ordinances in *Phoenix*, *Baton Rouge*, and *St. Louis County* were appropriately narrowly tailored to traffic safety because they restricted, in a content-neutral fashion, a type of conduct that presents a special traffic safety hazard because of the potential for driver distraction.<sup>222</sup>

Second, the court noted that Los Angeles County was unable to provide any evidence that "passive solicitation," such as a person standing on a sidewalk holding a "looking for work" sign, would implicate the types of traffic concerns that the Los Angeles County ordinance sought to relieve, or that the *Phoenix*, *Baton Rouge*, and *St. Louis County* ordinances did relieve.<sup>223</sup> Third, the *CHIRLA II* court recognized the ordinance's potential to chill otherwise legal speech and offered the hypothetical example of a solicitor who legally places leaflets on parked cars, but who runs afoul of the ordinance by announcing her availability for work or business to passing motorists.<sup>224</sup> Viewing all those characteristics

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219. *Supra* nn. 92–95 and accompanying text.

220. *Xiloj-Itzep*, 24 Cal. App. 4th Dist. at 629; *CHIRLA II*, 2000 WL 1481467 at \*1; *Redondo Beach*, 475 F. Supp. 2d at 955.

221. *See Xiloj-Itzep*, 24 Cal. App. 4th Dist. at 639–640 (explaining the reasoning of *Phoenix*, *Baton Rouge*, and *St. Louis County*, but failing to point out the distinctions between the ordinances in those three cases and the ordinance in the instant case).

222. *CHIRLA II*, 2000 WL 1481467 at \*5.

223. *Id.* at \*\*6–7.

224. *Id.* at \*8.

together, the *CHIRLA II* court found that the Los Angeles County ordinance burdened significantly more speech than necessary and was therefore not narrowly tailored to its stated substantial interest in traffic safety.<sup>225</sup>

The court then turned to the issue of quality of urban life and again found the ordinance to be insufficiently tailored. Complaints regarding disorderly conduct, the court found, stemmed from the *congregation* of solicitors (invariably, day laborers) in large groups, but the ordinance targeted not only groups of solicitors, but individual solicitors.<sup>226</sup> After expressing its reluctance to ban an entire class of speech because of the risk that some speakers might engage in other harmful behavior, the court concluded that Los Angeles County had more effective means at its disposal for regulating the quality of urban life<sup>227</sup> and accordingly found the ordinance insufficiently tailored in this regard as well.

Under a *CHIRLA II*-style analysis, Jupiter's Ordinance fails the narrow-tailoring test. The Ordinance runs into the same kinds of problems as did Los Angeles County's ordinance in that it substantially burdens far more speech than is necessary to accomplish its goals. To date, Jupiter has not been able to provide any evidence, anecdotal or otherwise, that a solicitor standing passively upon a sidewalk, announcing his or her availability for work by holding up a sign, creates the same kind of threat to traffic safety as does a solicitor who dashes out into the flow of traffic to make face-to-face contact with a motorist. In Jupiter, for example, groups of high-school students routinely stand on the sidewalks in front of the local Wal-Mart and advertise car washes. The teenagers jump up and down, wave their arms, hold signs, and call out "Ca-aa-ar Wa-aa-sh!" in singsong voices to passing motorists—all of which are prevented by the terms of the Ordinance.<sup>228</sup> Drivers know that to take advantage of the service, they need only pull into the Wal-Mart turn lane, which in turn leads to an alleyway where the car washes take place.<sup>229</sup> The solicitation

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225. *Id.* at \*9.

226. *Id.* at \*9.

227. The court pointed to provisions in the California Penal Code that criminalize littering, fighting, noise, offensive words, trespassing, disorderly conduct, and willful and malicious obstruction of public rights-of-way. *Id.* at \*9.

