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United States District Court, C.D. California.

COALITION FOR HUMANE IMMIGRANT RIGHTS OF LOS ANGELES CHIRLA); Sindicato de Trabajadores por Dia, Plaintiffs,
v.
Yvonne Braithwaite BURKE et al., Defendants.

No. CV 98–4863–GHK(CTX).
|
Sept. 12, 2000.

MEMORANDUM AND ORDER

KING, District J.

I.

INTRODUCTION

***1** On May 31, 1994, the Los Angeles County Board of Supervisors ("the County") adopted Ordinance No. 94–0043, which took effect on July 1, 1994. The Ordinance added two sections to the Los Angeles County Code. The first, Section 13.15.011, provides:

> It shall be unlawful for any person, while standing in any portion of the public right-of-way, including but not limited to public streets, highways, sidewalks and driveways, to solicit, or attempt to solicit, employment, business, or contributions of money or other property, from any person traveling in a vehicle along a public right-of-way, including, but not limited to, public streets, highways or driveways. The provisions of this Section shall only be operative in the unincorporated areas of the County.

The second, Section 13.15.012, provides:

> It shall be unlawful for any person, while the occupant of a moving vehicle, to solicit, or attempt to solicit, employment, business, or contributions of money or other property, from a person who is within the public right-of-way, including but not limited to a public street, highway, sidewalk, or driveway. The provisions of this Section shall only be operative in the unincorporated areas of the County.

Compl. Ex. A.

The Ordinance also amended Section 13.15.010 of the County Code. As amended, Section 13.15.010 defines "employment," "solicit," and "business" for purposes of Sections 13.15.011 and 13.15.012. In particular, "solicit" is defined as "any request, offer, enticement, or action which announces the availability for or of employment, the sale of goods, or a request for money or other property, or any request, offer, enticement or action which seeks to purchase or secure goods or employment, or to make a contribution of money or other property." A solicitation "shall be deemed complete when made, whether or not an actual employment relationship is created, a transaction is completed, or an exchange of money or other property takes place." L.A. Cty.Code § 13.15.010(B), Compl. Ex. A.

Plaintiffs in this action are the Coalition for Humane Immigrant Rights of Los Angeles ("CHIRLA") and Sindicato de Trabajadores por Dia ("Sindicato"). CHIRLA is a non-profit corporation. Compl. ¶ 2. As part of its efforts to secure the rights of immigrant workers, it operates a "Day Laborer Organizing Project." *Id.* CHIRLA alleges that the Ordinance has forced it to devote significant resources to addressing the

needs of day laborers who want to make their availability for work known in ways prohibited by the Ordinance. *Id.*

Sindicato is an unincorporated association whose goals are to defend the rights of day laborers. *Id.* ¶ 3. Its members and officers are all day laborers who regularly seek day work in the County, and who want to make their availability for day work known in ways prohibited by the Ordinance. *Id.*

Plaintiffs filed suit on June 17, 1998. They name as Defendants the five Supervisors of the County, in their official capacities. Plaintiffs allege three claims:

***2** (1) 42 U.S.C. § 1983 (First and Fourteenth Amendments), based on Section 13.15.011;

(2) 42 U.S.C. § 1983 (First and Fourteenth Amendments), based on Section 13.15.012; and

(3) 28 U.S.C. § 2201 (declaratory relief).

Plaintiffs allege that Sindicato members and others served by CHIRLA have obtained, and desire to continue to obtain, work by expressing their availability for employment in ways prohibited by the Ordinance. Compl. ¶ 12. They allege that the Ordinance subjects them to the danger of arrest, fines, and other penalties if they engage in protected speech. *Id.* ¶ 13. They seek:

(1) A permanent injunction against the enforcement of Sections 13.15.011 and 13.15.012;

(2) Damages caused by the enforcement and threatened enforcement of these Sections;

(3) A declaration that these Sections are unconstitutional under the First and Fourteenth Amendments; and

(4) Attorneys' fees, costs, and expenses under 42 U.S.C. § 1988.

The parties agree that the Ordinance regulates the time, place, and manner of expression in traditional public fora, including public sidewalks. Jt. Br. Re: Content Discrimination at 1:4–9. Pursuant to our orders, the parties have addressed the test for the constitutionality of a time, place, and manner restriction, which we discuss below, in a two-step joint motion for summary adjudication. First, the parties took discovery and filed joint briefs setting forth their positions on whether the Ordinance is content-neutral. After hearing oral argument, we held that the Ordinance is content-neutral because the County's predominant purpose in passing the Ordinance was to alleviate secondary effects such as traffic problems. Order of Oct. 29, 1999.

Subsequently, the parties took additional discovery and filed a joint brief addressing the remaining elements of the test for time, place, and manner restrictions. We heard oral argument on August 21, 2000, and now hold that the Ordinance violates the First Amendment, which applies to the County via the Fourteenth Amendment. *See Kev, Inc. v. Kitsap County,* 793 F.2d 1053, 1058 n.2 (9th Cir.1986).

II.

DISCUSSION

A. Elements of the Time, Place, and Manner Test

"[E]ven in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions '[1] are justified without reference to the content of the regulated speech, [2] ... are narrowly tailored to serve a significant governmental interest, and [3] ... leave open ample alternative channels for communication of the information." ' *Ward v. Rock Against Racism,* 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non–Violence,* 468 U.S. 288, 293 (1984)); *see also Alameda Books, Inc. v. City of Los Angeles,*—F.3d—, 2000 WL 1047892 at *3–4 (9th Cir. July 27, 2000) (discussing varying formulations of test), amended on denial of reh'g by 2000 WL 1210037 (9th Cir. Aug. 28, 2000). The second and third requirements are before us now.

