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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Friendly House, et al.,	)	No. CV 10-1061-PHX-SRB
Plaintiffs,	)	<b>ORDER</b>
vs.	)	
Michael B. Whiting, et al.,	)	
Defendants.	)	

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This matter comes before the Court on Plaintiffs’ Renewed Motion for Preliminary Injunction of Arizona Revised Statutes (“A.R.S.”) § 13-2928(A) and (B) (“3d PI Mot.”) (Doc. 510).

**I. BACKGROUND**

The facts of this case were set forth in this Court’s Order of October 8, 2010, which is incorporated fully herein. (*See* Doc. 447, Oct. 8, 2010, Order at 1-4.) The pertinent details are briefly summarized here. Plaintiffs bring a variety of challenges to Arizona’s Senate Bill 1070 (“S.B. 1070”), the “Support Our Law Enforcement and Safe Neighborhoods Act,” which was signed into law by Governor Brewer on April 23, 2010.<sup>1</sup> Among S.B. 1070’s

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<sup>1</sup> In this Order, the Court refers to Senate Bill 1070 and House Bill 2162 collectively as “S.B. 1070,” describing the April 23, 2010, enactment as modified by the April 30, 2010, amendments.

1 components, Section 5 added A.R.S. § 13-2928 to the Arizona Criminal Code. A.R.S. § 13-  
2 2928(A) makes it unlawful for an occupant of a motor vehicle that is stopped on a street,  
3 roadway, or highway and is impeding traffic to attempt to hire a person for work at another  
4 location. Similarly, A.R.S. § 13-2928(B) provides that it is unlawful for a person to enter a  
5 motor vehicle in order to be hired if the vehicle is stopped on a street, roadway, or highway  
6 and is impeding traffic. S.B. 1070 had an effective date of July 29, 2010; on July 28, 2010,  
7 the Court preliminarily enjoined certain provisions of the law, not including A.R.S. § 13-  
8 2928(A) and (B), from taking effect, in the related case *United States v. Arizona*, CV 10-  
9 1413-PHX-SRB.

10 Plaintiffs in this case also moved for a preliminary injunction as to a number of  
11 provisions of the law. (*See* Doc. 235, Pls.’ Mot. for Prelim. Inj. (“1st PI Mot.”).) At oral  
12 argument on the first Motion for Preliminary Injunction, counsel for Plaintiffs withdrew their  
13 request for an injunction running to A.R.S. § 13-2928(A) and (B). (Oct. 8, 2010, Order at  
14 35.) In the October 8, 2010, Order, the Court ruled that Plaintiffs’ first Motion for  
15 Preliminary Injunction was moot in light of the injunction entered in *United States v.*  
16 *Arizona*. (*Id.* at 34-35.) The Court also found that Plaintiffs had stated a claim with regard  
17 to their challenge to A.R.S. § 13-2928(A) and (B) on First Amendment grounds. (*Id.* at 19-  
18 20.)

19 Plaintiffs renewed their Motion for preliminary injunctive relief as to A.R.S. § 13-  
20 2928(A) and (B) on January 7, 2011. (Doc. 457, Pls.’ Mot. for Prelim. Inj. (“2d PI Mot.”) at  
21 2.) The Court denied the renewed Motion without prejudice on May 10, 2011, ruling that the  
22 outcome would be “at least impacted, if not determined” by the decision of the en banc court  
23 of the Ninth Circuit Court of Appeals in *Comite de Jornaleros de Redondo Beach v. City of*  
24 *Redondo Beach*, 657 F.3d 936 (9th Cir. 2011) (en banc). (Doc. 487, May 10, 2011, Order at  
25 3.) On September 16, 2011, sitting en banc, the Ninth Circuit Court of Appeals reversed the  
26 three-judge panel’s decision in *Redondo Beach* and held that a Redondo Beach ordinance  
27 prohibiting solicitation of business, employment, and contributions on streets and highways  
28 was not narrowly tailored to achieve the city’s interest in promoting traffic flow and safety

1 and thus violated the free speech guarantees of the First Amendment. 657 F.3d at 948.  
2 Plaintiffs now renew their Motion for Preliminary Injunction for the third time, arguing that  
3 “[u]nder both the previous holding of this Court and the en banc Ninth Circuit’s holding in  
4 [*Redondo Beach*], A.R.S. []§ 13-2928(A) and (B) are unconstitutional restrictions on  
5 speech.” (3d PI Mot. at 1.) The Court heard oral argument on this Motion on January 9, 2012.  
6 (See Doc. 577, Minute Entry.)

