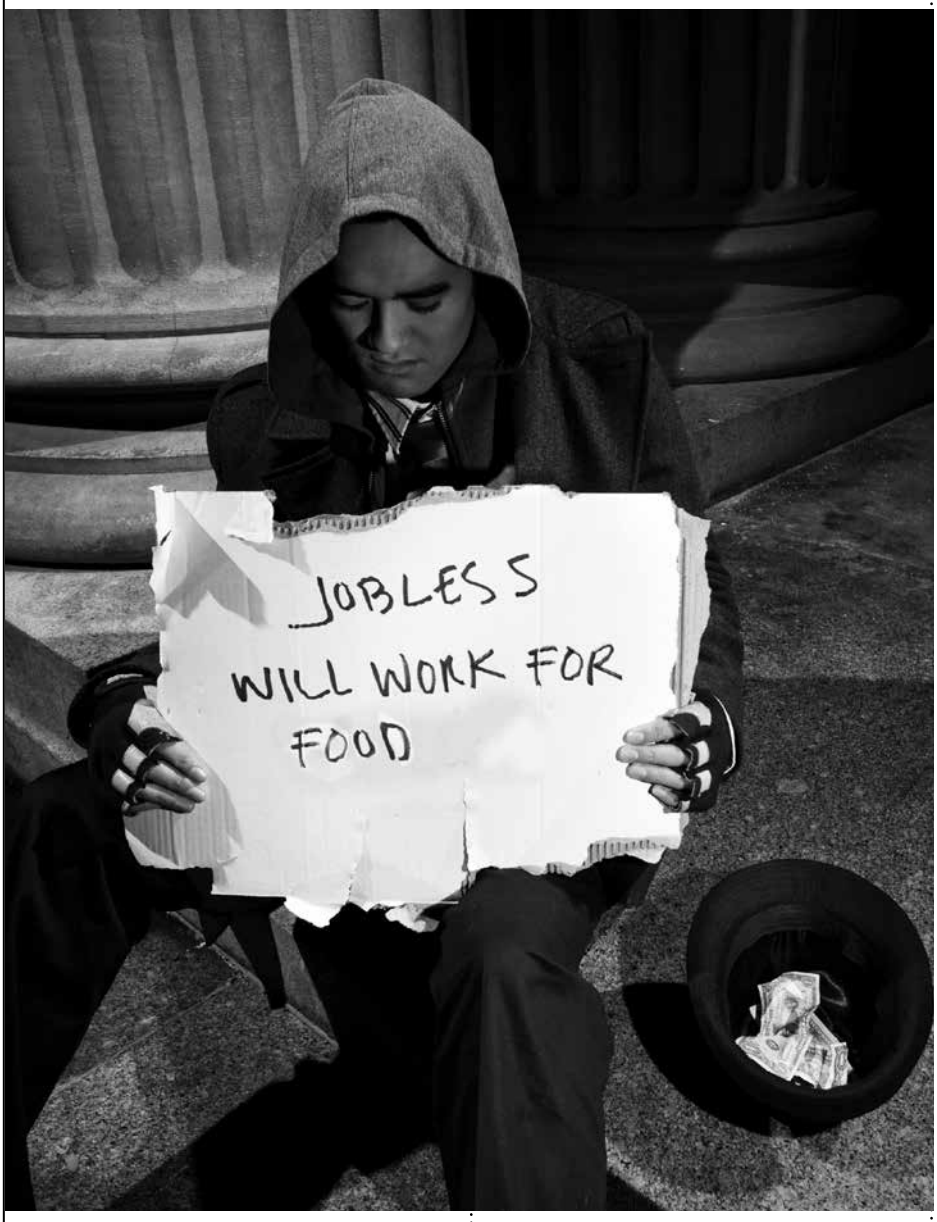
Street-Side Employment Solicitation Regulations — Are They on Life Support?

by Scott H. Howard



As the legal landscape of employment solicitation regulations becomes littered with ordinances declared unconstitutional by the courts, communities continue to grapple with attempts to balance the rights of laborers seeking employment by soliciting on streets and sidewalks with competing community interests. Efforts to prevent fighting and petty crimes, and address solicitors that block pedestrian ways and harass pedestrians, distract motorists, congest traffic, and damage landscaping, have been met with varying degrees of success.

