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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Friendly House, *et al.*,

Plaintiffs,

v.

Michael B. Whiting, *et al.*,

Defendants.

CASE NO. CV-10-01061-SRB

PLAINTIFFS' MOTION FOR PARTIAL RECONSIDERATION

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I. INTRODUCTION

Plaintiffs respectfully move for reconsideration of the Court's dismissal of Plaintiffs' First Amendment challenge to Section 5(C) of SB 1070, A.R.S. § 13-2928(C), because the Court's ruling was based on an erroneous interpretation of *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) – a case that Defendant Brewer first raised in her reply and that Plaintiffs accordingly have not had an opportunity to address. The dismissal was premised on the Court's conclusion that under *Hoffman* individuals who are "unlawfully present" and not employment authorized do not have the right to solicit work of any kind. Oct. 8, 2010 Order at 21. That premise is clearly erroneous, because day labor is exempt from the federal immigrant employment regulation scheme and *Hoffman* does not purport to address the lawfulness of such exempted work by individuals lacking employment authorization. Nor does *Hoffman* bar individuals without employment authorization from seeking redress in the courts for alleged violations of First Amendment and other Constitutional rights. Plaintiffs properly stated a cause of action challenging A.R.S. § 13-2928(C) because the provision is an unlawful, content-based restriction on solicitation speech fully protected by the First Amendment. In addition, A.R.S. § 13-2928(C) violates the First Amendment because it targets day laborers and is based on hostility against them. Accordingly, Plaintiffs' First Amendment claim should not have been dismissed.

II. PROCEDURAL HISTORY

Plaintiffs filed this action on May 17, 2010 challenging major provisions of Arizona Senate Bill 1070, as amended, ("SB 1070"), that together purport to create an immigration policy of "attrition through enforcement" in the State of Arizona. Plaintiffs assert in their Complaint that the provisions facially violate the Constitution, including the Supremacy Clause, the First Amendment right to freedom of speech and expressive activity, the Fourth Amendment right to be free from unreasonable searches and seizures, and the Equal Protection and Due Process clauses of the Fourteenth Amendment. On

June 4, 2010, Plaintiffs moved for a preliminary injunction of the provisions pursuant to a number of their claims. On June 18, 2010, various Defendants filed motions pursuant to Federal Rules of Civil Procedure 8, 12(b)(1), and 12(b)(6), seeking dismissal of all of Plaintiffs' causes of action. The Court resolved these motions in its Order dated October 8, 2010.

In its Order granting in part, and denying in part, Defendants' motions to dismiss, the Court dismissed Plaintiffs' First Amendment claim challenging the constitutionality of A.R.S. § 13-2928(C).[1] Plaintiffs respectfully move for reconsideration of this portion of the Court's Order.

III. STANDARD

A motion for reconsideration should be granted "if the district court: (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law." *Circuit City Stores, Inc. v. Mantor*, 417 F.3d 1060, 1064 n. 1 (9th Cir. 2005). *See* Fed. R. Civ. P. 59(e); Local Rule 7.2(g). Here, Plaintiffs submit, the Court clearly erred in its interpretation of law.

IV. ARGUMENT

A. Federal Law, Including IRCA, Does Not Make Employment Authorization a Prerequisite to Performing Day Labor.

The Court erred by dismissing Plaintiffs' First Amendment challenge to A.R.S. § 13-2928(C) based on the Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002).[2] The *Hoffman* decision did not address the legality of

[1] The Court's explanation for this ruling is contained in two sentences of the October 8, 2010 Order: "The Supreme Court has held that individuals who were not authorized to work did not have a right to backpay. *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137, 151 (2002) (noting that 'allowing…[an] award of backpay to illegal aliens would trench upon explicit statutory prohibitions critical to federal immigration policy'). Likewise, individuals who are unlawfully present in the United States and unauthorized to work do not have a right to solicit work. *Cf. id.*" Order at 21.

