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# LITIGATION AT WORK: DEFENDING DAY LABOR IN LOS ANGELES

Scott L. Cummings<sup>\*</sup>

*Local opposition to day laborers is built upon a standard diagnosis of the day labor “problem” and a common approach to its “remedy.” The diagnosis views day labor as a public nuisance that imposes negative externalities on a locality by disrupting normal patterns of business, traffic, and pedestrian exchange. The remedy involves the enactment of new land use regulations, known as antisolicitation ordinances, designed to remove day laborers from the street corners—thereby undermining their ability to earn a living. Such ordinances regulate immigration indirectly by criminalizing conduct engaged in disproportionately by immigrant workers. Their proliferation, in turn, has invited a specific type of legal challenge focused on the deprivation of day laborers’ First Amendment right to seek work. This Article examines a pivotal struggle in the national day labor movement: the two-decade long legal campaign to contest antisolicitation ordinances in the greater Los Angeles area. It asks whether and how litigation—often portrayed as a nemesis of social movements—has advanced the day laborers’ cause. What it shows is that litigation has been an indispensable social change tool in the fight for day laborers’ rights, albeit one that carries inherent risk. On the positive side of the ledger, the Los Angeles day labor campaign has drawn upon strong legal capacity to mobilize a rights strategy, coordinated with grassroots organizing, against the backdrop of limited political options. It has thus avoided many of the familiar pitfalls of social change litigation in successfully challenging key ordinances. Yet, despite its success in preserving public space for day labor solicitation, the campaign’s outcome rests in the hands of a federal appellate court, underscoring a fundamental social change reality: Even the most sophisticated litigation campaign ultimately hinges on the presence of sympathetic decisionmakers in the court of ultimate authority.*

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## INTRODUCTION

Although the power to exclude immigrants from the United States resides in the federal government, the fight to exclude them has increasingly played out

at the local level—in cities where immigrants live.<sup>1</sup> In this fight, the terrain of work is an important battleground, both because it is often work that attracts immigrants in the first instance and because it is the workplace that offers legal rights to immigrants otherwise bereft of them.<sup>2</sup> For those immigrants who labor in relative obscurity—in homes,<sup>3</sup> garment factories,<sup>4</sup> restaurant kitchens,<sup>5</sup> and other “invisible” spaces—the advocacy impulse has been to *expose* their exploitation in order to render it more visible.<sup>6</sup> By illuminating the shadows where immigrants toil, advocates aim to deprive employers of the ability to shield their abuses from law’s glare.

The case of day laborers, however, has followed a different trajectory. Day laborers are a predominately immigrant workforce, composed (mostly) of men who solicit daily employment on street corners (a *jornal* in Spanish, hence their Spanish name: *jornaleros*), often next to home improvement stores and other venues trafficked by contractors and do-it-yourselfers.<sup>7</sup> Day laborers’ public mode of gaining work makes them, unlike many of their counterparts, one of the most visible immigrant groups in the contemporary American economy.<sup>8</sup> They are, as a result, uniquely vulnerable to extralegal repression and even violence.<sup>9</sup> In the most ominous expression of this vulnerability, day laborers have been the frequent targets of harassment by anti-immigrant “Minutemen,” who treat day labor sites as the frontline of their vigilantism.<sup>10</sup>

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1. See Monica W. Varsanyi, *Immigration Policy Activism in U.S. States and Cities: Interdisciplinary Perspectives*, in *TAKING LOCAL CONTROL: IMMIGRATION POLICY ACTIVISM IN U.S. CITIES AND STATES* 1, 3 (Monica W. Varsanyi ed., 2010).

2. See Shannon Gleeson, *Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making*, 35 *LAW & SOC. INQUIRY* 561, 567–70 (2010).

3. See generally PIERRETTE HONDAGNEU-SOTELO, *DOMÉSTICA: IMMIGRANT WORKERS CLEANING AND CARING IN THE SHADOWS OF AFFLUENCE* (2001); Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 *N.C. L. REV.* 45 (2000).

4. See generally Scott L. Cummings, *Hemmed In: Legal Mobilization in the Los Angeles Anti-Sweatshop Movement*, 30 *BERKELEY J. EMP. & LAB. L.* 1 (2009).

5. Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 *CALIF. L. REV.* 1879 (2007).

6. See, e.g., Julie A. Su, *Making the Invisible Visible: The Garment Industry’s Dirty Laundry*, 1 *J. GENDER RACE & JUST.* 405 (1998).

7. ABEL VALENZUELA, JR., NIK THEODORE, EDWIN MELÉNDEZ & ANA LUZ GONZALEZ, *ON THE CORNER: DAY LABOR IN THE UNITED STATES* 1, 17 (2006).

8. See Jill Esbenshade, *The “Crisis” Over Day Labor: The Politics of Visibility and Public Space*, 3 *WORKINGUSA*, Mar.–Apr. 2000, at 27, 33–34; Arturo Gonzalez, *Day Labor in the Golden State*, 3 *CAL. ECON. POL’Y*, July 2007, at 1, 1.

9. See John M. Glionna, *Laborer Says Having Bag Put Over Head No Laughing Matter*, *L.A. TIMES* (San Diego County ed.), June 1, 1990, at B2.

10. See Casey Sanchez, *Blunt Force: San Diego Nativist Group Faces Troubles*, 126 *INTELLIGENCE REP.* 26 (Summer 2007), available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2007/summer/blunt-force>.

At the local level, vigilantism has combined with other forms of opposition to day labor: Residents claim that day laborers intimidate them and sully public space; businesses claim that day laborers drive away customers and drive down prices; and public officials claim that day laborers snarl traffic and increase the risk of car accidents.<sup>11</sup> Complaints from these local stakeholders have coalesced into a standard diagnosis of the day labor “problem” and a common approach to its “remedy.” The diagnosis views day labor as a *public nuisance* that imposes negative externalities on a locality by disrupting normal patterns of business, traffic, and pedestrian exchange. To remedy this nuisance, local jurisdictions have adopted a common strategy of enacting legislation, known as *antisolicitation ordinances*, designed to remove day laborers from the street corners—thereby undermining their ability to earn a living.<sup>12</sup>

In this way, day laborers have become the target of state-sponsored repression, placing them at the forefront of the broader movement to mobilize local government law to criminalize immigrants.<sup>13</sup> Yet antisolicitation ordinances are distinctive. In contrast to laws that directly impose criminal sanctions based on immigration status, antisolicitation ordinances criminalize conduct engaged in disproportionately by immigrant workers, thereby avoiding the controversy surrounding subfederal immigration enforcement. Such ordinances aim to regulate immigration indirectly—through the “backdoor”<sup>14</sup>—by reducing the economic incentive to enter. Their advent, in turn, has transformed day labor advocacy, focusing it on the deprivation of day laborers’ civil right to seek work, rather than the economic harms suffered while working. Doing so has meant challenging antisolicitation ordinances on their own terms with legal claims turning on the workers’ First Amendment right to free speech rather than their immigration status.<sup>15</sup>

This Article is about that legal challenge and what it has meant for the day labor movement. It examines the coordinated legal and organizing

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11. See Esbenshade, *supra* note 8, at 46–49; see also Gregg W. Kettles, *Day Labor Markets and Public Space*, 78 UMKCL. REV. 139 (2009).

12. See Esbenshade, *supra* note 8, at 55–56.

13. Ingrid V. Eagly, *Local Immigration Prosecution: A Study of Arizona Before SB 1070*, 58 UCLA L. REV. 1749 (2011).

14. See Kristina M. Campbell, *The High Cost of Free Speech: Anti-Solicitation Ordinances, Day Laborers, and the Impact of “Backdoor” Local Immigration Regulations*, 25 GEO. IMMIGR. L.J. 1, 2 (2010); Monica W. Varsanyi, *Immigration Policing Through the Backdoor: City Ordinances, the “Right to the City,” and the Exclusion of Undocumented Day Laborers*, 29 URB. GEOGRAPHY 29, 30 (2008).

15. See generally Gabriela Garcia Kornzweig, Note, *Commercial Speech in the Street: Regulation of Day Labor Solicitation*, 9 S. CAL. INTERDISC. L.J. 499 (2000).

campaign to resist antisolicitation ordinances in the greater Los Angeles area beginning in the late 1980s and continuing to the present day. This campaign has hinged on a carefully orchestrated impact litigation strategy that has asserted First Amendment challenges to ordinances passed and actively enforced throughout the region. Its goal has been to abrogate (or modify) ordinances in cities that have passed them and to deter their enactment in cities where they are under consideration. The ultimate legal objective is a definitive ruling on the merits in favor of solicitation, which is viewed as essential to the larger movement goal of helping day laborers build power.<sup>16</sup>

The centrality of litigation in the day labor movement implicates the classic scholarly debate about its efficacy as a social change strategy.<sup>17</sup> Drawing upon this literature, I suggest that the day labor campaign is one in which the underlying conditions point in favor of a litigation-based approach: Day laborers are politically weak (and are therefore generally unable to prevent the passage of antisolicitation ordinances), but nonetheless possess a strong (though disputed) legal right to solicit work in public that, if protected, is self-enforcing. As a matter of theory, therefore, we might expect litigation to “work” as a tactic for advancing a central goal of the day labor movement: protecting day laborers’ ability to earn a living.<sup>18</sup> The question I ask is: As a matter of practice, does it?

I seek to answer this question through a careful case study of day labor advocacy in Los Angeles. Part I provides the theoretical context for this analysis. Part II then presents a case history of the day labor campaign, emphasizing the legal strategy as it has related to the selection, design, and execution of eight pivotal impact cases in the greater L.A. area. Part III concludes by analyzing what has been won and lost—so far.

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16. Maria Dziembowska, *NDLON and the History of Day Labor Organizing in Los Angeles*, in *WORKING FOR JUSTICE: THE L.A. MODEL OF ORGANIZING AND ADVOCACY* 141 (Ruth Milkman, Joshua Bloom & Victor Narro eds., 2010). Toward the end of building power, lawyers have assisted day laborers in other ways, most notably by helping them assert their employment rights. See Liza Zamd, *All in a Day’s Work: Advocating the Employment Rights of Day Laborers*, 3 *MOD. AM.* 56 (Summer–Fall 2007).

17. See generally JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d ed. 2008); STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974).

18. My use of “work” in this way echoes Michael McCann’s classic analysis of rights-claiming strategies in the pay equity movement. MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994).

## I. WHEN DOES LITIGATION WORK?

The defining project of law and social change scholarship has been to answer a basic, yet fundamental, question: *Can law be mobilized to contest the power of those who have it and build the power of those who do not?*

The answer, unsurprisingly, is: It depends—on which scholars you ask and which groups you are asking about. Yet from the welter of contested ideas, it is possible to distill a framework that maps the conditions under which litigation is most likely to be successful in producing social change.

Success as a dependent variable requires some unpacking. In analyzing the impact of law on social change, scholars have generally distinguished between two categories of outcomes: direct and indirect effects. Direct effects encompass what Joel Handler referred to as “tangible benefits” of law reform that “can be identified and measured.”<sup>19</sup> The tangible benefits of a litigation strategy include both the establishment of “new norms” (or revalidation of existing ones) and their implementation.<sup>20</sup>

Following this definition, social change litigation is successful in a direct sense when there is both (1) a definitive legal ruling on the merits that resolves the issue favorably to the reform proponent (law on the books) followed by (2) effective and sustained enforcement at the level of practice (law in action). As scholars have frequently pointed out, it is possible for reformers to achieve (1) but not (2). *Brown v. Board of Education*<sup>21</sup> is often held up as the classic example of a court victory nullified by nonenforcement.<sup>22</sup>

Because direct success hinges on the effective implementation of legal mandates on the ground, scholars have expressed skepticism that court-driven reform efforts are optimal given the impediments to enforcement, including neglect and/or resistance by agencies charged with implementing a legal right,<sup>23</sup> the lack of resources for effective implementation, and countermobilization.<sup>24</sup>

Against the backdrop of enforcement constraints, scholars have also highlighted the indirect effects of social change litigation, suggesting that these, in the long run, may be just as important in advancing movement objectives. Even when implementation is not achieved, litigation may be useful in framing grievances in justice terms,<sup>25</sup> conferring legitimacy on a

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19. HANDLER, *supra* note 17, at 36.

20. *Id.*

21. 347 U.S. 483 (1954).

22. See ROSENBERG, *supra* note 17, at 42–57.

23. HANDLER, *supra* note 17, at 18–22.

24. ROSENBERG, *supra* note 17, at 15–21.

25. See Michael McCann, *Law and Social Movements*, in *THE BLACKWELL COMPANION TO LAW AND SOCIETY* 506, 511 (Austin Sarat ed., 2004).

movement's claims,<sup>26</sup> generating favorable publicity, raising consciousness among a movement's constituency,<sup>27</sup> and fostering empowerment.<sup>28</sup> Over the long run, these indirect effects may translate into concrete movement gains, allowing reformers to build enough power to enact and enforce legislative victories. In the short term, reformers may be able to leverage the moral force of courts (and the costs associated with litigation) to win policy concessions from decisionmakers.<sup>29</sup> Even when litigation fails on the merits, reformers may still "win through losing" by mobilizing in the wake of a court loss to achieve indirect benefits.<sup>30</sup>

What are the factors that predict when social change litigation will produce positive direct effects? Table 1 identifies key legal and political variables influencing litigation success. The left column shows variables that influence *legal mobilization*: the ability of reformers to bring an impact lawsuit, win on the merits, enforce the victory, and educate affected community members about their rights. The right column shows variables that influence *political mobilization*: the ability of reformers to enact and enforce legislative reform, or to enforce and protect legal reform achieved through courts.

TABLE 1. Variables Influencing Litigation Success

<i>Degree of Legal Mobilization</i>	<i>Degree of Political Mobilization</i>
Legal capacity	Political capacity
Receptivity of judiciary	Support of political elites
Mechanism of legal enforcement	Availability of resources to monitor legal enforcement
Extent of rights saturation	Extent of countermovement opposition

The degree of legal mobilization is measured across four variables: legal capacity, the receptivity of the judiciary to the right asserted, the

26. HANDLER, *supra* note 17, at 214–22.

27. *Id.*

28. Lucie E. White, *To Learn and Teach: Lessons From Driefontein on Lawyering and Power*, 1988 WIS. L. REV. 699.

29. See McCann, *supra* note 25, at 514.

30. See Douglas Nejaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 983 (2011).



mechanism of legal enforcement, and the extent of rights saturation in group members. Legal capacity hinges on the existence and strength of legal organizations advancing an issue and the degree to which they have relevant technical expertise, both substantive and procedural. The receptivity of the judiciary depends on the doctrinal availability and precedential strength of the legal right asserted and the ideological proclivities of the judges with final decisionmaking power.<sup>31</sup> The type of enforcement mechanism is a function of the nature of the remedy and its mode of implementation. Enforcement may be one-shot or require a long-term commitment of resources; it may involve injunctive or monetary relief; and it may require bureaucratic action or occur through voluntary conduct (and, in that sense, be self-enforcing).<sup>32</sup> Finally, the depth of legal consciousness may be understood in terms of rights saturation: Do members of groups affected by legal action understand the nature of the rights conferred and feel empowered to assert them?

The degree of political mobilization is also measured across four variables: political capacity, the degree of support from political elites, the availability of resources to monitor legal compliance, and the strength of countermovement opposition. Political capacity depends on the existence and effectiveness of promovement political organizations, which wield power by mobilizing financial resources, staff expertise, and relationships with other political actors.<sup>33</sup> Strong support from political elites increases the potential that promovement policies will be enacted or upheld in the legislature. Weak support means that elites are motivated (and have the power) to block promovement legislation or to reverse court victories. Strong political mobilization also includes the availability of resources to monitor legal enforcement over time. The final variable is the degree to which countermovement opposition might either be able to block legislative advances or mobilize a backlash that reverses court victories.

Using this framework, we may make some hypotheses about when social change litigation is most likely to succeed in producing tangible reform on the ground. Figure 1 shows different possible relationships between legal mobilization (LM) and political mobilization (PM), and how they might influence the success of social change litigation.

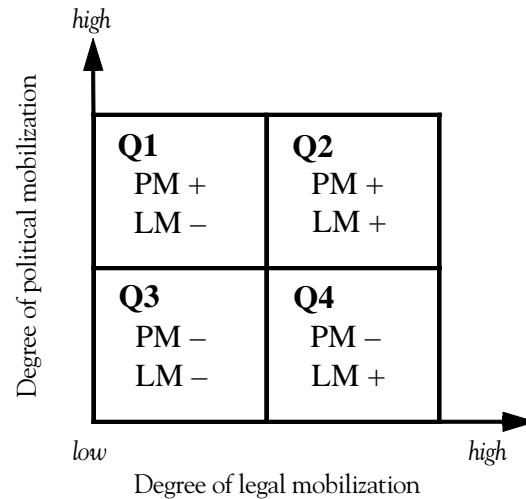
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31. ROSENBERG, *supra* note 17, at 36.

32. *Id.*

33. HANDLER, *supra* note 17, at 35 tbl.1.6.

FIGURE 1. Relationship of Variables Influencing Litigation Success



The first hypothesis is that social change litigation is most likely to succeed when reformers find themselves in the context presented in Quadrant 2 (Q2), where they have strong and compatible LM and PM. This will be the case when reformers have the resources to pursue litigation effectively, there is a supportive political and legal culture, the right asserted is a negative one designed to protect voluntary activity (and therefore no bureaucratic enforcement is required),<sup>34</sup> there is strong political organization and monitoring resources, and the legal and political strategies are coordinated toward the same goal. We presume in this context that, although political decisionmakers may be generally supportive of the reformers' goals, litigation provides the more expeditious and effective route to achieve them.

Conversely, social change litigation is most likely to fail when there are low levels of PM and LM, as indicated in Q3: weak capacity, hostile decisionmakers, bureaucratic enforcement, and strong opposition.

What about when LM and PM diverge? Q1 identifies the scenario of weak legal, but strong political, mobilization. We may view this situation as one in which the opportunity cost of pursuing social change litigation is high because: (1) there is a low chance of success on the legal merits; (2) there is a viable and potentially more effective alternative political strategy; and (3) litigation detracts from the political strategy either by withdrawing resources from it (time, money, expertise) or intensifying opposition to it (backlash).

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34. See *id.* at 211.

Q4 presents the opposite situation in which the weakness in political power argues in favor of pursuing a legal strategy, supported by strong legal capacity, favorable legal arguments, self-enforcing rights, and broad rights saturation. This is, in a rough sense, what we imagine as the paradigmatic impact campaign, in which litigating rights is the optimal way to advance the interests of a minority group otherwise locked out of majoritarian politics. In this context, the absence of political power means that reformers may be forced to litigate. However, the lack of political power also makes this strategy particularly vulnerable to political reversal.

In reality, the variables that influence litigation success do not fall so neatly into four distinct quadrants, but rather are mixed together based on the particular circumstances of a given campaign. We can think of Figure 1, therefore, as offering guideposts to understanding when litigation might work best in advancing a social reform objective. Which way the factors point in a specific case depends on a more fine-grained analysis of the actual context.

## II. LOCAL REGULATION: CONTROLLING IMMIGRATION VIA LAND USE LAW

Was the impact litigation campaign against antisolicitation ordinances conducted in a context that augured success? Or was it yet another instance of public interest lawyers turning to courts in the “hollow hope” that they would prove transformative?<sup>35</sup> The answer to these questions requires an examination of the conditions underlying the campaign.

### A. Economics: All in a Day’s Work

Within the informal economy, there is ample evidence that day laborers are a particularly disadvantaged class. Research from the early 2000s found that day laborers are “primarily undereducated [with] limited English proficiency, which severely hinders them socially and economically.”<sup>36</sup> Most are relatively recent immigrants, with a majority living in the United States five years or less, and three-quarters in the country ten years or less.<sup>37</sup> Day laborers are mostly young men, almost all of whom come from México (77.5 percent)

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35. Cf. ROSENBERG, *supra* note 17.

36. Abel Valenzuela, Jr., *Working on the Margins in Metropolitan Los Angeles: Immigrants in Day-Labor Work*, 2 *MIGRACIONES INTERNACIONALES* 5, 15 (2002).

37. ABEL VALENZUELA, JR., *UCLA CTR. FOR THE STUDY OF URBAN POVERTY—ISSR, DAY LABORERS IN SOUTHERN CALIFORNIA: PRELIMINARY FINDINGS FROM THE DAY LABOR SURVEY* 8 (1999).

and Central America (20.1 percent).<sup>38</sup> Nationwide, three-quarters of day laborers are reported to be undocumented migrants.<sup>39</sup>

The work environment of day laborers is highly deregulated and, as a result, frequently exploitative. Although day laborers solicit work in groups at day labor sites,<sup>40</sup> they perform work in relative isolation in unsteady jobs. Day laborers are concentrated in industries that require skill—construction, painting, gardening, plumbing, and carpentry<sup>41</sup>—but market informality produces low pay. Although day laborers earn an average hourly rate that is above the minimum wage, their average annual income is only slightly above the poverty line because of the volatile nature of their work.<sup>42</sup> As repeat players in the market, day laborers have incentives to be compliant, particularly when there is a surfeit of workers and the assertion of employment rights would mean that employers look elsewhere for more quiescent labor. The undocumented immigration status of some day laborers also makes them loathe to complain about mistreatment, despite evidence of systematic abuse—particularly the nonpayment or underpayment of wages.<sup>43</sup> Moreover, even though day laborers are covered by employment laws, enforcement by public agencies is inconsistent because of nonstandard work arrangements and lack of awareness by enforcement officials of the scope of employment abuse and the application of employment protections.<sup>44</sup>

## B. Politics: Regulating Day Labor as a Public Nuisance

Beginning in the 1980s, the growth of day laborers fueled local complaints that their presence constituted a threat to community safety and injured local businesses.<sup>45</sup> These complaints characterized day laborers as a

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38. *Id.* at v, 7–8.

39. VALENZUELA ET AL., *supra* note 7, at iii.

40. VALENZUELA, *supra* note 37, at 5 (noting that there were eighty-seven day labor sites in Southern California, eight of which were formal centers controlled by the city or a community group). See generally DAY LABOR RESEARCH INST., *COMPARING SOLUTIONS: AN OVERVIEW OF DAY LABOR PROGRAMS* (2004).

41. VALENZUELA, *supra* note 37, at 13.

42. Valenzuela, *supra* note 36, at 22–23.

43. VALENZUELA ET AL., *supra* note 7, at 14. Safety violations are also a major concern. See Juno Turner, Note, *All in a Day's Work? Statutory and Other Failures of the Workers' Compensation Scheme as Applied to Street Corner Day Laborers*, 74 *FORDHAM L. REV.* 1521, 1529 (2005).

44. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-925, *WORKER PROTECTION: LABOR'S EFFORTS TO ENFORCE PROTECTIONS FOR DAY LABORERS COULD BENEFIT FROM BETTER DATA AND GUIDANCE* 3 (2002). In addition, day laborers face significant barriers to asserting the rights they do possess, ranging from lack of knowledge to structural impediments such as the policy in some federal courthouses of requiring identification upon entry.

45. Esbenshade, *supra* note 8, at 46.

public nuisance,<sup>46</sup> citing a range of negative externalities produced by their solicitation. These externalities clustered around three perceived threats: (1) to public safety (based on claims that day laborers created traffic congestion and accidents); (2) to public welfare (based on claims that they littered, urinated in public, bothered women, and generally intimidated residents); and (3) to private economic interests (based on claims that they undercut legitimate businesses and scared away customers).

The construction of the day labor “crisis” as a nuisance problem reflected the complicated politics of the underlying immigration debate. The nuisance framing elided a central concern of day labor opponents: the perceived intrusion of outsiders into community space defined as racially and economically incompatible with their presence. The outsider status of day laborers was reinforced by the perception that they were undocumented immigrants without any legal right to be present in the community, where they came to take jobs from law-abiding citizens.<sup>47</sup>

Yet framing day labor as a nuisance problem rather than an immigration problem had pragmatic political benefits. Local opposition to day labor was not monolithic, particularly within the business community, where some (especially in the construction and home improvement trades) welcomed day laborers as a low-cost workforce. Defining day labor as a nuisance left open the possibility that day laborers could be regulated out of public view (meeting resident concerns), but still be available to meet local demand for cheap services (meeting business needs). Moreover, the nuisance frame underscored the central legal reality that local governments were limited in their capacity to remove day laborers based on their immigration status—a task reserved to the federal government. Thus, even if communities were indeed motivated by a desire to rid themselves of “illegal immigrants,” they did not have the legal power to do so (nor would it have been a completely effective strategy since not all day laborers lacked legal status).

Against this backdrop, the nuisance frame not only expressed local opposition to day labor, but also provided a legal hook to regulate it. The argument made by local jurisdictions was that, to the extent that the congregation of immigrant men on the corner imposed negative community externalities, localities could exercise their land use authority to mitigate them.<sup>48</sup> By enacting antisolicitation ordinances restricting day laborers’ access

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46. See, e.g., Carla Rivera, ‘Intent’ Clause Fuels Dispute on Day Labor Law, L.A. TIMES, Oct. 3, 1989, § 1, at 3 (quoting Costa Mesa City Council Member Ed Glasgow, who called day labor “a nuisance for people in town”).

47. Campbell, *supra* note 14, at 24.

48. See Scott L. Cummings & Steven A. Boutcher, *Mobilizing Local Government Law for Low-Wage Workers*, 2009 U. CHI. LEGAL F. 187, 203.

to public space, municipalities claimed to regulate conduct—rather than status—thus avoiding the controversy over the local enforcement of immigration law. In so doing, localities focused the debate over the legality of day labor solicitation on the question of whether the conduct at issue (the act of seeking work in public) was constitutionally protected speech. This, in turn, shifted the emphasis of day labor advocacy from enforcing economic rights to protecting civil liberties—though the two were inextricably linked. Indeed, ensuring day laborers’ civil right to seek work became a political precondition to protecting their economic right to be treated fairly while engaged in the act of working.

### C. Advocacy: Litigation When Nothing Else Works

The movement lawyers who took up the challenge of protecting day laborers’ right to seek work adopted a classic test case strategy. They mounted legal challenges to ordinances in jurisdictions with strong enforcement efforts, ultimately seeking to win a favorable ruling on the merits by the Ninth Circuit Court of Appeals, which encompassed the western part of the United States, where immigrants were most concentrated. In doing so, the lawyers proceeded in an environment that was relatively favorable to a litigation strategy—though one that nonetheless presented serious risks.

