Omar C. Jadwat (admitted *pro hac vice*)
Lucas Guttentag (admitted *pro hac vice*)
Tanaz Moghadam (admitted *pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION IMMIGRANTS' RIGHTS PROJECT
125 Broad Street, 18th Floor
New York, New York 10004
Telephone: (212) 549-2660
Facsimile: (212) 549-2654
ojadwat@aclu.org
lguttentag@aclu.org
tmoghadam@aclu.org

Linton Joaquin (admitted *pro hac vice*)
Karen C. Tumlin (admitted *pro hac vice*)
Nora A. Preciado (admitted *pro hac vice*)
Melissa S. Keaney (admitted *pro hac vice*)
Vivek Mittal (admitted *pro hac vice*)
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Boulevard, Suite 2850
Los Angeles, California 90010
Telephone: (213) 639-3900
Facsimile: (213) 639-3911
joaquin@nilc.org
tumlin@nilc.org
preciado@nilc.org
keaney@nilc.org
mittal@nilc.org

Thomas A. Saenz (admitted *pro hac vice*)
Cynthia Valenzuela Dixon (admitted *pro hac vice*)
Victor Viramontes (admitted *pro hac vice*)
Gladys Limón (admitted *pro hac vice*)
Nicholás Espíritu (admitted *pro hac vice*)
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
634 S. Spring Street, 11th Floor
Los Angeles, California 90014
Telephone: (213) 629-2512
Facsimile: (213) 629-0266
tsaenz@maldef.org
cvalenzuela@maldef.org
vviramontes@maldef.org
glimon@maldef.org
nespiritu@maldef.org

Attorneys for Plaintiffs
Additional Co-Counsel on Subsequent Page

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Friendly House, *et al.*, Plaintiffs, v. Michael B. Whiting, *et al.*, Defendants.	CASE NO. CV-10-01061-SRB **PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION OF A.R.S. §§ 13-2928 (A) AND (B) AND MEMORANDUM IN SUPPORT THEREOF** **(ORAL ARGUMENT REQUESTED)**

Daniel J. Pochoda (SBA No. 021979)
Anne Lai* (SBA No. 330036)
ACLU FOUNDATION OF ARIZONA
3707 N. 7th Street, Suite 235
Phoenix, Arizona 85014
Telephone: (602) 650-1854
Facsimile: (602) 650-1376
dpochoda@acluaz.org
alai@acluaz.org

Nina Perales (admitted *pro hac vice*)
Iván Espinoza-Madrigal (admitted *pro hac vice*)
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND
110 Broadway Street, Suite 300
San Antonio, Texas 78205
Telephone: (210) 224-5476
Facsimile: (210) 224-5382
nperales@maldef.org
iespinoza@maldef.org

Chris Newman (admitted *pro hac vice*)
Lisa Kung (admitted *pro hac vice*)
NATIONAL DAY LABOR ORGANIZING NETWORK
675 S. Park View Street, Suite B
Los Angeles, California 90057
Telephone: (213) 380-2785
Facsimile: (213) 380-2787
newman@ndlon.org
kung@ndlon.org

Daniel R. Ortega, Jr. (SBA No. 005015)
ROUSH, MCCRACKEN, GUERRERO, MILLER & ORTEGA
1112 E. Washington Street
Phoenix, Arizona 85034
Telephone: (602) 253-3554
Facsimile: (602) 340-1896
danny@rmgmo.com

Cecillia D. Wang (admitted *pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION FOUNDATION IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, California 94111
Telephone: (415) 343-0775
Facsimile: (415) 395-0950
cwang@aclu.org

Julie A. Su (admitted *pro hac vice*)
Yungsuhn Park (admitted *pro hac vice*)
Connie Choi (admitted *pro hac vice*)
Carmina Ocampo (admitted *pro hac vice*)
ASIAN PACIFIC AMERICAN LEGAL CENTER, a member of Asian American Center for Advancing Justice
1145 Wilshire Blvd., Suite 200
Los Angeles, California 90017
Telephone: (213) 977-7500
Facsimile: (213) 977-7595
jsu@apalc.org
ypark@apalc.org
cchoi@apalc.org
cocampo@apalc.org

Laura D. Blackburne (admitted *pro hac vice*)
NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP)
4805 Mt. Hope Drive
Baltimore, Maryland 21215
Telephone: (410) 580-5700
lblackburne@naacpnet.org

