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13 **UNITED STATES DISTRICT COURT**  
14 **DISTRICT COURT OF ARIZONA**

15 HECTOR LOPEZ; LEOPOLDO IBARRA;  
16 ISMAEL IBARRA,

17 Plaintiffs

18 v.

19 TOWN OF CAVE CREEK, ARIZONA;  
20 VINCENT FRANCIA, Mayor and Town  
21 Council member of Cave Creek, in his  
22 official capacity; GILBERT LOPEZ, Deputy  
23 Mayor and Town Council member of Cave  
24 Creek, in his official capacity,

25 Defendants.

Case No.

**COMPLAINT FOR INJUNCTIVE  
AND DECLARATORY RELIEF**

**42 U.S.C. § 1983 (FIRST AND  
FOURTEENTH AMENDMENTS)**

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**INTRODUCTION**

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2           1.     This civil rights action challenges Section 72.17(C) of the Cave Creek  
3 Town Code (the “Ordinance”), a content-based restriction on free speech that violates the  
4 First Amendment rights of persons who wish to express their availability for work, to  
5 advertise their business, or to request charitable contributions in public areas in the Town  
6 of Cave Creek.

7           2.     The Ordinance prohibits solicitation, or attempted solicitation, of  
8 employment, business or contributions from occupants of moving or parked vehicles,  
9 while the person soliciting, or attempting to solicit, stands on or adjacent to a street or  
10 highway, which includes sidewalks.

11           3.     The Ordinance is a content-based regulation of free speech and therefore  
12 violates the First Amendment, which applies to the Town of Cave Creek through  
13 incorporation by the Fourteenth Amendment, of the U.S. Constitution. Content-based  
14 regulations are subject to strict scrutiny and are presumptively unconstitutional. The  
15 Ordinance is content-based because it prohibits not the manner of solicitation but  
16 particular messages of solicitation.

17           4.     The Ordinance violates the First Amendment under any legal test. Even if  
18 the Ordinance were considered a content-neutral regulation, it would still be  
19 unconstitutional because it is not narrowly tailored to serve a significant government  
20 interest and fails to leave open ample alternative channels of communication. Indeed,  
21 district courts in the Ninth Circuit have repeatedly struck down similar anti-solicitation  
22 ordinances that were enacted for the stated purpose of regulating traffic safety, on the  
23 ground that they were not narrowly tailored to achieve that purpose.

24           5.     Plaintiffs are day laborers who in the past have successfully solicited  
25 temporary work in the Town of Cave Creek by peaceably standing in public areas and  
26 waiting for homeowners and other employers to pick them up and take them to job sites.  
27 Under the Ordinance, such solicitation is now prohibited. Plaintiffs would violate the  
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1 terms of the Ordinance if they, for example, wave their arms, carry a sign or distribute  
2 fliers, if what they are attempting to convey to occupants of vehicles, through any of  
3 these means, is their availability to work. The First Amendment does not tolerate these  
4 types of content-discriminatory restrictions on speech and expression.

5 **JURISDICTION AND VENUE**

6 6. This Court has jurisdiction over this action under 28 U.S.C. §§ 1331,  
7 1343(a), and 2201, as well as under 42 U.S.C. § 1983.

8 7. Under 28 U.S.C. § 1391(b), venue is proper in this district because  
9 Plaintiffs reside in this district and the events giving rise to the claims occurred and are  
10 occurring in this district.

11 **PARTIES**

12 8. Plaintiff Hector H. Lopez is a longtime resident of Arizona and has lived in  
13 Cave Creek for approximately five years. He is currently employed part-time at the  
14 Good Shepherd Episcopal Church in Cave Creek. Prior to working at the Church, he  
15 successfully solicited employment in the Town by peaceably standing in public areas and  
16 soliciting work from occupants of vehicles. Mr. Lopez currently would like to make his  
17 availability for day work known through means prohibited by the Ordinance in order to  
18 supplement his income. However, because of the Ordinance, Mr. Lopez is prohibited  
19 from engaging in expressive activity indicating his availability to work on sidewalks or  
20 other public areas in Cave Creek. He fears that he could be cited or arrested for violating  
21 the Ordinance.

22 9. Plaintiff Leopoldo Ibarra is a longtime resident of Arizona and currently  
23 resides in Cave Creek. He solicited employment in Cave Creek before the Town passed  
24 the Ordinance by peaceably standing in public areas and making his availability to work  
25 known. Mr. L. Ibarra is currently unemployed and wishes to be able to make his  
26 availability for day work known through means prohibited by the Ordinance. However,  
27 because of the Ordinance, Mr. L. Ibarra is prohibited from engaging in expressive activity  
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1 indicating his availability to work on sidewalks or other public areas in Cave Creek. He  
2 fears that he could be cited or arrested for violating the Ordinance.