TABLE 2. Variables Influencing Litigation  
Success in Day Labor Campaign

<b>+ Factors</b>	<b>– Factors</b>	<b>Risk Factors</b>
Strong legal capacity	Weak political capacity	Some adverse precedent
Credible rights claim	Strong countermovement opposition	Unpredictable judicial assignment
Voluntary enforcement	Jurisdictional fragmentation	Unpredictable political changes
Strong organizing capacity		
Available monitoring resources		
Moderate rights saturation		

As Table 2 shows, several positive factors pointed in favor of a litigation strategy. Beginning in the mid-1990s, there was strong legal capacity, with resources and expertise devoted to the antisolicitation campaign by the Mexican American Legal Defense and Educational Fund (MALDEF). Because antisolicitation ordinances purported to limit conduct deemed a public nuisance, they gave rise to a credible First Amendment argument that was potentially more legally and politically appealing to courts than a claim of discrimination based on race or national origin. Further, a successful case would result in an injunction blocking enforcement of the ordinance, resulting in the resumption of the voluntary job-seeking activity of the day laborers rather than requiring ongoing bureaucratic enforcement. In addition, the creation of the National Day Laborer Organizing Network (NDLON) brought grassroots organizing resources that provided monitoring of abuse and enforcement; it also created strong ties with workers that enhanced their understanding of their rights and their participation in the litigation process.

On the negative side of the ledger, there was weak political capacity to thwart the spread of antisolicitation ordinances. Despite the existence of NDLON, day laborers were a classically underrepresented political constituency. They were small in number, often not residents of the communities in which they sought work (and therefore not voters), and politically marginalized by race, class, and immigrant status. Their vulnerability contrasted sharply with the power of day labor opponents—neighborhood groups, business interests, and anti-immigrant organizations—whose combined political might rendered resistance through conventional political channels implausible, leaving few alternate avenues of redress. The fractured geography of the greater L.A. area—Los Angeles County and its four surrounding counties (Ventura to the north, San Bernardino and Riverside to the east, and Orange to the south)—reinforced the political deficits of day laborers. In this area, there are 183 separately incorporated cities, plus five county-level administrative units with jurisdiction over unincorporated areas. This fragmented jurisdictional context, where localities varied dramatically by political ideology and receptivity to immigrants, made it much harder for day labor advocates to consider politically contesting—much less actually stopping—the spread of ordinances. This was particularly true in jurisdictions in which the presence of pro-day labor actors, such as unions or immigrant rights groups, was weak.

The absence of a viable political strategy strengthened the case for legal intervention as a means of advancing the day laborers' policy objective: the eradication of antisolicitation ordinances. Yet litigation was not without risks. In particular, there were a number of contingencies that could be estimated but

not known with any degree of certainty. Although the right to communicate one's availability for work in a public forum rested on solid free speech foundations, there was precedent upholding other antisolicitation laws under the rubric of valid time, place, and manner restrictions. Accordingly, the litigation strategy rested, in part, on how well the advocates could marshal First Amendment arguments in their favor and distinguish adverse cases. Perhaps more crucially, the extent to which those arguments would prove successful hinged on who was selected to hear them in the lottery of judicial assignments—and what political predilections the jurists brought to the cases. Finally, changes in the broader political culture could affect the way that legal cases were framed and adjudicated. How judges would view antisolicitation ordinances—as an unfair sanction against hardworking immigrants taking jobs native-born workers did not want, or as an acceptable device to protect communities against illegal immigrants stealing opportunities from American workers—would depend profoundly on the economic and political moment at which the question was ultimately called.

### III. LOCAL RESISTANCE: THE CAMPAIGN TO DEFEND DAY LABOR

The campaign to challenge antisolicitation ordinances across the greater L.A. area sought to leverage scarce legal and organizing resources to maximal geographic effect—selecting strategic cases to abrogate the most egregious ordinances, deter copycats, and develop the legal and factual foundation for a positive resolution with precedential value. The overarching strategy emphasized protecting the sidewalks as a venue for solicitation and promoting access to private property with a nexus to the day labor market (such as home improvement stores). To do so, movement lawyers—over the course of two decades—filed eight lawsuits to enjoin ordinances in jurisdictions across the greater L.A. area. This Part addresses two central questions about the arc of the campaign. First, why did the lawyers choose to assert legal challenges where they did? And, second, how did the legal challenges differ in their conception, execution, and outcome?

#### A. Litigation Before Organizing: The State Court–Civil Rights Approach

##### 1. The Origins of Antisolicitation

The initial flashpoints of anti-day labor hostility occurred in more politically conservative jurisdictions in Orange County (OC) and the South Bay area of L.A. County. The earliest efforts to restrict day labor focused on



heightened enforcement of traffic laws to prevent solicitation at day labor sites. In 1985, the city of Orange, in the heart of OC, passed one of the first local ordinances to limit solicitation in response to complaints by local merchants that day laborers were “killing business” by “scaring off customers, blocking driveways and creating a nuisance.”<sup>49</sup> The Orange ordinance sought to prevent solicitation by empowering citizens to arrest “trespassers” on private property and creating a no-stopping zone around the corner that served as an informal day labor site.<sup>50</sup> Facing the threat of a lawsuit from the National Immigration Law Center (NILC) in Los Angeles, Orange officials decided not to enforce the trespass provision; nonetheless, the city succeeded in cutting the number of day laborers at the site by over half by citing prospective employers for traffic violations.<sup>51</sup> Following this traffic enforcement model, neighboring Santa Ana—also responding to business complaints “that many of the [day laborers] loiter, block traffic and drive away customers”—mounted a five-day crackdown in April 1986, although instead of citing employers, Santa Ana police issued tickets directly to day laborers for impeding traffic.<sup>52</sup>

Beginning in 1986, local efforts to restrict day labor shifted to the more systematic creation and enforcement of antisolicitation ordinances. This was driven by two legal changes. The first was the enactment of the Immigration Reform and Control Act of 1986 (IRCA),<sup>53</sup> which imposed sanctions on employers who hired undocumented workers. In the wake of IRCA’s passage, formal employers began firing immigrant workers suspected of being undocumented, which swelled the ranks of workers pursuing jobs through the informal market.<sup>54</sup> Nonetheless, some day labor sites reported a significant drop in day labor activity out of worker fear of Immigration and Naturalization Service (INS) enforcement.<sup>55</sup> The prospect of enhanced enforcement produced two alternate responses by local governments. Some sought to preserve day labor hiring—acknowledging its benefits to employers—but to confine it to formal day labor centers. Others moved more aggressively to eliminate day labor

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49. David Reyes, *At Sidewalk Hiring Hall, It's Laborers vs. Establishment*, L.A. TIMES (Orange County ed.), Mar. 30, 1985, § 2, at 1.

50. *Id.*

51. Roxana Kopetman, *Police Put Crimp in Hiring of Workers on Street Corners*, L.A. TIMES (Orange County ed.), Apr. 23, 1986, § 2, at 1.

52. *Id.*

53. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C. and 42 U.S.C.).

54. Hector Tobar, *Success of Day Labor Hiring Site Delays Council Curbs*, L.A. TIMES (Glendale ed.), Dec. 8, 1988, § 9, at 1.

55. Marita Hernandez, *Fear Prevails: Amnesty Law Takes Toll on Day Laborers*, L.A. TIMES, May 9, 1987, § 2, at 1.

altogether, building upon the anti-immigrant sentiment to pass broad prohibitions designed to sweep day labor—both legal and illegal—off the streets.

The second legal development altering the day labor landscape was the Ninth Circuit Court of Appeals' 1986 ruling in *Association of Community Organizations for Reform Now (ACORN) v. City of Phoenix*.<sup>56</sup> That decision gave legal ammunition to the effort to ban day labor by upholding a Phoenix city ordinance that prohibited ACORN's solicitation of monetary contributions from drivers of cars stopped at traffic lights (so-called "tagging").<sup>57</sup> Although the court assumed that ACORN members were exercising their free speech rights in a public forum, it nonetheless held that the ordinance—as a content-neutral time, place, and manner restriction—advanced the city's interest in promoting traffic safety while allowing for alternative means of communicating ACORN's message (such as distributing pamphlets to drivers).<sup>58</sup> Cities interested in prohibiting the solicitation of work on the border of street and sidewalk now had legal precedent they could marshal in support of their goal.

The first city to test this approach was Redondo Beach in the South Bay. Business complaints that day laborers were driving away customers led Redondo Beach in 1986 to follow a path similar to Orange, enacting an ordinance that banned cars from stopping near the intersection of the day labor site.<sup>59</sup> When the Legal Aid Foundation of Los Angeles (LAFLA) filed suit challenging the ban,<sup>60</sup> the city responded not by backing down, but rather by dramatically extending the geographic reach of the ordinance. In 1987, Redondo Beach—following the Phoenix ordinance nearly to the letter—became the first city in the greater L.A. area to make it illegal for "any person to stand on a street or highway and solicit, or attempt to solicit, employment, business, or contributions from an occupant of any motor vehicle."<sup>61</sup> The antisolicitation ordinance was born.

The Redondo Beach ordinance provided a template that emboldened other cities to pursue similar repressive tactics—which, in turn, began to generate more organized resistance.<sup>62</sup> In 1988, the city of Glendale (in northeast

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56. 798 F.2d 1260 (9th Cir. 1986).

57. *Id.* The Phoenix ordinance stated: "No person shall stand on a street or highway and solicit, or attempt to solicit, employment, business or contributions from the occupants of any vehicle." *Id.* at 1262 (citing Phoenix City Ordinance § 36.101.01).

58. *See id.* at 1264–73.

59. Dave Lanson, *Day-Laborer Traffic Rules Please No One*, L.A. TIMES, Apr. 20, 1986, at 1.

60. *Id.*

61. REDONDO BEACH, CAL., MUN. CODE § 3-7.1601(a) (1987).

62. *See, e.g.*, Louise Woo & Enrique Rangel, *Group Walks Streets to Educate Laborers About Their Rights*, ORANGE CNTY. REG., Mar. 2, 1988, at B1.

L.A. County) proposed to ban day labor solicitation to address what local government officials called an “ongoing problem” at an intersection near a Dunn-Edward’s paint store and a 7-Eleven.<sup>63</sup> Business owners in that area echoed concerns that day laborers scared off customers by “making comments and leaving trash,” while city officials argued that day laborers were prone to “disrupt businesses, create traffic congestion, cause litter problems and bother women.”<sup>64</sup>

The controversy generated by Glendale’s proposal galvanized a coalition of legal and grassroots organizations, which would form the foundation of day labor advocacy for the next twenty years. On the heels of the proposal, the ACLU threatened to sue the city for turning the act of “looking for an honest day’s work [into] a crime,”<sup>65</sup> while a number of grassroots organizations began to mobilize in the streets. In the immigrant rights category were three relatively new groups: El Rescate, founded in 1981 to provide legal and social services to El Salvadoran refugees fleeing the country’s civil war; the Central American Resource Center (Carecen), created in 1983 to assist Central American refugees more broadly; and the Coalition for Humane Immigrant Rights of Los Angeles (CHIRLA), started after the passage of IRCA to facilitate legalization for eligible immigrants.<sup>66</sup> These organizations were joined by LAFLA and lawyers from the National Lawyers Guild (NLG), which together had formed the Los Angeles Labor Defense Network to protect the rights of workers in the informal economy. The Network, led by CHIRLA, created an Adopt-a-Corner program in 1989 that sent student-led groups to day labor corners to conduct know-your-rights trainings.<sup>67</sup> In addition, faith-based leaders from local churches—such as Our Lady Queen of Angels pastor Luis Olivares, who had opened his downtown church as a sanctuary for undocumented immigrants, and clergy from Dolores Mission in Boyle Heights—joined to support the day labor cause.

In response to the proposed ordinance, these groups coordinated protests in Glendale, which prompted meetings between city officials and coalition representatives from Carecen, El Rescate, the Salvation Army, and the

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63. Stephanie O’Neill, *City Seeks Ban to Keep Job-Seekers Off Streets*, L.A. TIMES, Aug. 4, 1988, at 1 (quoting the Glendale City Manager).

64. *Id.*

65. *Id.*

66. Caitlin C. Patler, *Alliance-Building and Organizing for Immigrant Rights: The Case of the Coalition for Humane Immigrant Rights of Los Angeles*, in WORKING FOR JUSTICE, *supra* note 16, at 71, 73.

67. Telephone Interview With Nancy Smyth, Staff Dev. Dir., L.A. Alliance for a New Econ. (Dec. 20, 2010).

Glendale-based Catholic Youth Organization.<sup>68</sup> Opposition from the coalition succeeded in persuading Glendale City Council members to defer their vote on an antisolicitation ordinance,<sup>69</sup> creating space for the negotiation of an alternative plan between the city and the Catholic Youth Organization, which agreed to set up a formal day labor hiring center.<sup>70</sup> Under this plan, day laborers could assemble on the organization's property from 6 a.m. to 9 a.m. each day to meet contractors, and would be permitted after that time period to solicit work on the sidewalk in front of the organization's property.<sup>71</sup> This plan placated day labor opponents and led to a one-year moratorium on consideration of the ordinance.<sup>72</sup> It also underscored the political alignment in favor of day labor, with local contractors supporting the plan as a way to maintain access to a cheap labor pool.<sup>73</sup>

The following year, as police sweeps of day labor corners drew praise from many business owners,<sup>74</sup> the L.A. City Council proposed its own ordinance banning solicitation on the streets and sidewalks.<sup>75</sup> This triggered a protest led by CHIRLA, which was shedding its social service image to develop more aggressive advocacy strategies that included the Day Labor Outreach Project, established in 1989 by Nancy Cervantes to inform day laborers of their rights.<sup>76</sup> Cervantes was a recent USC law school graduate, who had been one of the founders of Carecen and a student organizer in the Glendale campaign. After the protest, L.A. city officials convened stakeholders to work out a compromise to protect the rights of day laborers while respecting the concerns of business owners and community residents over unregulated hiring sites. Out of these discussions, the city agreed to fund a six-month pilot project to launch six city-run day labor hiring centers opened to all workers

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68. See Stephanie O'Neill, *Pact Reached on Day Labor Pickup Site*, L.A. TIMES, Sept. 22, 1988, at 1.

69. *Id.*

70. *Id.*

71. *Id.*

72. Tobar, *supra* note 54.

73. The owner of one company, Sierra Leasing, agreed to pay for six months of the hiring center costs in order to facilitate the deal. O'Neill, *supra* note 68.

74. See Marita Hernandez, *Advocates Assail Arrests of Street Corner Laborers*, L.A. TIMES, Feb. 18, 1989, § 1, at 23.

75. Dziembowska, *supra* note 16, at 145.

76. Telephone Interview With Victor Narro, Project Dir., UCLA Downtown Labor Ctr. (Nov. 10, 2010); see also Hector Tobar, *Street-Corner Immigrant Workers Get Hot Line for Legal Assistance*, L.A. TIMES, Nov. 16, 1989, § 2, at 1 (describing CHIRLA'S legal help hotline). Cervantes later changed her name to Nancy Smyth.

irrespective of immigration status.<sup>77</sup> To spearhead this program—one of the first of its kind in the country—the city hired Cervantes, who helped open a day labor center in the South Bay’s Harbor City in 1989, and another in North Hollywood the following year.<sup>78</sup>

Some cities in OC followed the hiring center approach, although the general direction was toward greater restriction of day labor activity.<sup>79</sup> In 1988, Costa Mesa created the nation’s first day labor hiring center, which hosted nearly nine hundred workers in its first month; however, by requiring workers to present legal documents as a condition of entry, the site invited controversy and provoked threats by the ACLU to sue.<sup>80</sup> Costa Mesa coupled its hiring center with an ordinance (taking effect in 1989), which imposed a citywide ban on soliciting employment from a car.<sup>81</sup> Despite stepped-up enforcement, resulting mostly in the arrest of day laborers,<sup>82</sup> the market remained active in Costa Mesa, fueled by a booming economy and employers (particularly in the construction and car wash industry) who reported relying on undocumented workers for jobs that legal residents would not take.<sup>83</sup> The city then amended its ordinance to further prohibit day laborers from being in certain high-activity zones with the “intent” to solicit work.<sup>84</sup> The ACLU sued to enjoin the amendment in state court on behalf of a Costa Mesa resident (neither a day laborer nor an employer) on the ground that it was unconstitutionally vague.<sup>85</sup> The court agreed, striking down that portion of the law in 1990.<sup>86</sup> In 1992, the hiring center was opened to all workers (both documented and undocumented) after the state took it over for financial reasons.<sup>87</sup> The broader antisolicitation ordinance, however, remained on the books.

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77. Hector Tobar, *Hope of Jobs Surmounts Illegals’ Fears: Immigration: 150 Workers—and No INS Agents—Turn Out as Los Angeles Opens Its First Day-Laborer Hiring Site*, L.A. TIMES, Oct. 28, 1989, § 2, at 1.

78. Telephone Interview With Victor Narro, *supra* note 76.

79. Jeffrey Miller, *Day Labor Now a City Hall Concern*, ORANGE CNTY. REG., Sept. 24, 1989, at B1.

80. Charles Strouse, *Job Center a Year Later: Costa Mesa Plan to Get Dayworkers Off Street Lauded, Assailed*, L.A. TIMES (Orange County ed.), Sept. 3, 1989, § 4, at 7.

81. Jeffrey Miller, *Costa Mesa Continues Day-Labor Crackdown With 12 More Arrests*, ORANGE CNTY. REG., Sept. 21, 1989, at B3.

82. Miller, *supra* note 79.

83. Carla Rivera, *Need Outstrips Fear of Arrest: Employers Resisting Costa Mesa Labor Law*, L.A. TIMES (Orange County ed.), Oct. 1, 1989, § 1, at 1.

84. Miller, *supra* note 81; Rivera, *supra* note 46.

85. A private lawsuit was also filed. Jeffrey Miller, *2nd Suit Challenges Intent Provision of Costa Mesa Day-Labor Ordinance*, ORANGE CNTY. REG., Jan. 24, 1990, at B3.

86. *Illegals, Day Laborers Win in 2 Rulings*, L.A. TIMES, June 23, 1990, at A30.

87. Jeff D. Opdyke, *State Will Take Over Costa Mesa Job Center*, ORANGE CNTY. REG., Feb. 5, 1991, at B2.

Further south, Dana Point pursued a slightly different path. In August 1989, the city enacted an antisolicitation ordinance,<sup>88</sup> but opted not to mount a vigorous enforcement effort. Instead, it attempted to facilitate hiring off the streets by setting up a telephone job bank to link day laborers and employers.<sup>89</sup> The City of Orange, however, followed the Costa Mesa playbook more closely, expanding its ordinance in 1989 to prohibit solicitation on the streets and in private parking lots after its program of arresting hundreds of day laborers on misdemeanor charges and then turning them over to the INS failed to stem hiring activity.<sup>90</sup> Orange deferred enforcement, however, until after the opening of a city-sponsored day labor center, which was limited to documented workers.<sup>91</sup> Elsewhere, Laguna Beach and Brea both sanctioned day labor centers,<sup>92</sup> while several other OC cities—Placentia, San Juan Capistrano, and Stanton—were considering the enactment of a uniform ordinance barring public solicitation.<sup>93</sup>

By the beginning of the 1990s, cities had thus developed three tactics to deal with day laborers. One approach was to enact antisolicitation ordinances—citywide, in certain zones, or on private parking lots. A second was to increase police enforcement—either of existing traffic laws or newly minted antisolicitation ordinances. And a third was to sanction day labor hiring in geographically bounded centers. These tactics often formed an interlocking pattern: Cities like Costa Mesa and Orange sanctioned day labor centers, enacted ordinances to ban solicitation in other city locations, and increased police enforcement to secure the boundaries of this spatial division. In response, day labor advocates began to develop their own model for protecting day labor that sought to disentangle these city tactics: resisting ordinances and enhanced police enforcement, while promoting inclusive hiring centers.<sup>94</sup>

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88. DANA POINT, CAL., MUN. CODE § 5.06.020(a) (repealed 2007).

89. Miller, *supra* note 79. The Telephone Hiring Exchange, which cost \$9000 a year and was staffed by a part-time coordinator and volunteers, was found by the city to have assisted in placing roughly three-fourths of its workers with employers. Jim Carlton, *More Cities Turning to Hiring Halls to Solve Day Laborer Problems*, L.A. TIMES (Orange County ed.), Feb. 19, 1990, at B1.

90. Carlton, *supra* note 89; *Orange—Day Labor Laws Begin*, ORANGE CNTY. REG., Apr. 26, 1990, at B2; see also Bob Schwartz, *INS Chief Calls Arrests in Church ‘Regrettable,’* L.A. TIMES, Sept. 29, 1988, § 1, at 38. The Orange ordinance made it a misdemeanor to solicit work, punishable by a fine of up to \$1000 and six months in jail. *Orange—Day Labor Laws Begin, supra*.

91. Carlton, *supra* note 89; *Orange—Day Labor Laws Begin, supra* note 90.

92. Carlton, *supra* note 89; Danielle A. Fouquette, *Brea City Taking Over Day Labor Program*, L.A. TIMES (Orange County ed.), Oct. 5, 1990, at B3.

93. Miller, *supra* note 79.

94. See Abel Valenzuela, Jr., *Controlling Day Labor: Government, Community, and Worker Responses*, in CALIFORNIA POLICY OPTIONS 41 (Daniel J.B. Mitchell & Patricia Nomura eds., 2001).

## 2. The First Test Case: Agoura Hills

The first opportunity for the execution of this strategy came in the city of Agoura Hills, a suburban enclave in northwest L.A. County.<sup>95</sup> When about one hundred men started to solicit work outside of a shopping center in 1989, the city responded to local merchant complaints by setting up a hiring center on a vacant lot, where jobs were distributed via a lottery system.<sup>96</sup> The center, which was donated by its owner and subsidized by the city's Chamber of Commerce, led to a doubling of day laborers, most of whom traveled from Los Angeles and the San Fernando Valley.<sup>97</sup> Although the center was initially deemed successful, it quickly came to be viewed as a "serious public nuisance," with allegations that the workers were "catcalling" women, urinating and defecating in public, and engaging in a "mad dash" to prospective employers, causing "many near-accidents."<sup>98</sup> The city also claimed that day laborers continued to congregate at the old informal hiring site, prompting the city to put up no-stopping signs at that intersection.

On March 27, 1991, responding to local pressure, the city council passed an ordinance prohibiting any person from standing "on a public sidewalk, street or highway, or in a vehicle parking area located adjacent thereto," to solicit work from an occupant of a motor vehicle.<sup>99</sup> Upon the recommendation of the local community services department,<sup>100</sup> the city also instituted a phone bank system modeled on the Dana Point program. The hiring center was closed,<sup>101</sup> which—once the ordinance took effect in June—left day laborers with no public space in which to seek work. The ordinance was quickly denounced by a coalition that included CHIRLA and the ACLU, which spearheaded a protest of the law and drafted a letter to the city council demanding its repeal.<sup>102</sup> The city countered by ratcheting up enforcement, conducting a police sweep that resulted in the arrest of sixteen day laborers.<sup>103</sup>

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95. Sebastian Rotella & Steve Padilla, *Finding Work, Conflict in Suburbia*, L.A. TIMES (Valley ed.), July 21, 1991, at B3.

96. Michael Coit, *Workers Taken Off Streets: Agoura Hills Plan Controls Day Labor*, L.A. DAILY NEWS, Nov. 4, 1990, at T1.

97. *Id.*

98. Amy Louise Kazmin, *Dayworker Ordinance Is Challenged*, L.A. TIMES (Valley ed.), June 11, 1991, at B3.

99. AGOURA HILLS, CAL., ORDINANCE No. 172 (1991).

100. See Memorandum From Joseph Donofrio, Dir. of Cmty. Servs., to David Carmany, City Manager of Agoura Hills (Jan. 16, 1991) (on file with author).

101. Kazmin, *supra* note 98.

102. *Id.*

103. Curtis S. Updike, *Day Laborer Enforcement Effort Yields 21 Arrests*, L.A. DAILY NEWS, Sept. 5, 1991, at 1.

In response, the ACLU challenged the Agoura Hills ordinance on behalf of fourteen workers.<sup>104</sup> It did so in concert with a team of lawyers from L.A. immigrant rights legal organizations: the Immigrant Rights Project of Public Counsel, the Immigrants' Rights Office of LAFLA, NILC, MALDEF, and Carecen. This team included notable immigration lawyers (Public Counsel's Niels Frenzen, LAFLA's Michael Ortiz, NILC's Linton Joaquin, and MALDEF's Vibiana Andrade), along with veterans of the day labor movement, including Cervantes, who had joined Public Counsel after establishing day labor centers in Harbor City and North Hollywood.

To lay the groundwork for its attack, the legal team set up a "sting operation to demonstrate how [the city was] grabbing anyone who was a male Latino."<sup>105</sup> The sting was coordinated by Robin Toma, an ACLU staff attorney who had joined the group on a fellowship in 1988 after graduating from the UCLA School of Law. Toma organized UCLA students to stand as day laborers on the corner and coordinated with the local NBC news station, which secretly filmed the students being arrested and sheriffs telling prospective employers, "Don't you know you are not allowed to hire Mexicans?"<sup>106</sup> Cervantes also helped set up the sting and, despite the criticism of more senior colleagues who urged her to "just litigate,"<sup>107</sup> sought to advance a vision of community lawyering in which the lawsuit was complemented by efforts to build an organizing base. Toward that end, she coordinated with CHIRLA and Carecen, although those groups "didn't have formal organizing then, [but rather] were more militant and activist driven."<sup>108</sup> After the sting, Cervantes was the main liaison to the plaintiff group, which was composed partly of Kanjobal Indians from Guatemala, who were "really brave" in the face of what Cervantes recalled as "super angry anti-immigrant sentiment" that was "uglier than anything I had dealt with."<sup>109</sup>

The legal strategy was twofold. First, in terms of venue, the team opted to file suit in state court, where they thought they had a better chance to get a "fair shot" in light of the "problematic" federal ACORN precedent.<sup>110</sup> Second, on the merits, the complaint was framed broadly, with twenty causes of action, which included a facial First Amendment challenge, but emphasized

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104. Complaint for Damages, Declaratory, and Injunctive Relief, *Xiloj-Itzep v. City of Agoura Hills*, 29 Cal. Rptr. 2d 879 (Ct. App. 1994) (No. LC011284) [hereinafter *Xiloj-Itzep Complaint*].