Early legal challenges were based on First Amendment grounds and led to mixed results, depending on the scope of the ordinance under challenge.[1] It rapidly became clear that such legislation could only survive if it was a narrowly crafted, content-neutral regulation of time, place, or manner that addressed significant governmental interests, and that made available reasonable alternative avenues for communicating a solicitor's message.

However, "content neutrality" has recently become the central issue advanced by advocacy groups challenging anti-solicitation regulations, and this issue is gaining traction. Between the U.S. Supreme Court's 1981 decision in *Heffron v. International Soc. for Krishna Consciousness, Inc.*[2] and the present time, there has been an apparent shift in how these regulations are analyzed. Such regulations were previously interpreted as content neutral; now, some courts have determined that they are a content-based means of regulating a particular form of speech and are, therefore, impermissible when evaluated under the strict scrutiny standard. This inconsistent application of First Amendment jurisprudence to anti-solicitation regulations underscores the need for more guidance from the Supreme Court.

The Beginning of the Change

In 1986, in *ACORN v. City of Phoenix*,[3] the U.S. Court of Appeals for the Ninth Circuit upheld an ordinance that prohibited soliciting funds from the occupants of a vehicle. The court reasoned that the law was not content-based because it did not single out any group or the content of any speech, nor was it adopted to suppress a particular political viewpoint.[4] The court then focused its analysis on whether the ordinance was narrowly crafted to address a significant governmental interest (traffic safety) and whether it left open ample alternative avenues for communication (sidewalk solicitation from pedestrians, canvassing door-to-door, or direct mail). This decision was the framework for assessing anti-solicitation ordinances until the Ninth Circuit began not so subtly advancing the notion that prohibitions on solicitation should be considered as content-based regulations.

This departure from prior jurisprudence began with the 2006 ruling in *American Civil Liberties Union of Nevada v. City of Las Vegas* ("ACLU II").[5] There, the Ninth Circuit reviewed regulations that the City had

adopted to address the proliferation of solicitors in a five-block tract in downtown Las Vegas, known as the "Fremont Street Experience" (FSE). The economic downturn of the 1990s left the downtown unable to compete with the Las Vegas Strip, and the area was in economic decline. At a cost of $70,000,000, the FSE area was transformed into an attraction intended to compete with other entertainment venues, as a pedestrian-friendly thoroughfare.[6] Soon, however, it became apparent that many solicitation activities in the FSE disrupted the comfortable environment and would cause visitors, tenants, and corporate sponsors to go elsewhere. The City responded with an ordinance to restrict solicitation activities, and also banned vending, tabling, and leafleting (except labor activities) in the FSE.[7] The anti-solicitation ordinance broadly defined solicitation as "to ask, beg, solicit or plead, whether orally, or in a written or printed manner, for the purpose of obtaining money, charity, business or patronage or gifts or items of value for oneself or another person or organization."[8]

Departing from the analysis in *ACORN*, as well as other cases,[9] the Ninth Circuit determined that, although the record reflected that the ordinance was not enacted for the purpose of suppressing the content of speech, the ordinance differentiated between handbills that contained certain language and those containing other language.[10] This triggered the need for an official to examine the content of the message conveyed (the so-called "officer must read it" test).[11] The "examination" led to a content-based distinction, as it singled out certain speech for differential treatment based on the idea expressed.

The Ninth Circuit carved out a narrow exception to distinguish *ACORN*, apparently believing that prior precedent distinguished between "words of solicitation" and "acts of solicitation." Where a regulation created a distinction based on the printed content of a message, which then required an official to view the message before determining whether it was lawful or violative of a regulation, the regulation was content-based, thus requiring it to be analyzed through the lens of strict scrutiny.