B. Narrowly Tailored to Serve Significant Government Interest

1. The County's Interests

***3** The County contends that streetside solicitation of the sort restricted by the Ordinance causes several dangers or harmful "secondary effects." It argues that the solicitation targeted by the Ordinance compromises the safety of pedestrians and motorists using the public right-of-way, including the solicitors themselves, those solicited, and people uninvolved in the solicitation. The County further

contends that the targeted solicitation impedes traffic flow, blocks traffic lanes, and makes it more difficult for drivers to obey traffic laws by distracting them from paying attention to the road. The County also asserts that "the activities in question place a significant strain on police resources because of the influx of traffic and day workers to areas where solicitations occur," and the Ordinance is meant to "moderate the need for additional police." Finally, the County contends that the targeted solicitation causes a deterioration of the quality of life in the areas where it occurs because (1) motorists are beset by people seeking work, (2) would-be workers jump uninvited into vehicles; and (3) solicitors harass passersby, deposit trash, and urinate and defecate in public. *See* Defs.' Supp. Resps. to Pls.' 2d Interrogs. at 2:7–3:13.

The County's asserted interests are "significant enough to justify an appropriately tailored"ordinance. *Schenck v. Pro–Choice Network,* 519 U.S. 357, 376 (1997). It is clear that the County has a significant interest in promoting the safety of pedestrians and motorists and combating traffic congestion. *See Heffron v. International Soc'y for Krishna Consciousness, Inc.,* 452 U.S. 640, 650 (1981) ("[I]t is clear that a State's interest in protecting the 'safety and convenience' of persons using a public forum is a valid governmental objective."); *ACORN v. City of Phoenix,* 798 F.2d 1260, 1268 (9th Cir.1986) ("The orderly flow of motorized traffic is a major concern in congested urban areas, particularly because an obstruction or delay in traffic at one point along a traffic artery results in delays and backups far back down the roadway."). The County also has a significant interest in maintaining the quality of urban life, *see Young v. American Mini Theatres,* 427 U.S. 50, 71 (1976) (plurality opinion), which can translate into a significant interest in preventing activities such as harassment, littering, trespassing, and public urination and defecation. *See S.O.C., Inc. v. County of Clark,* 152 F.3d 1136, 1146 (9th Cir.1998) ("The County also may have a substantial interest in preventing solicitors from harassing pedestrians on streets and sidewalks."), amended by 160 F.3d 541 (9th Cir.1998); *One World One Family Now v. Honolulu,* 76 F.3d 1009, 1013 (9th Cir.1996) (cities have a substantial interest in protecting their aesthetic appearance by reducing visual clutter). Finally, we assume the County has a significant interest in moderating the number of police needed to patrol its streets.

2. Evidence of Harmful Effects

***4** Plaintiffs contend that the County must provide evidence that would be admissible in court to show that the proscribed speech causes the asserted harms. In fact, though, we cannot impose such a "rigid burden of proof" when we apply the narrow-tailoring requirement to a time, place, and manner restriction that is content-neutral under the secondary effects doctrine. *City of Renton v. Playtime Theatres, Inc.,* 475 U.S. 41, 50 (1986). Our role in this context is not to enforce the Federal Rules of Evidence, but to ensure that the County enacted the Ordinance based upon evidence "reasonably believed to be relevant to the problem" it addressed. *Id.* at 51–52. For example, the County was entitled to rely on information about problems caused by streetside solicitation in other municipalities. *See id.* at 51; *Alameda Books,* 2000 WL 1047892 at *7.

The County states that it relied on several sources of information about problems with streetside solicitation when it enacted the Ordinance, including the experiences of other municipalities (the City of Agoura Hills, the City of Brea, and the City of Laguna Beach), letters from constituents to the County Board of Supervisors, newspaper articles reporting complaints by residents of Ladera Heights about solicitation by day laborers, and testimony received at a May 24, 1994 meeting of the County Board. *See* Defs .' Supp. Responses to Pls.' 2d Interrogs. at 3:14–4:23. While much if not all of this evidence may not be admissible in court to prove that the targeted speech causes the asserted problems, it is the *type* of evidence upon which the County may rely. This does not mean, however, that the County has shown that it had a sufficient basis to enact a speech restriction as broad as the Ordinance challenged here.

3. Narrow Tailoring

The test for narrow tailoring places a burden on the County to show that a "reasonable fit" exists between its legitimate interests and the terms of its Ordinance. *S.O.C.,* 152 F.3d at 1148. This does not mean that the Ordinance must "be the least restrictive or the least intrusive means" of furthering the County's interests. *Colacurcio v. City of Kent,* 163 F.3d 545, 553 (9th Cir.1998) (citing *Ward v. Rock Against Racism,* 491 U.S. 781, 798–99 (1989)). It does mean, however, that the Ordinance must " 'promote[ ] a substantial government interest that would be achieved less effectively absent the regulation," ' *Colacurcio,* 163 F.3d at 553 (quoting *Ward,* 491 U.S. at 799), and must *not* "burden substantially

more speech than is necessary to further the government's legitimate interests." *Ward,* 491 U.S. at 799. Put another way, "the county 'must show that in enacting the *particular* limitations ... *it relied* upon evidence permitting a reasonable inference that, absent *such* limitations," ' the proscribed speech would cause harmful effects. *Alameda Books,* 2000 WL 1047892 at *6 (quoting *Tollis Inc. v. San Bernardino Cty.,* 827 F.2d 1329, 1333 (9th Cir.1987)) (emphasis added to "particular" and "such").