105. Telephone Interview With Robin Toma, Exec. Dir., L.A. Human Relations Comm. (Jan. 4, 2011).

106. *Id.*

107. Telephone Interview With Nancy Smyth, *supra* note 67.

108. *Id.*

109. *Id.*

110. Telephone Interview With Robin Toma, *supra* note 105.



discriminatory application of the law.<sup>111</sup> The legal team drew on the ACLU's previous suit against Costa Mesa, which rested on First Amendment grounds, but "fashioned a whole other thing" since there was a "stronger case of discriminatory intent."<sup>112</sup> The complaint was framed as a "civil rights and taxpayer action" on behalf of "thirteen Latino and Latino-appearing individuals who have been arrested, criminally prosecuted, or discriminated against."<sup>113</sup> The complaint sought to enjoin the ordinance and also asserted a claim for monetary relief against the city and fast food restaurant Jack-in-the-Box for racially discriminatory practices in denying day laborers service.<sup>114</sup>

Neither aspect of the legal strategy proved successful. The trial court denied the motion for a preliminary injunction in December 1991,<sup>115</sup> under circumstances suggesting that the decision to file in state court was a tactical miscalculation. After filing the petition, the ACLU "had [the] misfortune of realizing that [it] had earlier filed litigation against all superior court judges for granting continuances in criminal cases that violated defendants' right to a speedy trial."<sup>116</sup> As a result, many judges had to recuse themselves; one of the few who did not was assigned to the Agoura Hills case. The judge "was not very sympathetic," which Toma believed may have been due to the adversarial posture the ACLU had taken against the entire bench.<sup>117</sup> Nor did the lawyers get what they viewed as serious consideration on appeal. As one sign of this, when Toma stood up to argue, he was asked by one of the appellate judges if the plaintiff "was arguing on his own behalf."<sup>118</sup> The judge had mistaken him for one of the Latino day laborer plaintiffs.<sup>119</sup> The venue decision also did not avoid the appellate court's consideration of the *ACORN* precedent, which it cited liberally in holding that the Agoura Hills ordinance was a constitutionally permissible time, place, and manner restriction.<sup>120</sup>

Neither did the complaint's emphasis on discrimination succeed in gaining legal traction. Indeed, after the lower court dismissed the plaintiffs' equal protection arguments, the lawyers shifted course on appeal by resting their constitutional challenge on First Amendment grounds<sup>121</sup>—and dropping an

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111. Xiloj-Itzep Complaint, *supra* note 104.

112. Telephone Interview With Robin Toma, *supra* note 105.

113. Xiloj-Itzep Complaint, *supra* note 104, at 1.

114. *Id.* at 2–3.

115. Michael Connelly, *Laborers Fail to Win Ruling to Nullify Law*, L.A. TIMES (Valley ed.), Dec. 31, 1991, at B3.

116. Telephone Interview With Robin Toma, *supra* note 105.

117. *Id.*

118. *Id.*

119. *Id.*

120. Xiloj-Itzep v. City of Agoura Hills, 29 Cal. Rptr. 2d 879 (Ct. App. 1994).

121. Appellants' Opening Brief at 1–2, 29, Xiloj-Itzep, 29 Cal. Rptr. 2d 879 (No. B067188).

explicit discrimination claim.<sup>122</sup> The appellate court nonetheless rejected the discrimination claim for good measure, summarily concluding that the plaintiffs had “not shown a practice or pattern of unconstitutional enforcement,” and suggesting that if individual day laborers had been treated unconstitutionally, they could “assert such conduct as a defense to any prosecution and conceivably could have a cause of action against that deputy.”<sup>123</sup> The court also rejected the plaintiffs’ facial First Amendment challenge in terms that the advocates thought sounded like they had been “lifted . . . straight out of [the city’s] brief”<sup>124</sup>—holding that the ordinance was content-neutral, served a legitimate interest in safety, and provided ample alternative venues of communication.<sup>125</sup> Although the plaintiffs did manage to settle for \$7500 in damages against Jack-in-the-Box,<sup>126</sup> the region’s first frontal challenge to antisolicitation ordinances had failed to stop their advance. As an immediate consequence, the number of laborers in Agoura Hills went from “250 . . . down to 10 because of repression.”<sup>127</sup> The case also cast a negative light on the approach of targeting state courts, which some advocates began to criticize as inhospitable to day laborers’ rights.<sup>128</sup>

## B. Litigation Coordinated With Organizing: The Federal Court–Civil Liberties Approach

### 1. The Legal–Organizing Alliance: MALDEF and NDLON

By the time of the Agoura Hills appellate decision in 1994, the terrain of day labor advocacy had begun to change. The momentum in favor of antisolicitation ordinances was building, with a total of seventeen bans in the L.A. region by 1994—including one ordinance enacted by Laguna Beach that prohibited hiring outside its city-sanctioned day labor center.<sup>129</sup> Yet the infrastructure of day labor advocacy was also growing stronger, resulting in

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122. *Xiloj-Itzep*, 29 Cal. Rptr. 2d at 886 n.3.

123. *Id.* at 887.

124. Telephone Interview With Robin Toma, *supra* note 105.

125. *Xiloj-Itzep*, 29 Cal. Rptr. 2d at 889–92.

126. Telephone Interview With Robin Toma, *supra* note 105.

127. Telephone Interview With Pablo Alvarado, Exec. Dir., Nat’l Day Laborer Org. Network (Jan. 4, 2011).

128. Tracy Kaplan, *Supervisors Ban Curbside Job Solicitation*, L.A. TIMES, May 25, 1994, at B1 (attributing the following statement to ACLU director Ramona Ripston: “The courts are clearly not very hospitable places when it comes to protecting civil liberties and civil rights.”).

129. See Appendix: Current Status of Antisolicitation Ordinances in the Greater Los Angeles Area, *infra*, for a list of ordinances and their dates of enactment. For a discussion of the Laguna Beach ordinance, see Leslie Earnest, *Council Endorses Day Labor Penalties*, L.A. TIMES (Orange County ed.), Jan. 7, 1993, at B2.

an incipient alliance between law and organizing that would shape the future of the day labor movement.

On the law side, the arrival of Thomas Saenz as a staff attorney at MALDEF in the fall of 1993 marked a significant milestone. Saenz, who grew up in Alhambra on the east side of Los Angeles, went to Yale for college and law school, where he displayed the oratorical skills that would make him a formidable litigator, winning the school's Potter Stewart Prize for moot court. After law school, Saenz clerked for liberal icon Stephen Reinhardt on the Ninth Circuit—a clerkship reserved for only the most academically elite and politically progressive law school graduates.

Saenz then joined MALDEF, where “one of [his] first assignments was the Agoura Hills case pending on appeal.”<sup>130</sup> His marginal work on that case did not influence the appellate outcome, but did mark the start of his sustained day labor advocacy. Once the appellate court's ruling came down, Saenz and his colleague Vibiana Andrade filed a petition for rehearing to depublish the opinion.<sup>131</sup> The petition failed, but served to introduce Saenz to the key legal arguments over antisolicitation—and pointed toward future strategies to avoid repeating the Agoura Hills loss.

At the time, however, the loss dealt the day labor movement a heavy blow. Across the greater L.A. area, it raised the stakes for advocates who saw other cities enact ordinances that followed the letter of the law upheld in the Agoura Hills case. Moreover, with bad precedent on the books, legal organizations were reluctant “to come back and try again to challenge these ordinances.”<sup>132</sup> In terms of legal groups dedicated to fighting antisolicitation, “MALDEF was on its own.”<sup>133</sup>

Yet new nonlegal allies emerged. Saenz's arrival at MALDEF coincided with the development of a day labor organizing infrastructure that brought new advocates into the field. Among them was Victor Narro, who joined MALDEF as a community liaison in 1992 after graduating from the University of Richmond Law School. Two key institutional developments further strengthened day labor organizing. The first was the 1991 creation of IDEPSCA (the Spanish acronym for the Institute of Popular Education of Southern California), a grassroots, volunteer-based organization that used Paulo Freire's philosophy of nonhierarchical learning to promote leadership among Latino

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130. Telephone Interview With Thomas Saenz, President, Mexican Am. Legal Def. & Educ. Fund (Dec. 14, 2010).

131. *Id.*

132. Telephone Interview With Pablo Alvarado, *supra* note 127.

133. Telephone Interview With Thomas Saenz, *supra* note 130.

immigrants in Pasadena.<sup>134</sup> IDEPSCA initiated leadership development workshops for day laborers that led to the creation of the Association of Day Laborers of Pasadena, which “served as a mediator between day laborers, the city of Pasadena, police, and residents.”<sup>135</sup> IDEPSCA’s day labor work influenced the second crucial institutional development: the expansion of CHIRLA’s day labor advocacy under the leadership of Cervantes, who had left Public Counsel in 1993 to direct CHIRLA’s Workers’ Rights Project, which focused on stemming employment abuses among day laborers, household workers, and street vendors through popular education, organizing, and rights enforcement.<sup>136</sup>

## 2. Breakthrough: Los Angeles County

The first test for this new constellation of advocates came before the Agoura Hills case had reached its end. The flashpoint was a corner adjacent to the HomeBase store in Ladera Heights, a historically middle-class African American community in an unincorporated area of South Los Angeles under L.A. County’s jurisdiction.<sup>137</sup> Residents, organized as the Ladera Heights Civic Association, pressed the area’s County Supervisor, Yvonne Brathwaite Burke, to take action against roughly one hundred day laborers assembled at the site.<sup>138</sup> The laborers were accused of “loitering, obstructing traffic, whistling at women, drinking, and even engaging in theft.”<sup>139</sup> While the Agoura Hills case was on appeal, Burke proposed an ordinance barring solicitation in public areas and private parking lots and imposing fines of up to \$1000 and jail time for violators.<sup>140</sup>

The advocates’ initial response was to organize workers at the site and reach out to local residents and officials. CHIRLA’s Cervantes was on the ground first, joined by activists from the Southern Christian Leadership Conference (SCLC) and the Multicultural Collaborative, lawyers from the ACLU (including Toma), and MALDEF’s Narro, who was assigned to “connect MALDEF to meetings and events in the community” and “work closely with CHIRLA” to mobilize support for the day laborers.<sup>141</sup> The coalition

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134. Dziembowska, *supra* note 16, at 143.

135. *Id.* at 144.

136. Telephone Interview With Nancy Smyth, *supra* note 67.

137. Robert J. Lopez, *Day Laborers Face Opposition From Merchants*, L.A. TIMES (Ventura W. ed.), Mar. 6, 1994, at B22.

138. *Id.*

139. Dziembowska, *supra* note 16, at 145.

140. Erin J. Aubry, *Proposed Limits on Laborers Protested*, L.A. TIMES, Jan. 30, 1994, at 8.

141. Telephone Interview With Victor Narro, *supra* note 76.

members worked on multiple levels. They organized meetings with Burke in which they sought to “bust myths” about day laborers as undocumented workers, and brought in respected residents (including SCLC Director Joe Hicks, Southwestern Law Professor Isabelle Gunning, and community leader Genethia Hayes) to emphasize that day labor opponents “did not speak for me or my neighborhood.”<sup>142</sup> Advocates also testified against the ordinance in front of the County Board of Supervisors.<sup>143</sup> Coalition members met with the managers of HomeBase to find a solution that would allow the workers to stay in the parking lot,<sup>144</sup> and reached out to the local sheriff’s office to encourage the creation of a day labor center.<sup>145</sup> This grassroots effort was fruitful: Captain Jack Scully, who commanded the area’s sheriff station, became a “missionary for the cause” of setting up a day labor center, and the District Attorney, Gil Garcetti, agreed not to prosecute anyone under the ordinance.<sup>146</sup> Even the HomeBase manager showed signs of support, calling the workers at the day labor site “pretty well-behaved.”<sup>147</sup>

Despite these efforts, the residents opposing day labor were intransigent and Burke continued to advance their cause. In Narro’s view, the Agoura Hills trial court decision denying a preliminary injunction had strengthened the residents’ resolve because they “thought the law was on their side.”<sup>148</sup> Day labor advocates responded with efforts to pressure Burke to withdraw the proposed ordinance. In January 1994, they organized a protest march,<sup>149</sup> which was followed by an op-ed in the *Los Angeles Times* (written by Cervantes, along with Public Counsel’s Frenzen and the SCLC’s Hicks) calling the ordinance “overkill” and suggesting that instead of criminalizing immigrants seeking employment, Burke should seize the opportunity to create visionary change and “mediat[e] Latino-black friction.”<sup>150</sup> Though the op-ed brought significant attention to the issue, advocates believed it poisoned the well with Burke.<sup>151</sup> Nonetheless, the coalition again reached out to Burke in a letter signed by MALDEF President Antonia Hernandez proposing worker–resident mediation organized by CHIRLA. Burke agreed.<sup>152</sup>

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142. Telephone Interview With Nancy Smyth, *supra* note 67.

143. Telephone Interview With Robin Toma, *supra* note 105.

144. Telephone Interview With Victor Narro, *supra* note 76.

145. Telephone Interview With Nancy Smyth, *supra* note 67.

146. *Id.*; see also Kaplan, *supra* note 128.

147. Lopez, *supra* note 137 (quoting HomeBase manager Frank Gomez).

148. Telephone Interview With Victor Narro, *supra* note 76.

149. Aubry, *supra* note 140.

150. Nancy Cervantes, Joe Hicks & Niels Frenzen, Op-Ed., *A Case of Overkill to Curb Day Laborers*, L.A. TIMES, Jan. 25, 1994, at B7.

151. Telephone Interview With Nancy Smyth, *supra* note 67.

152. Dziembowska, *supra* note 16, at 145.

In the mediation sessions, day laborers attempted to “extend the olive branch”<sup>153</sup> and “humanize the issue” by telling their personal stories.<sup>154</sup> However, the sessions quickly deteriorated. The Civic Association president countered the Cervantes op-ed with one of her own, asserting that the county had an obligation “to seek protection for its residents” through an ordinance.<sup>155</sup> This adversarial posture carried through to the mediation sessions, where, as Cervantes recalled, only the “most hateful residents” turned out.<sup>156</sup> As she recounted, Burke sent the “squeakiest wheels” to the mediation—those who were “making her field staff’s lives miserable.”<sup>157</sup> Sensing that the residents were “not at the table in good faith,” the workers became disillusioned and the mediators became frustrated.<sup>158</sup> After only two sessions, the residents told Burke that “it wasn’t working.”<sup>159</sup> Burke moved forward with the ordinance to ban solicitation, stating that “[a] residential area cannot accommodate that type of activity.”<sup>160</sup> From the advocates’ point of view, what began as a promising organizing campaign had turned into a “horrible disaster.”<sup>161</sup>

The final hearing on the ordinance was held on March 25, 1994. It was marked by anti-immigrant hostility, including testimony in support of the ordinance by the author of Proposition 187, the voter initiative prohibiting undocumented immigrants from accessing social services in California that would pass in November of that year.<sup>162</sup> At the hearing’s conclusion, the Board of Supervisors voted three to one to outlaw solicitation in L.A. County’s unincorporated areas.<sup>163</sup> The ordinance, to take effect on July 1, 1994, was virtually identical to the one in Agoura Hills, prohibiting all solicitation “from any person traveling in a vehicle along a public right-of-way,” including sidewalks.<sup>164</sup>

After the ordinance passed, Saenz gathered with colleagues from Public Counsel and the ACLU to discuss legal strategy. Saenz was eager to file a lawsuit that would chart a different legal course than the one followed in

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153. Telephone Interview With Nancy Smyth, *supra* note 67.

154. Telephone Interview With Victor Narro, *supra* note 76.

155. Ronni Cooper, *Regulating Day Laborers*, L.A. TIMES, Feb. 1, 1994, at B6.

156. Telephone Interview With Nancy Smyth, *supra* note 67.

157. *Id.*

158. *Id.*

159. Telephone Interview With Victor Narro, *supra* note 76.

160. Lopez, *supra* note 137.

161. Telephone Interview With Nancy Smyth, *supra* note 67.

162. Telephone Interview With Victor Narro, *supra* note 76.

163. Kaplan, *supra* note 128. Supervisor Ed Edelman was absent for the vote. *Id.*

164. L.A. COUNTY, CAL., CODE § 13.15.011 (1994). The ordinance also applied to drivers and passengers in moving vehicles. *Id.* § 13.15.012.

Agoura Hills.<sup>165</sup> However, an immediate challenge was not to be. The day laborers still needed time to form an association to be ready to pursue a lawsuit. In addition, after Proposition 187 passed, Saenz became significantly devoted to litigating that case.<sup>166</sup> As a consequence, the county ordinance remained on the books for four years before MALDEF was able to challenge that law.

The interregnum, however, proved fruitful for day labor organizing, as new leadership emerged. When Cervantes left CHIRLA in 1996 to become the field director for L.A. City Councilmember Jackie Goldberg, Narro was tapped to replace her as director of the Workers' Rights Project. At CHIRLA, Narro joined Pablo Alvarado, who in 1990 had emigrated from El Salvador with a university degree in sociology.<sup>167</sup> Alvarado initially worked as a day laborer, primarily as a painter and gardener,<sup>168</sup> and volunteered as an organizer at IDEPSCA, where he coordinated with CHIRLA's Adopt-a-Corner program.<sup>169</sup> In 1995, he was hired by CHIRLA as the lead organizer in Ladera Heights to "make sure day laborers would participate in the negotiations."<sup>170</sup> Toward that end, Alvarado organized the Day Labor Union (Sindicato de Trabajadores por Día), gaining "needed legitimacy" through intensive engagement with the workers, which included the formation of a soccer team.<sup>171</sup>

Together with the Sindicato, Narro and Alvarado pursued a "human relations approach to continue the dialogue with the community stakeholders" in Ladera Heights after the ordinance was passed.<sup>172</sup> This approach built upon the efforts initiated by Cervantes, who launched the Ladera Heights Task Force—which included Captain Scully and other deputy sheriffs, residents, and members of the business community<sup>173</sup>—prior to the ordinance's enactment. As part of the Task Force, the sheriffs observed the operation of the hiring site and held a number of meetings with the workers.<sup>174</sup> As a result, the sheriffs agreed not to ticket any day laborers under the ordinance, thereby achieving an important outcome around the county: Although there was still "law on the books . . . , it wasn't being enforced."<sup>175</sup>

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165. Telephone Interview With Victor Narro, *supra* note 76.

166. *Id.*

167. *Conversation With Day Labor Activist Pablo Alvarado*, L.A. TIMES, Sept. 7, 1996, at B7.

168. *Id.*

169. Telephone Interview With Pablo Alvarado, *supra* note 127.

170. Dziembowska, *supra* note 16 (quoting Pablo Alvarado).

171. Telephone Interview With Pablo Alvarado, *supra* note 127.

172. Telephone Interview With Victor Narro, *supra* note 76.

173. Dziembowska, *supra* note 16, at 146.

174. *Conversation With Day Labor Activist Pablo Alvarado*, *supra* note 167.

175. Telephone Interview With Victor Narro, *supra* note 76.

Yet Saenz remained committed to “righting the wrong of Agoura Hills” by negating the legal validity of the county ordinance,<sup>176</sup> which covered 10 percent of the county’s population—and offered an appealing test case. When the Proposition 187 litigation concluded, Saenz turned his attention back to the county ordinance, which MALDEF formally challenged in June 1998 on behalf of CHILRA and the Sindicato. The complaint sought an injunction against the ordinance, damages caused by enforcement, and a declaration of the ordinance’s unconstitutionality.<sup>177</sup> Saenz asked CHIRLA to be a named plaintiff because of its growing day labor organizing work; CHIRLA, in turn, believed that it was important to “contribute to the lawsuit and mobilize workers,” while also recognizing that serving as plaintiff might provide “legitimacy to the organization” and help it “raise money to keep going.”<sup>178</sup>

MALDEF’s strategy was to challenge the ordinance squarely on First Amendment grounds, offering two alternative theories in its complaint. As a primary matter, MALDEF argued that the ordinance was content-discriminatory (and therefore presumptively unconstitutional) because it only targeted solicitation speech (and not other sorts of speech) in public right-of-ways.<sup>179</sup> Alternatively, MALDEF suggested that even if the ordinance was content-neutral, it was nonetheless not a reasonable time, place, and manner restriction because the county lacked a compelling interest in its enforcement and did not leave open adequate alternative channels of speech.<sup>180</sup> The case was assigned to district court Judge George King, a President Clinton appointee and former U.S. Attorney, who split the case into a two-step joint motion for summary judgment, first considering the issue of content neutrality and then deciding the ultimate question of whether the ordinance passed constitutional muster.<sup>181</sup>

From MALDEF’s point of view, the court got the issues half right—though the half decided in the day laborers’ favor was what ultimately counted the most. On the issue of content neutrality, the court held that although the ordinance did regulate a particular type of speech, it was nonetheless content-neutral because it was enacted to deal with undesirable “secondary effects” of

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176. Interview With Chris Newman, Legal Programs Dir., Nat’l Day Laborer Org. Network, in L.A., Cal. (Feb. 5, 2011).

177. Complaint ¶ 13, *Coal. for Humane Immigrant Rights of L.A. v. Burke (CHIRLA I)*, 1999 WL 33288183 (C.D. Cal. Oct. 29, 1999) (No. CV 98-4863-GHK).

178. Telephone Interview With Victor Narro, *supra* note 76.

179. Complaint, *supra* note 177, ¶ 7.

180. *Id.* ¶¶ 8–9.

181. *Coal. for Humane Immigrant Rights of L.A. v. Burke (CHIRLA II)*, No. CV 98-4863-GHK(CTX), 2000 WL 1481467, at \*2 (C.D. Cal. Sept. 12, 2000).



day labor solicitation—traffic disruption, harassment, littering, public defecation, and urination.<sup>182</sup>

The court then turned to the question of whether the ordinance was a reasonable time, place, and manner restriction. Here, the court broke with the Agoura Hills analysis and issued a stinging rebuke to the county, holding that the ordinance was neither narrowly tailored nor provided adequate alternative means of communication.<sup>183</sup> In addressing the force of the Agoura Hills precedent, the court noted that it was not bound by the state court decision, which it did not find “persuasive”<sup>184</sup> in any event. The court explicitly distinguished ACORN as a case that dealt only with “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.”<sup>185</sup> In contrast, the county ordinance swept too broadly, reaching “even a solicitor who stands on the sidewalk, away from the curb, and unobtrusively attempts to make known to the occupants of vehicles his availability for work.”<sup>186</sup> The court further held that there was “not a reasonable fit between the Ordinance, which reaches even the individual solicitor, and the quality-of-life concerns identified by the County.”<sup>187</sup> It similarly rejected the notion that day laborers had adequate alternative means of communicating their desire to work, stating that the county had not shown that any of the proposed alternatives (door-to-door canvassing, telephone solicitation, solicitation of parked vehicles, and solicitation on private property) were either available or reasonable.<sup>188</sup> Despite losing their lead argument, the MALDEF lawyers nonetheless won a sweeping victory—one that marked the first major legal setback to antisolicitation proponents.<sup>189</sup>

In the process, the day labor movement was itself born. The long battle in Ladera Heights forged new “alliances and true friendships” among advocates that pointed the way toward the future.<sup>190</sup> In addition, innovative law and organizing strategies were developed. The implacable public opposition of residents

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182. *CHIRLA I*, 1999 WL 33288183, at \*8.

183. *CHIRLA II*, 2000 WL 1481467, at \*13.

184. *Id.* at \*5 n.1.

185. *Id.* at \*5.

186. *Id.* at \*6.

187. *Id.* at \*10.

188. *Id.* at \*12.

189. David Rosenzweig, *Federal Judge Voids Ban on Soliciting by Day Laborers*, L.A. TIMES, Sept. 15, 2000, at B1. Robin Toma, who had left the ACLU after the Agoura Hills case to head the Los Angeles County Human Relations Commission, coauthored a book highlighting collaborations to defuse day labor conflicts, ROBIN TOMA & JILL ESBENSHADE, *DAY LABORER HIRING SITES: CONSTRUCTIVE APPROACHES TO COMMUNITY CONFLICT* (2001), which he used to urge County Counsel not to appeal. Telephone Interview With Robin Toma, *supra* note 105.

190. Telephone Interview With Nancy Smyth, *supra* note 67.

reinforced the necessity of legal action as a last resort—but also illuminated the importance of sustained grassroots action. While the “lawsuit was essential,”<sup>191</sup> the “human relations” model of building ties with the local law enforcement and business community paid crucial dividends.<sup>192</sup> By the time the court struck down the county ordinance, CHIRLA’s outreach had secured a nonenforcement policy that had already effectively nullified it. The organizing complemented the litigation, like “carrot and stick,” showing cities that there was a high road toward cooperative solutions on day labor, but that movement lawyers could prevail on the legal merits if necessary.<sup>193</sup>

### 3. Leveraging Success: The City-by-City Approach

#### a. Strategic Foundation: The Mobilization Template

The county case, *CHIRLA v. Burke*,<sup>194</sup> became the template for a succession of lawsuits filed to break the tide of antisolicitation around the greater L.A. area, in which nearly forty ordinances had been enacted by 2000.<sup>195</sup> The campaign was orchestrated as a collaborative legal and organizing effort. On the law side, MALDEF took the lead. Buoyed by its success in Ladera Heights and supported by a grant from the Rosenberg Foundation, MALDEF began developing a litigation campaign to strike down ordinances across the region, with the ultimate goal of winning a positive precedent at the Ninth Circuit Court of Appeals.<sup>196</sup> As an initial matter, a list of ordinances was compiled and Saenz sent letters to each city requesting compliance with the *Burke* decision. From the outset, this campaign was envisioned as integrating a crucial role for community organizing and was crafted in close alliance with day labor organizers, particularly Alvarado.

One of the first moves was to revisit the Agoura Hills ordinance, this time threatening to file a lawsuit in federal court on the basis of the *Burke* precedent.<sup>197</sup> MALDEF drafted the complaint, while organizers coordinated a protest to pressure Sheriff Lee Baca not to enforce the ordinance in Agoura

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191. *Id.*

192. Telephone Interview With Victor Narro, *supra* note 76.

193. Telephone Interview With Nancy Smyth, *supra* note 67.

194. *CHIRLA II*, 2000 WL 1481467, No. CV 98-4863-GHK (CTX) (C.D. Cal. Sept. 12, 2000).

195. See Appendix: Current Status of Antisolicitation Ordinances in the Greater Los Angeles Area, *infra*.

196. Telephone Interview With Thomas Saenz, *supra* note 130. Rosenberg had earlier given \$25,000 to CHIRLA to promote day labor outreach. Leslie Berestein, *Workshops Planned on Laborers' Rights*, L.A. TIMES, Apr. 9, 1995, at 10.

197. Telephone Interview With Thomas Saenz, *supra* note 130.

Hills (which was within the Sheriff Department’s jurisdiction). After reviewing a letter from MALDEF (which laid out the First Amendment case against the ordinance), Baca agreed to take no enforcement action.<sup>198</sup> In turn, MALDEF dropped its complaint.<sup>199</sup>

The positive resolution in Agoura Hills followed the Ladera Heights model by combining a credible legal threat with a “human relations” approach to engaging key decisionmakers. While underscoring the strategic importance of MALDEF’s legal advocacy, it also signaled the growing power of activists on the organizing side, who were on the cusp of creating their own institution.