Bradley S. Phillips+ (admitted *pro hac vice*)
Paul J. Watford+ (admitted *pro hac vice*)
Joseph J. Ybarra+ (admitted *pro hac vice*)
Elisabeth J. Neubauer+ (admitted *pro hac vice*)
Benjamin J. Maro+ (admitted *pro hac vice*)
MUNGER, TOLLES & OLSON LLP+
355 South Grand Avenue
Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100
Facsimile: (213) 687-3702
Brad.Phillips@mto.com
Paul.Watford@mto.com
Joseph.Ybarra@mto.com
Elisabeth.Neubauer@mto.com
Benjamin.Maro@mto.com

Susan Traub Boyd+ (admitted *pro hac vice*)
Yuval Miller+ (admitted *pro hac vice*)
Kimberly A. Morris+ (admitted *pro hac vice*)
MUNGER, TOLLES & OLSON LLP+
560 Mission Street
Twenty-Seventh Floor
San Francisco, CA 94105-2907
Telephone: (415) 512-4000
Facsimile: (415) 512-4077
Susan.Boyd@mto.com
Yuval.Miller@mto.com
Kimberly.Morris@mto.com

Stephen P. Berzon++ (admitted *pro hac vice*)
Jonathan Weissglass++ (admitted *pro hac vice*)
ALTSHULER BERZON LLP++
177 Post Street, Suite 300
San Francisco, CA 94108
Telephone: (415) 421-7151
Facsimile: (415) 362-8064
sberzon@altshulerberzon.com
jweissglass@altshulerberzon.com

+Attorneys for all plaintiffs except Service Employees International Union, Service Employees International Union, Local 5, United Food and Commercial Workers International Union, and Japanese American Citizens League

++Attorneys for Service Employees International Union, Service Employees International Union, Local 5, United Food and Commercial Workers International Union

*Admitted pursuant to Ariz. Sup. Ct. R. 38(f)

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I. INTRODUCTION

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

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

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

II. PROCEDURAL HISTORY

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

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

III. STANDARD

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

IV. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

1145 (noting, in holding ordinance content-based, that enforcing officer "would need to examine the contents of the handbill to determine whether its distribution was prohibited"); *see also Cincinnati v. Discovery Network*, 507 U.S. 410, 429 (1993). Similarly, pedestrians in Arizona can engage in any speech with motorists, and in any manner, without running afoul of §§ 13-2928 (A) and (B), as long as the speech does not constitute employment solicitation. Oct. 8, 2010 Order at 20. *Cf. ACLU II*, 466 F.3d at 794; *Humanitarian Law Project*, 130 S. Ct. at 2722-24.

This selective liability based on a particular subject of speech also evidences Arizona's attempt to chill the expression and communication of one particular set of constitutionally protected ideas. *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 394 (1992). "Selectivity of this sort creates the possibility that the [government] is seeking to handicap the expression of particular ideas." *Id.* While Arizona may enact legislation aimed at ensuring traffic safety, it cannot do so in a way that is designed to impose "special prohibitions on those speakers who express views on disfavored subjects" without the regulation becoming a constitutionally suspect content-based restriction on speech. *Id*. at 391.[2]

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

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

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

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

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

Although traffic safety can be a recognized significant interest, *Kuba v. 1-A Agr. Ass'n*, 387 F.3d 850, 858 (9th Cir. 2004), here, there are numerous state and local laws readily available to Defendants that address traffic flow and public safety issues caused by the interference with traffic. *See e.g.*, A.R.S. § 28-905 ("A person shall not open a door on a motor vehicle unless it . . . can be done without interfering with the movement of other traffic."); A.R.S. §§ 13-2906(A) (imposing a maximum 30-day jail sentence if person "recklessly interferes with the passage of any highway or public thoroughfare by creating an unreasonable inconvenience or hazard"); *see also* 28-871(A); 28-704(A); 28-873(A). Accordingly, Defendants cannot show that §§13-2928 (A) and (B) are the least restrictive means to achieve purported traffic safety interests because they could easily rely on the myriad existing laws that directly regulate behavior by pedestrians or drivers that disrupts traffic safety. *See Boos v. Barry*, 485 U.S. 312, 329 (1988) (holding statute was not narrowly tailored because "a less restrictive alternative is readily available"). Defendants may enforce these laws, which allow them to combat threats to traffic flow and public safety that they may assert an interest in eliminating, without unconstitutionally impinging on the protected speech that §§ 13-2928 (A) and (B) prohibit.