***5** We now examine whether the Ordinance is narrowly tailored to serve any of the County's asserted interests. *See Edwards v. City of Santa Barbara,* 150 F.3d 1213, 1216 (9th Cir.1998) ("A single legitimate government interest may be sufficient to sustain a content-neutral regulation.").

a. Traffic Flow and Safety

As the County points out, the Ninth Circuit applied the *Ward* standard for narrow tailoring in *ACORN v. City of Phoenix,* 798 F .2d 1260 (9th Cir.1986), to hold that Phoenix's significant interests in promoting traffic flow and safety justified a restriction on vehicle-addressed solicitation. The Eighth and Fifth Circuits reached similar conclusions in *ACORN v. St. Louis Cty.,* 930 F.2d 591 (8th Cir.1991), and *International Soc'y for Krishna Consciousness (ISKCON) v. City of Baton Rouge,* 876 F.2d 494 (5th Cir.1989). This case is distinguishable from these circuit cases, however, because the County's Ordinance imposes limits on speech that are substantially broader than those the circuit courts upheld. [1]

ACORN v. Phoenix involved an as-applied challenge brought by a political action organization against a city ordinance providing that "[n]o person shall stand on a street or highway and solicit, or attempt to solicit, employment, business, or contributions from the occupants of any vehicle." *ACORN v. Phoenix,* 798 F.2d at 1262 (internal quotation marks omitted). The plaintiffs sought to enjoin enforcement of the ordinance against their practice of "tagging," which typically involved wading into traffic lanes to approach cars stopped at red lights in order to solicit a contribution of money. *See id.* The circuit rejected ACORN's challenge to the ordinance, but noted that the ordinance "impose[d] no restrictions on other forms of communication, such as oral advocacy or distribution of literature, even to the occupants of vehicles." *Id.* at 1267; *accord id.* at 1268. Distribution of literature to motorists evidently would not be considered a "solicitation" under the ordinance even if the literature explained "how to obtain a membership, and where to send any contribution." *Id.* at 1271. Moreover, while the court appeared to assume in a footnote that the ordinance prohibited solicitation directed from the sidewalk toward the occupants of vehicles, it did so in reference to "solicitation occurring in direct proximity to the street." *Id.* at 1269 n.9. In context, it is clear that the court was addressing ACORN's face-to-face method of soliciting motorists while they were still in the flow of traffic and only temporarily stopped at a light. *See id.* at 1269 n.8 ("It is much easier to ignore a billboard or a pedestrian along the roadway than an individual standing closely beside your car, peering in the window directly at you, and demanding a personal response.").

Thus, the ordinance in *ACORN v. Phoenix* was "aimed narrowly at the disruptive nature of fund solicitation from the occupants of vehicles," *id.* at 1268, and the Ninth Circuit's decision was in keeping with case law recognizing the special risks to crowd and traffic control caused by solicitation that stops individuals " 'momentarily or for longer periods as money is given or exchanged for literature." ' *Id.* (quoting *Heffron v. International Soc'y for Krishna Consciousness,* 452 U.S. 640, 653 (1981)). As the *ACORN v. Phoenix* court observed, solicitation of motorists differs from "oral advocacy of ideas, or even the distribution of literature," because "successful solicitation requires the individual to respond by searching for currency and passing it along to the solicitor. Even after the solicitor has departed, the driver must secure any change returned, replace a wallet or close a purse, and then return proper attention to the full responsibilities of a motor vehicle driver." *ACORN v. Phoenix,* 798 F.2d at 1268.

***6** *ISKCON v. Baton Rouge* and *ACORN v. St. Louis* also involved narrow speech restrictions. The plaintiffs in *ISKCON v. Baton Rouge,* like the plaintiffs in *ACORN v. Phoenix,* sought to "solicit donations from occupants of motor vehicles that are temporarily stopped at traffic lights." *ISKCON v. Baton Rouge,* 876 F.2d at 496. And, like the Ninth Circuit in *ACORN v. Phoenix,* the Fifth Circuit observed that the ordinance at issue did not restrict "[d]irect communication of ideas, including the distribution of literature to occupants in vehicles," and was "narrowly aimed at the disruptive nature of fund solicitation from the occupants of vehicles." *ISKCON v. Baton Rouge,* 876 F.2d at 498. Moreover, it is not clear that the Baton Rouge ordinance extended to any solicitation speech directed from the sidewalk to the occupants of moving

vehicles: The ordinance prohibited "be[ing] upon or go[ing] upon any street or roadway ... shoulder [or] ... neutral ground for the purpose of solicitation." *Id.* at 495 (internal quotation marks omitted). In *ACORN v. St. Louis,* the parties stipulated that the challenged traffic code provision did "not forbid solicitors from soliciting drivers as long as they stand off the roadway—on the curb, median or shoulder of the road. Therefore, there is no ban on soliciting drivers—only on standing in the roadway to do it." *ACORN v. St. Louis,* 930 F.2d at 594.

Compared to the speech restrictions upheld in these three cases, the County's Ordinance is exceptionally broad. The Ordinance's definition of "solicit" encompasses "any request, offer, enticement, or action which announces the availability for or of employment, the sale of goods, or a request for money or other property, or any request, offer, enticement or action which seeks to purchase or secure goods or employment, or to make a contribution of money or other property." L.A. Cty.Code § 13.15.010(B), Compl. Ex. A. A solicitation is "deemed complete when made," regardless of whether "a transaction is completed" or any money or property changes hands. *Id.* The Ordinance criminalizes not just a solicitation, but any "attempt to solicit." *Id.* §§ 13.15.011, 13.15.012, Compl. Ex. A. Section 13.15.011 prohibits a pedestrian, including one standing on the sidewalk, from soliciting or attempting to solicit "any person traveling in a vehicle along a public right-of-way." This Section goes on to provide that the right-of-way includes, without limitation, "public streets, highways or driveways." Section 13.15.012 presents the mirror image: it forbids occupants of moving vehicles from soliciting or attempting to solicit any person "within the public right-of-way," including the sidewalk.

The Ordinance reaches even a solicitor who stands on the sidewalk, away from the curb, and unobtrusively attempts to make known to the occupants of vehicles his availability for work. For example, the County conceded at oral argument that § 13.15.011 bans a solicitor from standing on the sidewalk with a sign, saying something to the effect of "Looking for work," that he makes visible to occupants of traveling vehicles. Indeed, even a solicitor on the sidewalk with a sign saying "Park at the curb if you need a worker" would violate the Ordinance. Yet, there is no evidence upon which the County could have inferred that this type of passive solicitation creates the type of traffic congestion or safety concerns it sought to ameliorate with this Ordinance.