The groundwork for an independent day labor organizing group was built by CHIRLA’s Narro and Alvarado in the late 1990s. In 1996, CHIRLA took over management of day labor centers in Harbor City and North Hollywood, drawing on the organizing lessons learned in Ladera Heights to introduce leadership committees, workers’ rights courses, and other community education programs.<sup>200</sup> Often these programs occurred “under the table”—for instance, in the evenings at the CHIRLA office—since the city made clear that the centers were not to be used for “organizing project[s].”<sup>201</sup> CHIRLA’s goal was to transform the culture of the centers, which had been poorly run in a “top down” manner with security guards setting a tone of repression in response to internal problems, such as worker drinking and drug use.<sup>202</sup> CHIRLA also sought to make the centers operate more efficiently as hiring halls by bringing employers to the centers and creating a lottery system to organize the distribution of work.<sup>203</sup> CHIRLA and IDEPSCA shared responsibility for running the city-sponsored centers, with CHIRLA taking on a new center in Cypress Park, while IDEPSCA agreed to manage centers in Hollywood, downtown, and West L.A.<sup>204</sup>

By this point, Alvarado had become the driving force behind day labor organizing in Los Angeles. His vision was to build upon core day labor sites to promote new leadership and establish a countywide network.<sup>205</sup> In 1997, Alvarado organized the first Intercorner Day Labor Conference in CHIRLA’s parking lot, which built toward the creation of a formal L.A. County Day Labor Association, whose leaders were elected in 1998.<sup>206</sup> The Association was

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198. Karima A. Haynes, *Day-Labor Conference Begins in Northridge*, L.A. TIMES, July 27, 2001, at B3.

199. Telephone Interview With Thomas Saenz, *supra* note 130.

200. See Dziembowska, *supra* note 16, at 147.

201. Telephone Interview With Victor Narro, *supra* note 76.

202. Telephone Interview With Pablo Alvarado, *supra* note 127.

203. Telephone Interview With Victor Narro, *supra* note 76.

204. *Id.*

205. *Id.*

206. *Id.*

financially sponsored by IDEPSCA, but was largely run by Alvarado and other staff at CHIRLA.<sup>207</sup> The Association's goal was to take over the day labor centers and coordinate street corner organizing; however, due to resource constraints, that vision was never realized and the Association dissolved in 2000.<sup>208</sup> Out of its ashes, however, arose a national organization: NDLO. Founded in 2001 as a coalition of fifteen day labor organizations from around the country,<sup>209</sup> NDLO's goal was "not just to affect members, but to affect the entire day labor industry."<sup>210</sup> Alvarado was elected the leader of NDLO, which promulgated a "unified agenda"—a central pillar of which was defeating the proliferation of antisolicitation ordinances.<sup>211</sup> A crucial feature of this strategy was the promotion of "constructive approaches" to day labor through the creation of formal day labor hiring centers.<sup>212</sup> Yet Alvarado was aware that funding would be an ongoing constraint on the expansion of formal centers and thus emphasized the importance of sustaining the legal fight to block antisolicitation ordinances: "Unless you fund centers everywhere, you need to protect the corners."<sup>213</sup>

The strategy that developed drew upon the experience and input of advocates working in the day labor field since its early phase. It was also the product of "a special relationship between two people"<sup>214</sup>—Alvarado and Saenz—initially forged during the Ladera Heights campaign and reinforced when both participated in the Rockefeller Foundation's Next Generation Leadership Program in 2000. Their connection was crucial to developing the sophisticated law and organizing campaign that ensued.

The campaign model was elegantly simple. Since all the ordinances at the time were virtually "carbon copies" of the complete ban pioneered by Redondo Beach,<sup>215</sup> targets were selected by MALDEF and NDLO staff based on evidence of strong enforcement efforts.<sup>216</sup> Advocates also assessed

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207. Dziembowska, *supra* note 16, at 149.

208. *Id.* at 150.

209. *Id.* at 151.

210. Telephone Interview With Pablo Alvarado, *supra* note 127.

211. Dziembowska, *supra* note 16, at 151.

212. *Building Community: An Integral Approach to Addressing Day Laborer Related Concerns*, NAT'L DAY LABORER ORG. NETWORK, <http://www.mayorsinnovation.org/pdf/PabloAlvarado.pdf> (last visited May 18, 2011).

213. Telephone Interview With Pablo Alvarado, *supra* note 127.

214. Interview with Chris Newman, *supra* note 176.

215. Telephone Interview With Thomas Saenz, *supra* note 130.

216. There were some cities that adopted ordinances but took a "watch and see" approach to enforcement. See, e.g., Greg Sandoval, *No Citations Issued as Enforcement of Day-Laborer Law Begins*, L.A. TIMES (Valley ed.), May 15, 1997, at B6 (discussing Santa Clarita).

whether cities had viable hiring centers.<sup>217</sup> At enforcement hot spots, NDLOM helped to organize corners and develop committees of local workers, while MALDEF drafted a complaint on behalf of the committees and NDLOM. This structure was designed to ensure standing while protecting the interests of the workers. While Saenz viewed NDLOM as having organizational standing in its own right, the committee was added as a plaintiff because of the direct harm the ordinance imposed on the workers. The committee—rather than the workers individually—was named because of “concerns about transience” and to protect workers from intrusive discovery about their immigration status, which Saenz viewed as legally irrelevant, both because IRCA exempted day laborers (as casual workers or independent contractors),<sup>218</sup> and because “their status doesn’t affect their First Amendment right to seek employment.”<sup>219</sup> When defendants sought to discover the immigration status of the workers, MALDEF moved for a protective order to prevent those inquiries. Even if the motion was unsuccessful, the committee structure prevented individual workers from being singled out for questioning.

MALDEF worked alone on the lawsuit, which was grounded on the succinct First Amendment argument crafted by Saenz in the Los Angeles County case. The complaint presented a powerful free association argument uncluttered by other claims.<sup>220</sup> To mark the filing of the lawsuit, NDLOM and MALDEF would stage a public event, marching from the day labor site to city hall.<sup>221</sup> This was done both to advance the legal strategy—generating publicity in order to exert pressure on city officials to negotiate—and the organizing strategy—giving day laborers ownership over the struggle and a platform to make normative arguments casting their right to seek work in moral terms. As Saenz recounted, the mobilization template was designed to promote mutually reinforcing law and organizing objectives: “Working together we could accomplish the legal policy goal and NDLOM could organize groups around California.”<sup>222</sup>

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217. Telephone Interview With Thomas Saenz, *supra* note 130.

218. 8 C.F.R. § 274a.1(f)–(g) (2010).

219. Telephone Interview With Thomas Saenz, *supra* note 130.

220. Telephone Interview With Chris Newman, Legal Programs Dir., Nat’l Day Laborer Org. Network (Jan. 31, 2011).

221. Telephone Interview With Thomas Saenz, *supra* note 130.

222. *Id.*

b. An Easy Win: Rancho Cucamonga-Upland

This strategy was first deployed to challenge joint ordinances in the cities of Rancho Cucamonga and Upland, which abutted one another in San Bernardino County. Both cities passed ordinances in 2001 to enforce antisolicitation at one street corner, located at the cities' boundary.<sup>223</sup> The police mounted an enforcement campaign that involved weekly raids of the site.<sup>224</sup> Alvarado attempted to organize the workers on his own, since NDLOM had no staff at this time, but "wasn't making progress."<sup>225</sup> He therefore gave the workers an ultimatum: "This is the last time I'll come here. We can fight back. We have the lawyers and have them ready."<sup>226</sup> The workers agreed to sue and MALDEF drafted the complaint,<sup>227</sup> which was served on the Rancho Cucamonga mayor by five hundred workers who "knocked on [his] door and said, 'We are taking you to court . . . You are not going to intimidate us.'"<sup>228</sup> Once the suit was filed, the cities came to the table to start "discussing solutions almost right away."<sup>229</sup> In January 2003, the cities agreed to amend their ordinances so as to only prohibit solicitation "on a street or highway" and to explicitly "not prohibit solicitation by persons off the street or highway, or on a sidewalk."<sup>230</sup> In addition, the cities agreed to train police officers in appropriate enforcement measures and to establish a day laborer task force to "jointly address issues faced by each side."<sup>231</sup> The following year, Rancho Cucamonga officials worked with the nonprofit arm of a local church to open a day labor center in the city.<sup>232</sup>

The victory in these cases appeared to reflect a broader tapering in the push toward antisolicitation. A number of cities—Cypress, Lawndale, and Lake Forest—announced that they were going to stop enforcement of their ordinances in light of the *Burke* decision.<sup>233</sup> Huntington Beach and Costa

223. *Id.*

224. Telephone Interview With Pablo Alvarado, *supra* note 127.

225. *Id.*

226. *Id.*

227. Complaint for Injunctive and Declaratory Relief, *Comite de Jornaleros de Rancho Cucamonga y Upland v. City of Rancho Cucamonga & City of Upland* (Sept. 19, 2002).

228. Telephone Interview With Pablo Alvarado, *supra* note 127.

229. Telephone Interview With Belinda Escobosa Helzer, Dir., ACLU of S. Cal., Orange Cnty. Office (Dec. 16, 2010).

230. City of Upland Police Dep't, San Bernardino Cnty. Sheriff—Rancho Cucamonga, *Training Update on Amended City Solicitation Ordinances* (quoting City of Upland Ordinance No. 1733 and City of Rancho Cucamonga Ordinance No. 695, which were identical).

231. Settlement Agreement and Mutual Release 2 (on file with author).

232. Stephen Wall, *Rialto, Calif., Church Seeks to Open Center for Day Laborers*, SAN BERNARDINO CNTY. SUN, June 16, 2004, <http://www.highbeam.com/doc/1G1-118286570.html>.

233. Jennifer Mena, *Cities Back Off Bans on Seeking Jobs in Public*, L.A. TIMES (Orange County ed.), Aug. 25, 2001, at B1.

Mesa were also considering revisions to their ordinances to clarify that solicitation was not banned on the sidewalks.<sup>234</sup> The strategy of using *Burke* as a deterrent to protect public space for solicitation was meeting with some success. Yet day labor advocates were still worried about cities enacting cosmetic changes that complied with *Burke*, but that did not alter the ordinances' ultimate impact. This concern grew as cities sought to craft their ordinances to more carefully hew to the public safety justification that supported the tagging restriction in *ACORN*.<sup>235</sup> For instance, Huntington Beach's ordinance was amended to explicitly permit sidewalk solicitation, while the proposed Costa Mesa ordinance barred solicitation that diverted the attention of drivers.<sup>236</sup> Advocates objected that such laws still threatened the right of day laborers to seek work by preventing the crucial curbside interaction with prospective employers. As Alvarado put it, "If you think employers are going to exit their vehicles, park in permitted areas and talk to people on sidewalks, it's not going to happen."<sup>237</sup> As this new generation of ordinances sought to draw a finer line between street and sidewalk, advocates were forced to determine whether they genuinely preserved day laborers' right to seek work or were just a clever repackaging of the flat ban in more legally legitimate terms.

c. Transition: Glendale Redux

The new front in the campaign opened in Glendale, where the fragile peace achieved by activists in the 1980s was broken after the demise of the nonprofit-run center they had helped to create. Despite the truce between the city and day labor advocates, local merchants and residents continued to complain that day laborers presented a public nuisance: "drinking alcohol, harassing women, breaking bottles, urinating in public."<sup>238</sup> Business owners near the Home Depot store where day laborers gathered were particularly vociferous in their complaints.<sup>239</sup> However, city officials in the early 1990s were cautious about enacting an ordinance as they watched the lawsuit in Agoura Hills unfold. By 1994, the city attorney's office had prepared a draft ordinance to ban solicitation, but withheld it from city council pending the resolution of the Agoura Hills appeal,<sup>240</sup> arguing that it was "important that the city have the

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234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* (quoting Alvarado).

238. Steve Ryfle, *2-Pronged Plan for Street-Side Job Seekers*, L.A. TIMES, Sept. 13, 1996, at B4.

239. Jennifer Oldham, *Proposed Laborer Ban Awaits Action*, L.A. TIMES (Valley ed.), June 17, 1994, at B3.

240. *Id.*

Agoura Hills law to lean on in case civil rights groups decide to legally challenge any similar law Glendale might enact.”<sup>241</sup>

After the Agoura Hills ordinance was upheld, Glendale moved forward with its ordinance in earnest. However, in doing so, the city sought to forge a more humane path, which combined a public solicitation ban with the creation of a viable city-sponsored hiring center to provide day laborers with real opportunities for employment, job training, and education.<sup>242</sup> The city’s goal (following the L.A. model) was to create the hiring center as part of a “fair and balanced approach” that would respond to the concerns of residents and businesses “without infringing on the workers’ rights.”<sup>243</sup> The Glendale antisolicitation ordinance, which went into effect in September 1996, made it a misdemeanor to hire day laborers on the street.<sup>244</sup> The city also contributed \$75,000 to help construct a day labor center to be run by a private charity,<sup>245</sup> which opened the following year.<sup>246</sup> At the outset, Glendale’s plan was greeted with cautious optimism by day laborers, who welcomed the chance to use a center that would “make it . . . easier to get work,” and by advocates, who believed the hiring center model had “tremendous value.”<sup>247</sup>

Yet, by 2004, this optimism faded in the wake of police enforcement of the ban and worker frustration with the center. Because Glendale’s ordinance prohibited solicitation in any portion of the public right-of-way, including sidewalks, workers were effectively forced to use the hiring center. To ensure that workers did so, police began issuing citations for “quality-of-life” offenses such as “trespassing, littering and public urination” based on complaints from residents and Home Depot managers.<sup>248</sup> Glendale officials denied enforcing the ordinance per se, which they were careful not to do in light of the *Burke* decision.<sup>249</sup> However, advocates complained that this was a distinction without a difference. They were also frustrated with the hiring center: “just a tarp over an area where workers could go” that was not seen as effectively allowing workers to signal their availability.<sup>250</sup> Moreover, the center instituted some

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241. *Id.* (attributing the statement to Glendale City Attorney Scott Howard).

242. Ryfle, *supra* note 238.

243. *Id.*

244. GLENDALE, CAL., MUN. CODE § 9.17.030 (1996).

245. Ryfle, *supra* note 238.

246. Naush Boghossian, *Laborers Sue City Over Solicitation of Jobs Prohibition*, L.A. DAILY NEWS, May 21, 2004, at N3.

247. Ryfle, *supra* note 238 (quoting Robin Toma of the ACLU).

248. Boghossian, *supra* note 246.

249. *Id.*

250. Telephone Interview With Belinda Escobosa Helzer, *supra* note 229.



unpopular policies, such as a \$25 monthly user fee, which workers had to pay retroactively when returning from extended absences.<sup>251</sup>

This frustration motivated workers to contact MALDEF, which by this time had built its day labor litigation capacity to its high water mark. In 2001, Saenz had hired Belinda Escobosa Helzer as a staff attorney for immigrant rights—a position that soon became almost exclusively focused on day labor.<sup>252</sup> Helzer, who grew up in OC, graduated from Southwestern Law School and then clerked on the New Mexico Supreme Court before starting at MALDEF. One of her first assignments was working on the settlement in the Rancho Cucamonga case.<sup>253</sup> From there, she began working with Saenz, who by then had become MALDEF's vice-president, to identify ordinances and monitor enforcement efforts.<sup>254</sup> When they identified strong enforcement activity at specific day labor sites, they asked city officials to voluntarily cease enforcement or repeal their ordinances in light of *Burke*.<sup>255</sup> It was “through that process that [MALDEF] identified Glendale as a problem.”<sup>256</sup> Helzer's investigation of Glendale revealed selective enforcement of traffic laws: “Police would sit outside of Home Depot monitoring the workers. If they jay-walked, they got a ticket. If business people did the same thing, they didn't get a ticket.”<sup>257</sup>

With this evidence of selective enforcement in hand, MALDEF and NDLON launched their campaign. The organizing component was led by NDLON's Veronica Federosky. An immigrant from Argentina, Federosky began working in 1998 as an organizer for IDEPSCA, where she helped to open the downtown L.A. day labor site.<sup>258</sup> She joined NDLON in 2003 and, after working on the final stages of the Rancho Cucamonga campaign, Federosky joined the Glendale fight.<sup>259</sup> Her initial organizing challenge was winning worker confidence. Because “other organizers [from the center] had been there and promised things that hadn't come true and there had been so many abuses by the police, it was difficult for the workers to trust.”<sup>260</sup> Federosky sought to build rapport through education sessions focused on the workers'

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251. Naush Boghossian, *Glendale May Cut Fees for Day Laborers*, L.A. DAILY NEWS, June 12, 2004, at N8.

252. Telephone Interview With Belinda Escobosa Helzer, *supra* note 229.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. Telephone Interview With Veronica Federosky, Organizer, Nat'l Day Laborer Org. Network (Feb. 16, 2011).

259. *Id.*

260. *Id.*

legal right to seek employment and earn a minimum wage.<sup>261</sup> She also coordinated leadership training programs, established a worker committee, and organized a task force of city officials, police, Home Depot management, and day laborers.<sup>262</sup>

Helzer accompanied Federosky to the corner to discuss the workers' rights and to consider the possibility of legal action.<sup>263</sup> MALDEF lawyers also met several times with Glendale officials to try to work out a compromise.<sup>264</sup> Although City Attorney Scott Howard gave MALDEF a written agreement that the city would not enforce the ordinance,<sup>265</sup> the persistent issuance of quality-of-life citations against day laborers led MALDEF to file suit in May 2004 on behalf of NDLO and the worker committee organized by Federosky.<sup>266</sup> Helzer was the main lawyer on the case (with Saenz supervising), taking the lead in writing the complaint and subsequent motion for a preliminary injunction.<sup>267</sup>

The initial complaint asserted a facial challenge to the ordinance, following the *Burke* template: first claiming that the ordinance was content-discriminatory and, in the alternative, that it was not a valid time, place, or manner restriction.<sup>268</sup> Glendale responded with a curveball. In June, the city amended its ordinance to delete the explicit prohibition of solicitation on sidewalks in an attempt to blunt the plaintiffs' argument that the ordinance was not narrowly tailored to address safety concerns.<sup>269</sup> MALDEF then filed an amended complaint arguing that the new ordinance—inssofar as it did not explicitly *permit* sidewalk solicitation—was “similar” to the previous one and thus still unconstitutional on its face.<sup>270</sup> In MALDEF's motion for a preliminary injunction, Helzer argued both that the ordinance was content-discriminatory and an invalid time, place, and manner restriction.<sup>271</sup> As to the latter, she asserted that the ordinance was overbroad since it barred speech that was not

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261. *Id.*

262. *Id.*

263. *Id.*

264. Telephone Interview With Belinda Escobosa Helzer, *supra* note 229.

265. See Boghossian, *supra* note 246.

266. Complaint for Injunctive and Declaratory Relief, *Comite de Jornaleros de Glendale v. City of Glendale*, 2005 U.S. Dist. LEXIS 46603 (C.D. Cal. May 19, 2004) (No. CV 04-3521 SJO (Ex)).

267. Telephone Interview With Belinda Escobosa Helzer, *supra* note 229.

268. See Complaint, *supra* note 266, at 3.

269. GLENDALE, CAL., MUN. CODE § 9.17.030 (2004).

270. First Amended Complaint for Injunctive and Declaratory Relief at 4, *Comite de Jornaleros de Glendale*, 2005 U.S. Dist. LEXIS 46603 (No. CV 04-3521 SJO (Ex)).

271. Plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Ex Parte Application for Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction at 6–15, *Comite de Jornaleros de Glendale*, 2005 U.S. Dist. LEXIS 46603 (No. CV 04-3521 SJO (Ex)).

connected to safety: “Instead, the ordinance regulates *all* solicitation speech (and even attempted solicitation) regardless of whether the speaker approaches a vehicle, whether vehicles stop, impede or block traffic.”<sup>272</sup> Moreover, Helzer argued that no viable alternatives to solicit work existed. The ordinance’s lack of clarity about the legality of sidewalk solicitation combined with continued police enforcement of quality-of-life infractions to deter workers from solicitation in public, while the hiring center proved an inadequate substitute.<sup>273</sup>

In ruling on the motion, district court Judge S. James Otero, a nominee of President George W. Bush, rejected MALDEF’s content neutrality argument under the “secondary effects” doctrine.<sup>274</sup> However, Judge Otero agreed that the ordinance was not narrowly tailored: Since it was “unclear where the curb ends and where the sidewalk begins,” the ordinance’s vagueness was “likely to chill permissible speech.”<sup>275</sup> The court also agreed that the plaintiffs had not been afforded adequate alternatives since the ordinance did nothing to assure the continued availability of the hiring center, which was contingent on “the funding and management decisions of a private organization.”<sup>276</sup> The court issued a preliminary injunction in January 2005 and the plaintiffs quickly moved for summary judgment to impose a permanent injunction,<sup>277</sup> which the court—echoing its earlier holding—granted in May.<sup>278</sup>

It was a resounding victory, but one that marked a transition point in the movement. Glendale appealed the permanent injunction in fall 2005.<sup>279</sup> By this time, the legal team was in the midst of a profound change. Part of the change was a consequence of routine personnel issues, with Helzer and her MALDEF colleague, Shaheena Simons (a Yale Law School graduate who had joined MALDEF on a Fried Frank public interest fellowship in 2003), both taking family leave in 2005, before the resolution of the Glendale summary judgment motion.<sup>280</sup> These departures were followed by other major losses

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272. Plaintiffs’ Reply in Support of Plaintiffs’ Motion for Preliminary Injunction at 3–4, *Comite de Jornaleros de Glendale*, 2005 U.S. Dist. LEXIS 46603 (No. CV 04-3521 SJO (Ex)).

273. *Id.* at 4–5.

274. Order Granting Motion for Preliminary Injunction at 15–16, *Comite de Jornaleros de Glendale*, 2005 U.S. Dist. LEXIS 46603 (No. CV 04-3521 SJO (Ex)).

275. *Id.* at 22.

276. *Id.* at 24.

277. Plaintiffs’ Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment, *Comite de Jornaleros de Glendale*, 2005 U.S. Dist. LEXIS 46603 (No. CV 04-3521 SJO (Ex)).

278. *Comite de Jornaleros de Glendale*, 2005 U.S. Dist. LEXIS 46603, at \*16–20.

279. Brief of Appellant, *Comite de Jornaleros de Glendale v. City of Glendale*, No. 05-55880 (9th Cir. Oct. 14, 2005).

280. Telephone Interview With Belinda Escobosa Helzer, *supra* note 229; Telephone Interview With Shaheena Simons (Dec. 21, 2010).

that occurred against the backdrop of the 2004 resignation of MALDEF's long-time president, Antonia Hernandez, and her replacement by Ann Marie Tallman, a senior finance executive from Fannie Mae. In August 2005, Saenz announced that he was leaving to become general counsel for L.A. Mayor Antonio Villaraigosa. Soon thereafter, MALDEF's regional counsel, Hector Villagra—another Judge Reinhardt clerk and Fried Frank fellow who had spent his career at MALDEF—announced his departure. In September, just before Glendale filed its appeal, Saenz, Villagra, Helzer, and Simons withdrew as counsel of record for the plaintiffs; in their place, Araceli Perez, a junior MALDEF attorney, assumed counsel's role.<sup>281</sup> Yet MALDEF was not to be in charge of the appeal. Instead, NDLO retained a team from the Lawyers' Committee for Civil Rights (LCCR) in San Francisco led by two lawyers: Legal Director Robert Rubin and staff attorney Philip Hwang.

These transitions strained relations between the advocates and day laborers. Yet Federosky worked to make sure that the changes were communicated to the worker committee and that its leaders continued to make crucial decisions about the progress of the case.<sup>282</sup> When Glendale filed its appeal, the plaintiffs were therefore cognizant of the risks of proceeding to the Ninth Circuit. They had lost their main lawyers, while the factual and legal posture of the case was not ideal given that Glendale's ordinance excised sidewalks and the city had a functioning hiring center. Serious settlement talks ensued (building on those begun in district court), led by LCCR attorneys. Prior to oral argument, the two sides finalized a settlement in which Glendale agreed to adopt a revised ordinance that narrowly targeted traffic interference:<sup>283</sup> prohibiting solicitation from "any street, roadway, curb, or highway that is within, or immediately adjacent to, any industrial or commercial zone" from any vehicle either traveling in the street, or "stopped in or blocking a lane of traffic."<sup>284</sup> It explicitly did not prohibit solicitation "directed at the occupant of a vehicle that is stopped at the side of the roadway and out of the lanes of traffic."<sup>285</sup> This resolution constituted a victory—the Glendale sidewalks had been preserved for day labor solicitation that did not threaten traffic—but one that left open the crucial question: Who would lead the legal campaign against antisolicitation ordinances into its culminating phase?

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281. Petition to Withdraw as Counsel and Addition of New Att'y of Record, *Comite de Jornaleros de Glendale*, No. 05-55880.

282. Telephone Interview With Veronica Federosky, *supra* note 258.

283. See Stipulation of Dismissal and [Proposed] Order of Dismissal (Fed. R. Civ. P. 41(a)) at 2, Ex. A, *Comite de Jornaleros de Glendale*, 2005 U.S. Dist. LEXIS 46603 (No. CV 04-3521 SJO (Ex)).

284. GLENDALE, CAL., MUN. CODE § 9.17.030(a) (2008).

285. *Id.*

d. The Height of Intransigence: Redondo Beach

The question was quickly posed in Redondo Beach, where a lawsuit filed before the departure of Saenz and his colleagues from MALDEF would ultimately proceed without them. Redondo Beach's 1987 ordinance was the first in Southern California to ban anyone from standing on the street or sidewalk to solicit employment.<sup>286</sup> Yet, for over fifteen years, the city had a lax approach to enforcement and thus was not one of the initial targets of the legal campaign.