228. See Jupiter Town Code at § 7-91 (defining the term "solicit").

229. These observations are based on the Author's experience as a long-time resident of

does not impede the traffic flow in the manner envisioned by the Ordinance, which specifically referred to “individuals [who] rush cars and step into the streets and right[s]-of-way.”<sup>230</sup>

Despite the Town’s intent, however, even completely passive solicitors who simply stand or sit on sidewalks or driveways, holding signs announcing availability of their services or products, violate the Ordinance. The homeless veteran with the “Will Work for Food” sign, the marketer holding the giant cardboard arrow reading “New Town Homes This Direction,” or the minimum-wage employee holding a sign to promote a new restaurant are all potentially running afoul of the Ordinance’s broad sweep even though none of these people are engaging in “tagging” or “rushing” cars, stepping out into the street, or making distracting gestures; they are, essentially, no more dangerous to traffic safety than are large signs or billboards standing alone along the roadway. Even if these solicitors attempt to solicit only other pedestrians, they still may violate the Ordinance if they inadvertently convey their message to passing motorists. For these reasons, the Ordinance cannot be said to be narrowly tailored to traffic safety.

Likewise, the Ordinance is not narrowly tailored to address issues surrounding the quality of urban life. In *CHIRLA II*, the court concluded that a law restricting a certain type of speech because some speakers *might* simultaneously engage in otherwise undesirable activities could not be deemed narrowly tailored to the government interest in preventing those undesirable activities from taking place—especially when the government already has the means to prosecute offenders without burdening speech.<sup>231</sup> Likewise, though Jupiter’s Ordinance specifically calls day laborers out on engaging in “undesirable uses of public space” such as harassment, littering, and public urination,<sup>232</sup> Jupiter cannot use the fact that some day laborers may engage in undesirable conduct to justify prohibiting the solicitation of business and employment.<sup>233</sup> Additionally, like in *CHIRLA II*, where the

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Jupiter.

230. Jupiter, Fla., Ordin. 29-05.

231. *CHIRLA II*, 2000 WL 1481467 at \*9.

232. Jupiter, Fla., Ordin. 29-05.

233. *CHIRLA II*, 2000 WL 1481467 at \*9 (citing *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1219–1222 (8th Cir. 1998) (striking down an ordinance that prohibited the leafleting of unattended vehicles, reasoning that many leafletters and recipients of leaflets would not

government could have simply prosecuted offenders under applicable criminal laws,<sup>234</sup> so too can day laborers who engage in “undesirable uses of public space” be prosecuted for, if applicable, littering,<sup>235</sup> creating unwanted noise,<sup>236</sup> disorderly intoxication,<sup>237</sup> loitering or prowling,<sup>238</sup> exposure of sexual organs,<sup>239</sup> general nuisances,<sup>240</sup> or criminal mischief<sup>241</sup> without burdening the speech of those not engaged in harmful acts.<sup>242</sup> This substantial burden on speech that does not produce any harm, coupled with the availability of alternative methods of enforcement that effectively target undesirable acts without affecting speech at all, indicates that the Jupiter Ordinance is not narrowly tailored to the Town’s stated interest in preserving the quality of urban life.

#### b. Alternative Channels of Communication

Though the Ordinance cannot survive a content-neutral standard of review because it is not narrowly tailored, it should be noted that Jupiter does provide ample alternative channels of communication via the El Sol Neighborhood Resource Center.<sup>243</sup> The Center is open to day laborers (as well as any other Jupiter resident seeking daily employment) seven days a week, and its lottery system provides day laborers with no worse chance of obtaining employment than they would encounter as part of a large

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litter)).

234. *Id.* at \*9.

235. Jupiter Town Code at §§ 17-1–17-2.

236. Jupiter Town Code at §§ 13-81–13-98.

237. Fla. Stat. § 856.011 (2006).

238. *Id.* at § 856.021.

239. *Id.* at § 800.03.

240. *Id.* at § 823.01.

241. *Id.* at § 806.13.

242. *CHIRLA II*, 2000 WL 1481467 at \*9.