***7** In contrast, the courts in *ACORN v. Phoenix, ACORN v. St. Louis,* and *ISKCON v. Baton Rouge* upheld solicitation restrictions as they applied to face-to-face appeals for on-the-spot contributions from motorists, the form of speech which engendered the secondary effects the ordinances sought to eliminate. Those cases did not hold that it was constitutional to proscribe "any ... action" taken on the sidewalk "which announces the availability" of employment to motorists, including those which would not create traffic congestion and safety concerns. Indeed, the restriction in *ACORN v. St. Louis* was stipulated not to reach any solicitation of drivers conducted from the curb or shoulder, let alone the sidewalk. *See ACORN v. St. Louis,* 930 F.2d at 594.

The plain terms of § 13.15.011—which forbid, inter alia, any attempted action to announce the availability of goods or labor to the occupants of a vehicle traveling in a public driveway—also prohibit a solicitor seeking work from standing on the sidewalk near a public driveway with a handful of leaflets that he displays to the occupants of cars pulling into the driveway, even if he never tries to approach a vehicle. Likewise, there is no evidence that this form of speech creates any traffic congestion or safety concerns. The Ordinance differs markedly from the restrictions upheld in *ACORN v.. Phoenix* and *ISKCON v. Baton Rouge,* which did not prohibit solicitors from *distributing* literature to the occupants of vehicles. *See ACORN v. Phoenix,* 798 F.2d at 1267, 1268; *ISKCON v. Baton Rouge,* 876 F.2d at 498.

The Ordinance's provision restricting the speech of motorists is drawn in the same broad terms as its restriction on solicitation by pedestrians. Section 13.15.012 prohibits a moving vehicle's passenger from acknowledging the presence of a solicitor on the sidewalk and attempting "any ... action which seeks to announce availability ... of employment"—perhaps merely saying, and/or signaling with his hand, that he intends to pull over to a legal parking spot in order to engage in a transaction. There is no indication that the courts in *ACORN v. Phoenix, ACORN v. St. Louis,* and *ISKCON v. Baton Rouge* would have upheld a prohibition on this sort of speech.

Although not a solicitation case, *Schenck* addressed the issue of how broadly a speech restriction could reach in order to

advance valid interests in traffic flow and safety. In striking down a floating buffer zone that required protesters to stand at least 15 feet from vehicles seeking access to clinics where abortions were performed, the Court recognized that the restriction rested in part on a valid governmental interest in public safety, *see Schenck,* 519 U.S. at 376, and observed that protesters "sometimes threw themselves on top of the hoods of cars or crowded around cars as they attempted to turn into parking lot driveways." *Id.* at 363. Nonetheless, the Court concluded that the record did not support the vehicle buffer zone:

> ***8** We likewise strike down the floating buffer zones around vehicles. Nothing in the record or the District Court's opinion contradicts the commonsense notion that a more limited injunction—which keeps protesters away from driveways and parking lot entrances (as the fixed buffer zones do) and off the streets, for instance—would be sufficient to ensure that drivers are not confused about how to enter the clinic and are able to gain access to its driveways and parking lots safely and easily. In contrast, the 15–foot floating buffer zones would restrict the speech of those who simply line the sidewalk or curb in an effort to chant, shout, or hold signs peacefully. We therefore conclude that the floating buffer zones around vehicles burden more speech than necessary to serve the relevant governmental interests.

Id. at 380.

Besides sweeping too broadly in the area of vehicle-addressed solicitation, the Ordinance also has a propensity to chill speech that is not even directed at the occupants of traveling vehicles. Although the County argues that the Ordinance permits speakers to solicit pedestrians and the occupants of legally parked cars, it is difficult to see how a solicitor could direct his speech at these listeners in the vicinity of a public street or driveway without experiencing a reasonable and chilling fear that he would be prosecuted under the Ordinance. Consider again the solicitor who stands on the sidewalk with a sign stating "Looking for work." Even if the solicitor directed his sign only at other pedestrians approaching on the sidewalk, he would run the risk of prosecution if an occupant of a passing vehicle recognized that he was announcing his availability for work. [2] Similarly, a solicitor or group of solicitors walking down the sidewalk placing leaflets on, or approaching the occupants of, legally parked cars would risk prosecution if their actions inadvertently announced their availability for work to the occupants of traveling vehicles. The Ordinance, after all, contains no intent requirement. It simply bans, inter alia, "any ... action which announces the availability for or of employment" to "any person traveling in a vehicle along a public right-of way." L.A. Cty.Code § 13.15.011, Compl. Ex. A.

In *Schenck,* the Supreme Court also discussed the constitutional problem that arises when speakers have difficulty knowing whether or not they are in compliance with a speech restriction. In striking down the "floating buffer zone" that required protesters to stand at least 15 feet from people and vehicles seeking access to clinics where abortions were performed, the Court reasoned that it would be difficult for a protester to know how to maintain the 15–foot distance mandated by the injunction. *See id.* at 377–80. "This lack of certainty," the Court continued, "leads to a substantial risk that much more speech will be burdened than the injunction by its terms prohibits." *Id.* at 378. Like the Ordinance here, the speech restriction in *Schenck* contained no intent element to help assure speakers that they would not be prosecuted for inadvertent violations. *Cf. Hill v. Colorado,* 120 S.Ct. 2480, 2495 (2000) (upholding statutory 8–foot floating buffer zone where statute penalized only "knowing" violations).