3 10. Plaintiff Ismael Ibarra is a longtime resident of Arizona and currently  
4 resides in Phoenix with his family. Mr. I. Ibarra occasionally solicited employment in  
5 Cave Creek until the Town passed the Ordinance. He is currently employed and wishes  
6 to have the opportunity to supplement his income by soliciting employment in Cave  
7 Creek through means prohibited by the Ordinance. However, because of the Ordinance,  
8 Mr. I. Ibarra will not engage in expressive activity indicating his availability to work on  
9 sidewalks or other public areas in Cave Creek. He fears that he could be cited or arrested  
10 for violating the Ordinance.

11 11. Defendant Town of Cave Creek (“the Town”) is an unincorporated  
12 municipality located in Maricopa County. The Town adopts municipal ordinances  
13 through a seven-member Town Council and enforces these ordinances by contract with  
14 the Maricopa County Sheriff’s Office.

15 12. Defendant Vincent Francia is the Town’s Mayor and a member of the  
16 Town Council, which adopts laws and policies for the Town. Defendant Francia is  
17 responsible for the adoption and enforcement of the Ordinance. He is sued in his official  
18 capacity.

19 13. Defendant Gilbert Lopez is the Town’s Deputy Mayor and assists  
20 Defendant Francia with executive duties, including law enforcement policy. Defendant  
21 G. Lopez is also a member of the Town Council, which adopts laws and policies for the  
22 Town. Defendant G. Lopez is responsible for the adoption and enforcement of the  
23 Ordinance. He is sued in his official capacity.

24 **FACTUAL ALLEGATIONS**

25 14. On September 24, 2007, the Cave Creek Town Council adopted the  
26 Ordinance, which states: “No person shall stand on or adjacent to a street or highway and  
27 solicit, or attempt to solicit, employment, business or contributions from the occupant of  
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1 any vehicle.” Town Code § 72.17(C). The Ordinance has been in effect since October  
2 24, 2007.

3 15. A violation of the Ordinance constitutes a civil code infraction not to  
4 exceed \$250. *See* Town Code § 72.17(C) (referencing Town Code § 10.99). However,  
5 anyone who has been twice previously found to have violated any provision of the  
6 Ordinance within the preceding 24 months, shall, in addition to the civil code infraction,  
7 be guilty of a Class 1 misdemeanor and be punished by a fine not to exceed \$2,500, by  
8 imprisonment for a period not to exceed six months, by a term of probation not to exceed  
9 three years, or by any combination of such fine, imprisonment, and probation. Town  
10 Code § 10.99(D).

11 16. Defendants’ public statements suggest that they pursued enactment of the  
12 Ordinance out of a desire to target a perceived problem with illegal immigration in Cave  
13 Creek.

14 17. At the June 18, 2007, Town Council meeting, Defendant Francia appointed  
15 Defendant G. Lopez and another councilman, Ernie Bunch, to address public concerns  
16 about an alleged rise in illegal immigration and day laborers in the Town by way of anti-  
17 loitering and anti-solicitation ordinances.

18 18. In a letter to the editor of the local *Sonoran News* in August 2007,  
19 Defendant G. Lopez acknowledged the Town’s plan to respond to perceptions of illegal  
20 immigration by means of a law prohibiting day laborers from soliciting work in Cave  
21 Creek. Defendant G. Lopez’s letter indicates that he presumed that day laborers are  
22 undocumented immigrants.

23 19. The Ordinance prohibits and regulates speech and other expressive activity  
24 in areas, such as public sidewalks, which are traditional public fora.

25 20. The Ordinance discriminates among types of speech and other expressive  
26 activity on the basis of content, as it prohibits solicitation of employment, business or  
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1 contributions, but does not prohibit solicitation on other topics or speech unrelated to  
2 solicitation, even if expressed in the same time, place and manner.

3 21. The Ordinance proscribes particular messages of solicitation, and not the  
4 manner of solicitation. A violation of the Ordinance depends solely on a person, for  
5 example, saying the “wrong” words (e.g., “I need work”), distributing the “wrong”  
6 leaflets (e.g., “Donate to the Red Cross”), or carrying the “wrong” signs (e.g., “Lemonade  
7 for Sale”).

8 22. The Ordinance proscribes particular messages of solicitation, and not  
9 actions or conduct that the Town might legitimately regulate, such as disruption of  
10 vehicular or pedestrian traffic.

11 23. To enforce the Ordinance, a law enforcement officer must examine the  
12 content of the speech to determine whether it falls within the proscribed category of  
13 solicitation speech. The Town does not have a compelling governmental interest in  
14 regulating speech and expression in the content-based manner achieved by the Ordinance.