243. The Ordinance also permits the solicitation of business or employment in certain multifamily residential complexes and commercial parking lots so long as the owner has not posted a sign to the contrary. Jupiter Town Code at § 7-93(a). However, there is no guarantee that any such owner will permit her property to be used in such a way, and the Town may not merely rely on the hope that private property owners will be generous in order to support their contention that alternative channels of communication exist. To allow the Town to do so would render the alternative channels element “meaningless because there always is some possibility that some property owner somewhere might open up her land to speakers who are restricted from using the public forum. The regulator must do more than merely speculate that such a possibility exists.” *CHIRLA II*, 2000 WL 1481467 at \*13.

group standing on a street corner. Although some laborers may prefer to continue seeking employment on the streets,<sup>244</sup> this in and of itself does not render the Center inadequate, as an alternative channel of communication need not be the speaker's first choice.<sup>245</sup> Additionally, the fact that the Center was formally established by the Town, and is not simply a random central location where laborers congregate with the Town's silent approval, lends weight to Jupiter's assertion that the Center is an adequate alternative channel of communication.<sup>246</sup>

## 2. *The Ordinance as a Content-Based Regulation*

Despite the above analysis, the more likely scenario is that a court having determined that the solicitation of business or employment is non-commercial speech will classify the Ordinance as a content-based restriction on speech. Under the strict-scrutiny review afforded to content-based restrictions on speech, such a restriction must be the least restrictive means available to serve a

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244. Cerón, *supra* n. 19 (noting that some day laborers using the El Sol center were frustrated with the lottery system).

245. *Weinberg*, 310 F.3d at 1041; *see Heffron*, 452 U.S. at 647 (stating that "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired").

246. *See Xiloj-Itzep*, 24 Cal. App. 4th Dist. at 641 (holding that a telephone-hiring exchange established by the City of Agoura Hills was an adequate alternative channel of communication for solicitation); *but see Redondo Beach*, 475 F. Supp. 2d. at 968 (rejecting a day-labor center as an adequate alternative channel of communication). *Redondo Beach* held that a labor center run by charities was not an adequate alternative channel because there was no guarantee that the labor center would not be shut down at any time. *Id.* In fact, the center in that case was experiencing tremendous financial difficulty and at one point in time was even charging day laborers monthly dues of twenty-five dollars to keep the center running. *Id.* The court also noted that the center had no legal obligation to continue providing services to day laborers, and that should the charities decide to pull out of the center, that avenue of communication would be lost. *Id.* The court's reasoning in *Redondo Beach*, however, is simply bad policy. The court cited no precedent for the supposition that an alternative channel of communication, no matter how effectively it operates, can be deemed inadequate because it could shut down at any time, and in fact, caselaw seems to suggest exactly the opposite in that speculation cannot be the grounds for such a holding. *Cf. CHIRLA II*, 2000 WL 1481467 at \*13 (noting that the government may not prove the existence of adequate alternative channels of communication by speculating that some private property owner may provide her property for public use). If the government cannot meet its burden of proving the existence of alternative channels by speculating that they may "open up" at some future point, then certainly a court should not be able to refuse to recognize an alternative channel as adequate by speculating that the channel may someday cease to exist.

compelling government interest.<sup>247</sup> However, Jupiter's stated interests—traffic safety and quality of urban life—have never been deemed compelling by any court.<sup>248</sup> Likewise, Jupiter's Ordinance is clearly not the least restrictive means available to protect the Town's stated interests. For traffic safety, the Town could have enacted an ordinance prohibiting any solicitor from stepping into the flow of traffic to convey his or her message. Such an ordinance would have left unburdened speakers who remain on sidewalks or driveways and who do not threaten traffic safety by passively soliciting from out-of-the-way locations. Alternatively, Jupiter could have simply prohibited pedestrians from stepping into the flow of traffic to approach a vehicle for any purpose, whether to solicit business, employment, or charitable contributions or to distribute political or religious literature. As for Jupiter's interest in maintaining the quality of urban life, certainly Jupiter's least restrictive alternative is to simply prohibit the undesired activity (e.g., noise, littering, loitering, public intoxication, and public urination) through either its own penal code or the Florida State Statutes and to issue citations and fines accordingly.

