

**The Day Laborer Debate:
Small Town, U.S.A. Takes On Federal Immigration Law
Regarding Undocumented Workers**

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I. INTRODUCTION:

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 propelled 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 law suit⁴ challenging the legality of funding a day labor

¹ See *Analysis: Day Laborer Centers Spark Immigration Debate* (Natl' 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*, CH 2005-0004013

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

(Ft. Co. Cir. Ct. filed Sept. 1, 2005); Carol Morello, *Suit Filed To Block Herndon Labor Site*, WASH. POST, Sept. 2, 2005, at B8 (stating that Judicial Watch, who has brought suit against multiple Clinton administration officials and Vice President Dick Cheney, was suing Herndon for approving and supporting a day labor hiring site).

⁵ In this Comment, 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) (presenting the story of the

arena, local politicians and residents are devising ways to realistically address immigration issues in their communities.⁷

This Comment evaluates the validity of the charges brought against Fairfax County and Herndon for approving and funding the Herndon Official Workers Center ("H.O.W. Center" or "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 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).

Center.”⁸ Part II of this Comment discusses the origin of the law suit and the day labor phenomenon.⁹ Part II also enumerates the charges filed against Fairfax County and Herndon and examines the federal and state laws that these charges implicate.¹⁰ Part III of this Comment argues that Herndon and Fairfax County do not violate federal immigration law regarding the employment of undocumented workers because the H.O.W. Center does not create an employer-employee relationship with its patrons.¹¹ Part III further asserts that the Center’s activities

⁸ See *infra* Part II.A (describing the Judicial Watch suit which charges that Fairfax County and Herndon are in violation of federal law and call for a judgment declaring the establishment of the day laborer center unlawful).

⁹ See *infra* Part II.A-B (providing introductory detail about the both parties’ postures regarding the case and discussing day labor nationally and in Herndon).

¹⁰ See *infra* Part II.C-D (outlining the charges against Herndon and Fairfax County and discussing the statutes and primary cases controlling the employment and aid of undocumented workers).

¹¹ See *infra* Part III.A (analyzing the Immigration Reform and Control Act of 1986 and the associated regulations, and determining that the H.O.W. Center is neither an employer nor an employer’s agent and that the Center does not hire, recruit or

do not amount to a violation of the federal prohibition against harboring undocumented immigrants or aiding or abetting unlawful employment activity.¹² Finally, Part III of this Comment disputes the charge that the Center's public services violate federal and state law prohibiting the provision of benefits to undocumented individuals.¹³ This Comment concludes that 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.¹⁴

refer for a fee).

¹² See *infra* Part III.B-C (comparing the H.O.W. Center's operations to the facts of precedent cases interpreting federal harboring law and aiding and abetting immigration offenses).

¹³ See *infra* Part III.C-E (discussing the application of the Personal Responsibility and Work Opportunity Reconciliation Act, the Attorney General's guidance on exempted programs, and Virginia benefits law to the Center's services and determining that these services are entirely legal and necessary).

¹⁴ See *infra* Part IV-V (concluding that the H.O.W. Center not only respects immigration law, but addresses serious concerns about public safety, community relations, and the fundamental rights of undocumented workers who, for better or worse, are a

II. BACKGROUND

F. Judicial Watch Sues Herndon and Fairfax County

On September 1, 2005, Judicial Watch, a conservative political watch-dog group, filed a law suit against Herndon, Virginia, later adding Fairfax County as a co-defendant.¹⁵ 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.¹⁶ Herndon responded that the town's role in establishing the day labor center was a "classic land use decision," and that Judicial

critical part of the United States economy).

¹⁵ See Judicial Watch, *Judicial Watch Leads Fight Against Illegal Day Laborer Sites*, available at <http://judicialwatch.org/herndon.shtml> (reporting that Judicial Watch filed the suit against Herndon to prevent the establishment of a tax-payer funded zone that services undocumented immigrants).

¹⁶ See Am. Bill of Compl. For Declaratory and Injunctive Relief 10-13 (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]).

Watch had no standing to contest this decision.¹⁷ Judicial Watch argued that, on the contrary, the case concerns two local governments disbursing taxpayer resources to aid undocumented immigrants in violation of the law.¹⁸

G. The Day Laborers

In 2000, the population of immigrants in suburban America surpassed the number of immigrants living in cities.¹⁹ Changing economic and social factors have caused dramatic increases in the number of immigrants in smaller towns over the past two

¹⁷ 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").

¹⁸ See Pls.' Mem. In Opposition To Def. County of Fairfax's Dem. And Plea In Bar To Am. Bill of Compl. 1 (summarizing the case as a conspiracy between Fairfax County, Herndon, and Project Hope and Harmony to "establish, operate and support a marketplace for illegal aliens to obtain unlawful employment in defiance of the federal immigration laws").

¹⁹ See Vitello, *supra* note 7 (analyzing the social and political impact of growing immigration populations in suburban towns and the local attempts to control illegal immigration with limited jurisdiction).

decades, nationalizing the immigration phenomenon.²⁰ Immigrant workers have been drawn to various industries such as construction, food processing, and manufacturing, located in small, rural and suburban communities like Herndon, Virginia.²¹

Rapid increases in immigrant workers in these areas, combined with complex labor supply and demand issues, have resulted in growing numbers of day laborers.²² Day laborers are short-term workers that assemble in areas where they are likely

²⁰ 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).

²¹ See Vitello, *supra* note 7 (including Herndon, Virginia as one of the latest news-worthy small towns tackling national immigration issues).