[2] Defendant Brewer relied on *Hoffman* in support of her motion to dismiss Plaintiffs' First Amendment claim for the first time in her reply brief, and therefore

day labor and does not stand for the proposition that it is illegal for workers without employment authorization to solicit or engage in day labor. Rather, the *Hoffman* decision is predicated on a conflict between the Immigration Reform and Control Act's ("IRCA") employment verification scheme and one of the remedies otherwise available under the National Labor Relations Act ("NLRA"). *See id.* at 147-48; *see generally* Immigration Reform and Control Act of 1986, 8 U.S.C. §§ 1324a-1324b; National Labor Relations Act, 29 U.S.C. §§ 151-169 (2010). As the Supreme Court explained, "[t]his verification system is critical to the IRCA regime." *Id*. However, as discussed below, workers engaging in day labor and soliciting day labor are exempted from IRCA's employment verification regime, and there is no conflict between IRCA and the solicitation of day labor. *See* 8 CFR § 274a.1(f), (h).

The Supreme Court in *Hoffman* held that the National Labor Relations Board lacks the discretion to award backpay to unauthorized workers under the NLRA. 535 U.S. at 151-52. The Court reasoned that such an award conflicted with IRCA's employment verification system, because to gain formal employment, "either the undocumented alien tenders fraudulent identification . . . or the employer must knowingly hire the undocumented alien[,]" either of which would violate IRCA. *Id*. at 148. However, the Court noted that this verification system was limited to employee-employer relations, explaining that it is an "extensive *employment* verification system . . . designed to deny *employment* . . . ." *Id*. at 147 (internal quotation marks omitted) (emphasis added).

In contrast, "Congress purposely excluded independent contractors from IRCA's verification requirements." *Lozano v. City of Hazleton*, 2010 WL 3504538, at *37 (3rd Cir. 2010). As a result, most day laborers are not "employees" under federal law because "[t]he term employee . . . does not mean independent contractors . . . or those engaged in casual domestic employment . . . ." *See* 8 C.F.R. § 274a.1(f); *see also* 8 C.F.R. §

Plaintiffs could not address this argument in their opposition. Accordingly, Plaintiffs now seek this opportunity to fully brief the issue. *See Rowe v. Bankers Life and Cas. Co.*, 2008 WL 5156077 at *8 (D. Ariz. Dec. 09, 2008) (argument not raised in moving papers is deemed waived) (*citing United States v. Romm*, 455 F.3d 990, 997 (9th Cir.2006)).

274a.1(h) ("However, employment does not include casual employment by individuals who provide domestic service in a private home that is sporadic, irregular or intermittent."). Thus, individuals lacking employment authorization can lawfully solicit and engage in work as independent contractors and casual domestic workers. *Id*. Similarly, hiring a day laborer who lacks employment authorization does not violate IRCA, because "[i]t is not the intent of this Committee that sanctions would apply in the case of casual hires (i.e., those that do not involve the existence of an employer/employee relationship)." *See* H.R. Rep. No. 99-682(I), at 12, (1986), 99th Cong., 2d Sess., *reprinted in* 1986 U.S.C.C.A.N. 5649.

Therefore, unlike in the employee-employer relationship at issue in *Hoffman*, the hiring of day laborers does not contravene IRCA's employment regulation scheme because they are exempt from it. *Id*. Consequently, *Hoffman's* discussion regarding "employees" and "employment" verification does not stand for the proposition that individuals lacking employment authorization are prohibited from engaging in day labor work. As a district court in the Ninth Circuit explained when invalidating an anti-solicitation statute aimed at day laborers, "there does not appear to be any law that bars undocumented persons from seeking work." *Comite De Jornaleros De Redondo Beach v. City of Redondo Beach*, 475 F. Supp. 2d 952, 957 (C.D. Cal. 2006), *en banc reh'g granted*, 2010 WL 4069338 (9th Cir. Oct 15, 2010) (NOs. 06-55750, 06-56869) (ordering that the appellate panel's decision is non-citable to courts in the Ninth Circuit).

B. *Hoffman's* Narrow Limitation On A Single Remedy Under One Federal Statute Does Not Preclude Plaintiffs From Challenging A.R.S. § 13-2928(C) on First Amendment Grounds.