## 7 **II. LEGAL STANDARDS AND ANALYSIS**

### 8 **A. Preliminary Injunction Standard**

9 Plaintiffs seek to enjoin A.R.S. § 13-2928(A) and (B). (3d PI Mot. at 1.) “A plaintiff  
10 seeking a preliminary injunction must establish that he is likely to succeed on the merits, that  
11 he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance  
12 of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural*  
13 *Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

### 14 **B. Likelihood of Success on the Merits**

#### 15 **1. Commercial Speech v. Noncommercial Speech**

16 The Intervenor Defendants (“Defendants”) argue that Plaintiffs are not likely to  
17 succeed on the merits of their claim that A.R.S. § 13-2928(A) and (B) violate the First  
18 Amendment because these provisions are “constitutional restrictions on commercial speech,”  
19 properly evaluated under a more deferential standard than non-commercial speech. (Doc.  
20 553, Defs.’ Resp. to 3d PI Mot. (“Defs.’ Resp.”) at 6.) Plaintiffs argue that the commercial  
21 speech test should not be applied to A.R.S. § 13-2928(A) and (B), but, if it were, the  
22 provisions would not pass muster under even the more lenient standard. (Doc. 567, Pls.’  
23 Reply in Supp. of 3d PI Mot. (“Pls.’ Reply”) at 1.)

24 The Supreme Court has defined “commercial speech” as “speech that does no more  
25 than propose a commercial transaction.” *United States v. United Foods, Inc.*, 533 U.S. 405,  
26 409 (2001); see also *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447  
27 U.S. 557, 562 (1980) (defining “commercial speech” as “expression related solely to the  
28 economic interests of the speaker and its audience”). Commercial speech is generally

1 accorded less protection than other kinds of speech. *United Foods*, 533 U.S. at 409.

2 Plaintiffs argue that speech by day laborers soliciting work “is not ‘commercial  
3 speech’ under the First Amendment because day labor solicitation inextricably intertwines  
4 a request for work with political and economic messages communicating day laborers’  
5 existence, need for subsistence, social value and claims to inclusion.” (Pls.’ Reply at 8.)  
6 Although commercial speech is entitled to less protection under the First Amendment,  
7 “[c]ommercial speech does not retain its commercial character ‘when it is inextricably  
8 intertwined with otherwise fully protected speech.’” *Hunt v. City of L.A.*, 638 F.3d 703, 715  
9 (9th Cir. 2011) (quoting *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796  
10 (1988)). On the contrary, “where the two components of speech can be easily separated, they  
11 are not ‘inextricably intertwined.’” *Id.* Plaintiffs cite *Redondo Beach*, in which the court  
12 stated, “Solicitation is characteristically intertwined with informative and perhaps persuasive  
13 speech seeking support for particular causes or for particular views on economic, political,  
14 or social issues, so that without solicitation the flow of such information and advocacy would  
15 likely cease.” 657 F.3d at 945 (quotations and citation omitted). However, the *Redondo*  
16 *Beach* court went on to comment that the ordinance being reviewed in that case was not  
17 limited to commercial solicitation, so “we cannot, and do not, decide the [o]rdinance’s  
18 validity under the Supreme Court’s ‘commercial speech’ case law.” *Id.* at 945 n.2.

19 In contrast, A.R.S. § 13-2928(A) and (B) expressly apply to hiring, picking up, and  
20 transporting people for work. *See* A.R.S. § 13-2928(A), (B). The speech of day laborers  
21 seeking work from passing motorists “does no more than propose a commercial transaction”  
22 between the day laborer and the potential employer. *See United Foods*, 533 U.S. at 409. The  
23 Court finds that the speech impacted by these provisions is exclusively commercial speech,  
24 and, even if it were not, any intertwined expression of day laborers’ existence or social value  
25 is easily separated from the commercial speech involved in soliciting work. Thus, the Court  
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1 is obliged to apply the commercial speech test as established by the Supreme Court.<sup>2,3</sup>

## 2                   **2.       Commercial Speech Test and Application**

3                   The Supreme Court set forth a four-part test to determine the constitutionality of a  
4 restriction on commercial speech in *Central Hudson*:

5                   (1) if the communication is neither misleading nor related to unlawful activity,  
6 then it merits First Amendment scrutiny as a threshold matter; in order for the  
7 restriction to withstand such scrutiny, (2) [t]he State must assert a substantial  
8 interest to be achieved by restrictions on commercial speech; (3) the restriction  
9 must directly advance the state interest involved; and (4) it must not be more  
10 extensive than is necessary to serve that interest.