***9** Because of its broad terms, the Ordinance burdens a substantial amount of speech that has not been shown to cause the feared harms to traffic flow and safety. Solicitors who run into the street or stand on the curb and aggressively hail moving vehicles surely cause the harmful effects that the County fears, and the record contains evidence sufficient for the County to conclude that such solicitation has in fact occurred. [3] But the record does not support the County's

decision to ban all vehicle-addressed solicitation, defined as broadly as the Ordinance defines it here. [4]

In sum, we conclude that the Ordinance is not narrowly tailored to serve the County's significant interests in promoting traffic flow and safety. [5]

b. Quality of Urban Life

Aside from issues of traffic flow and safety, the County argues that its Ordinance is also justified as a means of preventing harmful secondary effects such as harassment, [6] trespassing, littering, and public urination and defecation. There is, however, little if any "fit" between the terms of the Ordinance and these concerns.

The threshold requirement for narrow tailoring is that the challenged regulation must " 'promote[ ] a substantial government interest that would be achieved less effectively absent the regulation,' " *Colacurcio,* 163 F.3d at 553 (quoting *Ward,* 491 U.S. at 799). Here, the County emphasizes that its restriction on vehicle-addressed solicitation does not prohibit door-to-door canvassing, solicitation "in parking areas and other areas designated for such activities," or solicitation by pedestrians of other pedestrians or occupants of parked cars. Defs.' Supp. Responses to Pls.' 2d Interrogs. at 6:7–14. Assuming for the sake of argument that these are viable alternative avenues for communication and solicitors would not be chilled by the terms of the Ordinance from taking advantage of them, *see* supra Part II.B.3.a, the fact is that each of these alleged alternatives still involves solicitors congregating on the sidewalk or in other public areas, giving rise to the same risks of harassment of passersby, littering, trespassing, and public urination and defecation. *Cf. Boos v. Barry,* 485 U.S. 312, 320 (1988) (plurality opinion) (suggesting that the secondary effects doctrine can justify a speech restriction only when the secondary harms are "almost unique to" the particular sort of speech that is restricted). As a result, there is no reasonable basis to believe the Ordinance does anything to address the quality-of-life issues identified by the County, or that the absence of the Ordinance would leave the County less able to promote its interests.

Even if there were reason to believe that the Ordinance would be effective in addressing the harms identified by the County, it still would not be narrowly tailored. A congregation of solicitors on the sidewalk—like many other congregations of people in public places—may lead to instances of littering, public urination, harassment of passersby, and other harmful secondary effects. The evidence relied upon by the County so reflects. *See, e.g.,* Jt. Br. Re: Secondary Effects Ex. D at 65 (letter complaining to Agoura Hills City Council of public urination and physical threats); *id.* Ex. E at 98–100 (Los Angeles Times article of February 27, 1994 reporting that "Ladera Heights residents say the workers litter the area, urinate in public, gamble, obstruct traffic and harass women."); *id.* Ex. F at 120 (letter to County Board complaining of public urination, trespassing, and handing out leaflets on homeowner's lawn). The Ordinance, however, does not address only congregations of solicitors; it reaches every individual solicitor who comes within its terms. While it may be true that every individual solicitor is a potential harasser, trespasser, and public urinator, courts are rightly reluctant to allow the government to target a category of speech based on the risk that some speakers may engage in harmful activity. *See Krantz v. City of Fort Smith,* 160 F.3d 1214, 1219–22 (8th Cir.1998) (court struck down ordinance that prohibited the leaving of leaflets on unattended vehicles, reasoning, inter alia, that many leafletters and recipients of leaflets would not litter). Such reluctance is especially appropriate when the government can further its interests by prosecuting the offenses that constitute the harmful effects without substantially burdening speech that does not cause the harmful effects. *See id.* at 1221 (citing *Schneider v. New Jersey,* 308 U.S. 147, 162 (1939) and *Martin v. City of Struthers,* 319 U.S. 141, 147 (1943)). Here, the County's law enforcement officers have a number of laws at their disposal that directly target the asserted harms. *See, e.g.,* Cal.Penal Code § 374.4 (littering); § 415 (fighting, noise, and offensive words); § 602(n) (trespassing); § 647 (disorderly conduct); § 647c (willful and malicious obstruction of right-of-way).

***10** This case is different in crucial respects from those cases in which courts upheld narrowly tailored restrictions on the speech of adult businesses. In those cases, the municipality reasonably concluded that the proscribed speech itself generated the harmful secondary effects. *See Renton,* 475 U.S. at 52 (concluding that ordinance was tailored "to affect only that category of theaters shown to produce the unwanted secondary effects"); *Colacurcio,* 163 F.3d at 554 (explaining that "courts have upheld distance requirements [for exotic dancing] as a narrowly tailored means of controlling illegal sexual contact and narcotics transactions" that can occur at

closer range). Thus, the speech restriction provided a way to cut off the secondary effects at their source. Here, by contrast, there is nothing inherent in vehicle-addressed solicitation that causes littering, harassment, trespassing, or public urination or defecation. Rather, these effects stem from the presence, and particularly the congregation, of people in a public place. The secondary effects are therefore not a result of vehicle-addressed solicitation; they are at most a corollary to it. *Cf. One World,* 76 F.3d at 1014 ("The ordinance targets precisely the activity—sidewalk vending—causing the problems the city legitimately seeks to ameliorate, and it doesn't sweep in expressive activity that doesn't contribute to those problems. As in [*Members of the City Council v. Taxpayers for Vincent,* 466 U.S. 789, 808 (1984)], the city 'did no more than eliminate the exact source of the evil it sought to remedy." '). In short, there is not a reasonable fit between the Ordinance, which reaches even the individual solicitor, and the quality-of-life concerns identified by the County.

c. Moderating the Need for Police

The County simply does not explain how an Ordinance criminalizing various forms of streetside solicitation would reduce or moderate the number of police needed to patrol the County's streets. In fact, the record upon which the County allegedly relied in adopting its Ordinance contains evidence supporting the conclusion that the Ordinance would *increase* the need for police. A January 4, 1994 letter from the City of Brea—one of the jurisdictions upon whose experiences the County claims to have relied—states that Brea chose *not* to enact an anti-solicitation ordinance because (1) it was of "dubious constitutionality"; and (2) it would require too many police resources to enforce. Jt. Br. Re: Secondary Effects Ex. D at 84. The record does not contain evidence supporting a reasonable conclusion that the Ordinance is narrowly tailored to conserve police resources. *See Alameda Books,* 2000 WL 1047892 at *5–7 (holding that evidence upon which the defendant city relied was insufficient to support a reasonable inference that absent the city's restriction, the targeted speech would have harmful effects).

