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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT COURT OF ARIZONA**

10 HECTOR LOPEZ; LEOPOLDO IBARRA;
11 ISMAEL IBARRA,

12 Plaintiffs

13 v.

14 TOWN OF CAVE CREEK, ARIZONA;
VINCENT FRANCIA, Mayor and Town
15 Council member of Cave Creek, in his
official capacity; GILBERT LOPEZ, Deputy
16 Mayor and Town Council member of Cave
Creek, in his official capacity,

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

Dated: March 25, 2008

Respectfully submitted,

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*Application for admission *pro hac vice*
forthcoming.