11 *World Wide Rush, LLC v. City of L.A.*, 606 F.3d 676, 684 (9th Cir. 2010) (quotations and  
12 citation omitted). “[T]he last two steps of the *Central Hudson* analysis basically involve a  
13 consideration of the fit between the legislature’s ends and the means chosen to accomplish  
14 those ends.” *Id.* (quotation and citation omitted). The Supreme Court recently refined the  
15 *Central Hudson* test, holding that if a ban on commercial speech is content-based,  
16 “heightened judicial scrutiny is warranted.” *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653,  
17 2664 (2011); *see also id.* at 2673 (Breyer, J., dissenting) (noting that the majority applies a  
18 “far stricter, specially ‘heightened’ First Amendment standard,” rather than the usual *Central*  
19 *Hudson* test).

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20                   <sup>2</sup> Because the Court concludes that the speech at issue here is properly analyzed as  
21 commercial speech, *Redondo Beach* does not control.

22                   <sup>3</sup> Plaintiffs point out that in the October 8, 2010, Order, the Court found that A.R.S.  
23 § 13-2928(A) and (B) were content-based and subject to strict scrutiny. (3d PI Mot. at 8  
24 (citing Oct. 8, 2010, Order at 20).) While this is true, in the previous Order, the Court was  
25 considering a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), which  
26 only tests the sufficiency of the pleadings, not a Motion for a Preliminary Injunction, which  
27 examines the likelihood of success on the merits. Furthermore, neither party raised the  
28 question of commercial speech in the previous round of Motions, so the Court was not  
squarely presented with this issue. Application of the law of the case doctrine, “a judicial  
invention designed to aid in the efficient operation of court affairs,” is discretionary. *Milgard  
Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990). In its discretion,  
the Court now concludes that the commercial speech test applies to the determination of  
whether Plaintiffs have shown a likelihood of success on the merits of their claim that A.R.S.  
§ 13-2928(A) and (B) are barred by the First Amendment.

1           The Court has previously found that A.R.S. § 13-2928(A) and (B) are content-based  
2 because they apply only to speech soliciting employment and not to other types of  
3 solicitation speech. (Oct. 8, 2010, Order at 20); *cf. City of Cincinnati v. Discovery Network,*  
4 *Inc.*, 507 U.S. 410, 429 (1993) (considering a ban on the use of newsracks for commercial  
5 handbills, as opposed to newspapers and holding that “the very basis for the regulation is the  
6 difference in content between ordinary newspapers and commercial speech. . . . Thus, by any  
7 commonsense understanding of the term, the ban in this case is ‘content based.’”). In *Sorrell*,  
8 the Supreme Court emphasized the second, third, and fourth elements of the *Central Hudson*  
9 test, stating, “To sustain the targeted, content-based burden [the statute at issue] imposes on  
10 protected expression, the State must show at least that the statute directly advances a  
11 substantial governmental interest and that the measure is drawn to achieve that interest.” 131  
12 S. Ct. at 2667-68. Accordingly, if a ban on commercial speech is content-based, *Sorrell*  
13 instructs that it must be “drawn to achieve” “a substantial governmental interest,” whereas  
14 the *Central Hudson* test requires that the regulation not be “more extensive than is necessary  
15 to serve that interest.” *Compare id.*, with *Cent. Hudson*, 447 U.S. at 566.

16                           **a.       Related to Unlawful Activity**

17           Defendants argue that the “conduct” restricted by A.R.S. § 13-2928(A) and (B) is  
18 “blocking or impeding traffic” and “is already unlawful.” (Defs.’ Resp. at 9.) However, this  
19 argument misses the mark: the test requires that the communication “concern lawful activity  
20 and not be misleading.” *Cent. Hudson*, 447 U.S. at 566. The communication allegedly  
21 impacted by Arizona’s law concerns day labor, not blocking or impeding traffic. Defendants  
22 do not argue, as indeed they cannot, that day labor in and of itself is unlawful. *See Va. State*  
23 *Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 (1976)  
24 (observing that commercial speech is unprotected by the First Amendment where “the  
25 transactions proposed . . . are themselves illegal in any way”); *Hispanic Interest Coal. of Ala.*  
26 *v. Bentley*, No. 5:11-CV-2484-SLB, 2011 WL 5516953, at \*34 (N.D. Ala. Sept. 28, 2011)  
27 (holding that “the solicitation of day labor . . . is a ‘lawful concern’”). Therefore, the Court  
28 finds that these provisions “merit[] First Amendment scrutiny as a threshold matter.” *See*

1 *World Wide Rush*, 606 F.3d at 684 (quotation and citation omitted).