Hoffman limited a single remedy in a single statute — it is not a First Amendment case and does not limit the First Amendment rights of any speakers, including unauthorized workers. *See generally* 535 U.S. 137 (no discussion of First Amendment). The Ninth Circuit and other courts have determined that the reasoning used by *Hoffman* to foreclose the remedy of backpay under the NLRA does not foreclose the same remedy

in other statutes where there are differing congressional interests at stake. *See Rivera v. NIBCO, Inc.*, 364 F.3d 1057, 1067 (9th Cir. 2004). Accordingly, *Hoffman* does not bar unauthorized workers' access to the courts and does not preclude them from asserting their First Amendment rights.

1. *Hoffman* Limits a Single Remedy to Workers Without Employment Authorization Under a Single Statute.

Hoffman concerned only whether the National Labor Relations Board had authority to award backpay to workers without employment authorization under the NLRA. *Hoffman*, 535 U.S. at 140. In a narrow holding under the NLRA, the Court determined that the remedy of awarding unauthorized workers backpay for work they did not perform, but would have performed had they not been terminated, would conflict with IRCA's employment verification system and with federal immigration policy enacted through IRCA. *Id.* at 150-51. The Court emphasized that awarding this backpay remedy to employees lacking employment authorization would "unduly trench upon explicit statutory prohibitions critical to federal immigration policy." *Id.* at 151. The Court's ruling was premised on its balance of what it believed to be competing policies underlying IRCA's employment verification scheme and the NLRA's backpay remedy, and it concluded that the former outweigh the latter. *Id*. *Hoffman*, therefore, simply forecloses a single remedy under the NLRA. *Id.* at 152. Consistent with the narrow scope of its ruling, the Supreme Court also left undisturbed it previous holding "that undocumented aliens are employees within the meaning of the NLRA." *Id*. at 150 fn. 4. As other courts have recognized, "[n]owhere in *Hoffman* did the Court hold that IRCA leaves undocumented aliens altogether unprotected by the NLRA." *Agri Processor Co., Inc. v. NLRB*, 514 F.3d 1, 7-8 (D.C. Cir. 2008). Rather, "the Court explicitly . . . said that remedies other than backpay . . . can still be imposed for NLRA violations committed against undocumented aliens." *Id*. at 8; *see also Escobar v. Spartan Sec. Serv.*, 281 F. Supp. 2d 895, 897 (S.D. Tex. 2003) (*Hoffman* "did not specifically foreclose all remedies

for undocumented workers under either the National Labor Relations Act or other comparable federal labor statutes.").

Subsequent court decisions have determined that *Hoffman*'s ruling does not affect the rights of unauthorized workers to state a cause of action and seek remedies in other statutory contexts. Rather, federal law continues to broadly protect the rights of workers without employment authorization, and the policy considerations of other statutes can override those of IRCA.

Thus, the Ninth Circuit has distinguished *Hoffman* in concluding that the Supreme Court's analysis in denying backpay for individuals without employment authorization under the NLRA likely does not preclude backpay awards under Title VII. *See Rivera*, 364 F.3d at 1067 (distinguishing Title VII from *Hoffman*). The *Rivera* Court explained that "the overriding national policy against discrimination would seem likely to outweigh any bar against the payment of backwages to unlawful immigrants under Title VII cases." *Id*. at 1069. Thus, to the extent there is any tension between Title VII's anti-discrimination policies and IRCA's immigration policies, the Ninth Circuit suggested that the tension should be resolved in favor of Title VII's broad protections for workers. *Id*.; *see also, Zavala v. Wal-Mart Stores, Inc*., 393 F. Supp. 2d 295, 322 (D.N.J. 2005) (allowing a backpay award to non-work authorized plaintiffs under Title VII).

