

THE DAY LABORER DEBATE: SMALL-TOWN, U.S.A. TAKES ON FEDERAL IMMIGRATION LAW REGARDING UNDOCUMENTED WORKERS

*By Margaret Hobbins**

Herndon, Virginia is the latest example of small-town immigration issues exploding into the national debate on illegal immigration.¹ This four square mile town,² population 22,000, was thrust into the national spotlight after a dramatic public reaction to Mayor Michael O'Reilly's proposal to construct a hiring site for day laborers.³ Three months before the center even opened its doors, Herndon and Fairfax County faced a lawsuit⁴ challenging the legality of funding a day labor center that would inevitably extend its services to undocumented immigrants.⁵

Small towns adjusting to significant increases in the immigrant worker population, have become a new battlefield for the immigration debate in the United States, attracting the attention of national interest groups, politicians, and the media.⁶ With limited authority over this decidedly federal arena, local politicians and residents are devising ways to realistically address immigration issues in their communities.⁷

First, this Essay evaluates the validity of charges brought against Fairfax County and Herndon for approving and funding the Herndon Official Workers Center ("the Center"). Second, it discusses the origin of the lawsuit and the day laborer phenomenon. This essay also enumerates the charges filed against Fairfax County and Herndon and examines the federal and state laws these charges implicate. Third, this essay argues that Herndon and Fairfax County do not violate federal immigration law regarding the employment of undocumented workers because the Center does not create an employer-employee relationship with its patrons. It further asserts that the Center's activities do not amount to a violation of the federal prohibition against harboring undocumented immigrants or aiding or abetting unlawful employment activity. Lastly, this essay disputes the charge that the Center's public services violate federal and state law prohibiting the provision of benefits to undocumented individuals. In fact, Fairfax County and Herndon are in full compliance with the law and should be lauded, not sued, for their efforts to promote public safety and restore community harmony through their support of the Herndon Official Workers Center.

BACKGROUND

THE DAY LABORERS

In 2000, the population of immigrants in suburban America surpassed the number of immigrants living in cities.⁸ Changing social and economic factors have caused dramatic increases in the number of immigrants in small towns over the past two decades, nationalizing the immigration phenomenon.⁹ Immigrant workers have been drawn to various industries such as construc-

tion, food processing, and manufacturing, located in small, rural, and suburban communities like Herndon, Virginia.¹⁰ Rapid increases in the number of immigrant workers in these areas, combined with complex labor supply and demand issues, have resulted in growing numbers of day laborers. Day laborers are short-term workers that assemble daily in areas where they are likely to be visible to potential employers. Typical assembly areas include sidewalks, parking lots, and construction supply stores.

The gathering of day laborers in public spaces is not a phenomenon unique to Herndon.¹¹ Day laborers congregate in every region in the United States, comprising a work-force of well over 100,000 on any given day.¹² Although most of the day laborer congregations are unofficial, 21% of day laborers frequent formalized hiring sites.¹³ Sixty-three formalized centers exist around the country and were typically established through the collaboration of community, faith-based organizations, and local governments.

In Herndon, day laborers have presented various challenges to the community. The day laborers have assembled at an unofficial site in the parking lot of the 7-Eleven for the past eight years. Herndon residents have complained about the waiting workers littering and drinking in public, which led to 21 arrests in 2005.¹⁴ The Community Relations Working Group ("the Working Group"), formed by Herndon residents to address these issues, concluded that moving the workers' informal gathering site to a less visible and trafficked area was the best option. Town officials discovered, through publicized missteps of similarly situated cities, that there is no legal way to ban solicitation altogether without creating a zone in which the activity is allowed.¹⁵ So, faced with a choice between the status quo and a tax-payer funded, formalized hiring site, the Working Group opted for the latter, concluding that the hiring hall should be organized and administered by a non-profit organization. Reston Interfaith won a grant from Fairfax County for the Center's operation costs.

HERNDON, FAIRFAX COUNTY, AND PROJECT HOPE AND HARMONY

After a series of contentious town meetings, the Herndon Town Council approved the hiring site proposal on August 17, 2005. The council resolution granted a conditional use permit to Project Hope and Harmony/Reston Interfaith, a coalition of charities and residents who would run the site. The resolution included provisions to: (1) restrict the site to a maximum of 150 workers; (2) limit operating hours; (3) sanction workers trespassing when coming or going to the site; (4) require enforce-

RELEVANT FEDERAL IMMIGRATION LAW AND VIRGINIA LAWS

IMMIGRATION REFORM AND CONTROL ACT OF 1986: UNLAWFUL EMPLOYMENT OF UNDOCUMENTED IMMIGRANTS

In 1986, Congress passed the Immigration Reform and Control Act (“IRCA”) to impede the flow of undocumented immigration into the United States.²⁷ The legislation sought to curtail illegal immigration by curbing the enticement of available employment through employer sanctions for hiring undocumented workers. With the stated intention “to remove a fearful, easily exploitable subclass from our society,”²⁸ the legislation created civil and criminal penalties for hiring, recruiting, and referring for a fee persons unauthorized to work in the United States.²⁹

IRCA mandates the verification of work authorization of every employee hired after November 6, 1986, by requiring employees to produce documents demonstrating their immigration status.³⁰ Compliance is predicated on a “good faith standard” and employers are not liable for hiring someone with fraudulent documents.³¹ IRCA also eliminated the “Texas Proviso,” a

1952 employers’ exemption from prosecution for concealing, harboring, or shielding undocumented immigrants.³² Employers are now criminally liable for knowingly bringing, transporting, concealing, harboring, or shielding an undocumented immigrant from detection.³³