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

1 and (B) cannot survive strict scrutiny.

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

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

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

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

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

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

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

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

B. Plaintiffs Are Suffering Irreparable Harm.

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

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

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

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

1 The day laborers fear being subjected to criminal sanctions, including
2 imprisonment, imposed by §§ 13-2928 (A) and (B), further evidencing irreparable harm
3 under First Amendment doctrine. *See* Harrington Decl. ¶¶ 10, 12; Enrique Decl. ¶¶ 10-14.
4 This fear has exacerbated among Plaintiff Tonatierra's day laborer members following the
5 publication of a news article reporting Maricopa County Sheriff Joe Arpaio's intent to
6 enforce § 13-2928. Enrique Decl. ¶¶ 12-14. On November 7, 2010, the Arizona Republic
7 published an article quoting Sheriff Arapio as stating that he "[is] going to enforce one
8 part of [S.B. 1070] about picking up laborers [because] [t]hat part wasn't thrown out." *Id.*
9 at ¶12, Exh. A. Plaintiff Tonatierra's day laborer members soon thereafter learned about
10 Sheriff Arpaio's reported threat to enforce § 13-2928, causing even greater fear that they
11 will be arrested if they solicit work in the manner proscribed by §§ 13-2928 (A) and (B).
12 *Id.* at ¶ 13. Indeed, another Arizona District Court has previously found irreparable injury
13 with respect to a similar ban on speech related to day labor adopted by the town of Cave
14 Creek, Arizona. *Lopez v. Town of Cave Creek*, 559 F. Supp. 2d 1030, 1036 (D. Ariz.
15 2008) (enjoining city ordinance that prohibited standing on a street to solicit employment
16 from the occupant of any vehicle). The result should be no different here.
17 The solicitation prohibitions imposed by §§ 13-2928 (A) and (B) also subject day
18 laborers to severe economic hardship. *Cf. Satellite Television of New York Assoc. v.*
19 *Finneran*, 579 F. Supp. 1546, 1551-52 (S.D.N.Y. 1984) (considering economic burden on
20 party moving for preliminary injunction in evaluating irreparable harm and balance of
21 hardships). Most of Plaintiffs' member day laborers rely on day work to sustain
22 themselves and their families. *See* Harrington Decl. ¶ 12; Enrique Decl. ¶ 15. Day work
23 is oftentimes the only available means for Plaintiffs' member day laborers to obtain work
24 and is critical to their livelihood. *Id.* Due to the restrictions and sanctions imposed by §§
25 13-2928 (A) and (B), the day laborer members have refrained from soliciting or modified
26 the manner in which they solicit work in public rights-of-way, resulting in the reduction of
27 income from their day labor and in severe economic hardship. *Id.* In addition, individuals
28 who hire day laborers have indicated that they are reluctant to communicate publicly with

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

C. The Equities Tip Decidedly in Plaintiffs' Favor.

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

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

D. A Preliminary Injunction is in the Public Interest.

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

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

V. CONCLUSION

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

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

Dated: January 07, 2011

Respectfully Submitted,

/s/ Victor Viramontes
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

/s/ Karen C. Tumlin
NATIONAL IMMIGRATION LAW CENTER

/s/ Omar C. Jadwat
AMERICAN CIVIL LIBERTIES UNION FOUNDATION IMMIGRATNS' RIGHTS PROJECT

/s/ Daniel J. Pochoda
ACLU FOUNDATION OF ARIZONA

/s/ Yungsuhn Park
ASIAN PACIFIC AMERICAN LEGAL CENTER

/s/ Elisabeth J. Neubauer
MUNGER, TOLLES & OLSON LLP

/s/ Jonathan Weissglass
ALTSHULER BERZON LLP

CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2011, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing, and transmittal of a Notice of Electronic Filing to the following ECF registrants:

James P. Abdo – jabdo@napierlawfirm.com; JPABDO@msn.com
David L. Abney – abneymaturin@aol.com
Russell R. Abrutyn – rabrutyn@marshalhyman.com
Joseph G. Adams – jgadams@swlaw.com; mgarsha@swlaw.com; docket@swlaw.com
Joe A. Albo, Jr. – joe.ablo@pinalcountyaz.gov; Kristine.carver@pinalcountyaz.gov; Joe.albo@azbar.org
Maria E. Andrade – mandrade@huntleylaw.com; mdiaz@huntleylaw.com
Kenneth A. Angle – kangle@graham.az.gov
Erin Archerd – earcherd@cov.com
Cynthia A. Aziz – Cynthia@azizimmigrationlaw.com
Vikram K. Badrinath – vbadrinath@aol.com; vikram.badrinath@azbar.org
Daniel C Barr – dbarr@perkinscoie.com; docketphx@perkinscoie.com; sneilson@perkinscoie.com
Gary M. Baum – gary.baum@cityofpaloalto.org; sharon.hanks@cityofpaloalto.org
Michael McCormack Bergin – bbergin@roselawgroup.com; jevert@roselawgroup.com
Anjali Bhargava – anjali.bhargava@cco.sccgov.org
Laura D. Blackburne – lblackburne@naacpnet.org
Adam N Bleir – adam@sherickbleier.com; clarissa@sherickbleier.com
Ronald G. Blum – rblum@manatt.com
Sean A. Bodkin – sean.bodkin@azbar.org
David J. Bodney – dbodney@steptoe.com; awilmont@steptoe.com; phdctnef@steptoe.com
Victor Bolden – vbolden@newhavenct.net
Jean Boler – jean.boler@seattle.gov

1 John J. Bouma – jbouma@swlaw.com; rnzacbow@swlaw.com; brhoades@swlaw.com;
2 docket@swlaw.com; mzachow@swlaw.com
3 Susan Traub Boyd- susan.boyd@mto.com; robyn.bird@mto.com
4 Stephen P. Berzon – sberzon@altshulerberzon.com
5 Maria R. Brandon – brandonm@mail.maricopa.gov; wink1@mail.maricopa.gov;
6 fitzpatrickl@mail.maricopa.gov; garciat@mail.maricopa.gov;
7 Garciaj013@mail.maricopa.gov
8 Richard L. Brusca – Richard.brusca@skadden.com
9 Robert G. Bucklew – gbuckelew@co.la-paz.az.us
10 William W. Carter – william.carter@lacity.org
11 Sirena Castillo – scastillo@manatt.com
12 Bryan B. Chambers – bchambers@co.gila.az.us
13 Stephanie Fleischman Cherny – Stephanie.cherny@skadden.com
14 Connie Choi – cchoi@apalc.org
15 Christopher R. Clark – crclark@dl.com
16 Vikki Cooper – vcooper@newhavenct.net
17 Zachary D. Cowan – zcowan@ci.berkeley.ca.us
18 Katherine Desormeau – kate.desormeau@cco.sccgov.org
19 Sara Elizabeth Dill – sdill@pkjlaw.com; saraedill@gmail.com
20 Cynthia Valenzuela Dixon – cvalenzuela@maldef.org; agodinez@maldef.org
21 J Richard Doyle – Richard.doyle@sanjoseca.gov; sue.uemura@sanjoseca.gov
22 Christopher Baird Dupont – dupontlaw@cox.net
23 Paul F. Eckstein – peckstein@perkinscoie.com; docketphx@perkinscoie.com;
24 cwendt@perkinscoie.com
25 Nicholas Jason Enoch - nicholas.enoch@azbar.org,danette@lubinandenoch.com
26 Ivan E Espinoza-Madrigal - iespinoza@maldef.org
27 Nicholas David Espiritu - nespiritu@maldef.org; agodinez@maldef.org
28 David Joseph Euchner - deuchner@comcast.net