This changed in October 2004, when Redondo Beach launched a month-long enforcement crackdown that resulted in sixty-three worker arrests.<sup>287</sup> Precipitated by "complaints from a couple of businesses in two strip malls" near the day labor site,<sup>288</sup> the crackdown included a sting operation in which local police went undercover posing as employers and arrested day laborers who entered their vehicles.<sup>289</sup> The workers called NDLO, <sup>290</sup> whose organizers had earlier left business cards with workers on the corner during a visit to evaluate enforcement activity.<sup>291</sup>

Day labor advocates responded quickly, moving forward along interrelated tracks. First, NDLO's Federosky launched an effort to organize the corner, following the well-honed model: establishing "a committee, creating rules for the corner, [conducting] leadership training, identifying leaders, and talking to workers about their responsibilities at the corner."<sup>292</sup> Unlike in Glendale, however, Federosky believed that the prospects for collaboration with local officials were dim. "In Redondo Beach, the politics were more racist from the city and the police, so it was a different dynamic. We were basically alone."<sup>293</sup>

Advocates also confronted the immediate challenge of supporting the defense of day laborers facing criminal charges as a result of the raids. This job fell to a newcomer, Chris Newman, who had arrived at NDLO to launch its in-house legal department. As a law student in Denver, Newman had helped to start a day labor center "as an outlet to get away from law school."<sup>294</sup> Through this work, he met Alvarado and Saenz, and then had a "light bulb" moment at an NDLO conference in San Francisco: He would make defending the rights

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286. REDONDO BEACH, CAL., MUN. CODE, § 3-7.1601 (1987).

287. Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 N.Y.L. SCH. L. REV. 465, 490-91 (2005-2006).

288. Telephone Interview With Chris Newman, *supra* note 220.

289. Narro, *supra* note 287, at 491.

290. Telephone Interview With Pablo Alvarado, *supra* note 127.

291. Telephone Interview With Veronica Federosky, *supra* note 258.

292. *Id.*

293. *Id.*

294. Telephone Interview With Chris Newman, *supra* note 220.

of day laborers his life's work.<sup>295</sup> Upon graduation, he won a Ford Foundation New Voices fellowship, which funded him to provide employment law services to day laborers through NDLO. <sup>296</sup> However, the Redondo Beach case—which “came out of the blue”—quickly changed the fellowship plan, shifting Newman's focus to contesting solicitation bans.<sup>297</sup>

When the Redondo Beach raids occurred, Newman was awaiting his bar results; thus, his role was limited to acting as a liaison between the workers and lawyers. One important part of this role was reaching out to the local public defenders who had been assigned to represent day laborers in their criminal cases.<sup>298</sup> Some of the defenders viewed the misdemeanor cases as a “hassle” and thus Newman took it upon himself to “get them enthused about representing the day laborers” as a part of the broader campaign.<sup>299</sup> Newman also took the lead in meeting with the workers about legal strategy. “Almost every other day,” Newman would meet workers on the corner, typically with Federosky, but sometimes also with Alvarado and Narro (who was acting as a legal observer).<sup>300</sup> Because Newman “was not involved in drafting” legal briefs, he was able to “mak[e] sure that the workers had ownership over their own claims and underst[ood] . . . all aspects of the case.”<sup>301</sup>

As Federosky recalled, the workers viewed the lawsuit as the only viable course of action: “They didn't see any other way out of it. They were so scared.”<sup>302</sup> For the lawyers, Redondo Beach presented an appealing case to pursue on the merits. Unlike in Glendale—where a challenge had been filed six months earlier and was still pending<sup>303</sup>—the Redondo Beach ordinance was a complete ban, the city had no organized day labor center, and enforcement was substantial. MALDEF lawyers (Saenz, Helzer, and Simons) filed for an injunction on behalf of two clients: the worker committee (Comite de Jornaleros de Redondo Beach) and NDLO. MALDEF's Simons drafted the federal complaint,<sup>304</sup> which was served on the city after a march in November 2004. MALDEF faced off against Redondo Beach's City Attorney Mike Webb, who the advocates saw as “a bit of an ideologue” who “liked the attention”

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295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.* Narro had become co-executive director of Sweatshop Watch, a garment workers advocacy group.

301. *Id.*

302. Telephone Interview With Veronica Federosky, *supra* note 258.

303. Narro, *supra* note 287, at 492–93.

304. Complaint for Injunctive and Declaratory Relief, Comite de Jornaleros de Redondo Beach v. City of Redondo Beach, 475 F. Supp. 2d 952 (C.D. Cal. Nov. 16, 2004) (No. CV 04-9396 CBM).

brought by the suit.<sup>305</sup> The plaintiffs drew a “good judge”<sup>306</sup>: Consuelo Marshall, a President Carter appointee and pathbreaking liberal jurist, who was the first woman hired by the L.A. City Attorney’s office and the first African American woman judge appointed in the Central District of California.

The case “moved fast.”<sup>307</sup> Judge Marshall granted the plaintiffs’ motion for a temporary restraining order within three weeks of the initial filing.<sup>308</sup> Less than two weeks later, the court issued a preliminary injunction, finding that there were “serious questions” about whether the ordinance was content-based; the order also expressed skepticism about the degree of narrow tailoring (stating that Redondo Beach “could simply enforce traffic laws” to protect public safety and that activities such as vandalism and littering had “nothing to do with speech pertaining to solicitation”) and the adequacy of alternate channels of communication (noting that the ordinance prohibited workers from soliciting work from drivers who had pulled over and parked their cars).<sup>309</sup> The city appealed the preliminary injunction decision to the Ninth Circuit, which affirmed in an unpublished opinion in May 2005.<sup>310</sup>

From there, however, the dynamic changed. As part of its discovery request, the city sought to acquire information about the legal status of the plaintiffs. The plaintiffs, in turn, moved for a protective order arguing that the “discovery is intended to intimidate and harass Plaintiffs’ members.”<sup>311</sup> The magistrate judge initially refused to issue a protective order, but Judge Marshall reversed that decision, ruling that the plaintiffs’ immigration status was irrelevant to their standing to bring the case and thus not subject to discovery.<sup>312</sup> Both sides then moved for summary judgment.

By this stage, MALDEF’s litigation team had largely disbanded. Helzer had taken leave and Simons had moved to MALDEF’s Washington, D.C. office. Saenz formally withdrew in August 2005 and Perez substituted in as lead counsel, finishing the motion for summary judgment before herself

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305. Telephone Interview With Chris Newman, *supra* note 220.

306. Telephone Interview With Thomas Saenz, *supra* note 130.

307. Telephone Interview With Shaheena Simons, *supra* note 280.

308. Temporary Restraining Order and Order to Show Cause Re Preliminary Injunction, *Comite de Jornaleros de Redondo Beach*, 475 F. Supp. 2d 952 (No. CV 04-9396 CBM).

309. Findings of Fact and Conclusions of Law at 7–13, *Comite de Jornaleros de Redondo Beach*, 475 F. Supp. 2d 952 (No. CV 04-9396 CBM).

310. *Comite de Jornaleros de Redondo Beach*, 475 F. Supp. 2d at 956.

311. Order Granting in Part and Denying in Part Plaintiffs’ Motion for a Protective Order at 2, *Comite de Jornaleros de Redondo Beach*, 475 F. Supp. 2d 952 (No. CV 04-9396 CBM).

312. Order Granting Plaintiffs’ Motion for Reconsideration of Magistrate Judge’s Order Granting in Part and Denying in Part Plaintiffs’ Motion for a Protective Order at 10, *Comite de Jornaleros de Redondo Beach*, 475 F. Supp. 2d 952 (No. CV 04-9396 CBM).

withdrawing in November 2005.<sup>313</sup> LCCR's Rubin and Hwang entered in MALDEF's place to complete the summary judgment briefing (although MALDEF litigation director Cynthia Valenzuela continued to review the briefs, along with Saenz).<sup>314</sup> The city filed a cross-motion for summary judgment, arguing that it was entitled to a dismissal because the plaintiffs did not have standing to sue and, even if they did, the ordinance was nonetheless valid.

Rubin argued the motion for summary judgment. In her 2006 ruling, Judge Marshall issued a sweeping and carefully documented decision in the plaintiffs' favor, permanently enjoining the ordinance on the ground that it was not narrowly tailored to promote traffic safety, crime prevention, or aesthetics, and did not allow day laborers alternative channels of solicitation.<sup>315</sup>

Yet the victory was bittersweet. Saenz, the architect of the litigation campaign, was gone and the legal department he had built was decimated. Moreover, Redondo Beach showed no sign of conceding the fight. The city promptly appealed the permanent injunction to the Ninth Circuit. Briefing was scheduled for mid-2007, and LCCR set to work on the appeal. On the ground, Federosky continued working at the Redondo Beach site to ensure that the police abided by the injunction,<sup>316</sup> which remained in effect pending the appeal.<sup>317</sup> The day laborers returned, but with a sense of caution: "At least for now," they thought, "it is safe."<sup>318</sup>

e. The Next Generation: Lake Forest, Costa Mesa, and Baldwin Park

(1) Behind the Orange Curtain

It was not safe for day laborers in other parts of the region, where antisolicitation ordinances had spread "like wildfire."<sup>319</sup> By the time Saenz left MALDEF in 2005, forty-two jurisdictions in the greater L.A. area had enacted antisolicitation ordinances, although movement lawyers had succeeded in

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313. Telephone Interview With Shaheena Simons, *supra* note 280.

314. Telephone Interview With Philip Hwang, Staff Att'y, Lawyers' Comm. for Civil Rights (Jan. 5, 2011).

315. *Comite de Jornaleros de Redondo Beach*, 475 F. Supp. 2d 952. The court also upheld plaintiffs' standing. *Id.* at 956–58. In a later decision, Judge Marshall awarded the plaintiffs' lawyers over \$208,000 in attorney's fees. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, No. CV 04-9396 CBM, 2006 U.S. Dist. LEXIS 95610, at \*2 (C.D. Cal. Dec. 12, 2006).

316. Telephone Interview With Veronica Federosky, *supra* note 258.

317. The injunction remained in effect pending appeal. Order Granting Defendant's Ex Parte Application for Order Granting Partial Stay of 4-27-06 Order Pending Appeal, *Comite de Jornaleros de Redondo Beach*, 475 F. Supp. 2d 952 (No. CV 04-9396 CBM).

318. Telephone Interview With Veronica Federosky, *supra* note 258.

319. Telephone Interview With Nora Preciado, Staff Att'y, Nat'l Immigration Law Ctr. (Dec. 17, 2010).



enjoining one (L.A. County) and forcing day-labor-friendly amendments in two others (Rancho Cucamonga and Upland).<sup>320</sup> In terms of enforcement activity, there were still a number of OC hotspots, where the strength of the Minutemen reflected the intensity of anti-immigrant sentiment. Even places with histories of supporting day labor witnessed escalating hostility. In Laguna Beach, one of the region's first city-sanctioned day labor centers came under vigorous attack by activists from the Minutemen and the California Coalition for Immigration Reform.<sup>321</sup> After one activist determined that the center was actually on state-owned land, she sued to eliminate it; the center was saved only after the city agreed to repurchase it from the state.<sup>322</sup>

The city of Lake Forest, just east of Laguna Beach, was another hot spot with a history of tension. Lake Forest had enacted an antisolicitation ordinance in 1993 that followed the Redondo Beach model by prohibiting any person from soliciting, or attempting to solicit, work in any public right-of-way, including the sidewalk.<sup>323</sup> In the late 1990s, CHIRLA had received complaints of sheriff harassment that resulted in a departmental review and a promise by OC Sheriff Mike Corona to halt enforcement.<sup>324</sup> Conditions improved temporarily, but by the mid-2000s, problems returned when the city—responding to business and Minutemen complaints—voted to allow local shopping mall merchants to pay for a private security guard to file trespass complaints against day laborers.<sup>325</sup> On the basis of these complaints, sheriffs could arrest the day laborers for trespassing. In so doing, the city could achieve the antisolicitation ordinance's objective—removing day laborers from their site—without its direct enforcement.

As the next wave of day labor conflicts shifted south, so too did the advocacy resources to address them. Although MALDEF was no longer involved in the litigation fight over day labor, its former lawyers were—albeit under the auspices of a different public interest organization, the ACLU. The campaign that Saenz had initiated was carried on in OC by two of his MALDEF protégés. Villagra left MALDEF in September 2005 to start the ACLU's OC office,

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320. See Appendix: Current Status of Antisolicitation Ordinances in the Greater Los Angeles Area, *infra*.

321. William Wheeler, *Immigration Debate Gets Contentious in Laguna*, ORANGE CNTY. REG., Jan. 8, 2006, <http://www.ocregister.com/articles/-19225-.html>.

322. Chris Caesar, *State Supreme Court Won't Hear Suit on Day-Labor Site*, ORANGE CNTY. REG., Feb. 23, 2009, <http://www.ocregister.com/articles/daylabor-137370-lagunabeach-daylaborsite.html>.

323. LAKE FOREST, CAL., MUN. CODE § 5.06.020 (1993).

324. Jack Leonard & Alex Katz, *Sheriff Acts on Laborers' Complaints*, L.A. TIMES, Oct. 6, 1999, at B1.

325. Jennifer Delson, *New Front on Day-Labor Battle Opens*, L.A. TIMES (Orange County ed.), Dec. 9, 2006, at B1.

recruiting Helzer to follow. They were joined that same year by Nora Preciado, a Berkeley Law School graduate who had won an Equal Justice Works fellowship to work on language access issues in healthcare.<sup>326</sup> Together, in early 2006, they considered the possibility of suing Lake Forest.

From a policy point of view, the new ACLU lawyers were intent on counteracting the spread of anti-immigrant sentiment in OC and viewed the defense of day laborers as a key substantive and symbolic battle.<sup>327</sup> As they reviewed OC cities with ordinances, they found a variety of approaches. Some had complete bans, like Lake Forest, while others, such as Orange, were considering amendments that attempted to draw a tighter connection between antisolicitation and public safety. The ACLU supported the Laguna Beach hiring center approach and wanted to push cities in that direction, rather than toward more punitive measures: “We didn’t want Lake Forest setting up a terrible precedent right down the street from [the Laguna Beach] workers’ center.”<sup>328</sup> Thus, after evaluating the ordinances and enforcement activity in the area, the ACLU determined that “Lake Forest was clearly the type of ordinance we wanted to take aim at initially.”<sup>329</sup>

The ACLU was also drawn to Lake Forest by NDLON, which in 2005, had sent in organizers, led by Federosky, to support a day labor march protesting Minutemen harassment and city enforcement. NDLON worked to organize the corners, which had between fifty and eighty workers.<sup>330</sup> However, NDLON’s efforts were challenged by its lack of OC-based resources and the fact that there were several corners in Lake Forest—with some tension among them.<sup>331</sup> Because of the city’s general political conservatism, NDLON also found it “more difficult to build relations with other community members . . . [and to] look for solutions so we don’t have to litigate.”<sup>332</sup> Federosky attempted to reach out to several churches from different denominations, but “they didn’t want anything to do with day laborers.”<sup>333</sup> Because of these constraints, NDLON could not implement its full organizing model in Lake Forest, but still “felt that it was important to do something there” to take a stand against day labor repression.<sup>334</sup> NDLON organizers contacted Villagra and Helzer—who they

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326. Telephone Interview With Nora Preciado, *supra* note 319.

327. Telephone Interview With Hector Villagra, Legal Dir., ACLU of S. Cal. (Nov. 29, 2010).

328. Telephone Interview With Nora Preciado, *supra* note 319.

329. Telephone Interview With Hector Villagra, *supra* note 327.

330. Telephone Interview With Nora Preciado, *supra* note 319.

331. Telephone Interview With Hector Villagra, *supra* note 327.

332. Telephone Interview With Veronica Federosky, *supra* note 258.

333. *Id.* This was true even after the day laborers organized a community service day to rebuild the houses of Orange County fire victims in an effort to “change hearts and minds.” *Id.*

334. Telephone Interview With Hector Villagra, *supra* note 327.

knew from MALDEF—and enlisted them to investigate. Preciado, who was bilingual, was the main point of contact with the workers and spent one day a week for several months going out to the sites with NDLO organizers to take “worker declarations of what was happening regarding enforcement.”<sup>335</sup>

What they found was a new pattern, one that combined private security enforcement with a model of “nonenforcement enforcement” by the sheriffs,<sup>336</sup> who would not issue citations (in keeping with Sheriff Corona’s earlier promise), but instead would try “shooing the workers away” by telling them it was illegal to do work, for which they could be fined and deported.<sup>337</sup> Armed with this information, the lawyers—after months of community-building by NDLO—approached the worker committee, called the Asociación de Trabajadores de Lake Forest (ATLF), to discuss filing suit. Preciado found the workers to be “really fed up with the daily harassment” and therefore “very enthusiastic,” although they did express concerns about retaliation “because of immigration status” and “being the targets of violence.”<sup>338</sup> After discussing concerns about confidentiality and the process of seeking a protective order, the workers “collectively decided it was worth risk.”<sup>339</sup>

The ACLU filed its complaint (in conjunction with a press conference and protest march) on March 1, 2007, seeking to enjoin the Lake Forest ordinance and to require the city to pay restitution to the workers for fines incurred.<sup>340</sup> The complaint named the city as a defendant, along with several individual city officials (including the mayor, city council members, and the police chief). The case was filed on behalf of ATLF, NDLO, and a student organizing group, Colectivo Tonantzin, which had organized counter-Minutemen demonstrations and volunteered to monitor the enforcement of Lake Forest’s ordinance. The case was assigned to district court Judge David Carter—a Vietnam veteran, former OC District Attorney, and superior court judge—who was appointed to the federal bench by President Clinton. From the outset, Carter was aggressive in pushing both sides to settle, and

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335. Telephone Interview With Nora Preciado, *supra* note 319.

336. Telephone Interview With Hector Villagra, *supra* note 327.

337. *Id.*

338. Telephone Interview With Nora Preciado, *supra* note 319.

339. *Id.*

340. Complaint for Declaratory and Injunctive Relief, Asociación de Trabajadores de Lake Forest v. City of Lake Forest (ATLF), No. SA CV 07-250 DOC (ANx) (C.D. Cal. Mar. 1, 2007).

the city quickly agreed to halt enforcement.<sup>341</sup> Shortly thereafter, the city repealed its ordinance.<sup>342</sup>

Despite the swift repeal, however, workers continued to complain that sheriffs engaged in the same enforcement activity. For proof, the ACLU recruited students to pose as employers. They picked up three workers and were immediately pulled over by sheriffs, who claimed hiring day laborers was illegal and warning that they could “sue you, rob you, and molest your children.”<sup>343</sup> With this evidence of ongoing enforcement, the ACLU filed an amended complaint in April 2007 dropping the facial challenge to the ordinance and instead arguing that the city continued to target the expressive activities of day laborers.<sup>344</sup> The complaint also added a new individual defendant: Sheriff Mike Corona, whose deputies were responsible for enforcement.<sup>345</sup> The city moved to dismiss on the ground that the repeal had mooted the plaintiffs’ challenge.<sup>346</sup> The court rejected the defendants’ motion, stating that the plaintiffs’ allegations that defendants had overseen and managed law enforcement operations in the city was “ample basis upon which to reasonably infer that the Individual Defendants incurred liability in their supervisory capacities.”<sup>347</sup>

During this whirlwind of activity, Preciado sought to keep the workers informed of the proceedings and to solicit their input about next steps. In these discussions, she recalled that the workers were inclined to “defer to [our assessment of] the best legal tactics so long as they knew the consequences.”<sup>348</sup> The key issues revolved around worker confidentiality and which parties to sue. In terms of confidentiality, Preciado made it clear that there were risks but also assured the workers that if “at any point names had to be disclosed, if it

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341. See Order to Withdraw Plaintiffs’ Motion for Preliminary Injunction and Take Hearing Re: Preliminary Injunction Off Calendar, *ATLF*, No. SA CV 07-250 DOC (ANx) (C.D. Cal. Mar. 19, 2007).

342. Alejandra Molina, *Lake Forest Eliminates Day Labor Law*, ORANGE CNTY. REG., Apr. 4, 2007, <http://www.ocregister.com/articles/city-184848-ordinance-day.html>.

343. Telephone Interview With Hector Villagra, *supra* note 327.

344. First Amended Complaint, *ATLF*, No. SA CV 07-250 DOC (ANx) (C.D. Cal. Apr. 19, 2007).

345. *Id.* Plaintiffs filed a second amended complaint in June 2007 that incorporated more factual allegations to establish the individual defendants’ personal liability for acting “within the course, scope, and authority of [their] agency or employment” “to violate Plaintiffs’ constitutional rights,” in conformity with “official policy, custom, or practice.” Second Amended Complaint at ¶¶ 15, 24, *ATLF*, No. SA CV 07-250 DOC (ANx) (C.D. Cal. June 19, 2007).

346. Defendants’ Notice and Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, *ATLF*, No. SA CV 07-250 DOC (ANx) (C.D. Cal. June 29, 2007).

347. Proceeding (in Chambers): Denying Defendants’ Motion for Failure to State a Claim Upon Which Relief Can Be Granted at 3, 5, *ATLF*, No. SA CV 07-250 DOC (ANx) (C.D. Cal. July 18, 2007).

348. Telephone Interview With Nora Preciado, *supra* note 319.

meant we had to drop the case, we would.”<sup>349</sup> After the court rejected the defendants’ motion to dismiss, there was also discussion of whether to add new defendants, Securtec, the private security company hired to patrol the shopping center, and individual sheriffs accused of misconduct. In both cases, naming these defendants could “make life miserable for the workers in the short term.”<sup>350</sup> However, adding them as defendants also presented the chance to recover monetary damages, which might increase pressure on all defendants to settle. Accordingly, plaintiffs further amended their complaint in December 2007 to add the new parties.<sup>351</sup>

The defendants then adopted an aggressive discovery strategy, embroiling the parties in a series of high-stakes disputes. In order to substantiate their claims of ongoing misconduct, plaintiffs submitted fifty-four “Doe” declarations by day laborers, collected by Preciado, which detailed the persistence of enforcement activities. In turn, the defendants moved for information regarding the identity of the Doe witnesses, as well as information about NDLOM members.<sup>352</sup> The ACLU filed for a protective order, but the magistrate judge rejected its request to bar defendants from acquiring identifying information about the Doe witnesses, although he did prevent the disclosure of immigration status.<sup>353</sup> In addition, defendants moved to depose Preciado about communications she had with workers while collecting the declarations. Although the court rejected this motion on the ground of attorney–client privilege,<sup>354</sup> it appeared that part of the defendants’ strategy was to discredit the plaintiffs, by casting them as illegal immigrants, and their counsel, by casting her as unethical.

This strategy continued as the case moved toward trial in summer 2008<sup>355</sup>—even after the parties narrowed their disagreements. In June, the ACLU settled its claims against Securtec and all of the city defendants (who agreed not to enforce the ordinance).<sup>356</sup> A compromise, however, could not be reached with the county defendants: the OC sheriff, the Lake Forest police chief (employed by the sheriff), and two individual sheriff deputies. As the August trial date

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349. *Id.*

350. *Id.*

351. Third Amended Complaint, *ATLF*, No. SA CV 07-250 DOC (ANx) (C.D. Cal. Dec. 5, 2007).

352. Proceedings on Plaintiffs’ Motion for a Protective Order at 2, *ATLF*, No. SA CV 07-250 DOC (ANx) (C.D. Cal. Feb. 28, 2008).

353. *Id.* at 9.

354. *Id.* at 11.

355. Alejandra Molina, *Lake Forest Attorney Says ACLU Suit Is Frivolous*, ORANGE CNTY. REG., May 14, 2008, <http://www.oregister.com/articles/aclu-184961-city-suit.html>.

356. Proceedings: Settlement Conference (Session One), *ATLF*, No. SA CV 07-250 DOC (ANx) (C.D. Cal. June 19, 2008); Proceedings: Settlement Conference (Session Two), *ATLF*, No. SA CV 07-250 DOC (ANx) (C.D. Cal. June 20, 2008).

drew near, the county defendants proposed a jury instruction entitled “Undocumented Aliens—Right to Work in the United States,” which suggested that they planned to introduce evidence about plaintiffs’ legal status and discuss immigration law provisions related to undocumented immigrants.<sup>357</sup> The defendants then moved to dismiss the plaintiffs’ claims on the grounds that all three (ATLF, NDLO, and Colectivo) lacked standing.<sup>358</sup> The defendants argued that because ATLF did not have identifiable members, it was not possible to show that they would have standing in their own right, while NDLO and Colectivo had not suffered any organizational harm.<sup>359</sup> Judge Carter, in a blow to the plaintiffs, granted the motion dismissing NDLO and Colectivo; ATLF was allowed to remain in the case based on evidence of actual day laborer membership.<sup>360</sup>

The ACLU lawyers quickly held “an attorney–client meeting on the sidewalk” to discuss “what a bottom-line settlement might look like.”<sup>361</sup> Immediately thereafter—and on the eve of trial—a settlement was reached, in which the county defendants agreed not to “interfere with the right of, or take any action for the purposes of discouraging, day laborers to stand, individually or in groups, on any public sidewalk in the City of Lake Forest, as long as no law is violated.”<sup>362</sup>

Plaintiffs could again declare victory, but at some cost. They had received a negative decision on the important issue of organizational standing and defendants would not agree in the settlement to give plaintiffs any attorney’s fees, which the court later refused to award. Not wanting to abide these negative rulings, the plaintiffs appealed to the Ninth Circuit, which offered a split decision, holding that the ACLU was entitled to attorney’s fees, but continuing to deny that NDLO had standing.<sup>363</sup>

In the end, the Lake Forest case could be counted as a success. The plaintiffs had won a hard-fought battle in the heart of OC to repeal Lake Forest’s ordinance and secure a strong agreement of nonenforcement. In

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357. Plaintiffs’ Motion in Limine to Exclude Any Evidence or Argument Relating to the Immigration Status of Any Witness or Federal Law Regulating the Hiring of Aliens, ATLF, No. SA CV 07-250 DOC (ANx) (C.D. Cal. Aug. 14, 2008).

358. Memorandum of Points and Authorities Regarding Standing, ATLF, No. SA CV 07-250 DOC (ANx) (C.D. Cal. Aug. 13, 2008).

359. *Id.* at 4–12.

360. Order Granting in Part and Denying in Part Motion Regarding Standing, ATLF, No. SA CV 07-250 DOC (ANx) (C.D. Cal. Aug. 18, 2008).

361. Telephone Interview With Hector Villagra, *supra* note 327.

362. Order Regarding Settlement Agreement and Release of Claims at 3–4, ATLF, No. SA CV 07-250 DOC (ANx) (C.D. Cal. Aug. 18, 2008). The defendants admitted no wrongdoing. *Id.* at 2.