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The Content-Based Wave Extends

Lopez v. Town of Cave Creek, Arizona[12] involved an ordinance that made it unlawful for any person to stand on or adjacent to a street or highway and solicit or attempt to solicit employment, business, or contributions from the occupant of any vehicle. The language in this ordinance was strikingly similar to the ordinance in *ACORN*. Despite this, the court determined that *ACORN* was distinguishable and that *ACLU II* was controlling, because the ordinance differentiated based on the content of speech: it prohibited solicitation speech, but not political, religious, artistic or other kinds of speech. This made it necessary for an official to examine the content of the message that was conveyed, thereby running afoul of *ACLU II*.[13] Even if the ordinance was content neutral, it would still be impermissible as it was not narrowly tailored to address the Town's interests in traffic safety.[14] There was insufficient evidence from the Town that traffic safety was endangered by day laborers soliciting employment from vehicles, and the ordinance disregarded less restrictive and more precise means of promoting traffic safety, such as the enforcement of existing traffic, parking and loitering laws.[15]

The *ACLU II* opinion was later cited with approval in the Ninth Circuit's decision in *Berger v. City of Seattle*.[16] In *Berger*, the en banc majority found that solicitation limitations adopted to control street performers at the Seattle Center were unconstitutional. As in *ACLU II*, the *Berger* court also found the passive solicitation rule[17] regulated speech, not conduct.[18] The court noted that, although the rule regulated the "manner" in which performers expressed themselves (conduct), it did so based on the content of the message, and invoked the "officer must read it" test from *ACLU II* to support the likelihood that the ordinance was content-based.[19] In what might likely be the final blow to *ACORN*, the court observed that *ACORN* was limited to its facts, and that the ordinance in *ACORN* was really designed to prohibit solicitation involving on-the-spot donations and the associated safety concerns.[20]

Chief Judge Kozinski, dissenting in *Berger*, recognized that the Supreme Court had fairly consistently characterized the inherent nature of business or employment solicitation laws as content-neutral, and that by engaging in a hyper-technical analysis of the term "content-based," the majority's ruling could effectively foreclose any reasonable time, place, or manner restrictions on solicitation.[21]

The Wave Reaches Shore

When the California city of Redondo Beach was faced with continuing problems created by large congregations of individuals soliciting for employment at certain key locations, it enacted an ordinance patterned

continued on page 8



Scott H. Howard is the City Attorney of the City of Glendale, California. Mr. Howard advises local elected officials on a variety of legal issues and provides training and advice to numerous organizations and institutes on subjects related to local government. He is an IMLA Fellow, and currently serves as a Regional Vice-President for IMLA's Ninth Circuit South.

after the one in *ACORN*. The first sentence of the ordinance was identical to the operative language of the Phoenix ordinance in *ACORN*; the second sentence added the California Vehicle Code's definitions of "street," and "highway," and the ordinance also imposed a correlative restriction on drivers against engaging in hiring activities while stopped. The ordinance was initially enjoined after the district court held that, although the measure was content neutral, it was not narrowly tailored and did not leave open ample alternative avenues for communication.[22]

On appeal, in the 2 to 1 decision of *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, the Ninth Circuit reversed, finding that there was no meaningful distinction between the *ACORN* and Redondo Beach ordinances, and that the Circuit was bound by the precedent established in *ACORN*.[23] Interestingly, the court was compelled to face the dichotomy created by both *ACLU II* and *Berger*. It distilled a general rule that an ordinance regulating solicitation was content neutral if it was aimed at acts of solicitation, and not at any particular message or form of speech.[24] Based on *ACORN*, the ordinance was content neutral.[25]

In response to arguments that the ordinance singled out specific categories of speech (similar to the claims raised in *ACLU II* and *Berger*), the court, citing *Hill v. Colorado*, referenced consistent Supreme Court pronouncements that, so long as a regulation was not adopted because of a disagreement with the message being conveyed, the regulation was considered facially content neutral.[26] Also in reliance on *Hill*, the court determined that the "officer must read it" test had never held that any need to look at the content of an oral or written statement, to determine whether a rule applied to a course of conduct, rendered the regulation content based.[27]

Unfortunately for municipalities seeking confirmation that street-side solicitation regulations could withstand facial constitutional scrutiny as content-neutral regulations, en banc review of the ruling was granted in October 2010, and oral argument is currently scheduled for the week of March 21, 2011 in San Francisco.[28] Given the trend of the Ninth Circuit since *ACLU II*, it is not a stretch to predict that the decision finding content neutrality will likely be reversed. The en banc court is poised to interpret *ACLU II* and *Berger* to find that, by differentiating between solicitation and other forms of speech, the Redondo Beach ordinance created a content-based distinction. Further, because law enforcement personnel need to read or understand the message, this supports the prediction that the ordinance will be found to be content-based. Absent a compelling governmental interest, the ordinance will probably fall under the weight of strict scrutiny.