The Ordinance is not narrowly tailored to serve the County's asserted significant interests. Even if it were narrowly tailored, however, the Ordinance still would fail the time, place, and manner test because the County has failed to show that it leaves open ample alternative avenues of communication.

C. Alternative Avenues of Communication

1. Burden of Proof

***11** As a matter of established First Amendment law, "it is clear that the burden of proving alternative avenues of communication rests on" the County. *Lim v. City of Long Beach,* 217 F.3d 1050, 1054 (9th Cir.2000), as amended on denial of reh'g by—F.3d—, 2000 WL 1191043 (9th Cir. Aug. 23, 2000). In *Lim,* which analyzed a zoning ordinance restricting the locations of adult businesses, the defendant city had to show that it offered "adult businesses a 'reasonable opportunity to open and operate ... within the city." ' *Id.* (quoting *Renton,* 475 U.S. at 54). In considering whether this condition is satisfied, the court must first look at whether the relocation sites for adult businesses are actually part of the real estate market for commercial businesses, and then consider whether there are enough relocation sites. *See id.* (citing *Topanga Press v. City of Los Angeles,* 989 F.2d 1524, 1529 (9th Cir.1993)). The *Lim* court held that in order to carry its threshold burden to show that relocation sites were part of the market, a defendant municipality must "provide[ ] a good faith and reasonable list of potentially available properties." *Lim,* 217 F.3d at 1055. The municipality "cannot merely point to a random assortment of properties and simply assert that they are reasonably available to adult businesses." *Id.*

While the specific requirements of proof that the *Lim* court applied to the zoning of adult businesses do not necessarily apply in the same way in the context of this case, there is no reason to believe that the government bears the burden of proving the existence of reasonable alternatives only in the context of zoning adult businesses. Given that the speech involved in adult business cases tends to be of relatively low First Amendment value, *see Colacurcio,* 163 F.3d at 550, it would not make sense to put the government to its proof when it asserts that there are reasonably available alternative sites for the operation of an adult business, but simply accept the government's asserted alternative avenues without any support when the government restricts other forms of speech, such as solicitation. Consequently, we conclude that under *Lim,* the County must at least make a reasonable and good faith showing that its proffered alternative avenues of communication provide a reasonable opportunity for Plaintiffs to convey their messages within the County.

2. The County's Asserted Alternatives

The County fails to carry its burden. It asserts that several alternative avenues are available to Plaintiffs: door-to-door canvassing of businesses and residences; telephone solicitations; solicitation by pedestrians of other pedestrians and occupants of lawfully parked vehicles; and solicitation on private property, "in parking areas and other areas designated for such activities." Defs .' Supp. Responses to Pls.' 2d Interrogs. at 6:7–14. The County has cited no evidence showing that the asserted alternative avenues are available, much less that they provide a reasonable opportunity for Plaintiffs to solicit day labor. Nor is there evidence that the County even tried to determine whether the Ordinance leaves Plaintiffs or other streetside solicitors with ample channels to convey their messages. [7] By themselves, these failures mean that the County has failed to carry its "clear ... burden of proving alternative avenues." *Lim,* 217 F.3d at 1054.

3. The Sufficiency of the County's Asserted Alternatives

***12** Even if the County did not have to produce evidence that viable alternative avenues exist, there are independent reasons to conclude that the County's asserted alternative avenues would not amply provide for the communication of Plaintiffs' messages. As an initial matter, the Ordinance's broad definition of "solicit" closes off certain alternative avenues that existed in cases which upheld restrictions on solicitation. In *ACORN v. Phoenix,* for example, the Ninth Circuit specifically stated that "distributing literature, even to occupants of vehicles" remained an open avenue of communication. *ACORN v. Phoenix,* 798 F.2d at 1271; *accord ISKCON v. Baton Rouge,* 876 F.2d at 498; *see also One World,* 76 F.3d at 1014 (stating that "handing out literature" was one alternative avenue open to plaintiffs who were barred by ordinance from selling message-bearing T-shirts on the sidewalk. As discussed above, the Ordinance prohibits the distribution and even the display of literature to people traveling in vehicles.

Furthermore, the *Xiloj–Itzep* court pointed out in the course of its alternative avenues analysis that Agoura Hills had "established a telephone hiring exchange which adds an avenue of communication that would not ordinarily be available." *Xiloj–Itzep,* 24 Cal.App.4th at 641. The record does not contain evidence that the County instituted any similar avenue, even though Agoura Hills is one of the jurisdictions upon whose experiences the County relied in adopting its Ordinance. [8]

Finally, an examination of the County's asserted alternatives reveals that either they are unlikely to be ample in the context of day labor solicitation, or the terms of the Ordinance likely will chill day laborers from using them. We examine the County's asserted alternatives in turn.

a. Canvassing and Telephone Solicitation

While door-to-door canvassing and telephone solicitation can be effective in raising funds for a political cause, *see ACORN v. Phoenix,* 798 F.2d at 1271, it is counterintuitive to conclude that they provide a reasonable opportunity to solicit day work. Fundraisers from a political organization can knock on doors and cold-call people with a fair degree of success because nearly everyone has some money and therefore is a potential donor. But the market for day labor is smaller and more discrete: Not everyone wants to or can use the services of day workers. As a result, employment solicitation has to be more targeted than political fundraising, making canvassing and telephone solicitation not reasonable alternative avenues of communication.