BRINGING IN AND HARBORING UNDOCUMENTED IMMIGRANTS: THE ENCOURAGING CLAUSE

Federal immigration law prohibits the encouraging or inducing of undocumented immigrants to enter or remain in the United States.³⁴ In *U.S. v. Oluwole Oloyede*, the court held that the encouragement clause applied to “any person” — not just employers as it was previously construed.³⁵ In *Oloyede*, the court expanded the statute’s application to an immigration attorney and taxi driver that “showed a distinct pattern of luring well-educated, employed aliens...by offering to sell them a legal status they could not otherwise obtain.”³⁶ The Fourth Circuit of the United States Court of Appeals went beyond the dictionary definition of “encourage” used by the District Court and instead interpreted its meaning from the predecessor harboring statute.³⁷ The Court held that the defendant’s actions to reassure their clients that they would be able to secure status for them through fraudulent means, and that they would not risk detection and deportation, amounted to “encouragement.”³⁸

ment of the Code of Conduct set forth by Project Hope and Harmony; and (5) require that site administrators make information available to employers about the federal prohibitions against hiring unauthorized workers and how to properly verify worker eligibility.¹⁶

The ensuing descent of national actors, interest groups, and politicians into the lives of the 22,000 residents of Herndon and the approximately 100 workers at issue has exposed this relatively ordinary, local solution to intense legal scrutiny.

JUDICIAL WATCH SUES HERNDON AND FAIRFAX COUNTY

On September 1, 2005, Judicial Watch, a conservative political watch-dog group, filed a lawsuit against Herndon, Virginia, later adding Fairfax County as a co-defendant.¹⁷ On behalf of seven named plaintiffs, all of whom are tax-payers and residents of Herndon, Judicial Watch sought to enjoin Herndon and Fairfax County from using taxpayer funds to establish the day laborer site approved by the Herndon Town Council.¹⁸ Herndon responded that the town’s role in establishing the day labor center was a “classic land use decision,” and that Judicial Watch had no standing to contest this decision.¹⁹ Judicial Watch argued that the case concerns two local governments disbursing taxpayer resources to aid undocumented immigrants in violation of federal immigration law. On February 10, 2006, the Circuit Court of Fairfax County ruled that the Complainants had standing to challenge the funding and operation of the Center.²⁰

THE JUDICIAL WATCH COMPLAINT

Judicial Watch’s complaint charged that the use of taxpayer funds and tax-payer-financed resources in furtherance of the Center contravenes federal and Virginia law. Count I of the complaint argued that Herndon and Fairfax County were violating federal law that prohibits harboring undocumented individuals and the unlawful employment of undocumented workers.²¹ The complaint contended that the Center violated the harboring clause by encouraging and inducing undocumented immigrants to come to, enter, or live in the United States while knowing that they are undocumented.²² The complaint also charged that Herndon and Fairfax County were aiding or abetting in the previously listed immigration violations.²³

Lastly, Judicial Watch charged Herndon and Fairfax County with violating federal and Virginia law prohibiting the provision of benefits to undocumented immigrants.²⁴ Judicial Watch consequently concluded that the town and county’s illegal use of taxpayer resources was an ultra vires act²⁵ and is in violation of a Herndon zoning ordinance requiring that all activities taking place in an approved site be lawful.²⁶

With the stated intention “to remove a fearful, easily exploitable subclass from our society,” the legislation created civil and criminal penalties for hiring, recruiting, and referring for a fee persons unauthorized to work in the United States.

AIDING OR ABETTING IN THE COMMISSION OF BRINGING IN AND HARBORING UNDOCUMENTED IMMIGRANTS

Federal law also prohibits aiding or abetting in the commission of bringing, transporting, concealing, harboring, and shielding from detection undocumented immigrants, as well as encouraging or inducing an undocumented immigrant to enter or remain in the United States.³⁹ The elements of aiding or abetting for harboring an undocumented immigrant include: (1) the undocumented person entered or remains in the United States unlawfully; (2) the defendant transported, concealed, harbored, sheltered the person, or encouraged or induced the undocumented person to enter or remain in the United States; (3) the defendant knew or recklessly disregarded that the undocumented person entered or remained in the United States unlawfully; and (4) the defendant's conduct "tended to substantially facilitate" the undocumented person in remaining in the United States unlawfully.⁴⁰

PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY ACT

The Personal Responsibility and Work Opportunity Act ("the Welfare Reform Act"), passed in 1996, eliminated most public benefits for undocumented immigrants.⁴¹ The statute generally renders "not qualified aliens" ineligible for state or local public benefits, yet qualifies this ineligibility with far-reaching exceptions, including emergency health care services, short-term, non-cash, in-kind emergency disaster relief, immunizations and preventive treatment for symptoms of communicable diseases, and "programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General."⁴²

RELEVANT VIRGINIA LAW

In March 2005, Virginia Governor Mark Warner signed legislation requiring state and local governments to check the immigration status of those seeking state and local benefits and to bar undocumented individuals from eligibility.⁴³ The statute follows the lead of the Welfare Reform Act and exempts the life-saving services mandated under the 1996 legislation.⁴⁴ As of January 1, 2006, Virginia law requires proof of immigration status for all benefit applicants over the age of 19.⁴⁵ However, the Virginia Code also contains a statute that allows local boards to disregard the requirements of the Commonwealth public assistance programs and disburse funds "for the purpose of aiding needy persons within their respective counties, cities, or districts."⁴⁶

HERNDON AND FAIRFAX COUNTY HAVE NOT VIOLATED FEDERAL OR STATE LAW BY SUPPORTING THE CENTER

The Fairfax County Circuit Court should dismiss Judicial Watch's complaint because Herndon and Fairfax County have not contravened federal or state law in their support of the Center. First, the Center does not create an employer-employee

relationship with its patrons, and therefore has no obligations under IRCA. Second, the Center's activities do not amount to a violation of the harboring clause. Third, the Center's activities do not amount to aiding or abetting illegal activity. Finally, the Center is exempt from federal laws prohibiting public benefits to undocumented workers, and is thus in full compliance with federal and Virginia state law.