2 **b. Governmental Interest**

3 Defendants identify several interests that Arizona seeks to advance through these  
4 provisions: “crime reduction, traffic safety, economic development, and protecting the  
5 aesthetics of its communities.”<sup>4</sup> (Defs.’ Resp. at 9.) Plaintiffs do not contest that these are  
6 substantial governmental interests. Indeed, all of Arizona’s asserted interests have been found  
7 to be at least “substantial.” *See City of L.A. v. Alameda Books, Inc.*, 535 U.S. 425, 435 (2002)  
8 (finding that “reducing crime is a substantial government interest”); *Metromedia, Inc. v. City*  
9 *of San Diego*, 453 U.S. 490, 507-08 (1981) (concluding that there can be no “substantial  
10 doubt that the twin goals that the ordinance seeks to further—traffic safety and the appearance  
11 of the city—are substantial governmental goals”); *Hampton Int’l Commc’ns, Inc. v. Las Vegas*  
12 *Convention & Visitors Auth.*, 913 F. Supp. 1402, 1412 (D. Nev. 1996) (recognizing a  
13 substantial governmental interest in regulating economic development where the government  
14 was engaged in “a permitted commercial activity”); *cf. One World One Family Now v. City*  
15 *& Cnty. of Honolulu*, 76 F.3d 1009, 1012 (9th Cir. 1996) (noting that the lower court found  
16 that “protecting the local merchant economy” was a “legitimate governmental interest[.]”).  
17 The Court finds that Arizona has asserted several substantial governmental interests that  
18 animate A.R.S. § 13-2928(A) and (B), including the one on which Defendants principally  
19 rely, traffic safety.

20 **c. Direct Advancement of Interest**

21 Turning to the third element of the commercial speech test, the Court next considers  
22 whether the government’s interest is directly advanced by the challenged provisions.  
23 Defendants argue that A.R.S. § 13-2928(A) and (B) “directly advance Arizona’s interest in  
24 traffic safety by prohibiting in-street employment solicitation that blocks or impedes traffic.”  
25 (Defs.’ Resp. at 10.) Defendants assert that when people solicit employment in the street, it  
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27 <sup>4</sup> Although Defendants name these four interests, they only argue with respect to one:  
28 traffic safety.

1 creates a particularly grave traffic safety problem. (*Id.* at 2-3; *see also, e.g.*, Doc. 470, Defs.’  
2 Resp. to 2d PI Mot., Ex. E, Decl. of Cory L. Braddock, Exs. 3, 4.) Plaintiffs do not argue that  
3 the regulations do not directly advance the government interest in promoting traffic safety.  
4 A regulation “may not be sustained if it provides only ineffective or remote support for the  
5 government’s purpose.” *Cent. Hudson*, 447 U.S. at 564. This inquiry focuses on whether the  
6 regulation advances the governmental interest in its general application, not specifically with  
7 respect to a particular speaker. *See Vanguard Outdoor, LLC v. City of L.A.*, 648 F.3d 737,  
8 742-43 (9th Cir. 2011). In other words, is the ordinance impermissibly underinclusive? *See*  
9 *Metro Lights, LLC v. City of L.A.*, 551 F.3d 898, 907 (9th Cir. 2009).

10 A ban on speech or activity “may be constitutionally underinclusive under *Central*  
11 *Hudson* when it has exceptions that undermine and counteract that interest the government  
12 claims it has adopted the law to further because such a regulation cannot directly and  
13 materially advance its aim.” *Vanguard*, 648 F.3d at 742 (quotations and citation omitted).  
14 Such a regulation is barred in two situations: “(1) first, if the exception ensures that the  
15 regulation will fail to achieve its end, it does not materially advance its aim; and (2) second,  
16 exceptions that make distinctions among different kinds of speech must relate to the interest  
17 the government seeks to advance.” *Id.* In *Metromedia*, the Supreme Court rejected the  
18 argument that the city “denigrate[d] its interest in traffic safety and beauty and defeat[ed] its  
19 own case by permitting onsite advertising and other specified signs” while banning offsite  
20 advertising. *Metromedia*, 453 U.S. at 510-11. The Supreme Court concluded that the law’s  
21 non-application to one type of sign, offsite advertising, did not alter the direct relation  
22 between the city’s goals and the ban’s application to those signs. *Id.* at 511.