1 Stanley G Feldman - sfeldman@hmpmlaw.com,svancamp@hmprnlaw.com
2 Wendy L Feng- wfeng@cov.com,mochoa@cov.com
3 Louis S Fidel - loufidel@hotmail.com
4 Nathan Jean Fidel – nfidel@hmpmlaw.com; slarsen@hmpmlaw.com;
5 jlarsen@ hmpmlaw.com
6 Noel A Fidel - noel.fidel@mwmf.com; lori.mandeIl@mwmf.com; nafidel@mac.com
7 Jack Hamilton Fields - jackfields@co.yavapai.az.us
8 Albert M Flores- amflegal@aol.com
9 June Ava Florescue - jfloresc@co.gila.az.us
10 Kathleen M. Foster - kfoster@newhavenct.net
11 Kenneth M Frakes – kfrakes@roselawgroup.com; frakes3@cox.net
12 Nora V. Frimann – nora.frimann@sanjoseca.gov; sue.uemura@sanjoseca.gov
13 Peter William Ginder - peter.ginder@ci.minneapolis.mn.us
14 Laura Prendergast Gordon – gordonlp@elpasotexas.gov
15 Carla Gorniak - cgoniak@dl.com
16 Matthew Harrison Green – mgreenh@mattgreenlaw.com; allisona@mattgreenlaw.com;
17 theresa@mattgreenlaw.com
18 Jon Marshall Greenbaum - jgreenbaum@lawyerscommittee.org
19 Lucas Guttentag – lguttentag@aclu.org; irp_ecf@aclu.org
20 Lawrence L Hafetz - Ihafetz@counsel.lacounty.gov
21 Greta S Hansen - greta.hansen@cco.sccgov.org
22 Britt Wesley Hanson - bhanson@cochise.az.gov,kaguilar@cochise.az.gov
23 David T. Hardy – dthardy@mindspring.com
24 Gerald T. Hendrickson – jerry.hendrickson@ci.stpaul.mn.us
25 Robert Arthur Henry – bhenry@swlaw.com; pwilliams@swlaw.com;
26 docket@swlaw.com
27 Dennis J Herrera - tara.collins@sfgov.org
28

Michael M. Hethmon – mhethmon@irli.org; info@irli.org; smkonos@irli.org
Peter S. Holmes - peter.holmes@seattle.gov
Jeffrey Allen Imig - jimig@hmpmlaw.com; jarchambeau@hmpmlaw.com
Omar C Jadwat - ojadwat@aclu.org; mlauterback@aclu.org
Jonathan L Jantzen – jonathan.jantzen@tonation-nsn.gov
Linton Joaquin - joaquin@nilc.org
Daniel S Jurkowitz – danieljurkowitz@pcao.pima.gov; Annette.atkins@pcao.pima.gov;
susan.montgomery@pcao.pima.gov
Joseph Andrew Kanefield - jkanefield@az.gov
Melissa S Keaney - keaney@nilc.org; keaney@nilc.org
Peter Shawn Kozinets – pkozinets@steptoe.com; phdctnef@steptoe.com;
mmedlin@steptoe.com
Elizabeth Janney Kruschek - ekruschek@perkinscoie.com
Lisa Kung – kung@ndlon.org
Anne Lai - alai@acluaz.org; .jessican@acluaz.org; mhlee@acluaz.org
Carolyn B Lamm - clamm@whitecase.com
Tamara Lange - tamara.lange@cco.sccgov.org; alexandra.weight@cco.sccgov.org
Michael Dennis Latham - mlatham@co.apache.az.us
Jennifer AD Lehman - jlehman@counsel.lacounty.gov,dbluem@counsel.lacounty.gov
Thomas P Liddy - liddy@mail.maricopa.gov; garciat@mail.maricopa.gov;
garciajO13@mail.maricopa.gov
Gladys Limon - glimon@maldef.org; agodinez@maldef.org
William M. Litt - littwm@co.monterey.ca.us
James Neil Lombardo - neil.lombardo@skadden.com
Anne Cecile Longo – longoa@mcao.maricopa.gov; ca-civilmailbox@mcao.maricopa.gov
Richard Anthony Lopez - rlopez@cov.com
Foster Maer - fimaer@latinojustice.org
Stephen W Manning - smanning@ilgrp.com