Contrary to Judicial Watch's charge that Herndon and Fairfax County contravene IRCA's employment clause, the Center has no affirmative obligations under the statute and the associated regulations because the Center is not an employer or an employer's agent nor do its activities amount to hiring, recruiting, or referring for a fee.⁴⁷ Due to the fact that the Center does not fall into an employer category and because the Center does not engage in hiring, recruiting, or referring for a fee, it is not required to verify the immigration status of the individuals using its services.⁴⁸

Second, the Center, a self-described non-profit community coalition, is not an employer, employer's agent, nor is it acting directly in the interest of an employer.⁴⁹ "Employer" is defined by the associated regulations as a person or entity that exchanges wages for employee services.⁵⁰ Additionally, the regulations' definition of "employee" also includes an employer's agent or anyone who acts in the direct interest of an employer.⁵¹ The Center is not engaging the labor of any employee by providing an assembly space and social services for the workers. Given that the Center staff and volunteers are not authorized to act on behalf of potential employers, the Center cannot be considered an agent of potential employers who hire the workers at the Center.

Moreover, the Center is not acting in the direct interest of potential employers by operating the Center.⁵² In fact, the Center's policy of recordkeeping works directly *against* the interests of many unscrupulous employers of day laborers by recording the employer's contact information and the duration and pay of the job. To hire a worker from the Center, the employer must fill out a worker request form and sign a liability waiver acknowledging that the documents will be confidential unless subpoenaed or if a dispute arises with the worker. This paper-trail deters employers from failing to pay their workers, which is a common occurrence for workers who gather at unregulated day labor sites.⁵³ Furthermore, the Center's mission statement explains that they work in the general interest of the community, not in the direct interest of employers. Thus, the Center is not an employer or agent of an employer and has no obligations under IRCA.

Not only is the Center not an employer by any definition, but its activities do not amount to the prohibited hiring, recruiting, or referring for a fee listed in IRCA's employment clause.⁵⁴ The Center, as described by the conditional use permit granted by Herndon, is a place for workers to assemble to find casual, sporadic, or temporary work and connect with potential employers for this work.⁵⁵ The associated regulations define hiring as "the actual commencement of employment of an employee for

wages or other remuneration.”⁵⁶ The actual “hire” occurs when a worker enters into a contract, subcontract, or exchange.⁵⁷ In *Jenkins v. Immigration and Naturalization Service*, the Ninth Circuit held that the time of hire was the time at which the worker commenced his actual labor.⁵⁸ No worker will commence his labor at the Center, which, according to the regulations and judicial interpretation, means that no one will be hired at the Center.⁵⁹

Furthermore, the regulations define recruiting as sending an individual or their documentation to another person in order to receive remuneration for finding the individual employment.⁶⁰ Referring for a fee involves “soliciting” a person and then referring them for employment on a fee basis.⁶¹ The Center does not fall into either of these related employment categories because: (1) the Center is a non-profit organization and does not receive remuneration from either the workers or the employers; (2) the Center does not send people or documentation to employers; and (3) the Center does not solicit workers.⁶² As stated in the Center’s liability waiver, the Center limits its involvement in the worker-employee relationship to operating a meeting place and matching skill needs and skill sets. Therefore, the Center’s activities are not equivalent to hiring, recruiting, or referring for a fee.

Additionally, Herndon and Fairfax County are not harboring undocumented immigrants by encouraging or inducing undocumented immigrants to come to, enter, or reside in the United States. Successful prosecutions of the encouraging section of the harboring clause generally involve issues such as the sale of fraudulent documents and people smuggling by individual profiteers — a far cry from a non-profit coalition operating a hiring hall.⁶³ Thus, the Center’s operations do not amount to encouraging under the harboring clause, and Herndon and Fairfax County do not satisfy the knowledge element of the statute.⁶⁴

Judicial Watch claimed that operation of the Center “encourages immigrants to enter and stay in this country illegally.”⁶⁵ Judicial Watch argued that by providing an assembly site for workers to obtain employment, the Center facilitates employment for undocumented immigrants and this encourages their stay.⁶⁶ However, this provision of a general public service does not amount to the level of encouragement prosecuted under the act, which is more akin to enabling than the common definition of encouragement.

The Fourth Circuit in *Oloyede*, found that selling fraudulent documents and immigration papers amounted to encouraging immigrants to live in the United States illegally. The key difference between the defendants’ actions in *Oloyede* and the Center’s services is that the *Oloyede* defendants targeted undocumented individuals and engaged in illegal activity to enable the

individuals to remain in the United States.⁶⁷ The Center, on the other hand, is making a service available to the public, whose population inevitably includes individuals that lack work authorization.⁶⁸ Under Judicial Watch’s desired application of the encouraging section of the harboring clause, the public bus service providing transportation for many of the workers going to the Center could also be charged with encouraging the stay of undocumented immigrants.

Knowledge of unlawful immigration status is an essential element to the encouraging section of the harboring clause.⁶⁹ Judicial Watch argued that Herndon and Fairfax County were “aware and reasonably knew” that the Center would assist individuals unauthorized to work in the United States.⁷⁰ Three principal facts are provided to substantiate the claim that Herndon and Fairfax County had “knowledge”: (1) the town was allegedly aware of the Fairfax County Day Labor Survey, which found that the majority of day laborers are undocumented; (2)

members of the Herndon Town Council who disapproved of the site stated that funding the Center would endorse illegal immigration; and (3) Herndon is requiring the Center to distribute information informing employers that the hiring of undocumented workers is illegal.⁷¹ However, this evidence of knowledge is attenuated, unlike the clear indication of knowledge demonstrated in *Oloyede*.