23 The Court finds that here, as in *Metromedia*, the fact that A.R.S. § 13-2928 (A) and  
24 (B) only limit solicitation of employment and not other types of solicitation does not weaken  
25 the link between the ban and Arizona’s interest in traffic safety. *See id.* at 509 (“We would  
26 be trespassing on one of the most intensely local and specialized of all municipal problems  
27 if we held that this regulation had no relation to the traffic problem of New York City.”  
28 (quoting *Ry. Express Agency v. New York*, 336 U.S. 106, 109 (1949))). Arizona may elect to



1 privilege other kinds of solicitation above employment solicitation. *See id.* at 512; *Metro*  
2 *Lights*, 551 F.3d at 911. Even though the ban is content-based and by logical extension  
3 underinclusive to some degree, it still bans a significant amount of solicitation that would  
4 theoretically take place if permitted and thereby directly advances the traffic safety goal.  
5 Significantly, A.R.S. § 13-2928 (A) and (B) ban solicitation of employment only where that  
6 solicitation impedes traffic. The third element of the commercial speech test is satisfied.

7 **d. Drawn to Achieve Governmental Interest**

8 As explained above, *Sorrell* modified the commercial speech test originally set forth  
9 in *Central Hudson* by holding that a content-based restriction on commercial speech must  
10 be “drawn to achieve” a substantial governmental interest. 131 S. Ct. at 2667-68. “There  
11 must be a fit between the legislature’s ends and the means chosen to accomplish those ends.”  
12 *Id.* at 2668 (quotation and citation omitted). The pre-*Sorrell* version of this element,  
13 contained in the *Central Hudson* test, is “substantially similar” to the time, place, and manner  
14 restrictions for content-neutral speech. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469,  
15 477 (1989) (quotation and citation omitted); *see also Moser v. F.C.C.* 46 F.3d 970, 973 (9th  
16 Cir. 1995). The *Central Hudson* test does not require that the government employ the least  
17 restrictive means of advancing its interest. *Bd. of Trs.*, 492 U.S. at 477. But the Supreme  
18 Court required that the means be narrowly tailored to the end, even before *Sorrell* tightened  
19 the test for content-based bans on commercial speech. *Id.* at 480.

20 The Court finds that Defendants have not shown that A.R.S. § 13-2928(A) and (B),  
21 which are content-based restrictions of speech, are drawn to achieve the substantial  
22 governmental interest in traffic safety. As an initial matter, because the regulation is content-  
23 based and applies only to solicitation of employment, not other types of solicitation, it  
24 appears to be structured to target particular speech rather than a broader traffic problem. *See*  
25 *Metro Lights*, 551 F.3d at 905 n.8 (observing that underinclusivity is relevant to both the  
26 third and fourth prongs of the *Central Hudson* analysis). The adoption of a content-based ban  
27 on speech indicates that the legislature did not draft these provisions after careful evaluation  
28 of the burden on free speech. *See Discovery Network*, 507 U.S. at 417, 428-30.

1            “[T]he existence of obvious, less burdensome alternatives is ‘a relevant consideration  
2 in determining whether the “fit” between ends and means is reasonable.’” *Berger v. City of*  
3 *Seattle*, 569 F.3d 1029, 1041 (9th Cir. 2009) (quoting *Discovery Network*, 507 U.S. at 417  
4 n.13); *see also Ballen v. City of Redmond*, 466 F.3d 736, 743-44 (9th Cir. 2006). Here,  
5 numerous other traffic regulations are already in place in Arizona to “directly address traffic  
6 and safety without restricting speech.” (See 3d PI Mot. at 6 (citing A.R.S. §§ 13-2906(A),  
7 28-873(A), 28-905).) For example, civil penalties exist for stopping or parking a car in such  
8 a way that it impedes traffic. A.R.S. § 28-873(A). It is also unlawful to open a door on a  
9 motor vehicle if it interferes with traffic, and a maximum sentence of 30 days in jail may be  
10 imposed if a person “recklessly interferes with the passage of any highway or public  
11 thoroughfare by creating an unreasonable inconvenience or hazard.” *Id.* §§ 13-2906(A), 28-  
12 905; *see also id.* §§ 13-707(A), 28-704(A), 28-871(A) (other pre-existing traffic and  
13 misdemeanor restrictions on impeding traffic that encompass the behavior targeted by A.R.S.  
14 § 13-2928(A) and (B)).<sup>5</sup>