363. *Asociación de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1090 (9th Cir. 2010).

addition, the ACLU had prevailed in a new type of case that went beyond a facial challenge to require intensive documentation of the nature of enforcement practice. Villagra acknowledged that it was a learning experience, which they would not necessarily repeat: “We had done a lot on the fly in Lake Forest and compressed a lot into a short time.”<sup>364</sup>

The next time, in Orange, movement lawyers proceeded more deliberately. There, after a legal review prompted by the threat of litigation, the city enacted a panoply of new laws in 2007: requiring identification to access the day labor center, establishing an antisolicitation “buffer zone” around the center, banning solicitation next to streets without parking lanes, and requiring private owners to get a permit to allow day laborers on their property.<sup>365</sup> As the day labor population precipitously declined,<sup>366</sup> the ACLU spent “a year going out and making sure the workers knew who we were and keeping tabs on the police department.”<sup>367</sup> However, instead of suing, lawyers decided to take a wait-and-see approach, educating the workers about where they *could* legally solicit—next to streets with public parking—rather than suing over where they could not.<sup>368</sup>

The ACLU, however, could not afford to wait in Costa Mesa—another OC city with a long history of day labor tensions. After the city agreed to open its hiring center to all workers in the early 1990s, there was a period of fragile détente between the city and day laborers.<sup>369</sup> By the mid-2000s, that was broken as day labor opponents succeeded in pressuring the city to close the center, which opponents called “the illegal alien day-labor center,”<sup>370</sup> despite evidence that nearly all of the laborers were documented.<sup>371</sup> In 2005, the city amended its antisolicitation ordinance (in response to a threatened lawsuit by MALDEF) to ban the “active solicitation” of employment “from any person in a motor vehicle traveling along a street.”<sup>372</sup> Active solicitation was defined as “solicitation accompanied by action intended to attract the attention of a person in a

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364. Telephone Interview With Hector Villagra, *supra* note 327.

365. Ellyn Pak, *Orange Tightens Day Laborer Rules*, ORANGE CNTY. REG., Dec. 11, 2007, <http://www.oregister.com/articles/city-142049-problems-laborers.html>.

366. Eugene W. Fields & Rosalba Ruiz, *Day-Labor Numbers Dropping in Orange*, ORANGE CNTY. REG., Apr. 3, 2008, <http://www.oregister.com/articles/day-144791-laborers-city.html>.

367. *Id.*

368. Eugene W. Fields, *Advocacy Group Finds Way Around Day-Labor Law*, ORANGE CNTY. REG., Nov. 17, 2008, <http://www.oregister.com/articles/day-144322-laborers-streets.html>.

369. See Stephen Wall, *Case Closed: Job Center Stays, City Council Says*, ORANGE CNTY. REG., Dec. 17, 1998, at 18.

370. Brian Martinez, *Center of Contention*, ORANGE CNTY. REG., Apr. 3, 2005, [www.oregister.com/oct/2005/04/03/sections/local/local/article\\_466862.php](http://www.oregister.com/oct/2005/04/03/sections/local/local/article_466862.php) (quoting an email distributed by the California Coalition for Immigration Reform urging support for Costa Mesa’s decision to close the center).

371. Rachana Rathi, *Job Center’s End Won’t Still Debate*, L.A. TIMES, Mar. 17, 2005, at B1.

372. COSTA MESA, CAL., MUN. CODE § 10-354(a) (2005).

vehicle traveling in the street such as waving arms, making hand signals, shouting to someone in a traveling vehicle, jumping up and down, waving signs pointed so as to be readable by persons in traveling vehicles, quickly approaching nearer to vehicles which are not lawfully parked, and entering the roadway portion of a street.”<sup>373</sup> The goal of the ordinance, as stated in its preamble, was to ban solicitation activity that posed public safety risks (by distracting drivers).<sup>374</sup> Yet Costa Mesa Mayor Allan Mansoor also suggested another reason: “The real question I have is . . . do you want a bunch of unknown people loitering in front of your home or soliciting near your home or in front of your business, especially when many of them are here illegally? I think the answer is no.”<sup>375</sup>

Heightened enforcement activity followed,<sup>376</sup> culminating in 2009 with “a sting operation where officers posed as contractors, picked up a van full of workers and drove them straight to” immigration authorities.<sup>377</sup> NDLO came in to organize, but the distance and lack of resources meant that “the follow up with workers wasn’t as often” as organizers believed necessary.<sup>378</sup> As a result, NDLO “called in Colectivo and asked if they could go to the corner.”<sup>379</sup> In February 2010, the ACLU’s Helzer (on behalf of a worker committee and Colectivo) sued to enjoin the ordinance’s enforcement on the ground that its vague proscription against “active” solicitation “suppresses and unduly chills protected speech.”<sup>380</sup> The city agreed to place enforcement on hold pending the resolution of the case, which was itself stayed pending the outcome of the Redondo Beach appeal.<sup>381</sup>

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373. *Id.* § 10-354.2(1).

374. Costa Mesa, Cal., Ordinance of the City Council of the City of Costa Mesa, California, Amending Title 10, Chapter XIX of the Costa Mesa Municipal Code Regarding Solicitation of Employment, Business or Contributions From Streets and Certain Commercial Parking Lots (codified as amended in COSTA MESA, CAL., CODE § 10-354) (on file with author).

375. Cindy Carcamo & Ellyn Pak, *ACLU Sues Costa Mesa Over Day Laborer Issue*, ORANGE CNTY. REG., Feb. 3, 2010, <http://www.ocregister.com/news/city-232185-day-ordinance.html>.

376. See John Earl, ‘Chilling Effect’: Costa Mesa Day Laborers Claim Police Harassment Under Enforcement of Sign Ordinance, ORANGE COAST VOICE, Oct. 5, 2007, at 1, available at [http://www.ocvoice.com/OCV\\_-\\_October\\_2007.pdf](http://www.ocvoice.com/OCV_-_October_2007.pdf).

377. Telephone Interview With Hector Villagra, *supra* note 327.

378. Telephone Interview With Veronica Federosky, *supra* note 258.

379. *Id.*

380. Complaint for Injunctive and Declaratory Relief, Asociación de Jornaleros de Costa Mesa v. City of Costa Mesa, No. SA CV 10-00128 CJC (RNBx) (C.D. Cal. Feb. 2, 2010). NDLO was not named as a plaintiff, but Newman was co-counsel. MALDEF also co-counseled this lawsuit.

381. Ellyn Pak & Cindy Carcamo, *Costa Mesa Won’t Enforce Anti-Solicitation Law*, ORANGE CNTY. REG., Mar. 2, 2010, [http://articles.ocregister.com/2010-03-02/cities/24636049\\_1\\_anti-solicitation-ordinance-day-laborers-naui-huitzilopochtli](http://articles.ocregister.com/2010-03-02/cities/24636049_1_anti-solicitation-ordinance-day-laborers-naui-huitzilopochtli).



## (2) MALDEF's Return

In Costa Mesa, Helzer was joined by MALDEF's Saenz, who had returned to the organization in 2009 when he was named president and general counsel. His return marked the culmination of organizational changes that started soon after he had left. The tenure of Tallman came to an end in 2006, and she was replaced on an interim basis by John Trasviña, a former Justice Department lawyer who had worked early in his career for MALDEF in Washington, D.C. His arrival coincided with that of staff attorney Kristina Campbell, who came from the farmworker program at Phoenix's Community Legal Services.

Campbell quickly became involved in the day labor issue in Baldwin Park, an eastern L.A. suburb, where a site adjacent to Home Depot provoked nuisance claims. The city amended its ordinance on June 8, 2007,<sup>382</sup> after a city attorney review prompted by "two letters from MALDEF questioning the validity of [its old] ordinance."<sup>383</sup> As in other cities in the post-*Burke* period, Baldwin Park attempted to amend its ordinance to focus on public safety concerns, making it unlawful for "any person to solicit while lying, sitting, standing or walking in any place which is a street or parking area."<sup>384</sup> The new ordinance also banned solicitation on the sidewalk "if such use results in there being less than three (3) feet of free and clear passageway in, along, and through such pedestrian area."<sup>385</sup>

NDLON assumed the familiar role as vanguard, with Marco Amador organizing a few dozen workers on the corner in the lead-up to the ordinance's enactment. Campbell coordinated strategy with Amador, both of whom visited the site to discuss the "goals, risks and benefits" of a lawsuit.<sup>386</sup> Campbell recalled that the workers were "aware of the risks" and "very pragmatic," asking: "Will you be the lawyer? Who will be the judge? Will we get arrested? How long will it take?"<sup>387</sup> Campbell also plotted legal strategy with NDLON's Newman and new attorney Marissa Nuncio.

Within MALDEF, Campbell was primarily responsible for handling the case, joined by Valenzuela and new Fried Frank fellow, Gladys Limón. Together,

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382. Nisha Gutierrez, *City Bans Solicitation in Some Areas*, SAN GABRIEL VALLEY TRIB., June 8, 2007, <http://www.highbeam.com/doc/1P2-27130556.html>.

383. Staff Report From Stephanie Scher, City Att'y, to Mayor and City Council Members (May 2, 2007) (regarding Baldwin Park's "commercial solicitation ordinance").

384. BALDWIN PARK, CAL., ORDINANCE No. 1302 (May 2, 2007) (amendment to BALDWIN PARK, CAL., MUN. CODE § 97.136(A)).

385. *Id.* (amendment to BALDWIN PARK, CAL., MUN. CODE § 97.137(A)).

386. Telephone Interview With Kristina Campbell, Assistant Professor of Law, Univ. of the D.C. Sch. of Law (Dec. 2, 2010).

387. *Id.*

they attended city council meetings and tried to negotiate a resolution with the city attorney. Yet those efforts did not produce any “serious discussions” due to the “gung ho” position taken by Baldwin Park Mayor Manny Lozano,<sup>388</sup> who suggested at a hearing on the ordinance that he did not want MALDEF coming to Baldwin Park and telling city officials what to do.<sup>389</sup> Campbell did not view the tension in Baldwin Park as fundamentally a racial one: The city was 80 percent Latino as were all five city council members. Instead, it was about “Latino versus Latino class bias . . . about third-, fourth-, and fifth-generation Chicanos and Latinos not wanting new arrivals to have a place in their city.”<sup>390</sup>

In June 2007, Campbell sued the city on behalf of the Jornaleros Unidos de Baldwin Park and NDLO (which had not yet experienced the standing setback in Lake Forest).<sup>391</sup> NDLO and MALDEF organized a well-publicized rally to announce the lawsuit—replete with workers carrying signs that read (in Spanish) “Reward Hard Work, Do Not Criminalize It” and “Work Yes, Ordinance No!”<sup>392</sup> The complaint followed the familiar model laid down by MALDEF—first arguing content discrimination, then contesting the ordinance’s validity as a time, place, and manner restriction. The one change in strategy this time was triggered by a 2006 Ninth Circuit decision, *ACLU v. City of Las Vegas*,<sup>393</sup> in which the court struck down an ordinance barring solicitation from a redevelopment area as content-based because it prohibited one type of speech (solicitation) while permitting others (nonsolicitation).<sup>394</sup> MALDEF sought to apply the *Las Vegas* ruling to negate the Baldwin Park ordinance on content-discrimination grounds.

It worked. The district court, in an order by Judge Edward Rafeedie (a President Reagan appointee), found the ordinance to be content-based and swiftly issued a preliminary injunction.<sup>395</sup> Immediately thereafter, the city’s outside counsel called Campbell “and said if they repealed are you willing to dismiss?”<sup>396</sup> The lawyers wrote up a stipulation binding Baldwin Park to repeal

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388. *Id.*

389. *Id.*

390. *Id.*

391. Complaint for Injunctive and Declaratory Relief, *Jornaleros Unidos de Baldwin Park v. City of Baldwin Park*, No. CV 07-4135 ER (MANx) (C.D. Cal. June 25, 2007).

392. Fred Ortega, *Day Laborers Protest New Law*, SAN GABRIEL VALLEY TRIB., June 21, 2007, <http://www.highbeam.com/doc/1P2-27132005.html>.

393. 466 F.3d 784 (9th Cir. 2006).

394. *Id.* at 796–97.

395. Order Granting Preliminary Injunction at 3–4, *Jornaleros Unidos de Baldwin Park*, No. CV 07-4135 ER (MANx) (C.D. Cal. July 17, 2007).

396. Telephone Interview With Kristina Campbell, *supra* note 386.

the ordinance, with each party agreeing to bear its own legal costs.<sup>397</sup> MALDEF lawyers told the clients that “the city would voluntarily rescind the ordinance; they would get no damages; but we couldn’t guarantee that the city wouldn’t reintroduce an ordinance in the future. That was satisfactory to them.”<sup>398</sup>

The stipulation was signed less than ten days after the preliminary injunction was issued. But the dismissal took until October 2007 to finalize<sup>399</sup> because the mayor began “making noises about coming back with a constitutional ordinance.”<sup>400</sup> At one point, a new ordinance was noticed for a city council meeting, but Campbell and Newman were able to organize to quash it—encouraging California congresswoman Hilda Solis, who represented the district encompassing Baldwin Park, to speak to Mayor Lozano.<sup>401</sup> After she did, the mayor “took the ordinance off the agenda” and promised to create an organized day labor center.<sup>402</sup> The workers negotiated directly with Home Depot management to create a formal center,<sup>403</sup> out of which “a self-sustaining worker committee” was born in Baldwin Park.<sup>404</sup>

### C. Organizing for Policy Impact: The AFL-CIO Partnership and Home Depot Ordinance

In the midst of these litigation battles, NDLOM turned its organizing efforts to the policy arena, with campaigns to influence interconnected legislation at the local and federal levels. Since the late 1990s, day labor advocates had been working to advance an ordinance to require home improvement stores in Los Angeles to provide access to day labor hiring. The campaign was built around the basic fact that Home Depot was a magnet for day labor activity—and hence a flashpoint of hostility. The idea of enacting an ordinance was conceived as a way to both counteract city efforts to disperse day

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397. Tania Chatila, *Solicitation Ban Overturned*, SAN GABRIEL VALLEY TRIB., Aug. 16, 2007, <http://www.highbeam.com/doc/1G1-167710638.html>.

398. Telephone Interview With Kristina Campbell, *supra* note 386.

399. Stipulation to Dismiss, *Jornaleros Unidos de Baldwin Park*, No. CV 07-4135 ER (MANx) (C.D. Cal. Oct. 5, 2007).

400. Telephone Interview With Kristina Campbell, *supra* note 386.

401. *Id.* (stating that she and Chris Newman spoke to staff members of Representative Solis in Washington, D.C. while they were in town attending an immigrant rights conference). In addition, Solis met directly with the Baldwin Park day laborers, who urged her to help in their struggle; it was on the heels of that meeting that Solis asked Mayor Lozano to withdraw the proposed ordinance. Telephone Interview With Chris Newman, Legal Programs Dir., Nat’l Day Laborer Organizing Network (June 28, 2011).

402. Telephone Interview With Kristina Campbell, *supra* note 386.

403. Tania Chatila, *BP Day Laborers Organize*, SAN GABRIEL VALLEY TRIB., Nov. 8, 2007, <http://www.highbeam.com/doc/1P2-27135561.html>.

404. Telephone Interview With Chris Newman, *supra* note 220.

laborers and to create viable, self-financing centers for organizing. It was linked to the expansion of Home Depot in the L.A. market,<sup>405</sup> which advocates viewed as an opportunity to shift part of the cost of day labor centers to the company.

Narro, while at CHIRLA in the late 1990s, began advocating that Home Depot be required to establish a day labor hiring center as a condition of new store approval by the city. Narro first advanced this idea in Cypress Park, where Home Depot proposed to open a store in the early 2000s. Narro contacted the L.A. councilmember representing the area, Mike Hernandez, who agreed to facilitate a deal. With Hernandez's support, Narro negotiated a license agreement with Home Depot under which the store allowed CHIRLA to operate a day labor center in a city-funded trailer on the store's parking lot.<sup>406</sup> In exchange, Hernandez agreed to facilitate city land use approval. Day labor advocates hoped to convert that victory into formal policy requiring home improvement stores to establish day labor centers. This approach avoided the contentious question of whether day laborers had a First Amendment right to solicit, and instead emphasized the "win-win" scenario of mitigating the externalities of day labor by organizing it in a single location. As Narro put it, "We didn't [go to] Home Depot saying, 'hey, we've got the First Amendment right to be here . . . .' [Instead, we said,] 'let's work on a mitigation plan that benefits you guys and benefits us.'"<sup>407</sup>

Against this backdrop,<sup>408</sup> the L.A. City Council began to move toward passage of an ordinance to require similar day labor centers in connection with all large-scale home improvement stores. In 2005, the planning commission recommended approval of a draft ordinance changing the conditional use process for home improvement stores to require that they set aside areas for day laborers.<sup>409</sup>

However, this effort ran into the buzzsaw of national immigration reform. In 2005, the U.S. House of Representatives proposed a comprehensive immigration overhaul, known as the Sensenbrenner bill.<sup>410</sup> One of its provisions would have required all day labor centers to implement a system of employer

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405. Julie Tamaki, *Hardware Chain Adds a Depot for Hiring Laborers*, L.A. TIMES, Dec. 11, 1997, at B1.

406. License Agreement (Dec. 11, 2000) (on file with author).

407. Presentation by Victor Narro, Project Dir., UCLA Downtown Labor Ctr., to Problem Solving in the Public Interest Seminar, UCLA School of Law (Sept. 4, 2008).

408. In 2004, the Burbank City Council voted to approve a Home Depot store conditioned on the creation of a day labor center. Alex Dobuzinkis, *Day-Laborer Center Sees Mixed Usage*, L.A. DAILY NEWS, May 2, 2004, at N3.

409. CITY PLANNING COMM'N, L.A. CITY PLANNING DEP'T, CITY PLAN CASE NO. 2005-3903-CA (2005).

410. Border Protection, Anti-Terrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong., 2d Sess.

verification, and another—in direct response to the pending L.A. legislation—would have preempted any city ordinance tying home improvement store approval to the creation of day labor centers.<sup>411</sup> Home Depot lobbied for this latter provision, which was inserted by Representative Chris Cannon from Utah.<sup>412</sup>

NDLON went to Washington, D.C. to lobby against the bill, retaining Fred Feinstein, former general counsel to the National Labor Relations Board, to help it make its case to congressional leaders. Alvarado, Newman, and Feinstein met with House Speaker Nancy Pelosi’s staff, but the initial reception was chilly. As Alvarado put it, “No one was going to help day laborers and we had to step in to fight.”<sup>413</sup> Yet NDLON and its immigrant rights allies did not have the power to remove the anti-day labor provisions by themselves and were thus advised to seek reinforcement. As Alvarado recalled sympathetic lawmakers’ blunt political assessment: “If you don’t have [organized] labor with you, we can’t help.”<sup>414</sup> As a result, Alvarado reached out to union leaders in an effort to generate the necessary support.<sup>415</sup>

He succeeded in persuading a delegation from the AFL-CIO to meet with NDLON in Los Angeles. There, Alvarado and other NDLON staff took delegates to the Agoura Hills day labor site, where they happened to witness a discussion among the day laborers over whether they should collectively agree to raise the minimum hourly wage at the corner from \$12 to \$15. When “eighty-five out of one hundred day laborers raised their hands” to increase the minimum wage, AFL-CIO officials recognized the historical parallel to “how the unions began.”<sup>416</sup> According to Alvarado, making this connection between day laborers and the formal union movement was key to generating AFL-CIO support.<sup>417</sup>

From there, the two sides began discussions about a formal affiliation, which was understood to be in both of their best interests: “They needed us and we needed them.”<sup>418</sup> The AFL-CIO was moved by a desire to build support among immigrant workers, which was lost when the Change to Win unions

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411. *Id.* §§ 705, 708.

412. Richard Simon, *Day Labor Site Mandate Riles D.C.*, L.A. TIMES, Apr. 23, 2006, <http://articles.latimes.com/2006/apr/23/nation/na-daylabor23>.

413. Telephone Interview With Pablo Alvarado, *supra* note 127.

414. *Id.*

415. See Victor Narro, *Si Se Puede! Immigrant Workers and the Transformation of the Los Angeles Labor and Worker Center Movements*, 1 L.A. PUB. INT. L.J. 65, 100 (2009).

416. Telephone Interview With Pablo Alvarado, *supra* note 127.

417. *Id.* The relationship between NDLON and the AFL-CIO had begun before the delegation’s visit, dating back to NDLON’s first general assembly, which was attended by representatives of the Laborers’ International Union of North America, an AFL-CIO affiliate. Telephone Interview With Chris Newman, *supra* note 401.

418. Telephone Interview With Pablo Alvarado, *supra* note 127.

broke away.<sup>419</sup> For NDLO, the motivation was “protection”: Alvarado believed that NDLO did not have the power to “protect day labor rights without having [union] support.”<sup>420</sup> In August 2006, the AFL-CIO passed a historic policy, called the National Partnership Agreement Between the AFL-CIO and NDLO, permitting NDLO members to become affiliates of the AFL-CIO.<sup>421</sup> Under this arrangement, the partners agreed to coordinate efforts to enforce immigrant rights at the local level, while pursuing comprehensive pro-immigrant reform at the federal level.<sup>422</sup> Locally, this agreement promised greater resources for NDLO’s ongoing battle to stem the tide of antisolicitation back home.<sup>423</sup>

At the federal level, the AFL-CIO partnership immediately lent crucial muscle to NDLO’s effort to prevent anti-day labor provisions from being included in the Senate’s version of the immigration reform bill,<sup>424</sup> which was introduced in May 2007 as part of a “grand bargain” that included enhanced border security and a pathway to citizenship for undocumented immigrants. During consideration of the bill, Senator Johnny Isakson, a Republican from Georgia, where Home Depot was headquartered,<sup>425</sup> introduced an amendment that would have (like its House counterpart) prevented cities from requiring home improvement stores to establish day labor centers as a condition of opening.<sup>426</sup> Although NDLO leaders were able to secure commitments from all Democratic Senators (except Diane Feinstein of California) to vote against the amendment, they nonetheless worried that a lengthy floor debate over day labor would be politically damaging.<sup>427</sup> To put pressure on Home Depot to withdraw the amendment, NDLO threatened to organize large protests at its Atlanta headquarters. When it did, “Home Depot got scared, . . . and negotiations began.”<sup>428</sup> However, when it became clear that there were not

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419. The Change to Win Federation is composed of unions associated with aggressive organizing within communities of color. It currently includes the International Brotherhood of Teamsters, Service Employees International Union, United Farm Workers of America, and United Food and Commercial Workers International Union.

420. Telephone Interview With Pablo Alvarado, *supra* note 127.

421. National Partnership Agreement Between the AFL-CIO and the National Day Labor Organizing Network (NDLO) (on file with author); see also Jill Tucker, *AFL-CIO, Nonunion Day Laborers Team Up to Fight for Worker Rights*, S.F. CHRON., Aug. 10, 2006, [http://articles.sfgate.com/2006-08-10/bay-area/17305996\\_1\\_afl-cio-worker-centers-day-laborers](http://articles.sfgate.com/2006-08-10/bay-area/17305996_1_afl-cio-worker-centers-day-laborers).

422. Narro, *supra* note 415, at 100.

423. Dziembowska, *supra* note 16, at 152.

424. Comprehensive Immigration Reform Act of 2007, S. 1348.

425. Anna Gorman, *Day Labor Sites at Issue in Immigration Bill*, L.A. TIMES, June 23, 2007, at B3; see also Editorial, *Home Depot Amendment*, N.Y. TIMES, June 22, 2007, <http://www.nytimes.com/2007/06/22/opinion/22fri2.html>.

426. See S. Amend. 1982, Offered by Sen. John Isakson (June 5, 2007), available at <http://www.govtrack.us/congress/amendment.xpd?session=110&amdt=s1282>.

427. Telephone Interview With Chris Newman, *supra* note 401.

428. Dziembowska, *supra* note 16, at 152.

enough votes to end debate on the overall bill, the grand bargain collapsed and the bill died without the amendment being considered.

With the specter of federal preemption lifted, the path was cleared for Los Angeles to reconsider its Home Improvement Stores Ordinance. Indeed, the ugly federal preemption fight was viewed by some day labor advocates as adding momentum to the local effort to pass the ordinance, which became a symbolic test of the city's ongoing power to use land use laws to influence labor standards.<sup>429</sup> Against this backdrop, the L.A. City Council—led by Bernard Parks, who had a large Home Depot store in his district<sup>430</sup>—enacted the Home Improvement Stores Ordinance in August 2008<sup>431</sup>—after four years of advocacy.<sup>432</sup> The ordinance gave the city discretion to require large-scale (100,000 or more square feet) home improvement stores to establish an accessible day labor center in order to obtain a conditional use permit.<sup>433</sup> As of 2009, due to the recession, no Home Depots had yet created day labor centers, although there were thirteen proposed stores pending that would require compliance with the ordinance.<sup>434</sup>

#### D. Litigation Above (and Beyond) Organizing: The Uncertain Appeal of Law

The momentum gained by day labor advocates through 2008 in the litigation and policymaking realms was challenged by a changing economic, political, and legal terrain. The recession devastated the day labor market, particularly as construction came to a halt. While some day laborers returned to their countries of origin, many stayed and tried to scrape by.<sup>435</sup> The political environment changed too, as immigrants again were scapegoated for economic insecurity, and the emerging Tea Party movement made anti-immigration policy a key tenet. Many localities took repressive steps to criminalize immigrants' status and activity, culminating in the passage of Arizona's SB 1070.<sup>436</sup> Among other things, that law banned day laborers and prospective

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429. Telephone Interview With Chris Newman, *supra* note 401.

430. David Zahniser, *Council Targets Large Stores*, L.A. TIMES, Oct. 13, 2007, at B3.

431. L.A., CAL., ORDINANCE 180,174 (Aug. 22, 2008) (codified as amended in L.A., CAL., MUN. CODE § 12.24 (2008)).

432. Anna Gorman, *Day Laborer Rules OKd*, L.A. TIMES, Aug. 14, 2008, at B3.

433. L.A., CAL., MUN. CODE § 12.24U.14(a), (e)(2)(i).

434. Cummings & Butcher, *supra* note 48, at 239.

435. Fernanda Santos, *In the Shadows, Day Laborers Left Homeless as Work Vanishes*, N.Y. TIMES, Jan. 2, 2010, at A16.

436. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

employers from impeding traffic<sup>437</sup>—a provision directly traceable to the ordinances pioneered in the greater L.A. area.

The legal strategy carefully built by Saenz and his colleagues also suffered a major setback in the Redondo Beach appeal.<sup>438</sup> Whereas Glendale had appealed to gain leverage in settlement, Redondo Beach took its resistance one step further by rejecting any notion of compromise.<sup>439</sup> Instead, Redondo Beach sought to set precedent upholding the legality of antisolicitation ordinances by reclaiming the ACORN decision as doctrinal support.