#### IV. CONCLUSION

As the issue of immigration remains at the forefront of national debate and as Congress continues to refuse to enact meaningful policies for addressing the large number of undocumented immigrants, local governments are still struggling to address the problem on the municipal level. The town of Herndon, Virginia, recently garnered significant media attention after it passed its own ordinance restricting the solicitation of employment from public rights-of-way.<sup>249</sup> After an individual who was ticketed for violating the ordinance brought suit against the town, Herndon moved to dismiss the complaint.<sup>250</sup> In August 2007, Circuit Court Judge Leslie M. Alden granted the motion to dismiss, finding in

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247. *Solantic*, 410 F.3d at 1267; *Playboy*, 529 U.S. at 813; *Perry*, 460 U.S. at 45.

248. *Solantic*, 410 F.3d at 1267 (noting that a city's sign code failed strict scrutiny in part because the city's asserted interests in traffic safety and aesthetics were not compelling, nor had prior caselaw ever recognized them as compelling).

249. Herndon Code Ordin. (Va.) §§ 42-134–42-137 (2005).

250. See Or. Denying Def.'s Mot. to Dismiss, *Town of Herndon v. Thomas*, No. MI-2007-644, slip. op. at 1 (Va. 9th Cir. Aug. 29, 2007) (briefly reciting the procedural posture of the case).

an eight-page opinion that although the ordinance was content-neutral and was narrowly tailored to serve Herndon's significant interests,<sup>251</sup> the ordinance did not permit ample alternative channels of communication and thus ultimately failed the test for content neutrality.<sup>252</sup> The order rejected as an alternative channel Herndon's self-described "temporary assembly site," explaining that "[b]y specifically describing the assembly site as *temporary*, [Herndon] clearly intends for the site to exist for an uncertain period of time. However, the Ordinance . . . does not have a similar temporal element."<sup>253</sup> Judge Alden's concern was well-founded; Herndon's day-labor center closed the following September.<sup>254</sup> Like *Redondo Beach*, this order can perhaps be best described as a "right decision, wrong reasons" outcome. The trial court incorrectly applied the secondary-effects doctrine to find the ordinance content-neutral, but at least correctly held that the ordinance could not pass constitutional muster.<sup>255</sup> The Herndon ordinance, because it targeted only the solicitation of employment, regulates commercial speech, or, in the alternative, constitutes an impermissible content-based regulation on speech.

While the Jupiter Ordinance has yet to be challenged legally, the El Sol Center has found itself the target of political protests. Opponents of the site regularly picket there on weekends,<sup>256</sup> and

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251. *Id.* at 3–6.

252. *Id.* at 6–8.

253. *Id.* at 7 (emphasis in original).

254. Dale Eisman, *Immigration a Dividing Line in Virginia Politics*, *Virginian-Pilot* (Norfolk, Va.) A1 (Nov. 10, 2007).

255. *Id.* at 4, 8.

256. Dwayne Robinson, *Anti-Immigrant Protest Targets Day-Labor Site*, *Palm Beach Post* 3C (Mar. 2, 2008). Some protesters describe the Center, where workers are served coffee and donuts, as a "Taj Mahal"; one protester's dog wore a sign reading "I have my papers, do you?" *Id.*; Ana X. Cerón, *Protesters Putting Pressure on El Sol Day Labor Center*, *Palm Beach Post* 1B (Apr. 1, 2008). Some protesters have posted video messages criticizing El Sol and Jupiter's immigration policy on YouTube. Ana X. Cerón, *Ex-Police Officer Criticizes Jupiter's Immigrant Policy in YouTube Video*, *Palm Beach Post* 1B (Apr. 4, 2008). In one video, former Jupiter police officer John Banister stands outside El Sol and describes how for three years he reported all arrests of undocumented immigrants to Immigration and Customs Enforcement until his supervisor informed him that such a practice went "against the political agenda of what Jupiter was trying to do." YouTube, *Ex-Jupiter Lawman Exposes the Truth*, <http://www.youtube.com/watch?v=218v4dIyQdg> (posted Mar. 21, 2008). The video, posted by user "NoillegalAliens," contains the following tagline: "Digital camera: \$250; Memory card: \$40; Having a former Jupiter police officer tell his side of the story about Jupiter's [defacto] sanctuary city policy . . . : priceless". *Id.* For more YouTube videos added by the same user, see YouTube, *NoillegalAliens Channel*, <http://www.youtube.com/channel/UC...>