15            The Court also notes that S.B. 1070 contains a purposes clause that is relevant to this  
16 analysis. Section 1 of S.B. 1070, which has no A.R.S. citation, states that “the intent of [S.B.  
17 1070] is to make attrition through enforcement the public policy of all state and local  
18 government agencies in Arizona” and that “[t]he provisions of this act are intended to work  
19 together to discourage and deter the unlawful entry and presence of aliens and economic  
20 activity by persons unlawfully present in the United States.” Section 1 also states that “there  
21 is a compelling interest in the cooperative enforcement of federal immigration laws  
22 throughout all of Arizona.” This purposes clause applies to all sections of S.B. 1070, and  
23 nowhere does it state that a purpose of the statutes and statutory revisions is to enhance  
24 traffic safety. Rather, A.R.S. § 13-2928(A) and (B), like the other parts of S.B. 1070, are  
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26            <sup>5</sup> The fact that A.R.S. § 13-2928(A) and (B) are additions to Title 13, Arizona’s  
27 Criminal Code, rather than Chapter 3 of Title 28 of the A.R.S., which governs traffic and  
28 vehicle regulation, also undermines an argument that these provisions are actually “drawn  
to” address a traffic safety problem.

1 explicitly intended “to make attrition through enforcement the public policy of all state and  
2 local government agencies in Arizona” and “to discourage and deter the unlawful entry and  
3 presence of aliens and economic activity by persons unlawfully present in the United States.”  
4 The fact that A.R.S. § 13-2928(A) and (B) were created as part of a package of statutes and  
5 revisions aimed at perceived problems related to unlawful immigration also weighs against  
6 a finding that the provisions are “drawn to” address a traffic problem.

7 The commercial speech test “ensure[s] not only that the State’s interests are  
8 proportional to the resulting burdens placed on speech but also that the law does not seek to  
9 suppress a disfavored message.” *Sorrell*, 131 S. Ct. at 2668. Because A.R.S. § 13-2928(A)  
10 and (B) are not drawn to achieve Arizona’s goal of promoting traffic safety, the Court finds  
11 that Plaintiffs have shown a likelihood of success on the merits of their claim that the First  
12 Amendment bars these provisions.

### 13 C. Irreparable Harm

14 The Supreme Court has repeatedly recognized the “basic doctrine of equity  
15 jurisprudence that courts of equity should not act . . . when the moving party has an adequate  
16 remedy at law and will not suffer irreparable injury if denied equitable relief.” *Younger v.*  
17 *Harris*, 401 U.S. 37, 43-44 (1971). Thus Plaintiffs have the burden to establish that, absent  
18 a preliminary injunction, there is a likelihood—not just a possibility—that they will suffer  
19 irreparable harm. *Winter*, 555 U.S. at 20-21. The Ninth Circuit Court of Appeals has stated  
20 ““that an alleged constitutional infringement will often alone constitute irreparable harm.””  
21 *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997) (quoting *Assoc. Gen.*  
22 *Contractors of Cal., Inc. v. Coal. for Econ. Equal.*, 950 F.2d 1401, 1412 (9th Cir. 1991)). In  
23 the free speech context, the Supreme Court has held that “[t]he loss of First Amendment  
24 freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”  
25 *Elrod v. Burns*, 427 U.S. 347, 373 (1976); accord *Klein v. City of San Clemente*, 584 F.3d  
26 1196, 1207-08 (9th Cir. 2009).

27 The record contains evidence showing that the individual day laborer Plaintiffs and  
28 day laborer members of some of the organizational Plaintiffs are being chilled from soliciting

1 day labor. (See 3d PI Mot. at 12; see also *id.*, Ex. 2, Decl. of Alison J. Harrington ¶¶ 10-11;  
2 3d PI Mot., Ex. 3, Decl. of Tupac Enrique ¶¶ 10-13.) The Court has concluded that Plaintiffs  
3 are likely to succeed on the merits of their First Amendment challenge to A.R.S. § 13-  
4 2928(A) and (B), and that conclusion, when coupled with Plaintiffs' evidence regarding the  
5 chilling of individuals' solicitation of day labor, demonstrates that Plaintiffs are likely to  
6 suffer irreparable harm in the absence of an injunction.