The Court in *Oloyede* was presented with evidence that unquestionably demonstrated that the defendants had knowledge of the unlawful immigration status of the people to whom they sold fraudulent documents.⁷² The contention that Herndon and Fairfax have knowledge of day laborers’ unlawful status, a contention partly based on an anonymous survey, contrasts sharply with the salient facts of *Oloyede*. In *Oloyede*, the defendants were informed that their clients were undocumented, possessed fraudulent documents, and the defendants assured their clients that paperwork fabrication was necessary to remain in the United States.⁷³ The fact that Herndon and Fairfax County distribute material instructing the Center users on how to obey the law further distinguishes *Oloyede*, in which the defendants instructed an individual to break the law by committing fraud in an immigration hearing.⁷⁴

Judicial Watch also charged that the operation of the Center violates the Welfare Reform Act, which prohibits the provision of state and local benefits to undocumented individuals.⁷⁵ However, this charge is not supported because the Welfare Reform Act exempts the specific category of public services under which the Center falls.⁷⁶ Under the statute’s final exception, the Attorney General was required to specify exempted program categories, providing that the programs: (1) deliver in-kind services at the community level; (2) do not condition assistance

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upon recipient's income or resources; and (3) are necessary for the protection of life or safety.⁷⁷ The 2001 Notice of Final Order from the Attorney General, specifying the exempted program categories, included activities intended to protect the safety of workers, children, adolescents, and residents, as well as other necessary programs that protect life and safety in general.⁷⁸ The Center fits directly within both of these categories. The Center delivers non-cash, in-kind services to the community at large⁷⁹ and these services are open to all members of the public seeking daily employment and are not contingent upon financial need.⁸⁰ Most importantly, the Center's operations protect the lives and safety of the Herndon public and the workers seeking day labor.⁸¹

The Center protects the life and safety of workers and community residents by providing a safe location with appropriate facilities for day laborers to assemble.⁸² The Center was specifically designed to eliminate the safety hazards of workers and employers congregating at the Herndon 7-Eleven, where the assembly caused traffic congestion and risked car accidents and injury to workers and residents.⁸³ Center guidelines address other safety concerns voiced by residents, including littering, intimidating patrons, and urinating and drinking in public. Additionally, by providing workers and employers an enclosed space, both residents and workers are less threatened by unwanted attention.⁸⁴

The Center also reduces safety risks to workers on the job by increasing employer accountability.⁸⁵ Day labor itself is one of the most dangerous occupations in the United States.⁸⁶ A 2006 national study stated that one in five workers had been injured on the job and that 75% of day laborers found their work to be unsafe.⁸⁷ In the Midwest, where day laborers engage in more roofing activities, 92% of workers reported unsafe working conditions.⁸⁸ Many of these unsafe conditions are not revealed to workers until they discover them upon arrival at the work site.⁸⁹ As stated above, part of the Center's policy is to retain the worker request form, which provides evidence of an employment relationship in the event of an injury and potential workers' compensation claim. With an established record, workers are less likely to endure abuse and life-threatening conditions out of fear that unaccountable employers will fire them and withhold pay for complaining. Therefore, the Center helps to prevent employers from taking advantage of an informal employment relationship and the worker's precarious financial position.⁹⁰ The Center's recordkeeping establishes an air of ac-

countability that is "necessary for the life and safety" for all day laborers.⁹¹ For the foregoing reasons, the Center is exempt from the prohibition on providing public benefits to undocumented immigrants.

Additionally, the Center provides services that are necessary to protect the life and safety of all Herndon and Fairfax County residents by promoting community stake-holding among the immigrant worker community.⁹² Undocumented workers are generally frightened that police and local authorities will arrest and eventually deport them for lacking documentation, which results in a powerful disincentive to report crimes.⁹³ Undocumented workers frequently witness crimes and are themselves victimized, but their fear prevents local authorities from benefiting from assailant descriptions, identifications, and physical evidence.⁹⁴ The Center encourages workers to become community stakeholders and report instances of witnessed or personally experienced victimization.⁹⁵ The Center is building community trust and creating stake-holders out of *all* of the community members, regardless of socioeconomic or immigration status.⁹⁶ In this way, the Center serves the social purpose that the Attorney General intentionally exempted from the Welfare Reform Act prohibitions.

Herndon is a reluctant microcosm of the contentious national immigration debate. The town created a local solution to an entrenched, complex national conflict - the seemingly impossible tension between the demands of the American economy, the rights of immigrants who supply its labor, the concern of communities facing rapidly changing demographics, and the federal government's capacity and willingness to enforce immigration law.⁹⁷ Herndon's solution, a day labor hiring site, does not contravene federal or state law. Opponents to day labor hiring sites should not sue Herndon for using lawful means to ameliorate social turbulence. Rather, they should lobby Congress for a comprehensive legislative solution.⁹⁸

More is at stake in Herndon than residents' complaints about day laborers at the local 7-Eleven and the debate over I-9 forms. The safety and dignity of each member of the diverse Herndon community is jeopardized when misperceptions and fear trump social utility. Day laborer centers should be praised, not sued, because they accomplish what the federal government has not accomplished - a realistic step towards resolving the national immigration quandary.

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ENDNOTES

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¹ See *Analysis: Day Laborer Centers Spark Immigration Debate* (Nat'l Public Radio Broadcast Aug. 19, 2005) (transcript on file with author) (reporting that Herndon's day labor issue quickly expanded into a national debate on immigration when immigration restrictionists nation-wide "picked up the drumbeat," leading many politicians into the fray).

² See Lisa Rein, *Hate Calls Swamp Herndon Town Hall: Radio Host Had Urged Day-Labor Site Protests*, WASH. POST, Aug. 6, 2005, at B1 (providing geographic context in describing Herndon's struggle to address the day laborer issue).

³ See Lisa Rein, *Herndon Weighs New Day-Laborer Site*, WASH. POST, Aug. 4, 2005, at B9 (noting the surprisingly small population of Herndon given the national attention that the town received).

⁴ See Karunakaram, et al. v. Town of Herndon, 2006 Va. Cir. LEXIS 33 (Feb. 10, 2006); Carol Morello, *Suit Filed To Block Herndon Labor Site*, WASH. POST, Sept. 2, 2005, at B8.

⁵ In this essay, the term "immigrant" applies to both temporary migrants and permanent noncitizens in the United States. Use of the term "alien" is limited to statute and case citations, as it can be considered derogatory and socially harmful. See Kevin R. Johnson, "Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons, 28 U. MIAMI INTER-AM. L. REV. 263, 264-65 (1997) (arguing that the term "alien" has severe social ramifications: the classification of noncitizens as "other" and inflaming nativist sentiment).