To do so, the Redondo Beach city attorney had to invalidate the careful district court record that had been compiled by Saenz—but did not have to contend with Saenz directly. When Saenz left for the mayor’s office, LCCR’s Rubin and Hwang took the reins of the appeal—joined by pro bono lawyers from the law firm Morrison & Foerster, and supported by MALDEF’s Campbell and Valenzuela.<sup>440</sup> In the appellate process, Hwang was lead attorney, following much of the strategy and substance laid out by MALDEF in “updating the cases and arguments, and adding examples.”<sup>441</sup> Briefing was completed in 2007 and Hwang argued the 2008 appeal as the lawyer most “involved in briefing at that point.”<sup>442</sup>

After the argument but before its decision, the Ninth Circuit issued an en banc opinion in *Berger v. City of Seattle*,<sup>443</sup> which struck down rules that set locations for street performances, permitted only passive solicitation of money, and prohibited performers from communicating with visitors waiting in line at the Seattle Center.<sup>444</sup> The panel handling the Redondo Beach appeal asked for supplemental briefing on the impact of *Berger*, which Hwang viewed as an “optimistic” sign since the logic of *Berger* argued against the Redondo Beach ordinance’s legality.<sup>445</sup>

This optimism proved to be misplaced. The panel, consisting of appellate Judges Kim Wardlaw, a Clinton appointee, Sandra Ikuta, a George W. Bush appointee, and Alaska-based district court Judge Ralph Beistline, another

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437. *Id.* § 13-2928(B) (“It is unlawful for a person to enter a motor vehicle that is stopped on a street, roadway or highway in order to be hired by an occupant of the motor vehicle and to be transported to work at a different location if the motor vehicle impedes the normal movement of traffic.”).

438. Narro, *supra* note 287.

439. Telephone Interview With Chris Newman, *supra* note 220.

440. Answering Brief of Appellees, *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 607 F.3d 1178 (July 10, 2007) (No. 06-55750).

441. Telephone Interview With Philip Hwang, *supra* note 314.

442. *Id.*

443. 569 F.3d 1029 (9th Cir. 2009) (en banc).

444. *Id.* at 1034, 1059.

445. Telephone Interview With Philip Hwang, *supra* note 314; see also Supplemental Letter From Philip Hwang to Molly Dwyer, *Comite de Jornaleros de Redondo Beach* (July 20, 2009).



Bush appointee (sitting by designation), reversed the lower court injunction in a split decision, with Wardlaw issuing a scathing dissent. The majority agreed with the district court that the ordinance was content-neutral, distinguishing the *ACLU v. Las Vegas* case on the ground that the ordinance there had discriminatorily outlawed a particular type of speech—the distribution of handbills requesting financial assistance—rather than prohibiting the general, content-neutral “act of solicitation” as Redondo Beach had done.<sup>446</sup>

The circuit court, however, then departed significantly from the lower court on the issues of narrow tailoring and alternative channels. Relying heavily on *ACORN*, the majority found that day labor solicitation raised the same “risks of traffic disruption and injury” as the tagging activity in that case.<sup>447</sup> It thus concluded that the ordinance “targets only in-person demands directed at occupants of vehicles, and thus specifically addresses traffic flow and safety, the evils Redondo Beach sought to combat.”<sup>448</sup> On the issue of alternatives, the court held that ample means for solicitation still existed since employers “can park legally and respond to solicitations made by individuals on foot without either party to the transaction violating the ordinance.”<sup>449</sup> Wardlaw’s dissent vigorously disputed the application of *ACORN* and the majority’s conclusions as to the reasonableness of the restrictions. Yet the damage had been done. The decade-long path to a definitive ruling on the merits by the Ninth Circuit striking down antisolicitation ordinances had resulted in just the opposite.

The panel decision, however, did not ultimately end the case. By the time the Ninth Circuit panel’s ruling was issued in June 2010, Saenz had returned to MALDEF and he, along with Valenzuela and Limón, worked with LCCR lawyers to draft a petition for rehearing en banc, arguing that review was “necessary to maintain the uniformity of this Court’s precedent, and to preserve the quintessential nature of sidewalks as public fora.”<sup>450</sup> Their key arguments sought to distinguish *ACORN* as inapplicable to sidewalk speech restrictions, apply *Berger*’s content-discrimination analysis, and emphasize the overbroad nature of the Redondo Beach ordinance.<sup>451</sup> In a rare and significant move, a

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446. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 607 F.3d 1178, 1185 (9th Cir. 2010).

447. *Id.* at 1190.

448. *Id.* at 1191.

449. *Id.* at 1192.

450. Petition for Rehearing En Banc at 1, *Comite de Jornaleros de Redondo Beach*, 607 F.3d 1178 (No. 06-55750). In support of the plaintiffs’ petition, an amicus curiae brief was filed on behalf of prominent workers rights organizations, which reinforced the day laborers’ First Amendment arguments. See Brief of Amici Curiae National Domestic Worker Alliance, National Employment Law Project, Restaurant Opportunities Center—United, and Right to the City in Support of Appellees’ Petition for Rehearing En Banc, *Comite de Jornaleros de Redondo Beach*, 607 F.3d 1178 (No. 06-55750).

451. Petition for Rehearing En Banc, *supra* note 450, at 2–20.

majority of active Ninth Circuit judges voted to rehear the case en banc. The case was assigned to an eleven-judge en banc panel, which heard oral arguments in San Francisco on March 21, 2011. The decision—which will punctuate over two decades of day labor advocacy—is pending.

#### IV. JUSTICE ON THE CORNER? THE IMPACT OF DAY LABOR ADVOCACY (SO FAR)

I began by suggesting that conditions were relatively favorable for an impact litigation campaign to challenge antisolicitation ordinances given the legal and organizing capacity to support the campaign, and the nature of the right asserted, which was grounded upon credible free speech precedent and could be voluntarily enforced. There were also challenges (strong countermovement opposition and jurisdictional fragmentation) as well as risks (some adverse precedent combined with the unpredictability of judicial assignments). The current status of the campaign—awaiting an en banc decision from the Ninth Circuit after a negative panel decision in the Redondo Beach case—underscores the significance of those risks. It also points to an inescapable feature of impact litigation campaigns: that their ultimate resolution rests on the luck of the judicial draw.

Yet the ideological support of the ultimate decisionmakers is a necessary, but not sufficient, condition for litigation success, which also requires initiative, resources, and skill. And any evaluation of the judicial outcome must be assessed relative to plausible alternatives. This Part appraises the litigation campaign at this pivotal moment by examining how changing personnel and tactics interacted with evolving policy and politics to shape the urban geography of antisolicitation in the greater L.A. area.

##### A. Who: Building a Legal Field

###### 1. Leadership

The trajectory of day labor advocacy can be understood, in part, through the stories of individual lawyers and activists who assumed leadership positions, built new organizational structures, and invested the time and resources to develop and implement strategies. This leadership was institutionally embedded, occurring within an evolving field in which each success created new opportunities for advocates to take on important roles. However, success ultimately depended on individuals seizing those opportunities to advance the day labor cause. It is useful, therefore, to trace the contributions of the intellectual

architects and organizational entrepreneurs who made choices—often in the face of political and professional risk—to defend day labor.

On the legal side, Cervantes blazed an important early path. A law student organizer in the initial Glendale campaign, she founded CHIRLA’s Day Labor Outreach Project, then launched the L.A. day labor pilot project, after which she helped litigate the Agoura Hills case as an attorney at Public Counsel. Cervantes later became director of the Workers’ Rights Project at CHIRLA, where she led an expansion of the group’s day labor organizing. At each step, she left behind institutional building blocks that were used by advocates who followed.

One of these was Saenz, the chief architect of the federal litigation strategy, which he pushed at a time when “MALDEF was on its own” due to the reluctance of other legal groups after Agoura Hills to wade into antisolicitation litigation. Saenz’s approach built upon the claims advanced in Agoura Hills, but honed and repackaged them in a way he believed would present the most compelling case. His contribution, however, went beyond the development of litigation strategy to also include institution building efforts that extended outside of MALDEF and endured after his departure. Saenz raised money from the Rosenberg Foundation to establish a day labor project at MALDEF, created an internal database of ordinances, made key hires including Helzer, Simons, and Perez,<sup>452</sup> and built partnerships with outside organizations, like LCCR, to facilitate skilled stewardship of the Glendale and Redondo Beach cases in his absence. Finally, his personal capacity to relate to day laborers and value the contributions of organizers helped build relationships that were crucial to creating long-term alliances. This quality was noted by Narro, who observed a “different dynamic” between lawyers and organizers after Saenz’s 2006 departure. While Saenz “really believed in the concept of transparency and working things out, others were paternalistic, creating a lot of tension.”<sup>453</sup> NDLO’s Federosky echoed this sentiment, placing Saenz in the category of lawyers who would “make the effort to earn the workers’ trust, instead of just going and reporting” on the litigation.<sup>454</sup> He imbued this spirit in his protégés, particularly Helzer, who left MALDEF to carry on the day labor struggle in OC. As she put it, a key part of her lawyering involved working with NDLO to build trust with the workers, showing them “that we are here to help you and are not going to expose you, report you, or trick you.”<sup>455</sup>

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452. Saenz also hired Augustín Corral, the paralegal who created the ordinance database.

453. Telephone Interview With Victor Narro, *supra* note 76.

454. Telephone Interview With Veronica Federosky, *supra* note 258.

455. Telephone Interview With Belinda Escobosa Helzer, *supra* note 229.

On the organizing front, Alvarado's rise as NDLO's leader was a crucial movement development. A highly educated former day laborer, he had the unique combination of legitimacy, intellectual vision, and charisma that allowed him to bring together day laborers from around the country to build an independent movement base. A key strength was his ability to operate effectively at different institutional levels. A committed practitioner of popular education, he was able to build grassroots leadership (evident in his success forming day labor committees), thereby "empower[ing] day laborers to be protagonists in their own stories."<sup>456</sup> At the same time, he was a full partner in strategic agenda-setting with lawyers and unions (as his successful alliances with MALDEF and the AFL-CIO highlight), while having the organizational wherewithal to shift day labor organizing from a small program housed at CHIRLA to a separately funded organizational structure, NDLO, which now has fourteen staff members, including two development staff and three attorneys.

The establishment of NDLO created space for other leaders to emerge. Newman, in particular, benefited from Alvarado's trailblazing, which not only served as professional inspiration, but also gave him the organizational opportunity to pursue his calling as an NDLO attorney. Newman used that opportunity to expand NDLO's in-house legal capacity. He now serves as the group's national legal director—responsible for developing strategic partnerships and connecting member organizations with legal services—and is joined by Jessica Karp, a staff attorney working on antisolicitation, and Nadia Marin, former director of the Workplace Project on Long Island, who focuses on employment rights.

As Newman's career path underscores, the exercise of leadership can pay career dividends. This is true of other actors in the movement, particularly Alvarado, who gained widespread attention when featured in a *Time* profile of the "25 Most Influential Hispanics in America" as "the new Cesar Chavez."<sup>457</sup> However, the exercise of leadership has also exacted professional costs. Although Saenz assumed the presidency of MALDEF, he was passed over (after initially being selected) for the position of Assistant Attorney General for Civil Rights in the Obama Department of Justice because of the controversial nature of his immigrant rights advocacy.

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456. Interview With Chris Newman, *supra* note 176.

457. Sonja Steptoe, *25 Most Influential Hispanics in America: Pablo Alvarado*, *TIME*, Aug. 22, 2005, at 53.

## 2. Networks

These individual choices and trajectories were woven into a broader tapestry in which advocates shifted organizational affiliations but continued to engage in day labor networks as a way to promote continuity, share resources and expertise, and maintain solidarity. The networks operated at two levels.

First, there were formal networks established to create opportunities for advocates to make contact and share resources. The original coalition that challenged Glendale's proposed ordinance in 1988 grew out of the Los Angeles Labor Defense Network, which had been created to support low-wage workers across different industries. CHIRLA and then NDLO were both coalitions founded upon organizational networks in order to facilitate exchange among member groups.

Second, there were informal, albeit powerful, personal and professional networks among advocates, which stimulated innovative collaborations and sustained commitment over time. Perhaps the most important collaboration was between MALDEF and NDLO, giving rise to the mobilization template used throughout the campaign. This collaboration was forged by Saenz and Alvarado, but extended by other actors who played significant roles. Narro, who began with Saenz at MALDEF, helped to incubate NDLO as part of CHIRLA's Worker's Rights Project and is now the Project Director of the UCLA Downtown Labor Center, which is the host site for NDLO. Network participation also served to vouch for commitment to the day labor cause, resulting in new career opportunities and sustained professional relationships. For instance, when Villagra left MALDEF to open the ACLU office in OC, his first hire was Helzer, who had been his MALDEF colleague. Simons, who succeeded Helzer at MALDEF, emphasized the enduring personal relationships forged through the day labor network: "There was a deep respect that we all had for each other. I look back at that work as a very special time and a time of growth as a lawyer, as a person, and in terms of my understanding of the world."<sup>458</sup>

### B. What: Strategic Litigation as a Mode of Multidimensional Advocacy

#### 1. Litigation on the Edge of Occam's Razor

How much did the lawyering itself affect the outcome of the day labor cases? Did the choice of venue, the nature of the claims, or the quality of the advocacy affect outcomes on the merits? The answers to these questions are

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458. Telephone Interview With Shaheena Simons, *supra* note 280.

ultimately unknowable since there is no counterfactual to compare, but we may highlight some of the key aspects of the legal strategy and the tradeoffs they involved.

Central to the MALDEF strategy was Saenz's "Occam's Razor" approach:<sup>459</sup> Focus on free speech, not identity-based discrimination; present a single, powerful argument, rather than cluttering the complaint with multiple causes of action. With this strategy in place, the key issue was limiting *ACORN* to its facts.

The benefits of this strategy were apparent. Free speech is a political value that cuts across identity groups, and the "right to work" unfettered by government regulation could be presented as a core value that resonates with both redistributive and libertarian politics. The First Amendment frame would cast day laborers in their most favorable light: active, diligent, and contributing to the economic good by taking jobs no one else wanted. This frame would present day laborers as agents, while "soften[ing] the [case's] edges to gain broader appeal."<sup>460</sup> A discrimination frame, in contrast, would label them victims and suggest that they needed special solicitude. Though that may have been true, it made for a less compelling and possibly less winnable legal argument: Without evidence of intent, a race or national origin discrimination claim was unlikely to prevail.

Yet this approach also risked imposing movement costs. As a "surrogate" for a race or national origin claim,<sup>461</sup> the free speech argument potentially elided what was ultimately at stake in the antisolicitation ordinances by obscuring the real motivation of its proponents: to eliminate immigrant workers from the street. Failing to name that reality in litigation risked undermining its power to mobilize public opinion and advance the broader goal of the immigrant rights movement: promoting a more inclusive immigration policy.<sup>462</sup> If the ordinances were only about speech, and not about membership, then that objective would not be explicitly named.

Ultimately, the legal team made a calculation that the discrimination argument would have less legal traction and be more likely to generate political backlash. The lawyers made a choice to maximize the chances for success on the legal merits to advance the immediate movement goal (eliminating ordinances) rather than to make stronger claims that may have supported the immigrant rights movement's most ambitious agenda.

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459. Telephone Interview With Chris Newman, *supra* note 220.

460. Telephone Interview With Hector Villagra, *supra* note 327.

461. See generally Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992).

462. See Campbell, *supra* note 14.

It is not possible to know whether this choice influenced outcomes, although it is notable that the federal court–civil liberties approach produced a series of district court wins and favorable settlements, as shown in Table 3:

TABLE 3. Outcome of Day Labor Cases in Greater L.A. Area

<i>Juris.</i>	Agoura Hills	L.A. County	Rancho Cucamonga-Upland	Glendale	Redondo Beach	Lake Forest	Baldwin Park	Costa Mesa
<i>Year Filed</i>	1991	1998	2002	2004	2004	2007	2007	2010
<i>Result</i>	Law upheld	Perm. Inj.	Settled + law amended	Settled + law amended	Law stayed pending appeal	Law repealed + settled	Prelim. inj. + law repealed	Law stayed pending appeal

The favorable outcomes all occurred in federal district court; the unfavorable outcomes thus far have been in state superior court (Agoura Hills) and federal appellate court (Redondo Beach). Of the positive outcomes, two resulted in the ordinances being repealed (Lake Forest and Baldwin Park), two resulted in settlements that required cities to amend their ordinances to explicitly permit solicitation on the sidewalk (Rancho Cucamonga–Upland and Glendale), and one (Los Angeles County) resulted in the ordinance being permanently enjoined (though it remains on the books). Redondo Beach’s ordinance is stayed while awaiting the en banc decision, while Costa Mesa is stayed during the pendency of the Redondo Beach case. Of the post–Agoura Hills lawsuits, all involved facial First Amendment challenges, except Lake Forest, which involved an applied challenge to ongoing enforcement practices after the ordinance’s repeal. The first six challenges were to first-generation ordinances—the complete citywide solicitation ban, applying to streets and sidewalks, pioneered by Redondo Beach—while the last two challenged second-generation ordinances—those that attempted to move beyond the complete ban model to more narrowly target solicitation that interfered with traffic (Baldwin Park’s 2007 ordinance banned solicitation that left less than three feet of “free and clear passageway” in pedestrian areas, while Costa Mesa’s prohibits “active” solicitation designed to distract drivers). The free speech challenges to first-generation ordinances emphasized overbreadth, while the challenges to second-generation ordinances claimed vagueness (Glendale’s post-amendment ordinance was also struck down in part on vagueness grounds).

The first four federal court cases (L.A. County, Rancho Cucamonga–Upland, Glendale, and Redondo Beach), involved MALDEF and Saenz at

the district court level; the Redondo Beach appeal was handled by LCCR (although the en banc appeal was again handled by MALDEF upon Saenz's return—raising the question of whether his participation will influence the outcome). The Lake Forest and Costa Mesa cases were brought by the ACLU in OC, and the Baldwin Park case was brought by MALDEF before Saenz's return.

## 2. Lawyering Outside the Box

Although the day labor movement lawyers opted for an impact litigation strategy, they did so as part of a broader multidimensional approach, in which they targeted different advocacy domains (courts, legislatures, media), at different levels (federal, state, and local), with different tactics (litigation, popular education/organizing, and lobbying).<sup>463</sup> Their goals were both defensive (to resist antisolicitation ordinances) and offensive (to promote organized day labor hiring centers while creating a more positive public narrative about day labor). The lawyers engaged in a range of tactics “outside the box” of conventional lawyering—all with an eye toward advancing their goals through the most effective channels available.

There were repeated examples of this multidimensional approach throughout the campaign. In Agoura Hills, lawyers organized students to pose as day laborers and coordinated with local news media to film their arrest. In Ladera Heights, lawyers engaged Supervisor Burke through private meetings and mediation sessions, organized outreach to HomeBase management and law enforcement officials, and conducted a media strategy that included a sharply worded op-ed criticizing the proposed ordinance. After *Burke*, lawyers pursued a model that combined litigation with mass demonstration and street-level organizing. In Redondo Beach, Newman coordinated with the public defender's office to make sure the lawyers understood how the individual prosecutions related to the broader advocacy strategy; he also worked behind the scenes to organize amicus briefs to the Ninth Circuit and to place a *Los Angeles Times* editorial urging the court to strike down the ordinance.<sup>464</sup> Individual lawyers performed other tasks, which included testifying at a city council hearing on the proposed ordinance in Baldwin Park and educating day laborers about where they could legally solicit in Orange. In addition, lawyers such as Narro

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463. Cf. Scott L. Cummings & Douglas NeJaime, *Lawyering for Marriage Equality*, 57 UCLA L. REV. 1235, 1312 (2010) (explaining the multidimensional advocacy approach used by LGBT movement lawyers).

464. Editorial, *Day Laborers and the Law*, L.A. TIMES, Mar. 29, 2011, <http://articles.latimes.com/2011/mar/29/opinion/la-ed-daylabor-20110329>.



played a key role in drafting the L.A. Home Improvement Stores Ordinance and pressing for its enactment.

These activities matched the lawyers' attitudes about lawyering, which were generally framed in multidimensional terms. Helzer, for instance, stated that she approached cases as problems, always asking, "What is the best solution?"<sup>465</sup> The answer could be litigation, but also policy advocacy or organizing depending on the situation. "You try to use all the tools in your toolbox" in "a collaborative effort . . . It can't be from the top-down."<sup>466</sup> Preciado echoed this point, asserting that "you have to have advocacy, organizing [and other strategies] as part of one package to be effective."<sup>467</sup> Newman, a self-described "Freire guy" inspired by the Workplace Project on Long Island, believed in advocacy that was "keyed into different ways that lawyers could help."<sup>468</sup> Villagra had a related perspective on how he framed legal arguments, stating that "we move from mode to mode," adapting underlying legal theories depending on a pragmatic assessment of what is likely to be most effective in a given context.<sup>469</sup>

In general, the lawyers were candid and self-conscious about the limits of litigation, while nonetheless acknowledging its importance in creating space for day laborers to find work. Saenz acknowledged that "litigation is not a stand-alone" because it is "too slow moving and episodic," and that a "sustained effort" to organize workers was an essential part of advancing their rights.<sup>470</sup> Narro put the point more directly: "Lawyers should never litigate without organizing."<sup>471</sup>

From Cervantes's perspective, litigation had been "equally important" as organizing in the day labor movement: While organizing gave the workers a "voice," litigation was "another feather in the quill," necessary to "send a message" to cities that day labor rights would be defended in multiple venues.<sup>472</sup> Similarly, Newman saw the value of litigation in terms of its potential to change public attitudes: "It will be a Pyrrhic legal victory if we only win legal doctrine but don't shift morality and public opinion. The legal argument becomes a vehicle by which you mobilize public relations."<sup>473</sup> Yet he was careful to distinguish between the positive use of litigation in the day labor campaign and the typical civil rights model: "Impact litigators are like surgeons. They identify the problem, sedate the patient, operate, wake the patient up and say, 'You are

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465. Telephone Interview With Belinda Escobosa Helzer, *supra* note 229.

466. *Id.*

467. Telephone Interview With Nora Preciado, *supra* note 319.

468. Telephone Interview With Chris Newman, *supra* note 220.

469. Telephone Interview With Hector Villagra, *supra* note 327.

470. Telephone Interview With Thomas Saenz, *supra* note 130.

471. Telephone Interview With Victor Narro, *supra* note 76.

472. Telephone Interview With Nancy Smyth, *supra* note 67.

473. Interview With Chris Newman, *supra* note 176.

free to go home.’ But the people involved in litigation don’t want to be sedated in the process.”<sup>474</sup> LCCR’s Hwang also viewed day labor litigation as “a model of how public interest litigation should happen” in that the lawyers were not “dictating” to clients, who “took it upon themselves to discuss issues and take ownership and make decisions.”<sup>475</sup> He noted, however, that even in the context of day labor litigation, there were serious challenges, including the difficulty of translating the complexity of litigation into something understandable for clients: “There would be twists and turns, and there is something unnerving about it . . . . In the moment, you don’t know where the case is going to end up.”<sup>476</sup>

Others stressed the value added to litigation by organizing. For instance, Helzer saw organizing as essential to the “intense relationship building that needs to be done” with day laborers in order to help them understand unfamiliar court processes and what they could do to protect their own livelihood.<sup>477</sup> Simons noted that her direct involvement in organizing enriched her personally: “Considering that day laborers are such a vulnerable target of anti-immigrant feelings, I think that they are very brave and very organized and very opinionated. As a young lawyer, that was something that I appreciated and that I learned from.”<sup>478</sup>

While most lawyers believed that litigation was useful, some had a less sanguine view. MALDEF’s Campbell, for example, viewed litigation as

kind of a bandaid that addresses an immediate harm—the inability to seek work—but doesn’t really address the larger goal of integrating day laborers into society and getting rid of stigma based on race, class, and immigration status. Personally, I feel like we won all those cases and it’s great—it puts food on table. But it is micro as opposed to macro. Nothing has changed. Has anything changed at Home Depot? No.<sup>479</sup>

However, while she believed that “as an impact litigation strategy, the impact has been small,” she did not know “if there is a better solution.”<sup>480</sup> Newman, in contrast, emphasized the positive consequences of the Baldwin Park litigation (which Campbell handled): “Jornaleros in Baldwin Park not only beat back an unconstitutional ordinance in court and in the court of public opinion; in the process, they made political alliances with the city council and with Congresswoman Solis, and they eventually gained power to open an organized

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474. Telephone Interview With Chris Newman, *supra* note 220.

475. Telephone Interview With Philip Hwang, *supra* note 314.

476. *Id.*

477. Telephone Interview With Belinda Escobosa Helzer, *supra* note 229.

478. Telephone Interview With Shaheena Simons, *supra* note 280.

479. Telephone Interview With Kristina Campbell, *supra* note 386.

480. *Id.*

hiring site with established minimum wages right there within the Home Depot parking lot.”<sup>481</sup>

While the lawyers expressed a deep respect for and sensitivity to the organizing efforts, the organizers, in turn, tended to support litigation as an essential means to advance the movement’s goals. For NDLO’s Alvarado, “litigation is a tool that we can use to build power.”<sup>482</sup> Federosky saw organizing as essential to give workers “ownership of the struggle,” but also believed that litigation was necessary—even if as a last resort:

I think litigation is a very important tool for workers to be able to defend their lives. They can organize, mobilize, and write letters, but if you have really racist politicians and a racist environment, you have to have lawyers. It is sad, but I think that sometimes the work the lawyers did was essential.<sup>483</sup>

### 3. Standing Conflicts

The post–Agoura Hills cases generally involved a dual-plaintiff structure with NDLO (or CHIRLA in L.A. County) asserting organizational standing and a committee of affected workers claiming direct harm. This structure was designed to facilitate coordination between the legal and organizing components of the campaign. NDLO was formally involved in strategic decisionmaking in the case and was able to serve as a conduit to the worker committees that its organizers helped to establish—providing crucial information to the workers and giving them confidence that the lawsuit was, in fact, advancing their interests. NDLO’s presence also addressed concerns about the transience of workers, who cycled in and out of hiring sites. And, for those workers who assumed leadership roles, the committee structure was designed to shield their identity during discovery in order to protect them from retaliation.

Although this arrangement formalized an integrated law and organizing approach to attacking ordinances, it did raise the potential for divergence between NDLO’s interests—which may have emphasized longer-term movement goals—and that of the workers—who may have been more concerned with the immediate protection of their right to work. However, for the lawyers, such concerns were mitigated in practice by a commitment to transparency and the strength of NDLO’s relationship with the workers, which was seen as promoting a general alignment of interests.

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481. Email From Chris Newman, Legal Programs Dir., Nat’l Day Laborer Org. Network, to author (July 1, 2011) (on file with author).