now two police officers sit outside El Sol to ensure the safety of everyone involved.<sup>257</sup> Florida State Representative Gayle Harrell has proposed a bill to bar any municipality from creating or assisting day-labor centers.<sup>258</sup> Despite the increased negative attention, other local governments continue to model themselves after Jupiter. The town of Loxahatchee Groves, which passed its own non-solicitation ordinance in early 2008, set up the Buena Fe Center in a trailer adjacent to a local church.<sup>259</sup> However, day laborer's knowledge of the Loxahatchee Groves ordinance but apparent unfamiliarity with Buena Fe have caused many laborers to migrate to unincorporated parts of Palm Beach County to seek work.<sup>260</sup> Unlike in Jupiter, Loxahatchee Groves's ordinance and its day-labor center have not yet begun to operate in tandem.

Despite the apparent success of Jupiter's immigration policy, Jupiter's non-solicitation ordinance likely cannot withstand a First Amendment challenge brought by day laborers regardless of whether the Ordinance is found to regulate commercial or non-commercial speech. However, some simple modifications to the Ordinance would result in a regulation far more likely to pass constitutional muster. First, Jupiter should revise its stated intent to clearly reflect exactly what kind of speech it is trying to regulate. Currently, the Ordinance's legislative history seems to reflect some confusion as to whether the Ordinance was intended to regulate commercial speech or non-commercial speech in a content-neutral fashion.<sup>261</sup>

Second, if Jupiter intends to regulate non-commercial speech in a content-neutral manner, it should seriously consider amending the Ordinance to ban *all* forms of vehicle-addressed solicitation, whether that solicitation is for business, employment, or charitable contributions. Extending the Ordinance's reach to all

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.com/noillegalaliens (accessed Apr. 5, 2008).

257. Jupiter began stationing law-enforcement officers outside El Sol in December 2007 after a confrontation between a protester and an individual seeking to hire day laborers resulted in an arrest. *Id.* The protester was charged with misdemeanor battery but was later acquitted. *Id.*

258. Robinson, *supra* n. 256.

259. Mitra Malek, *Buena Fe Debuts as 2nd Day Labor Center in Area*, Palm Beach Post 1B (Mar. 11, 2008).

260. Mitra Malek, *Workers Move to County Roadside*, Palm Beach Post 1B (Mar. 19, 2008).

261. *Supra* n. 30 and accompanying text.



such conduct, without regard to the speech conveyed by the conduct, will bring the Ordinance more in line with the ordinances at issue in *Phoenix*, *Baton Rouge*, and *St. Louis County*, all of which were subject to the test for content-neutrality and subsequently upheld by their respective courts.<sup>262</sup>

Third, regardless of what type of speech Jupiter seeks to regulate, the Town must refine the Ordinance to be more narrowly tailored. One possible approach would target only those types of solicitation that cause the most danger to traffic safety, such as solicitation requiring the solicited person to stop in the middle of the traffic flow, or solicitation involving pedestrians darting out into the street. An additional provision could focus on motorists, criminalizing the act of stopping a car in the flow of traffic (regardless of whether it is at a red light or stop sign) to complete a solicitation. Keeping the Ordinance narrowly focused on solicitations that pose an immediate threat to both drivers and pedestrians (as opposed to solicitations that may catch a driver's eye, but are no more dangerous than a colorful billboard) would certainly lend credence to any argument that the Ordinance is, in fact, narrowly tailored to serve the substantial government interest in traffic safety.

Though Jupiter is certainly to be commended for taking bold steps to address the problems associated with day labor, any solutions must still be consistent with the protections of free speech afforded by the United States Constitution. As it stands right now, Jupiter's ordinance is likely unconstitutional. However, with some minor modifications, the Ordinance's deficiencies can be corrected, and its chances of surviving a constitutional challenge will greatly increase.

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262. Should Jupiter take this approach, it will be required to provide an alternative channel of communication for those who solicit charitable contributions. However, because the market for potential charitable donors is wider than the market for potential employers of day laborers, methods such as literature distribution to pedestrians, shoppers, and parked vehicles may suffice.