15 24. Even if the Ordinance were content-neutral, it would violate the First  
16 Amendment because it is not sufficiently narrowly tailored to serve a significant  
17 governmental interest.

18 25. If Defendants were concerned about traffic safety or maintaining clear  
19 passage on sidewalks, they could have enforced existing state and local laws that were  
20 sufficient for those purposes. Instead of availing themselves of existing regulations on  
21 activities relating to traffic and safety, Defendants enacted the Ordinance as a restriction  
22 on speech that is not narrowly tailored to prevent traffic hazards or other valid  
23 governmental interests of the Town.

24 26. The Ordinance does not leave open ample alternative channels in which  
25 Plaintiffs and other day laborers can express their availability to work in public areas.

26 27. The Ordinance is overbroad and burdens substantially more speech than is  
27 necessary to further any governmental interest.

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1 28. The Ordinance is vague and does not provide adequate notice of what it  
2 prohibits. It fails to define key terms that would indicate where solicitation speech may  
3 be permitted. The Ordinance does not define the terms “solicit, or attempt to solicit,” nor  
4 are these terms explicitly defined in any other sections of the Town Code.

5 29. The Ordinance offers no guidance to persons such as Plaintiffs and other  
6 day laborers as to whether standing in the same vicinity as other day laborers, raising an  
7 arm to signal to a passing construction contractor in a pickup truck, or watching for a bus  
8 to stop on a sidewalk could be construed as an “attempt to solicit.”

9 30. The Ordinance offers no guidance to law enforcement officers as to what is  
10 prohibited under the Ordinance, creating a serious risk of arbitrary and discriminatory  
11 enforcement against those who are or may appear to be day laborers. Plaintiffs are dark-  
12 skinned Latino men, as are the majority of day laborers in Cave Creek, and fear that they  
13 will be targeted if they stand in public areas because of their appearance.

14 31. Plaintiffs and other day laborers have previously successfully obtained and  
15 currently wish to continue to obtain lawful employment performing services, such as  
16 gardening, moving and construction, by expressing their availability to work, while  
17 standing on a public sidewalk or other public way, to persons in vehicles on the street.

18 32. Plaintiffs and other day laborers fear expressing their availability for  
19 employment in the manner they have used in the past because the Ordinance subjects  
20 them to the danger of arrest and fines.

21 33. An actual case or controversy exists between Plaintiffs and Defendants  
22 regarding the constitutionality and legal enforceability of the Ordinance.

23 34. Plaintiffs are entitled to a declaration of their rights with regard to the  
24 Ordinance.

25 **CAUSE OF ACTION**

26 **(42 U.S.C. § 1983 – First and Fourteenth Amendments)**

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1 35. Plaintiffs re-allege paragraphs 1-34 of this Complaint as though fully set  
2 forth here.

3 36. By leaving in place, enforcing, and/or threatening to enforce Section  
4 72.17(C) of the Cave Creek Town Code, Defendants deprive Plaintiffs and others of  
5 rights guaranteed by the First Amendment, as incorporated by the Fourteenth  
6 Amendment, of the U.S. Constitution. Defendants commit these unconstitutional acts  
7 under color or authority of law.

8 37. Section 72.17(C) and all acts by Defendants to enforce its unconstitutional  
9 restrictions on speech therefore should be enjoined.

10 **PRAYER FOR RELIEF**

11 WHEREFORE, Plaintiffs pray that the Court:

12 1. Declare Section 72.17(C) of the Cave Creek Town Code null and void as  
13 unconstitutional because it violates the First Amendment, as incorporated by Fourteenth  
14 Amendment, of the U.S. Constitution.

15 2. Pending a decision on the merits, enter a preliminary injunction that enjoins  
16 Defendants from enforcing Section 72.17(C).

17 3. Upon hearing the merits, enter a permanent injunction that enjoins  
18 Defendants from enforcing Section 72.17(C) in perpetuity.

19 4. Award Plaintiffs, under 42 U.S.C. § 1988, reasonable attorney's fees, costs  
20 and expenses of this litigation; and

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5. Award such further and additional relief as is just and proper.

Dated: March 25, 2008

Respectfully submitted,

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Cecillia D. Wang\*  
AMERICAN CIVIL LIBERTIES UNION  
FOUNDATION  
IMMIGRANTS' RIGHTS PROJECT

Daniel Pochoda  
ACLU FOUNDATION OF ARIZONA

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By: /s/ Kristina M. Campbell

*Attorneys for Plaintiffs*

\*Application for admission *pro hac vice*  
forthcoming.