Moreover, day laborers are unlikely to possess the resources that enable organizations such as ACORN or ISKCON to canvass and telephone potential contributors. Because of day laborers' lack of resources, we should be especially wary of restrictions that close off their ability to speak inexpensively in the public forum. *See generally Colacurcio,* 163 F.3d at 555 ("The [Supreme] Court has been particularly hesitant to close off channels of communication which provide individuals with inexpensive means of disseminating core political messages."). [9]

b. Soliciting Pedestrians and Occupants of Parked Vehicles

***13** As discussed in Part II.B.3.a, the Ordinance's broad terms and lack of any intent element raise a substantial risk that individuals on the sidewalk will be chilled from soliciting other pedestrians or the occupants of parked cars. This undermines the County's claim that these types of solicitation are viable alternatives to the proscribed speech.

c. Solicitation on Private Property, in Parking Lots, or in "Other Designated Areas"

The County cannot support its restriction on speech in a public forum merely by claiming that Plaintiffs can solicit work on some unspecified parcels of private property. This would render the "alternative avenues" element meaningless because there always is some possibility that some property owner somewhere might open up her land to speakers who are restricted from using the public forum. The regulator must do more than merely speculate that such a possibility exists.

To the extent the County is suggesting that Plaintiffs could conduct solicitation on private property without the owner's consent, we reject this argument as well. Trespass is not an "ample alternative avenue" to speaking in a public forum.

We also reject the County's argument to the extent it suggests that Plaintiffs can simply obtain their own property and conduct solicitation there. There has been no showing that Plaintiffs have the resources to do this, and it is unlikely that they do. This difference distinguishes this case from *One World,* in which the Ninth Circuit reasoned that "opening their own stores" was an alternative avenue of communication for T-shirt vendors whose "tax-free and rent-free" sidewalk businesses were undercutting local merchants. *One World,* 76 F.3d at 1013, 1014 (internal quotation marks omitted).

In sum, we cannot conclude that the County's asserted alternative avenues are ample. The Ordinance creates a substantial risk that day laborers simply will be unable to solicit work in the unincorporated areas of the County. As a result, the Ordinance effectively "foreclose[s] an entire medium of public expression across the landscape of a particular community or setting." *Colacurcio,* 163 F.3d at 555.

III.

CONCLUSION

It is indisputable that the County has valid grounds to be concerned about the dangers that inevitably arise when pedestrians aggressively solicit the occupants of moving vehicles. The fact that numerous laborers feel compelled to take to the streets to look for day work should be a powerful reason for all the parties in this case to seek a safe, long-term, and constitutionally valid solution to the problems stemming from reckless vehicle-addressed solicitation.

This Ordinance, however, is not that solution. Compared to other, constitutionally valid laws that have served similar government interests, this Ordinance is not narrowly tailored and does not leave open ample alternative avenues of communication.

Accordingly, we hold and declare the operative sections of the Ordinance, codified at Sections 13.15.011 and 13.15.012 of the Los Angeles County Code, invalid as they violate the First and Fourteenth Amendments to the United States Constitution.

***14** Nothing in this Order, of course, prevents the County from promoting its legitimate interests by enforcing generally applicable laws that do not target protected speech, such as laws prohibiting jaywalking, reckless driving, illegal turns, littering, public urination and defecation, trespassing, or disorderly conduct.

IV.

ORDER

Sections 13.15.011 and 13.15.012 of the Los Angeles County Code are DECLARED to violate the First and Fourteenth Amendments to the United States Constitution. The County, its employees, officers, agents, servants, attorneys, successors and assigns, and all those in active concert and/or participation with any of them who receive actual notice of this order by personal service or otherwise, are PERMANENTLY ENJOINED from enforcing these sections.

IT IS SO ORDERED.

All Citations

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Footnotes

1 The County also relies on *Xiloj–Itzep v. City of Agoura Hills,* 24 Cal.App.4th 620 (1994), in which the state court of appeal rejected a First Amendment challenge to an ordinance nearly identical to the Ordinance here. We are not bound by the *Xiloj–Itzep* court's interpretation of the First Amendment, and we do not find its reasoning persuasive. In particular, we disagree with the state court's reading of *ACORN v. Phoenix, ACORN v. St. Louis,* and *ISKCON v. Baton Rouge.* In the *Xiloj–Itzep* court's view, these cases "held that limiting the prohibition to vehicle-addressed solicitation satisfies the requirement that the regulation be narrowly tailored to protecting the free flow of traffic and traffic safety." *Xiloj–Itzep,* 24 Cal.App.4th at 639. As discussed in the text, however, a closer reading of these circuit cases reveals that none of the three involved a solicitation restriction as broad as the Ordinance here.

2 Indeed, the County appeared to acknowledge at oral argument that the Ordinance prohibits a solicitor on the sidewalk from displaying a sign so that it could be seen both by pedestrians and people in approaching vehicles.

3 *See, e.g.,* Jt. Br. Re: Secondary Effects, Ex. D at 67 (letter to Agoura Hills City Council complaining of solicitors running up to cars at a busy gas station); *id.* at 70 (letter complaining of solicitors "lunging at cars when they slow down at driveways"); *id.* at 84 (letter from Brea's city manager stating that streetside solicitation "resulted in a variety of traffic safety issues as contractors made illegal turns and day workers ran into the street to be picked up"); *id.,* Ex. C at 20:18–19 (speaker at May 24, 1994 Board meeting stating that "Sometimes it's so bad that you even have to get over to the left side of the road to drive [past] these people."); *id.* at 26:22–24 (speaker stating that drivers sometimes have difficulty pulling away from solicitors who approach the windows of vehicles while they are stopped in traffic).

4 There may always be some risk of driver distraction when a speaker on the sidewalk directs his message at the occupants of vehicles traveling on the public right-of-way, just as there is always some risk of driver distraction caused by storefronts, billboards, and other signage along the street. Here, the record contains insufficient evidence to permit the County to come to the reasonable conclusion that the unobtrusive speech we discuss above—e.g., the carrying of signs and displaying of leaflets on the sidewalk—creates enough of a distraction to justify banning it. *Cf. ACORN v. Phoenix,* 798 F.2d at 1269 n.8 ("It is much easier to ignore a billboard or pedestrian along the roadway than an individual standing closely beside your car, peering in the window directly at you, and demanding a personal response from you.").