For similar reasons, courts have held that an award of backpay to unauthorized workers under the Fair Labor Standards Act ("FLSA") is not precluded by *Hoffman*. *See, e.g., Chellen v. John Pickle Co.*, 446 F. Supp. 2d 1247, 1286 (N.D. Okla. 2006) (citing *Rivera* in upholding FLSA protections of unauthorized workers); *see also Flores v. Albertsons, Inc.*, 2002 WL 1163623 at *5 (C.D. Cal. Apr. 9, 2002); *Liu v. Donna Karan Int'l, Inc.*, 207 F. Supp. 2d 191, 192 (S.D.N.Y. 2002); *Flores v. Amigon*, 233 F. Supp. 2d 462, 463 (E.D.N.Y. 2002); *Galaviz-Zamora v. Brady Farms, Inc.*, 230 F.R.D. 499, 501-03 (W.D. Mich. 2005). The Fifth Circuit has similarly awarded workers' compensation benefits to employees without employment authorization under the Longshore and Harbor Workers' Compensation Act, and held that the award does not conflict with

IRCA's immigration policies. *See Bollinger Shipyards, Inc. v. Dir., Office of Workers' Comp.*, 604 F.3d 864, 878 (5th Cir. 2010) (distinguishing *Hoffman*).

For the foregoing reasons, *Hoffman's* holding is limited to precluding backpay for unperformed work as a remedy under the NLRA, and federal law continues to otherwise protect the rights of unauthorized workers. Accordingly, the Court erred in applying *Hoffman* to Plaintiffs' First Amendment challenge to A.R.S. § 13-2928(C). Plaintiffs are aware of no case where *Hoffman* has been relied upon as authority to bar unauthorized workers from raising a First Amendment claim.

2. *Hoffman* Does Not Close the Courthouse Doors to Individuals Without Employment Authorization Seeking to Vindicate First Amendment Rights.

Hoffman does not bar individuals without employment authorization from asserting their rights under the First Amendment. First Amendment protections "extend . . . to all 'persons' and guard against any encroachment on those rights by federal or state authority" irrespective of their immigration status. *Am.-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1064 (9th Cir. 1995), *rev'd on other grounds*, 525 U.S. 471 (1999) (*quoting Bridges v. Wixon*, 326 U.S. 135, 161 (1945)). "Accordingly, the [Supreme] Court has explicitly stated that '[f]reedom of speech . . . is accorded aliens residing in this country.'" *Id.* (*quoting Bridges*, 326 U.S. at 148)); s*ee also Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, No. CV04-9396 (C.D. Cal. Oct. 4, 2005) (same) (attached to Decl. of Victor Viramontes)). Moreover, because the First Amendment implicates crucial civil rights, dismissal is particularly inappropriate, since ". . .the dominant characteristic of civil rights actions [is that] they belong in court." *See Burnett v. Grattan*, 468 U.S. 42, 50 (1984); *c.f. King v. Zirmed, Inc.*, 2007 WL 3306100 at *5 (W.D. Ky. Nov. 6, 2007) (rejecting "expansive reading of *Hoffman* which would deprive illegal immigrant employees of such things as basic rights to contracts").

As explained above, day labor performed by individuals lacking employment authorization does not contravene IRCA's provisions or policies because day labor is

exempt from IRCA's verification and sanctions scheme. Moreover, to the extent there is any tension between First Amendment rights guaranteed to unauthorized day laborers and IRCA's underlying policy objectives, IRCA must yield. *See United States v. Stevens*, 130 S.Ct. 1577, 1585 (2010) (rejecting contention that First Amendment guarantees should be "balanced" against federal statutory policies); *see also Schneider v. New Jersey*, 308 U.S. 147, 161 (1939) (noting that the freedom of speech is a fundamental right). As the Ninth Circuit explained, IRCA's policy objectives can be trumped by other federal laws and are not absolute. *See Rivera*, 364 F.3d at 1069. Here, amorphous policy concerns cannot trump Plaintiffs' First Amendment rights.

C. Plaintiffs Have Adequately Stated a Claim That A.R.S. § 13-2928(C) Is a Constitutionally Impermissible Content-Based Restriction On Protected Speech.