⁶ See FARMINGVILLE (PBS P.O.V 2004) (Jun. 22, 2004) (presenting the story of the Long Island suburban town of Farmingville, where the population of Mexican day laborers gathering on street corners caused an uproar in the local community, including a "hate-based" attempted murder of 2 two Mexican day laborers, leading the town into a long debate about federal immigration law and local solutions).

⁷ See *Chae Chan Ping v. U.S.*, 130 U.S. 581, 604 (1889) (establishing the federal power over immigration); *Hines v. Davidowitz*, 312 U.S. 52, 63 (1941) (underscoring the federal power of immigration and the doctrine of preemption of state or local government attempts to legislate immigration); See Paul Vitello, *As Illegal Workers Hit Suburbs, Politicians Scramble to Respond*, N.Y. TIMES, Oct. 6, 2005, at A1 (discussing the creation of hiring sites in Herndon, Virginia and citations for overcrowded housing in Danbury, Connecticut as examples of local government efforts to address and regulate large numbers of immigrant workers).

⁸ See Vitello, *supra* note 7.

⁹ See Kevin R. Johnson, *The End of "Civil Rights" as We Know It? Immigration and Civil Rights in the New Millennium*, 49 UCLA L. REV. 1481, 1495 (2002) (analyzing emerging civil rights dimensions to immigration law and discussing the migration patterns that are contributing to immigration's transformation from a regional to a national issue).

¹⁰ See Vitello, *supra* note 7 (including Herndon, Virginia as one of the latest news-worthy small towns tackling national immigration issues).

¹¹ See *Analysis: Day Laborer Centers Spark Immigration Debate*, *supra* note 1 (reporting on the day laborer debate in Herndon and referring to day labor gatherings around the country, commenting that there are dozens of formal hiring sites nation-wide).

¹² See ABEL VALENZUELA, JR., NIK THEODORE, EDWIN MELÉNDEZ, AND ANA LUZ GONZALEZ, *ON THE CORNER: DAY LABOR IN THE UNITED STATES* (Jan. 2006), available at <http://www.sscnet.ucla.edu/issr/csup/index.php> (presenting the first nationwide study on day labor, which includes information about day labor population concentration: 42% of day laborers are in the West, 23% in the East, 18% in the Southwest, 12% in the South, and 4% in the Midwest).

¹³ See *id.* at 4.

¹⁴ See Carol Morello, *Herndon Roiled by Site for Laborers*, WASH. POST, July 31, 2005, at C7 (weighing the pros and cons of moving the workers gathering site to a formalized location).

¹⁵ See All Questions and Responses, Herndon Town Meeting, July 15, 2003, Question 27a-h (on file with author) (referring to the Glendale, California ordinance banning solicitation [hereinafter *Herndon Town Meeting*]; see also Coalition for Humane Immigrant Rights of Los Angeles et al. v. Yvonne Braithwaite Burke et al., 2000 U.S. Dist. LEXIS 16520, *43 (D. Cent. Cal. 2000) (declaring unconstitutional county code sections formulated to impede the unofficial assembly of day laborers seeking work because the ordinance was not narrowly tailored to serve a significant government interest).

¹⁶ See Resolution for a Conditional Use Permit for a Temporary Day Worker Assembly Site (on file with author) (presenting the council resolution granting a Conditional Use Permit and noting provisions for the site).

¹⁷ See Judicial Watch, *Judicial Watch Leads Fight Against Illegal Day Laborer Sites*, available at <http://judicialwatch.org/herndon> (reporting that Judicial

Watch filed the suit against Herndon to prevent the establishment of a tax-payer funded zone that services undocumented immigrants).

¹⁸ See Am. Bill of Compl. For Declaratory and Injunctive Relief, available at <http://judicialwatch.org/archive/2005/fairfax-motion-as-filed.pdf>, 43-57 (enumerating the four causes of action against Fairfax County and Herndon (1) illegal use of taxpayer funds, (2) violation of Virginia Code, (3) ultra vires act, and (4) violation of zoning laws [Herndon only]) [hereinafter *American Bill*].

¹⁹ See Reply Br. Of Herndon 1 (accusing Judicial Watch of launching a "broadside attack on illegal immigration" in their memorandum, instead of addressing the "discrete legal issues actually before the court").

²⁰ See *Karunakaram, et al. v. Town of Herndon*, 2006 Va. Cir. LEXIS 9 (Feb. 10, 2006) (calling for briefing on substantive legal issues in order to determine whether or not to grant Herndon and Fairfax County the requested demurrer).

²¹ See Immigration Reform and Control Act of 1986 § 274a, 8 U.S.C.A. § 1324a (a)(1)(A) (2006) (rendering unlawful hiring and recruiting for a fee individuals lacking work authorization); Immigration and Nationality Act § 274, 8 U.S.C.A. § 1324(a)(1) (2006) (penalizing criminally individuals who knowingly bring, transport, conceal, harbor or shield from detection an undocumented immigrant and those that aid or abet in these aforementioned acts).

²² See 8 U.S.C.A. § 1324(a)(1)(A)(iv) (prohibiting the encouraging or inducing of undocumented immigrants to come and stay in the United States in "knowing or reckless disregard" that the arrival or stay is illegal).

²³ See 8 U.S.C.A. § 1324(a)(1)(A)(v)(II) (articulating that any person who aids or abets in harboring violations will be criminally liable and may face fines and/or imprisonment).

²⁴ See Personal Responsibility and Work Opportunity Act of 1996 § 401, 8 U.S.C.A. 1621 (2006) (limiting state and local benefits to "qualified aliens," excluding undocumented people from most state and local assistance); VA. CODE ANN. § 63.2-503.1 (2006) (limiting the provision of public services to undocumented recipients to those allowable under 8 U.S.C.A. § 1621, such as emergency medical care, immunizations, and in-kind emergency disaster relief).