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If this anticipated result comes to pass, it will essentially confine *ACORN* to the landfill of irrelevance, and potentially spell the death knell for street-side anti-solicitation regulations, particularly for states within the Ninth Circuit.

Where Do We Go From Here?

Since *ACLU II*, *Berger*, and the pending en banc review of *Comite*, stree-side solicitation regulations in states covered by the Ninth Circuit appear to be falling under attack with greater frequency. The principal argument is that a ban on employment or business solicitation is a content-based regulation which cannot survive strict scrutiny.[29] Outside the Ninth Circuit, solicitation cases appear to follow the adage that "the dog don't bark according to no rule." Cases from Ohio, New York, Colorado, Alaska, Florida, and Texas have been analyzed as content neutral or as regulating commercial speech,[30] and thus, have a greater chance of fending off challenges with the appropriate evidentiary support. As agency attorneys called upon to advise local legislators, this lack of certainty is disconcerting.

Local governments are invariably faced with difficult challenges when attempting to address day laborer issues through street-side solicitation limits. The options are not very encouraging. Doing nothing engenders community complaints about traffic and pedestrian hazards, nuisance conduct, and general quality of life issues. By adopting legislation to address concerns related to the conduct of solicitors, such legislation now, more than ever, runs the risk of a legal challenge for being a content-based regulation. Establishing day-laborer centers, to encourage those seeking employment to move off the streets to the centers, will face potential opposition from anti-immigration groups, and may not fully address traffic and pedestrian safety concerns with those seeking work.[31] Enforcing only existing laws, such as littering, traffic infractions, loitering with intent to commit crime, and trespass, can be labor-intensive and, for the most part, requires that the offence be committed in the presence of a peace officer. Some cities have experimented with creative alternatives to address the problem.[32] Finally, local governments also have the option of sitting on the sidelines and letting others steer litigation toward the harbor of certainty, to await a definitive decision from a circuit court in your jurisdiction or, better yet, the grant of certiorari in an appropriate case and a decision by the U.S. Supreme Court.