5 We are mindful that we should interpret the Ordinance to avoid constitutional difficulties insofar as it is possible to do so. *See Frisby v. Schultz,* 487 U.S. 474, 483 (1988). At the same time, though, we should not insert missing terms into the Ordinance or adopt an interpretation precluded by its plain language. *See S.O.C.,* 152 F.3d at 1144 (referring to court's consideration of a limiting construction imposed on a speech restriction by the defendant county). Here, the plain language of the Ordinance broadly defines "solicit" to include, inter alia, "any ... action which announces the availability for work." Second, we cannot read an intent element into the statute where none exists. Third, the County stated in oral argument that the Ordinance prohibits a solicitor on the sidewalk from directing a sign toward people traveling in vehicles—a form of solicitation that evidently would not have been banned by the Ordinances upheld in *ACORN v. Phoenix, ISKCON v. Baton Rouge,* and *ACORN v. St. Louis.*

Similarly, we have considered whether the state court of appeal's decision in *Xiloj–Itzep* places a limiting gloss on the Ordinance so as to render it constitutional. We conclude that *Xiloj–Itzep* does not save the Ordinance from Plaintiffs' constitutional challenge. First, although the *Xiloj–Itzep* court considered an

Agoura Hills ordinance that is virtually identical to the County's, there is no guarantee that the County will enforce its ordinance in the same way that the court described Agoura Hills' enforcement of its ordinance. *See Xiloj–Itzep,* 24 Cal.App. 4th at 632 (describing Agoura Hills' instructions to the Sheriff's lieutenant charged with enforcing the city's ordinance). Second, the *Xiloj–Itzep* opinion does not clearly show whether the court interpreted Agoura Hills' ordinance to reach the sort of solicitation that concerns us here: relatively unobtrusive modes of communication such as carrying signs and displaying literature. *Compare Xiloj–Itzep,* 24 Cal.App.4th at 642 ("The Ordinance does not prevent seeking day work in the City, it simply prevents distracting motorists and running out into traffic to solicit.") *with id.* at 631 ("[I]t became obvious that all vehicle-addressed solicitation was a problem. Thus, the Ordinance defines solicitation to include all offers of services, vending and seeking of contributions by all persons."). Finally, although the *Xiloj–Itzep* court stated that Agoura Hills' ordinance left day laborers "free to congregate on the City's sidewalks and other public areas to wait for employers and to solicit work from employers who are legally parked or have exited their cars," *id.* at 631, the court did not analyze whether the difficultly of complying with the ordinance would chill solicitors from engaging in these supposedly permitted activities, as discussed in the text of this section.

6 While one of the County's asserted secondary effects is harassment of motorists and passersby, the record does not contain a reasonable basis to conclude that the restricted solicitation speech itself is directed at "unwilling listeners"—i.e., people uninterested in hiring day laborers who nonetheless are subjected to solicitation while they sit captive in their cars. Rather, the Ordinance criminalizes solicitation regardless of whether or not the listener welcomes the message. Indeed, the Ordinance clearly contemplates a willing exchange between solicitor and solicitee because its definition of "solicit" encompasses speech by both the offeror and the seeker of goods, services, or contributions. Thus, this case differs from cases upholding restrictions on speech that targeted a captive or unwilling audience. *See Hill,* 120 S.Ct. at 2489–91 (discussing the unwilling listener in the context of protests outside clinics where abortions were performed); *Doucette v. City of Santa Monica,* 955 F.Supp. 1192, 1206 (C.D.Cal.1997) (upholding anti-solicitation ordinance that focused on "places where citizens cannot easily escape"); *see also ACORN v. Phoenix,* 798 F.2d at 1270 n.11 (noting but not reaching the question of whether ACORN's "tagging" activities would merit a lower level of protection because they arguably targeted motorists while they were held "captive" in their cars by red lights).

Most of the evidence of harassment in the record relates not to the proscribed solicitation itself, but to rude behavior directed by day laborers at female passersby. *See, e.g.,* Jt. Brief on Secondary Effects Ex. D at 70; *id.* Ex. E at 95; *id.* at 98–100; *id.* Ex. F at 117. By stating that the Ordinance does not target speech directed at unwilling listeners, we do not intend to suggest that the victims of harassment are somehow "willing" or to slight the County's interest in preventing harassment. Rather, we mean to underscore the point that the Ordinance's restriction on vehicle-addressed solicitation is not narrowly tailored to combat solicitors' harassment of fellow pedestrians.

7 In a similar vein, the County provided no information in response to interrogatories directed at discovering the existence of its asserted alternative avenues. Plaintiffs asked for all facts, documents, and witnesses supporting the County's contention that the Ordinance left open the asserted avenues. Defs.' Supp. Responses to Pls.' 2d Interrogs. at 6:15–7:10. The County objected to these questions and merely referred back to its list of claimed alternative avenues. *Id.* 6:19–7:15.

8 Additionally, according to a January 7, 1994 letter to the County Board from the city manager of Brea, that city opened a job center for day workers on city-owned property. The letter states: "While this is an imperfect solution ... the Brea Job Center has removed day workers from city streets and responded to their needs

as well as those of local employers." Jt. Br. Re: Secondary Effects Ex. D at 84–85. The record contains no evidence that the County made available a similar alternative avenue of communication.

9 While Plaintiffs' solicitation speech does not fit into the category of "core political messages" mentioned in *Colacurcio,* it is not without First Amendment protection. *See 44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 495–500 (1996) (principal opinion) (discussing level of constitutional protection afforded to non-misleading commercial speech). The ability to solicit work in the public forum is not of such lowly concern as to render *Colacurcio* 's discussion irrelevant.

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