Because § 13-2928(C) makes it "unlawful for a person who is unlawfully present in the United States and who is an unauthorized alien" to engage in the solicitation of lawful work in a public place, it restricts expression protected by the First Amendment. *See A.C.L.U. of Nevada v. City of Las Vegas*, 466 F.3d 784, 792 (9th Cir. 2006).

Further, § 13-2928(C) is a content-based restriction on speech because "by its very terms" it singles out solicitation speech, a "particular content for differential treatment." *See Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009). Like A.R.S. §§ 13-2928(A) and (B), § 13-2928(C) regulates only solicitation related to work rather than a broad category of solicitation. *See* A.R.S. §§ 13-2928(A), (B), and (C). For the same reasons discussed by the Court in rejecting dismissal of Plaintiffs' claims against §§ 13-2928(A) and (B), § 13-2928(C) is a content-based regulation of speech because its provisions "differentiate[] based on the content of speech." Oct. 8, 2010 Order at 20 (citing *Berger*, 569 F.3d at 1051).

Such content-based regulations conflict with the central purpose of the First Amendment and are presumptively unconstitutional. *See Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004). Given the content-based nature of the speech limitation here, the Court

should reach the merits and decide the statute's legality. Nothing in *Hoffman*, or the cases interpreting it, allows the Court to reach a contrary result.

D. A.R.S. § 13-2928(C) Unconstitutionally Targets the Speech of Day Laborers.

Even if individuals lacking employment authorization did not have a right to solicit day labor, categories of expression generally unprotected by the First Amendment are not "entirely invisible to the Constitution…." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 383 (1992).[3] In such instances, the Supreme Court has held that "the First Amendment imposes . . . a 'content discrimination' limitation upon a State's prohibition of proscribable speech." *Id.* at 387; *see also Chaker v. Crogan*, 428 F.3d 1215, 1223-28 (9th Cir. 2005) (striking statute that criminalized knowingly false complaints against peace officers, but not knowingly false statements in favor of peace officers, even though the defendant had no "right" to file a false complaint). Even when speech can be proscribed, the First Amendment forbids laws that are promulgated based on hostility toward an underlying message. *R.A.V.*, 505 U.S. at 388-89. As such, courts have an important and continuing role in determining whether "the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

Here, day laborers are a target of A.R.S. § 13-2928(C) because it proscribes their primary method for seeking work. *See* Compl. ¶ 108 (describing the practices of day laborers). As Plaintiffs have explained, the legislative intent behind anti-solicitation laws in Arizona was motivated by distaste for the phenomenon of day laborers. *See* Pls.' Mot. for Prelim. Inj. at 31 n.27 (noting statements of Rep. Kavanagh that there are "other ways decent people can get jobs, and certainly standing on the street like a hooker isn't one of them" and that "large congregations of almost exclusively men hanging around" are "a

[3] As with the other arguments in this brief, Plaintiffs did not have the opportunity to address this point in their opposition. In her motion to dismiss opening brief, Defendant Brewer did not contend that unauthorized individuals have no First Amendment right to solicit day labor.

problem—it's unsightly, it's intimidating"). Similarly, Plaintiffs pointed out that Senator Pierce, a sponsor of SB 1070, communicated the idea that there is an "invasion" of "nonwhite aliens pouring across our borders." Complaint ¶¶ 70-71; *see also id.* at ¶ 160 (noting campaign of Maricopa County Sheriffs' Office to systematically target Latino day laborers through pretextual traffic stops). This Court has recognized that in the analogous Equal Protection context, Plaintiffs have adequately articulated a claim that SB 1070 was motivated in part by discrimination against Latinos. Oct. 8, 2010 Order at 15-18. Plaintiffs should not be foreclosed at this early stage of the proceedings from presenting evidence of the Arizona Legislature's hostility towards day laborers as manifested in A.R.S. § 13-2928(C).

V. CONCLUSION

Because *Hoffman* is not a bar to First Amendment claims and federal law permits day labor, Plaintiffs respectfully request that the Court grant this motion for reconsideration.

Respectfully Submitted,

Dated: October 22, 2010

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