²⁵ See *American Bill*, *supra* note 18, at ¶¶ 49-52 (claiming that Herndon and Fairfax County are acting outside of municipal authority and even if the powers could be implied by Virginia law, the establishment and operation of the Center are not "reasonable methods" of enacting those powers); see also *Arlington County v. White*, 259 Va. 708, 712 (Va. Sup. Ct. 2000) (holding that the method selected to implement implied authority must be reasonable; if the method is found to be unreasonable, the government action is ultra vires).

²⁶ See *American Bill*, *supra* note 18, at ¶¶ 53-57 (arguing that Herndon's failure to make provisions to prevent illegal activity on the site amount to a violation of the relevant zoning ordinance, as they constitute an "arbitrary, capricious, and unreasonable act").

²⁷ See Immigration Reform and Control Act of 1986 § 274a, 8 U.S.C.A. § 1324a (a)(1)(A) (2006).

²⁸ See D. M. MEISSNER AND D.G. PAPADEMETRIOU, *THE CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE LEGALIZATION OF UNDOCUMENTED ALIENS: A THIRD QUARTER ASSESSMENT 3* (1988), quoted in HELENE HAYES, *U.S. IMMIGRATION POLICY AND THE UNDOCUMENTED: AMBIVALENT LAWS, FURTIVE LIVES 4* (2001).

²⁹ See Immigration Information, Immigration Reform and Control Act of November 6, 1986 ("IRCA"), available at <http://uscis.gov/graphics/shared/aboutus/statistics/legishist/561.htm> (listing the provisions of IRCA, including the temporary worker program).

³⁰ See Control of Employment of Aliens, 8 C.F.R. § 274a.2 (2006) (listing the documents required for employment authorization, including a U.S. passport, Alien Registration Card, and an Employment Authorization Document).

³¹ See *id.* (allowing an affirmative, rebuttable defense for employers who have demonstrated good faith compliance with the verification requirements).

³² See William G. Phelps, Annotation, *Validity, Construction, and Application of § 274(a)(1)(A)(III) of Immigration and Nationality Act (8 U.S.C.A. § 1324(A)(1)(A)(III))*, Making It Unlawful to Harbor or Conceal an Alien, 137 A.L.R. FED. 255 (1997-2005) (collecting and analyzing cases in the federal courts discussing the federal law prohibiting concealing, harboring, or shielding undocumented immigrants).

³³ See Immigration and Nationality Act of 1952 § 274, 8 U.S.C.A. § 1324(a)(1) (2006).

³⁴ See *id.* (cracking down on all perceived enablers of illegal immigration, including those that encourage already present undocumented immigrants to remain).

³⁵ See *U.S. v. Oloyede*, 982 F.2d 133, 136 (4th Cir. 1992) (finding appellant's argument that IRCA was intended to only apply to employers incorrect because Congress intended a broader scope of application).

³⁶ See *id.* (including a description of the undocumented individuals' testimony about their urgent need to remain in the United States and how they paid \$1,600 and \$3,500 to the defendants for their assistance).

³⁷ See *id.* at 137 (stating that “encouraging relates to actions taken to convince the illegal alien to come to this country or to stay in this country”).

³⁸ See *id.* (holding that selling fraudulent documents fits neatly within the category of unlawful encouragement).

³⁹ See Immigration and Nationality Act of 1952 § 274, 8 U.S.C.A. § 1324(a)(1) (B) (2006) (punishing harboring offenses done for the purpose of financial gain with fines and imprisonment).

⁴⁰ See *U.S. v. De Jesus-Batres*, 410 F.3d 154, 161 (5th Cir. 2005) (stating the elements the government needed to prove in order to convict the De Jesus-Batres family for aiding and abetting the harboring of undocumented immigrants in their Houston home. In affirming the defendants’ conviction, the court stated that with respect to aiding and abetting, (1) it is unnecessary to prove the aiding and abetting was for financial gain; and (2) it is unnecessary to prove specific intent to violate immigration laws).

⁴¹ See Personal Responsibility and Work Opportunity Act of 1996 § 401, 8 U.S.C.A. 1621 (2006) (removing the eligibility of “not qualified aliens” from federal public benefits).

⁴² See 8 U.S.C.A. § 1621(b) (listing the 4 exception areas to the statute, preventing the elimination of basic life-saving services and protecting public health).

⁴³ See VA. CODE ANN. 63.2-503.1 (2006) (requiring “legal presence” in order to qualify for state and local benefits and excepting the benefits mandated by 8 U.S.C.A. § 1621, emergency medical services, non-cash disaster relief, immunizations, and attorney-general specified programs).

⁴⁴ See VA. CODE ANN. § 63.2-503.1(A) (recognizing the higher authority of 8 U.S.C.A. § 1621 and yielding to the preemption doctrine under which federal law in a particular area may trump similar or dissimilar state laws); *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941) (“When the national government by treaty or statute has established rules and regulations touching the rights...of aliens as such, the treaty or statute is the supreme law...No state can add to or take from the force and effect of such treaty or statute...”).

⁴⁵ See VA. CODE ANN 63.2-503.1 (2006) (demanding identification or the provision of an affidavit attesting to legal status).

⁴⁶ See VA. CODE ANN 63.2-314 (2006) (clarifying the authority of the local governing boards to use public grants or private sources without respecting other state regulations).

⁴⁷ See Immigration Reform and Control Act of 1986 § 274a, 8 U.S.C.A. § 1324a (2006) (omitting any reference to affirmative obligations of employment centers who provide a place for workers to assemble and connect with employers); Control of Employment of Aliens, 8 C.F.R. § 274a.2 (2006) (specifying employer requirements and defining terms used in the statute).

⁴⁸ See 8 U.S.C.A. § 1324a(b) (describing the employment verification system “in the case of a person or entity hiring, recruiting or referring an individual for employment,” but not considering other situations, such as a workers’ assembly site).

⁴⁹ See Project Hope and Harmony, Making Day Labor Work, Jan. 11, 2006, available at <http://www.projecthopeharmony.org/uploads/press%20release.pdf> (promoting the release of the “Progress Report” after one month of operation, including statistics on the population served and hiring percentages, as compared to the informal gathering site at the 7-Eleven).