1 Michael M Markman - mmarkman@cov.com,mmarkman@cov.com
2 Miguel A Marquez - miguel.marquez@cco.sccgov.org
3 Joanna S McCallum - jmccallurm@manatt.com
4 Michael William McCarthy - mmccarthy@co.greenlee.az.us;
5 mwmccarthy2002@yahoo.com
6 Charles J. McKee - mckeecj@co.monterey.ca.us
7 Charlie F. McNabb, Jr. – mcnabbcf@elpasotexas.gov
8 Lydia Mendoza - Irnendoza@manatt.com
9 Linda Meng - linda.meng@portlandoregon.gov
10 Yuval Miller - yuval.miller@mto.com; susan.ahmadi@mto.com
11 Mary Bridget Minder – bminder@perkinscoie.com; docketphx@perkinscoie.com
12 sneilson@perkinscoie.com
13 Vivek Mittal - mittal@nilc.org, mittal@nilc.org
14 Tanaz Moghadam - tmoghadam@aclu.org; arastogi@aclu.org
15 Kimberly A. Morris Kimberly.morris@mto.com
16 Michael P. Murphy – mmurphy@co.sanmateo.ca.us
17 Michael Napier – mnapierpc@aol.com; mike@napierlawfirm.com
18 Elisabeth Jill Neubauer - Elisabeth.Neubauer@mto.com; Marsha.Oseas@mto.com
19 Chris Newman – newman@ndlon.org
20 John D. Nibbelin – jnibbelin@co.sanmateo.ca.us
21 George A. Nilson - george.nilson@baltimorecity.gov
22 Carmina OCampo - cocampo@apalc.org; cocampo@apalc.org
23 Michael J ONeill – mike@landmarklegal.org
24 Andrea Sheridan Ordin - aordin@counsel.lacounty.gov
25 Daniel R Ortega, Jr - danny@rmgmo.com; lupe@rmgmo.com
26 Yungsuhn Park - ypark@apalc.org,ypark@apaIc.org
27 Robert Enrique Pastor – rpastor@hmpmlaw.com; slarsen@hmpmlaw.com;
28 jlarsen@hmpmlaw.com

1 Lance B Payette - lance.payette@navajocountyaz.gov
2 Cesar A Perales - cperales@latinojustice.org
3 Nina Perales - nperales@maldef.org; cleija@maldef.org
4 Jose L Perez - jperez@latinojustice.org
5 William Rowe Phelan, Jr. - william.phelan@baltimorecity.gov
6 Bradley S. Phillips – brad.phillips@mto.com; james.berry@mto.com;
7 mary.pantoja@mto.com
8 Gregory N Pimstone - gpimstone@manatt.com
9 Daniel Joseph Pochoda - dpochoda@acluaz.org; danpoc@cox.net;
10 jessican@acluaz.org
11 Nora A Preciado - preciado@nilc.org,preciado@nilc.org
12 John Daniel Reaves – jdreaves@usa.net
13 Rebecca Ann Reed - rreed@hrnpmIaw.com,gnielsen@hmpmlaw.com
14 Robert S Remar - rremar@leonardcarder.com
15 Jose de Jesus Rivera - azdjrivera@hmpmlaw.com; slarsen@hmpmlaw.com
16 jlarsen@hmpmlaw.com; jsoto@hmpmlaw.com
17 Garrett Roe - groe@irli.org; info@irli.org; smykonos@irli.org
18 Chris Myrl Roll – chris.roll@pinalcountyaz.gov; kristine.carver@pinalcountyaz.gov
19 George Jacob Romero - YCAttyCivil@yumacountyaz.gov
20 Thomas A Saenz - tsaenz@maldef.org
21 Gerald M. Sato – gerald.sato@lacity.org
22 Susan L Segal - susan.segal@ci.minneapolis.mn.us
23 Andrew Silverman – silverman@law.arizona.edu
24 Deborah S Smith deb@debsmithlaw.com
25 Wayne Snodgrass wayne.snodgrass@sfgov.org
26 Henry L. Solano – hsolano@dl.com; courtalert@dl.com
27 Julie A Su jsu@apalc.org
28 Ghazal Tajmiri - tajmiri@nilc.org;

Robert Alexander Taylor robert.taylor@co.mohave.az.us

Phil A Thomas pthomas@leonardcarder.com

Carmen A. Trutanichh – ctrutanich@lacity.org

Karen Cassandra Tumlin - tumlin@nilc.org

Victor Viramontes – Vviramontes@maldef.org, agodinez@maldef.org

Charles F Walker charles.walker@skadden.com

Cecillia D Wang cwang@aclu.org; irptempl@aclu.org;1fernandez@aclu.org

Paul J Watford paul.watford@mto.com; marie.baltierra@mto.com

Jonathan Weissglass – jweisglass@altshulerberzon.com; smendez@altshulerberzon.com

Aileen Wheeler awheeler@cov.com, awheeler@cov.com

Bruce P White - whiteb@mcao.maricopa.gov

Jean E Wilcox jwilcox@coconino.az.gov, mrankin@coconino.az.gov

Joseph J Ybarra joseph.ybarra@mto.com

Joseph Young - jyoung@co.apache.az; us.josephdyoung7@gmaiLcom

Stephen N Zack szack@bsfllp.com • Barnaby W. Zall bzall@aol.com

Barnaby W. Zall – bzall@aol.com

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

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

/s/ Anna Godinez