7 **D. The Balance of the Equities and the Public Interest**

8 The Court considers the final two elements of the preliminary injunction test together.  
9 Plaintiffs have the burden to show that the balance of equities tips in their favor and that a  
10 preliminary injunction is in the public interest. *Winter*, 555 U.S. at 20. "A preliminary  
11 injunction is an extraordinary remedy never awarded as of right." *Id.* at 24. "In each case,  
12 courts 'must balance the competing claims of injury and must consider the effect on each  
13 party of the granting or withholding of the requested relief,'" paying particular attention to  
14 the public consequences. *Id.* (quoting *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S.  
15 531, 542 (1987)).

16 Plaintiffs have demonstrated that they have a significant interest in exercising their  
17 First Amendment rights, as explained above. Not only is the exercise of free speech a crucial  
18 civil right, Plaintiffs have shown that they and their members are being chilled from  
19 soliciting employment by the threat of enforcement of A.R.S. § 13-2928(A) and (B).  
20 Defendants assert a countervailing interest "in the safety of [Arizona's] streets and reducing  
21 the crime, intimidation, and property destruction that result[] when large groups of day  
22 laborers congregate in and along the roadside." (Defs.' Resp. at 17.) The Court finds that,  
23 while Defendants' interest is significant, the balance of hardships tips in Plaintiffs' favor.  
24 Defendants have not shown that A.R.S. § 13-2928(A) and (B) are drawn to achieve  
25 Arizona's goal of ensuring traffic safety or any of the other specified governmental interests.  
26 On the other hand, Plaintiffs have presented evidence that individual Plaintiffs and members  
27 of organizational Plaintiffs are being directly impacted by the threat of enforcement under  
28 these provisions. Given the strong protection traditionally accorded to First Amendment

1 rights and considering all the evidence in the record, the Court concludes that the balance of  
2 the equities favors Plaintiffs.

3 The public interest inquiry primarily focuses on the impact on non-parties, as opposed  
4 to parties. *Sammartano v. First Jud. Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002). “Courts  
5 considering requests for preliminary injunctions have consistently recognized the significant  
6 public interest in upholding First Amendment principles.” *Id.* (collecting cases). Here, as in  
7 other cases implicating freedom of speech, continuing enforcement of a regulation that likely  
8 violates the First Amendment would infringe not only the rights of Plaintiffs and their  
9 members, but also of other day laborers and potential employers. Defendants have not shown  
10 a competing public interest that is compelling enough to outweigh the public interest in a free  
11 exchange of ideas. *Cf. Hale v. Dep’t of Energy*, 806 F.2d 910, 918 (9th Cir. 1986) (finding  
12 that the plaintiffs’ First Amendment rights were outweighed by the government’s interest in  
13 the safety and security of a nuclear testing site). It is not in the public interest to enforce a law  
14 that likely violates the First Amendment. This factor, too, favors Plaintiffs.

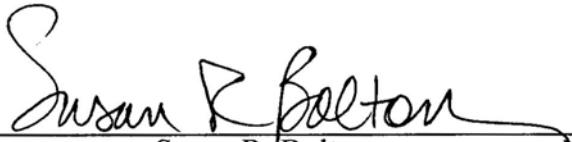
### 15 **III. CONCLUSION**

16 Plaintiffs have demonstrated that they are likely to succeed on the merits of their claim  
17 that A.R.S. § 13-2928(A) and (B) violate the First Amendment. Plaintiffs have also shown  
18 that they are likely to suffer irreparable harm in the absence of an injunction, that the balance  
19 of equities tips in their favor, and that the public interest favors injunctive relief.

20 **IT IS THEREFORE ORDERED** granting Plaintiffs’ Renewed Motion for  
21 Preliminary Injunction of A.R.S. § 13-2928(A) and (B) (Doc. 510).

22 **IT IS FURTHER ORDERED** preliminarily enjoining Defendants from enforcing  
23 A.R.S. § 13-2928(A) and (B).

24 DATED this 29<sup>th</sup> day of February, 2012.

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Susan R. Bolton  
United States District Judge