⁵⁰ See 8 C.F.R. § 274a.1 (g) (2006) (defining employer as “a person or entity, including agent or anyone acting directly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration”).

⁵¹ See *id.*; see also *Steiben v. INS*, 932 F.2d 1225, 1227 (8th Cir. 1991) (upholding the validity of 8 C.F.R. 274(g) and concluding that the former Immigration and Naturalization Service did not exceed statutory authority by establishing a regulation including agent or ‘anyone acting in employer’s interest’ in the employer definition).

⁵² See Project Hope and Harmony, Mission and Organization, available at <http://www.projecthopeharmony.org/pages/page.asp?pageid=4643#> (announcing Project Hope and Harmony’s mission to contribute to an inclusive Herndon community by resolving the day labor issue and strengthening relations between all residents).

⁵³ See *Herndon Town Meeting*, *supra* note 15 (quoting Tom Freilich’s anecdote about the rampant exploitation of workers in an unregulated day labor environment, which included one worker receiving a check for \$1.00 instead of \$100.00 after a day’s labor and having no recourse).

⁵⁴ See Immigration Reform and Control Act of 1986 § 274a, 8 U.S.C.A. § 1324a (2006) (listing the three employment relationships prohibited by IRCA in subsections).

⁵⁵ See Resolution for a Conditional Use Permit for a Temporary Day Worker Assembly Site, *supra* note 16 (stating the approved functions of the day laborer site and placing multiple conditions on the functioning of the center, including that all center activities be lawful).

⁵⁶ See Immigration Reform and Control Act of 1986 8 C.F.R. § 274a.1 (c); see

also infra Part III (discussing judicial interpretation of 8 C.F.R. § 274a(1)(c), which determined that a worker was hired when labor commenced).

⁵⁷ See 8 C.F.R. § 274a.1 (c) (stating that renegotiation or extension of a contract is also considered “a hire”).

⁵⁸ See *Jenkins v. Immigration and Naturalization Service* 108 F.3d 195, 198 (9th Cir. 1997) (affirming an Administrative Law Judge’s initial holding that a worker had been hired because he had already begun to clear brush).

⁵⁹ *Id.* (deciding the time of hire according to the strict regulatory definition, and rejecting the petitioner’s argument that he and the workers were still in negotiation).

⁶⁰ See 8 C.F.R. §274a.1 (d) (defining referring for a fee, including fees from a retainer and contingency basis).

⁶¹ *Id.* (including both “direct” and “indirect” solicitation in the definition).

⁶² Interview with Joel Mills, Town Resident, Executive Council Member and Spokesperson for Project Hope and Harmony (Feb. 2, 2006) (notes on file with author) (stating that the Center does not advertise, but does distribute information to educate the public about the Center’s community purpose).

⁶³ See, e.g., *Oloyede*, 982 F.2d at 140 (finding that selling fraudulent documents and immigration papers amounted to encouraging aliens to live in the United States illegally); *U.S. v. Fuji*, 301 F.3d 535, 540 (7th Cir. 2002) (holding that smuggling people for “private financial gain” constituted encouraging people to live in the United States illegally).

⁶⁴ See 8 U.S.C.A. § 1324(a)(1)(A)(iv) (stating that knowing or reckless disregard of immigration status is an element to the offense of harboring).

⁶⁵ See Pls.’ Mem. In Op. To Def. County of Fairfax Dem. And Plea In Bar to Am. Bill of Compl. 4.

⁶⁶ *Id.* (arguing that the provision of employment services, including matching employer to employee, encourages undocumented immigrants to remain in the United States).

⁶⁷ See *Oloyede*, 982 F.2d 133, 136 (4th Cir. 1992) (highlighting the fact that the defendants targeted particularly desperate individuals capable of paying them for their assistance).

⁶⁸ See DEPARTMENT OF SYSTEMS MANAGEMENT FOR HUMAN SERVICES, DAY LABOR SURVEY: AN ACCOUNT OF DAY LABORERS IN FAIRFAX COUNTY 15 (2004) [hereinafter *Day Labor Survey*] (recording that nearly 86 % of survey respondents would prefer permanent employment, and approximately 85 % of that group answered that lack of documentation prevented them from seeking permanent employment).

⁶⁹ See Immigration and Nationality Act of 1952 § 274, 8 U.S.C.A. § 1324(a)(1) (A)(iv) (2006) (stating that the offense of encouraging or inducing an undocumented immigrant to violate immigration law must be “knowing or in reckless disregard” of the fact that the action is illegal).

⁷⁰ See *American Bill*, *supra* note 18, ¶ 25 (elaborating on how Herndon and Fairfax County had knowledge of future Center patrons’ immigration status when they approved the funding and zoning of the Center).

⁷¹ See *American Bill*, *supra* note 18, ¶¶ 24-27 (listing circumstantial evidence, including statements from newspaper articles to demonstrate town and county knowledge).

⁷² See *American Bill*, *supra* note 18, 137 (holding that the evidence regarding defendant’s knowledge was clear from their client’s testimony about deliberately fabricated paperwork).

⁷³ Cf. *American Bill*, *supra* note 18, ¶¶ 22-27 (referring to Judicial Watch’s relatively circumstantial evidence that Herndon and Fairfax County were aware that the Center’s patrons were largely undocumented).

⁷⁴ See *Oloyede* 982 F.2d at 137 (demonstrating knowledge of unlawful status through testimony about defendants’ attempt to defraud the immigration court through false documents and testimony).

⁷⁵ See Personal Responsibility and Work Opportunity Act of 1996 § 401, 8 U.S.C.A. 1621(b)(4) (2006) (limiting the provision of state and local benefits to certain immigrants, such as permanent residents, asylees, and refugees).

⁷⁶ See 8 U.S.C.A. 1621(b)(4) (listing the exceptions to the prohibition on extending services to undocumented individuals, including public health and various in-kind services).

⁷⁷ *Id.* (describing the final discretionary category, prohibiting the provision of services to undocumented individuals based on their level of indigence).