Notes

1. ACORN v. Phoenix, 789 F.2d 1260 (9th Cir. 1986) (ordinance upheld); Coalition for Humane Immigrant Rights of Los Angeles v. Burke, No. CV 98-4863-GHK(CTX), 2000 WL 1481467 (C.D. Cal. Sept. 12, 2000) (hereinafter "CHIRLAI") (ordinance struck down as not narrowly tailored); Xiloj-Itzep v. City of Agoura Hills, 24 C.A. 4th 620, 29 Cal. Rptr.2d 879 (Cal. Ct. App. 1994) (ordinance upheld).
2. 452 U.S. 640 (1981) (prohibition against distributing written material, except from booths at state fair, found to be content neutral and justified).
3. 798 F.2d 1260 (9th Cir. 1986).
4. *Id.* at 1267.
5. American Civil Liberties Union of Nevada v. City of Las Vegas, 466 F.3d 784 (9th Cir. 2006).
6. *Id.* at 787.
7. *Id.* at 787, 789.
8. *Id.* at 788.
9. *See, e.g.,* Int'l Soc. for Krishna Consciousness of New Orleans, Inc. v. City of Baton Rouge, 876 F.2d 494 (5th Cir. 1989); Menotti v. City of Seattle, 409 F.3d 1113 (9th Cir. 2005); Ward v. Rock Against Racism, 491 U.S. 781 (1981); Thomas v. Chicago Park Dist., 534 U.S. 316 (2002).
10. 466 F.3d at 794.
11. *Id.* at 795-96.
12. 559 F.Supp. 2d 1030 (D. Ariz. 2008).
13. *Id.* at 1032-33.
14. *Id.* at 1034.
15. *Id.* at 1034-35.
16. 569 F.3d 1029 (9th Cir. 2009) (en banc).
17. The rule prohibited performers from actively soliciting donations by word of mouth, gesture, or mechanical devices. Passive solicitation (including a receptacle with a written sign seeking donations) was permitted.
18. 569 F.3d at 1052.
19. *Id.*
20. *Id.* at 1052 n.23, acknowledging that a broader reading of *ACORN* would conflict with the *Berger* holding.
21. *Id.* at 1089.
22. Comite De Jornaleros De Redondo Beach v. City of Redondo Beach, 475 F. Supp.2d 952 (C.D. Cal. 2006).
23. Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 607 F.3d 1178, 1187 (9th Cir. 2010).
24. *Id.* at 1188.
25. *Id.* at 1187.
26. *Id.* at 1188 (citing *Hill v. Colorado*, 530 U.S. 703 (2000)).
27. *Id.* at 1188-89.
28. Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 623 F.3d 1054 (9th Cir. Oct. 15, 2010) (No. 06-55750, 06-56869).
29. A state law case under review is *Friendly House, et al. v. Michael B. Whiting, et al.* U.S.D.C. Case No. CV-10-01061, filed May 17, 2010, challenging Arizona's statewide ban on "employment solicitation" by and from motorists.
30. State v. Dean, 866 N.E. 2d 1134 (Ohio Ct. App. 2007) (prohibition on improper solicitation—seeking immediate grant of money, goods or other gratuity from operator or occupant of motor vehicle—found content neutral); People v. Barton, 861 N.E. 2d 75 (N.Y. Ct. App. 2006) (panhandling prohibition on seeking funds from occupants of motor vehicles found content neutral); Houston Chronicle Publ'g Co. v. City of League City, 488 F. 3d 613 (5th Cir. 2007) (prohibition of street-vendor solicitation in roadway found content neutral); Sun-Sentinel Co. v. City of Hollywood, 274 F. Supp. 2d 1323 (S.D. Fla. 2003) (prohibition of in-roadway solicitation found content neutral); Denver Publ'g Co. v. City of Aurora, 896 P.2d 306 (Colo. 1995) (solicitation directly from vehicle occupants on city street found content neutral); Times News Publ'g Co. v. City of Burlington, No. 1:08CV00415, 2008 WL 2622995 (M.D.N.C. June 30, 2008) (prohibition on solicitation of occupants of vehicles found content neutral); City of Skagway v. Robertson, 143 P.3d 965 (Alaska 2006) (limiting person-to-person solicitation to avoid aggressive tactics analyzed as commercial speech restriction).
31. *See, e.g.*,Garcia v. Dicterow et al., Cal. State App. Case No. G039824, a challenge to a day-laborer center funded by the City of Laguna Beach. The trial court granted judgment for the City, finding there was no unlawful expenditure of taxpayer funds, no referrals for employment of an immigrant with knowledge that the person was unauthorized, and no inducements for an immigrant to reside in the U.S. with knowledge that residency was in violation of the law. The City was not providing "benefits," as the term is used in 8 U.S.C. §1621(c). The Court of Appeal affirmed in an unpublished non-citable opinion, and review by the California Supreme Court was denied in February 2009.
32. As done by the City of Vista, California in June 2006, an ordinance requires employers or agents who employ day laborers to obtain a registration certificate. Obtaining a certificate is a no-fee ministerial process. The certificate must be displayed on the vehicle used to transport a day laborer from an uncontrolled location (as defined). Upon a day laborer accepting employment, the employer or agent must immediately provide a term sheet (as defined) prior to operation of the vehicle used to transport a day laborer. The ordinance was challenged in U.S. District Court on grounds that it acts as a prior restraint on speech, as it set no effective time limit for issuance of the permit; delegated unbridled discretion to the City, and negated meaningful judicial review. The City successfully opposed; an application for a temporary restraining order, asserting: (1) the ordinance and an adopted policy clarifying the ordinance mandated issuance of a certificate in two days, and additional information was necessary; (2) the employer could use a sample city "term sheet" in English and Spanish; and (3) a writ of mandate under California law was available for review of the issuance, revocation or denial of the permit. The case was dismissed through a settlement, allowing first-time offenders to register on-site with the code enforcement officer. Current information indicates enforcement has been suspended as a result of a drop in complaints and budgetary limitations. ML