482. Telephone Interview With Pablo Alvarado, *supra* note 127.

483. Telephone Interview With Veronica Federosky, *supra* note 258.

In terms of transparency, Saenz emphasized that it was important up front “to be as clear and informative as you can about how the process works.”<sup>484</sup> In initial conversations with the client groups, the lawyers were explicit about the tradeoffs and risks of having two organizational plaintiffs. According to Campbell, “We definitely had conversations about how [the workers] were a separate client group from NDLO and that NDLO couldn’t make decisions for them.”<sup>485</sup> Their retainers included language informing both client groups about the potential for conflicts and gaining their consent to the joint representation.

Because NDLO worked to build trust and rapport with the workers, the lawyers tended to view the interests of NDLO and the committees as “totally aligned,”<sup>486</sup> so that the dual-plaintiff structure “seemed very natural.”<sup>487</sup> Because the lawyers retained the worker committee only after it had been organized by NDLO, the workers already “knew and trusted” NDLO as an ally and “believed that NDLO was joining the lawsuit . . . because its goals were same as theirs: to get the ordinance repealed.”<sup>488</sup> The lawyers worked to reinforce this trust by making a fundamental compact with the workers: that they would protect worker identity, even if it meant ultimately dismissing the case. “We made that promise and they trusted us.”<sup>489</sup>

The later OC cases, particularly Lake Forest, challenged this model on legal and practical grounds.<sup>490</sup> Legally, Lake Forest resulted in a setback to the dual-plaintiff structure by denying NDLO organizational standing. Because NDLO had legal staff, however, it was able to maintain its collaboration going forward (in Costa Mesa) by changing its involvement from plaintiff to co-counsel. Further, the lawyers in Lake Forest were unable to completely protect workers’ identity, as the court ruled that basic demographic information (though not immigration status) must be revealed in discovery. As a practical matter, the connections among client groups also produced legal complications and generated some friction. During discovery, ATLF elected NDLO’s Federosky as its representative to be deposed, to which the city objected based on the fact that she was not part of the worker committee. The court resolved the matter by requiring other worker representatives to be deposed in addition

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484. Telephone Interview With Thomas Saenz, *supra* note 130.

485. Telephone Interview With Kristina Campbell, *supra* note 386.

486. Telephone Interview With Thomas Saenz, *supra* note 130.

487. Telephone Interview With Kristina Campbell, *supra* note 386.

488. *Id.*

489. Telephone Interview With Hector Villagra, *supra* note 327.

490. In the Lake Forest case, in addition to NDLO and ATLF, Colectivo Tonantzin was named as a plaintiff. In Costa Mesa, NDLO was not listed as a plaintiff—reflecting the negative standing decision in the Lake Forest case.

to Federosky. But the episode highlighted the fuzzy boundary between ATLF and NDLO as plaintiff organizations. The politics of the Lake Forest case were also more complex with the addition of Colectivo as a plaintiff based on the group's active support of day labor and proximity to the campaign. As a more radical group comprised of mostly college-aged activists committed to more confrontational mobilization, Colectivo did not always see eye-to-eye with NDLO organizers, who, according to Villagra, Colectivo members viewed "as not progressive enough."<sup>491</sup>

### C. When: The Politics of Time

Because the legal campaign has occurred over a nearly twenty-year period, its effectiveness has been influenced not only by the particularities of individual lawyers and strategies, but also by changes in the political and legal environment.

During the course of the campaign, the nature of immigration politics changed significantly. In the 1990s, when day labor advocacy started to grow, day labor organizing was happening in relative obscurity and the booming economy created an essential role for immigrant workers. The following decade, immigration politics began to change. The surge in undocumented immigration provoked an increasingly virulent response from the Minutemen movement, while 9/11 inflamed xenophobia. In this context, day laborers became a "visible symbol (to some) of a broken system."<sup>492</sup> This was underscored in the anti-day labor provisions in the Sensenbrenner bill, which transformed the policy discussion around how to deal with day labor conflicts.<sup>493</sup> The landscape changed even further in 2008, with the economic collapse weakening the argument for the presence of immigrant workers to take "jobs that American workers don't want," and the rise of the Tea Party movement shifting Republicans further to the right on immigration issues.<sup>494</sup>

In this context, day labor advocates have found themselves in an increasingly defensive position. Helzer noted that the "main challenge of the work is just the distraction by the . . . anti-immigrant community. The most hate mail I have gotten is when I do day labor cases . . . [Opponents believe] that the folks we represent are less than human."<sup>495</sup> From Newman's perspective, as the immigration "debate has coarsened, . . . day laborers have been more

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491. Telephone Interview With Hector Villagra, *supra* note 327.

492. Telephone Interview With Chris Newman, *supra* note 220.

493. *Id.*

494. Julia Preston, *Lack of Consensus in Legislatures Slows Tough Measures on Immigration*, N.Y. TIMES, Mar. 14, 2011, at A13.

495. Telephone Interview With Belinda Escobosa Helzer, *supra* note 229.

exposed to abuses of all kinds. There is a slide toward dehumanization” that has forced him to focus his immigration work on defending civil rights.<sup>496</sup>

One question is whether this environment contributed to the changing direction of the litigation campaign, which was disrupted by the appellate opinion in the Redondo Beach case. Given the complex relationship between politics and law, it is impossible to answer this question with any precision. Yet advocates believe that the vilification of immigrants may have influenced the legal outcome in Redondo Beach. Whereas in 2004, when the case was filed, day laborers had not yet come to symbolize the “quintessential illegal population,”<sup>497</sup> by 2010, the tenor of the debate had soured dramatically, leading Newman to believe that “we’d have won [Redondo Beach] 3-0 if it was heard in 2004.”<sup>498</sup>

During the course of the day labor campaign, law changed in addition to politics. Following *Burke* in 1999, some cities began to revise their ordinances to more specifically target traffic safety concerns they associated with day labor. This happened in Baldwin Park and Costa Mesa, and although neither case has turned out negatively for day laborers, both underscore the advocacy challenge of responding to cities’ efforts to create more narrowly tailored restrictions. In meeting the antisolicitation challenge, lawyers continuously seek to mobilize new doctrinal developments in their favor, although this has not been met with the success they had hoped for. In particular, the lawyers were disappointed that the Ninth Circuit ruled against the day laborers in Redondo Beach despite the intervening *Berger* authority, which they believed directly supported their argument that restrictions on solicitation that did not have a safety impact were overbroad.<sup>499</sup>

This relates to a final change: in the ideological composition of judges sitting in the Ninth Circuit. Whereas that circuit has long been deemed one of nation’s most liberal, appointments over the past two decades have changed its ideological tenor.<sup>500</sup> Of the twenty-eight currently sitting active judges, eleven were appointed by Republican presidents (seven by George W. Bush); and of Clinton’s thirteen appointments, five (Silverman, Graber, Gould, Tallman, and Rawlinson) are considered conservative.<sup>501</sup> This ideological shift is reflected in the composition of the Ninth Circuit en banc panel in the Redondo Beach case. The panel was composed of eleven judges (Alex Kozinski,

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496. Interview With Chris Newman, *supra* note 176.

497. Telephone Interview With Chris Newman, *supra* note 220.

498. *Id.*

499. Telephone Interview With Michael Kaufman, Staff Att’y, ACLU of S. Cal. (Dec. 21, 2010).

500. Erwin Chemerinsky, *The Myth of the Liberal Ninth Circuit*, 37 *LOY. L.A. L. REV.* 1 (2003).

501. Emily Bazelon, *The Big Kozinski*, *LEGAL AFF.*, Jan./Feb. 2004, at 23.

Sidney Thomas, Ronald Gould, Marsha Berzon, Jay Bybee, Consuelo Callahan, Carlos Bea, Milan Smith, Jr., Sandra Ikuta, and Randy Smith), seven of whom were appointed by Republican presidents (all but one of whom, Judge Kozinski, by President George W. Bush, including Judge Ikuta, who already ruled against the plaintiffs in the underlying panel decision).<sup>502</sup> This judicial draw underscores the roulette nature of a litigation campaign—and the peculiarity of the Ninth Circuit en banc process, in which a majority of judges may vote to approve a rehearing en banc (suggesting support for reversing the panel), but those actually selected by lottery to sit on the panel (a subset of the total court) may be ideologically disinclined to reverse.

#### D. Where: The Urban Geography of Antisolicitation

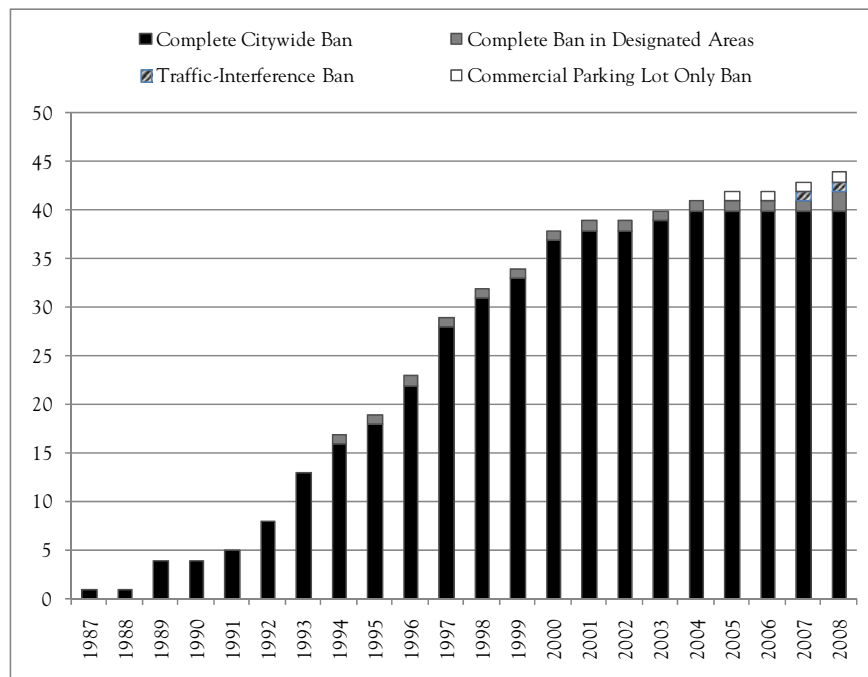
A Ninth Circuit ruling is precisely what MALDEF had planned at the outset of the impact campaign. What it did not anticipate was being in the posture of asking the en banc court to overturn a negative panel decision. The current posture of the litigation campaign makes it a difficult moment to ask whether the strategy has been worthwhile. From the movement lawyers' point of view, a positive ruling (reversing the panel) will validate the legal strategy—though it may also provoke a Supreme Court appeal. A negative decision will legally sanction the antisolicitation ordinance and empower cities to enact more of them.

On the cusp of this important decision, we may evaluate what day labor lawyers have achieved so far, while acknowledging the uncertainty that still lies ahead. In order to assess the impact of the litigation campaign, it is helpful to step back to look at the trend line of antisolicitation ordinances in the greater L.A. area over the past twenty-five years. To do so, I reviewed the enactment of all ordinances in the five-county greater L.A. area (L.A. County, Ventura, San Bernardino, Riverside, and OC), which has 188 jurisdictional units (183 cities and 5 counties). Beginning with Redondo Beach in 1987, these jurisdictions enacted forty-four antisolicitation ordinances; thus, roughly one-quarter (24 percent) of jurisdictions in the area have at some point passed such laws. Figure 2 charts the growth of these ordinances over time. In order to illustrate the trajectory of initial ordinance enactment, it shows the total number of all ordinances passed in their original form; it does not account for ordinances that were later amended or repealed.

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502. United States Court of Appeals for the Ninth Circuit Calendar, [http://www.ca9.uscourts.gov/datastore/calendaring/2011/03/11/sfeb\\_032111.pdf](http://www.ca9.uscourts.gov/datastore/calendaring/2011/03/11/sfeb_032111.pdf).

FIGURE 2. Number of Antisolicitation Ordinances in Greater Los Angeles Area by Year



The rate of increase of ordinances has slowed in the past decade (1999-2008) to 29 percent (from 34 to 44) when compared to the preceding decade (1990-1999), when ordinances grew by 750 percent (from 4 to 34). There are many variables that might explain this decrease, including the fact that the most anti-day labor jurisdictions may have enacted ordinances in the early wave, leaving fewer opportunities for enactment over the last decade. It is notable, however, that the slow-down also coincides with the *Burke* decision and MALDEF's strategy of warning cities not to pass ordinances and suing those that nonetheless did.

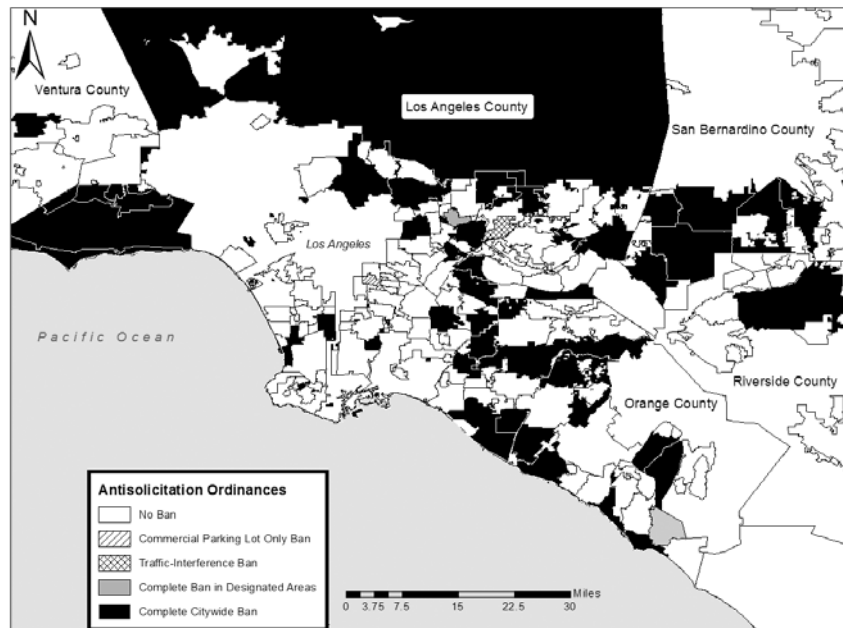
In terms of the types of ordinances passed, there are four basic categories. The first, and most common, is the *complete citywide ban*, which prohibits all solicitation from public right-of-ways, including sidewalks. A second type, the *complete ban in designated areas*, applies the complete ban concept to a specific area in the city where day labor activity occurs. The third type is the *traffic-interference ban*, the second-generation ordinances (like in Costa Mesa and Orange) that apply to sidewalks but target activity claimed to be linked with traffic safety concerns. The fourth type is the *commercial parking lot only*



*ban*, which prohibits solicitation in commercial parking lots without owner permission but does not restrict public solicitation in other areas. As Figure 2 shows, complete citywide bans have been by far the most common over time (40 total).<sup>503</sup> There have been two ordinances originally passed as complete bans in designated areas, one traffic-interference ban, and one commercial parking lot only ban.

What Figure 2 does not show is how ordinances themselves have changed over time *in response to the litigation campaign*, which has resulted in some ordinances being enjoined, repealed, or amended. It is therefore useful to map the geographic impact of the litigation campaign by comparing the status quo in the absence of litigation with the current geography of antisolicitation after litigation. Figure 3 maps the greater L.A. area as it would look if all the ordinances enacted since 1987 remained on the books *in their original form*. It therefore shows the geographic reach of antisolicitation ordinances if the litigation campaign had not occurred.

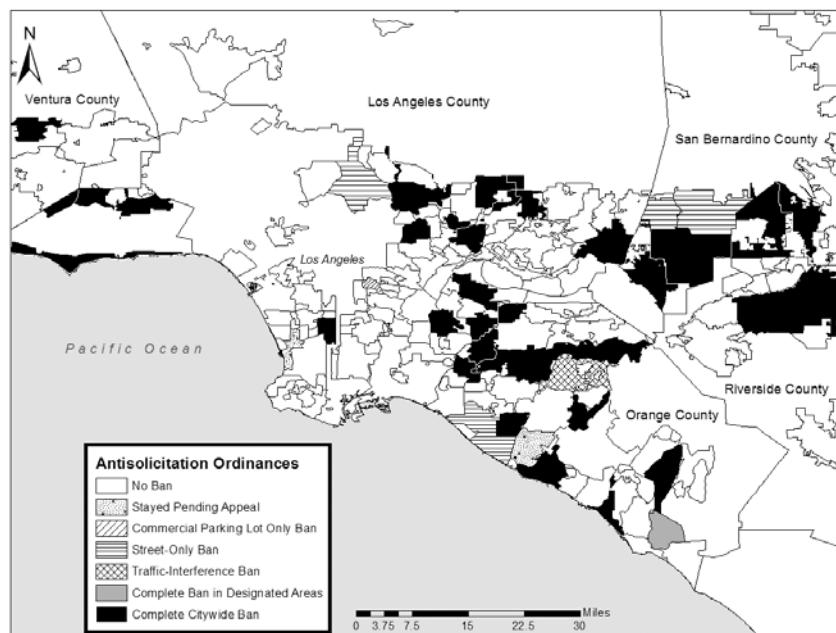
FIGURE 3. Antisolicitation Ordinances in the Greater Los Angeles Area (Prelitigation)



503. Of the jurisdictions originally enacting complete citywide bans, five provided statutory exceptions for solicitation from day labor centers (El Monte, Glendale, Laguna Beach, Pomona, and Rialto). The City of Orange added such an exception when it amended its ordinance in 2007.

Figure 4, by contrast, shows the geography of antisolicitation ordinances *in their current form*, reflecting changes resulting from the litigation campaign so far. It thus eliminates those ordinances that were either enjoined or repealed as the direct result of the litigation campaign, and also shows where ordinances were amended as a result of litigation (or the threat thereof) to be less restrictive.

FIGURE 4. Antisolicitation Ordinances in the Greater Los Angeles Area (Postlitigation)



As this comparison reveals, the litigation campaign has protected a significant area for unrestricted or sidewalk-based solicitation. In all, ten jurisdictions reduced or eliminated restrictions on solicitation as a result of the campaign. Three jurisdictions went from complete citywide bans to no bans: The L.A. County ordinance was enjoined in 2000 as a result of MALDEF's lawsuit; Lake Forest repealed its ordinance in 2007 in response to the ACLU's suit; and Dana Point repealed its ordinance in 2007 after a legal review prompted by contact from MALDEF. One jurisdiction, Baldwin Park (2007), repealed its traffic-interference ban as part of its settlement with MALDEF. Two jurisdictions, Costa Mesa (2005) and Orange (2007) changed their ordinances from complete citywide bans to traffic-interference bans after a legal review prompted by the threat of litigation by MALDEF. (As the map

shows, Costa Mesa's ordinance is stayed pending the en banc appeal of Redondo Beach's ordinance, which is also stayed.) And four jurisdictions changed their ordinances from complete citywide bans to street-only bans: Rancho Cucamonga (2003), Upland (2003), and Glendale (2008) as a result of settlements with MALDEF, and Huntington Beach (2006) after a legal review prompted by the Redondo Beach and Glendale district court decisions.

The maps may understate the impact of the litigation campaign in three ways. First, the threat of litigation, particularly after the success in *Burke*, may have caused some cities to withdraw proposed ordinances—thus preventing their enactment in the first instance. Second, there are some cities with ordinances in which advocates have persuaded local officials to *refrain* from robust enforcement, such as Agoura Hills. In these locations, the ordinances are on the books, but do not prevent solicitation in practice. Third, litigation (or its threat) may have also contributed to cities opting for less repressive responses to day labor activity, such as the creation of day labor centers. Though we do not have systematic data on the relationship between litigation and the development of day labor centers in the greater L.A. area, there is evidence from a national survey of day labor centers suggesting that their growth has corresponded to the period of greatest success in the litigation campaign, with approximately 60 percent of centers opening between 2000 and 2005.<sup>504</sup>

Although much has been achieved through litigation, the scope of antisolicitation is still broad, encompassing an evolving range of different types of ordinances. Of the 40 L.A.-area ordinances currently in force, 32 (80 percent) are still crafted as complete citywide bans.<sup>505</sup> Striking down Redondo Beach's law would nullify these ordinances, leaving a patchwork of less intrusive ones, including four street-only bans (Glendale, Huntington Beach, Rancho Cucamonga, and Upland), two traffic-interference bans (Costa Mesa and Orange), one ban only in designated areas (San Juan Capistrano), and one commercial parking lot only ban (Huntington Park).<sup>506</sup> This would be a dramatic change. Upholding the Redondo Beach ordinance would validate

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504. Nik Theodore, Abel Valenzuela, Jr. & Edwin Meléndez, *Worker Centers: Defending Day Labor Standards for Migrant Workers in the Informal Economy*, 30 INT'L J. MANPOWER 422, 425 (2009).

505. Of these, twenty-nine apply to both workers and employers, two to workers only, and one (Pasadena's) to employers only.

506. See Appendix: Current Status of Antisolicitation Ordinances in the Greater Los Angeles Area, *infra*. Twenty-six cities also have commercial parking lot bans in addition to bans on solicitation in public space. These come in a variety of forms, with seventeen prohibiting such solicitation if the lot owner both establishes a lawful area for solicitation and posts appropriate signs. Eight of the bans prohibit commercial parking lot solicitation only upon posting of signs, one prohibits it with either a lawful area or a sign, and one prohibits it without conditions.

the status quo—and invite other jurisdictions to copy the complete citywide ban model.

### CONCLUSION

Despite the uncertain future of the day labor campaign, it is important to emphasize in conclusion that how we evaluate its outcome has to be framed in relation to the question: As opposed to what? What were the alternative avenues of preserving the right of day laborers to solicit work? Politically, they were weak—and continue to face significant challenges to building political power. If litigation does not ultimately “work” in this context, it seems likely that it reflects not the deficits of litigation per se, but the underlying political vulnerability of day laborers themselves.

In the final analysis, one crucial lesson that the day labor campaign teaches is that litigation hinges on the presence of sympathetic judges in the court of ultimate authority. It can be the case that conditions are ripe for a successful legal mobilization, but in the end, a victory requires persuading judges to adopt the lawyers’ interpretation of law. In the day labor context, the strategy was to bet on a good Ninth Circuit panel, win on the First Amendment argument, and limit the decision to that court by contesting certiorari to the Supreme Court. Now, if the en banc panel rules against the day laborers, lawyers would be forced to choose whether to let the negative precedent stand or risk an appeal to the Supreme Court.

That, of course, is a decision that is not yet ripe, but in making the calculation, lawyers would have to consider the movement consequences of an en banc opinion upholding antisolicitation ordinances. An adverse opinion would, of course, withdraw the threat of legal action from the arsenal of day labor advocacy, forcing activists to rely on political mobilization to defeat ordinances in the policy arena. This would be a major setback, although it does not ultimately suggest that the litigation campaign itself was a failure, since without it there would be more ordinances and they would likely have spread at a faster rate. A decision upholding the legal validity of the ordinance would simply allow cities to continue doing what they have already done.

In the final analysis, it is clear that law has mattered profoundly in the day labor movement: Day laborers are better off now than they would have been without the litigation campaign. But the limits of the campaign also underscore a recurrent truth: Even in highly favorable circumstances, while litigation may serve as a check on abuse, it cannot completely stop power insistent upon repression.

APPENDIX: CURRENT STATUS OF ANTISOLICITATION ORDINANCES IN  
THE GREATER LOS ANGELES AREA

Jurisdiction	County	First Passed	Change Due to Litigation Campaign	Complete Citywide Ban	Street-Only Ban	Traffic-Interference Ban	Complete Ban in Designated Areas	Applies to Workers	Applies to Vehicles	Ban in Commercial Parking Lots	Exception for Day Labor Center
Redondo Beach	LA	1987	Complete citywide ban challenged in 2004; ordinance stayed pending decision in Ninth Circuit en banc appeal	x				x	x		
Costa Mesa	OC	1989	Complete citywide ban replaced in 2005 with current traffic-interference ban (prohibiting "active solicitation"), which was challenged in 2010 and is stayed pending Redondo Beach case			x		x	x	x	
Dana Point	OC	1989	Complete citywide ban repealed in 2007								
Orange	OC	1989	Original ordinance, a complete citywide ban, was amended to focus on traffic interference after legal review in 2007			x		x	x		x
Agoura Hills	LA	1991		x				x	x	x	
Gardena	LA	1992		x				x	x		
La Mirada	LA	1992		x				x	x		
Malibu	LA	1992		x				x	x	x	
Anaheim	OC	1993		x				x			
Laguna Beach	OC	1993		x				x	x	x	x

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Lake Forest	OC	1993	Complete citywide ban repealed after lawsuit filed in 2007; city agreed to nonenforcement in 2008 settlement								
Rancho Cucamonga	SB	1993	Complete citywide ban amended by settlement in 2003 to explicitly permit sidewalk solicitation		x						
Upland	SB	1993	Complete citywide ban amended by settlement in 2003 to explicitly permit sidewalk solicitation		x						
Fontana	SB	1994		x				x	x		
Los Angeles County	LA	1994	Complete countywide ban permanently enjoined in 2000								
Temple City	LA	1994		x				x	x	x	
Tustin	OC	1994		x				x	x	x	
Calabasas	LA	1995		x				x	x	x	
Fountain Valley	OC	1995		x				x	x		
Alhambra	LA	1996		x				x	x	x	
Glendale	LA	1996	Complete citywide ban amended as part of 2008 settlement to explicitly permit sidewalk solicitation		x			x	x	x	x
Moorpark	V	1996		x				x	x	x	
Newport Beach	OC	1996		x				x	x		

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Chino	SB	1997		x				x	x	x	
Duarte	LA	1997		x				x	x	x	
Mission Viejo	OC	1997		x				x	x	x	
Monrovia	LA	1997		x				x	x	x	
Pomona	LA	1997		x				x	x	x	x
Riverside	R	1997		x				x	x	x	
Buena Park	OC	1998		x				x	x	x	
Cypress	OC	1998		x				x	x	x	
El Monte	LA	1998		x				x	x	x	x
La Habra	OC	1999		x				x	x		
Whittier	LA	1999		x				x	x	x	
Azusa	LA	2000		x				x	x	x	
Huntington Beach	OC	2000	Complete citywide ban amended to explicitly permit sidewalk solicitation after legal review in 2006		x			x	x	x	
Ontario	SB	2000		x				x	x	x	
Westlake Village	LA	2000		x				x	x	x	
Norwalk	LA	2001		x				x			
Pasadena	LA	2003		x					x	x	
Rialto	SB	2004		x				x	x	x	x

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Huntington Park	LA	2005								x	
Baldwin Park	LA	2007	Traffic-interference ordinance repealed after lawsuit filed in 2007								
San Juan Capistrano	OC	2008					x	x	x		