⁷⁸ See Final Specification of Community Programs Necessary for the Protection of Life or Safety Under Welfare Reform Legislation, 66 Fed. Reg. 3613-02 (Jan. 16, 2001) (addressing comments from various organizations and government agencies affected by 8 U.S.C.A. § 1621, specifying exempted programs, and detailing verification requirements of non-exempted programs).

⁷⁹ See Project Hope and Harmony, Mission and Organization, *supra* note 52 (recounting the Center’s non-profit status and mission to promote better relationships among diverse members of the community in order to solve the community’s day labor issue).

⁸⁰ See Interview with Joel Mills, *supra* note 62 (stating that the Center welcomes

all people to use its services).

⁸¹ See NATIONAL DAY LABORERS' ORGANIZING NETWORK, SUE MCCARTY, AND GEORGE FARADAY, COMMON GROUND 6-7, available at <http://www.ndlon.org/research/CommonGroundReport-Eng.doc> (providing research findings on the unhealthy and dangerous work conditions of day laborers, ranging from serious physical injuries to sexual harassment and psychological abuse); Mauricio Espana, Comment, *Day Laborers, Friend or Foe: A Survey of Community Responses*, 30 FORDHAM URB. L.J. 1979, 1992-93 (2003) (shedding light on the life-threatening nature of day labor work, reporting that between 1994 and 1995, there were 4200 immigrant worker fatalities).

⁸² See ROBIN TOMA AND JILL ESPENSHADE, LOS ANGELES COUNTY HUMAN RELATIONS COMMITTEE, DAY LABORER HIRING SITES: CONSTRUCTIVE APPROACHES TO COMMUNITY CONFLICT 1 (2001) 5 (listing community complaints about informal day laborer gatherings, largely resulting from "mismatching" a place's use with its facilities).

⁸³ See Interview with Joel Mills, *supra* note 62 (stating that one of the goals of Project Hope and Harmony was to reduce the safety hazards posed by workers connecting with employers in and along the street); see Lisa Rein, *Herndon Approves Day Labor Center*, WASH. POST, Aug. 18, 2005, at A1 (quoting worker Eric Arauz, "We want a secure site because our lives are in danger when contractors leave us on the road.").

⁸⁴ See Morello, *supra* note 4 (reporting harassment from some workers and residents, (1) describing a mother's anger that her daughter felt intimidated after being whistled at by workers and (2) recounting the workers' hope for a hiring site where they would not be harassed and insulted by passersby).

⁸⁵ See Interview with Joel Mills, *supra* note 62 (explaining that although the primary intention of Project Hope and Harmony was to restore community unity and order, one coincidental benefit has been creating a safer, more accountable worker-employer relationship through Center practices).

⁸⁶ See VALENZUELA ET AL., *supra* note 12, at 12, 14 (revealing shockingly high levels of exploitation and safety hazards for day laborers).

⁸⁷ *Id.*

⁸⁸ *Id.*; see DANIEL KERR AND CHRIS DOLE, CHALLENGING EXPLOITATION AND ABUSE: A STUDY OF THE DAY LABOR INDUSTRY IN CLEVELAND 20 (2001), available at <http://www.nelp.org/docUploads/challenging%20exploitation%20Cleveland%2Epdf> (describing numerous dangers inherent in unregulated day labor work, largely resulting from unsafe work environments and lack of in basic safety equipment).

⁸⁹ See *id.* at 21 (summarizing workers' accounts of unsafe conditions of which they were not warned; one worker was sent to "crush barrels" that emitted

"unidentified noxious fumes" and there was no protective mask available).

⁹⁰ See VALENZUELA ET AL., *supra* note 12 (stating that 49% of workers surveyed had been denied payment for work completed in the two months prior to the survey and 48% were underpaid); KERR & DOLE, *supra* note 88, at 22 (reporting that many work place injuries are left untreated out of fear that the worker will not be paid by the employer, exposing the vulnerable, powerless positions held by workers with respect to many exploitative employers).

⁹¹ See Final Specification of Community Programs, *supra* note 78 (containing no language requiring legal immigration status of the workers that the exemption protects).

⁹² See David Cho and Tom Jackman, *Law Raises Immigrants' Suspicions; Va. Arrests Possible Without Warrants*, WASH. POST, July 11, 2004, at C1 (reporting that the Virginia immigrant community's alienation from police and fear of reporting crimes causes serious public safety concerns).

⁹³ See Mary Beth Sheridan, *Va. Law Seeks New Role Against Illegals; Police to Enforce Immigrations Law*, WASH. POST, Apr. 24, 2004, at A1 (relaying D.C. Police Chief Charles H. Ramsey's opposition to a 2004 Virginia statute allowing Virginia police to apprehend certain undocumented immigrants because it discourages immigrants from reporting crime).

⁹⁴ See Allison Fee, Note, *Forbidding States From Providing Essential Services to Illegal Immigrants: The Constitutionality of Recent Federal Action*, 7 B.U. PUB. INT. L.J. 93, 115 (1998) (arguing that the net effect of denying essential service to undocumented immigrants does not effectively discourage illegal immigration, but undermines city efforts to "educate, immunize, and protect portions of their population").

⁹⁵ See Interview with Joel Mills, *supra* note 62 (discussing unexpected developments in operating the center, including the promotion of public safety through crime reporting).

⁹⁶ See Fulvio Cativo, *Crimes Against Hispanics Targeted; Montgomery Urges Leaders to Pass Word That Help Is at Hand*, WASH. POST, June 24, 2005, at B4 (describing the difficult but critical task of creating a more inclusive community in order to protect immigrants from crimes).

⁹⁷ See Vitello, *supra* note 7 (reporting a pattern among suburban towns of politicians grappling for authority to manage abrupt changes in immigration that have caused community problems).

⁹⁸ See, e.g., National Immigration Forum, Take Action, Tell Your Representatives to Act on Immigration Reform This Session, available at <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=580> (providing information about pending immigration legislation).

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