²² See Charlie LeDuff, *For Migrants, Hard Work in Hostile Suburbs*, N.Y. TIMES, Sept. 24, 2000, at 1 (reporting on day laborers' difficult adjustment to American suburbs, including precarious lives marked by racial slurs, exploitation, and occasional violence).

to be visible to potential employers.²³ Typical assembly areas include sidewalks, parking lots, and around construction supply stores.²⁴ The gathering of day laborers in public spaces is not a phenomenon unique to Herndon.²⁵ Day laborers congregate in every region in the United States, comprising a work-force of well over one hundred thousand on any given day.²⁶ Although most of the day laborer congregations are unofficial, twenty-one

²³ See ROBIN TOMA AND JILL ESPENSHADE, LOS ANGELES COUNTY HUMAN RELATIONS COMMITTEE, DAY LABORER HIRING SITES: CONSTRUCTIVE APPROACHES TO COMMUNITY CONFLICT 1 (2001) (comparing various solutions available to communities managing day laborer gatherings).

²⁴ See *id.* (explaining the different work skills, ethnicities, and wage rates among the day laborer population).

²⁵ 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).

²⁶ See ABEL VALENZUELA, JR., NIK THEODORE, EDWIN MELÉNDEZ, AND ANA LUZ GONZALEZ, ON THE CORNER: DAY LABOR IN THE UNITED STATES i (2006) (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).

percent of day laborers frequent formalized hiring sites.²⁷ There are sixty-three formalized centers around the country, typically established through the collaboration of community and faith-based organizations and local governments.²⁸

In Herndon, day laborers have assembled at an unofficial site in the parking lot of the 7-Eleven for the past eight years, which has presented various challenges to the community.²⁹ Herndon residents have complained about the waiting workers littering and drinking in public, which led to twenty-one arrests in the last year.³⁰ The Community Relations Working

²⁷ See *id.* at 4 (stating that these formalized centers were formed recently, mostly since 2000, in order to provide an alternative to the comparatively chaotic, unregulated sites).

²⁸ See *id.* at 6 (listing the "marked improvement over informal sites" that formal hiring sites provide: a defined space, registration of workers and employers, minimum wage rates, and labor standards).

²⁹ See All Questions and Responses, Herndon Town Meeting, July 15, 2003, Question 49 (on file with author) (stating that the town has not encouraged day labor yet the gatherings at 7-Eleven have been taking place for more than eight years).

³⁰ See Carol Morello, *Herndon Roiled by Site for Laborers*, WASH. POST, July 31, 2005, at C1 (weighing the pros and cons of moving

Group (CRWG), 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.³¹ Town officials discovered, through publicized missteps of similarly situated cities,³² that there is no legal way to ban solicitation altogether without creating a zone in which the activity is allowed.³³ So, with a choice between the status quo

the workers gathering site to a formalized location).

³¹ See All Questions and Responses, *supra* note 29, at Question 27a-h (stating the proposed solution of the CRWG after five years of work "addressing community concerns" about the informal gathering site at the 7-Eleven).

³² See All Questions and Responses, *supra* note 29, at Question 27a-h (referring to the Glendale, California ordinance banning solicitation); 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).

³³ See Carol Morello, *Herndon Panel Weighs New Day Laborer Site*, WASH. POST, Aug. 4, 2005, at B9 (describing the issues considered

and a tax-payer funded, formalized hiring site, the CWRG opted for the latter.³⁴ The CRWG concluded that the hiring hall should be administered by a non-profit, and Reston Interfaith won a grant from Fairfax County for the Center's operation costs.³⁵

H. Herndon, Fairfax County, and Project Hope and Harmony

The Herndon town council approved the hiring site proposal on August 17, 2005, after a series of contentious town meetings.³⁶ The council resolution granted a conditional use

by the planning commission before the final vote on the proposed day laborer hiring site).

³⁴ See All Questions and Responses, *supra* note 29, at Question 27a-h (relaying the limited choices of the CRWG in deciding to propose a formal hiring site to the town).

³⁵ See Town Meeting, Panel Q & A, July 15, 2003 (on file with author) (stating that Fairfax County supplied a grant to Reston Interfaith to fund a site coordinator and that they have been "actively involved" in the day labor issue); At Home in Herndon, 2005 4th Quarter Newsletter, available at <http://www.town.herndon.va.us/At%20Home%20in%20Herndon%20Newsletters.htm> (disclosing that Fairfax County is providing \$170,000 to Project Hope and Harmony for the H.O.W. Center).

³⁶ See Lisa Rein, *Herndon Approves Day Labor Center*, WASH. POST, Aug. 18, 2005, at A1 (reporting the outcome of the Herndon town

permit to Project Hope and Harmony/Reston Interfaith, a coalition of charities and residents who would run the site.³⁷ 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 enforcement of the Code of Conduct set forth by Project Hope and Harmony; and (5) demand that the site administrators make available to employers information about federal prohibitions against hiring unauthorized workers and eligibility verification.³⁸

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 un-extraordinary, local solution to intense legal

council vote and describing deep divisions in the town).

³⁷ See Reply Br. Of Herndon 1 (referring to the conditional use permit as a "legislative act" that granted the right to use the vacant police station and did not require taxes to be levied).

³⁸ 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).

scrutiny.³⁹ This phenomenon begs the question, submitted by a resident two years ago at a Herndon town meeting: "Isn't it illegal to hire illegals?"⁴⁰

I. The Judicial Watch Complaint

Judicial Watch's Amended Complaint charged that the use of taxpayer funds and tax-payer-financed resources in furtherance of the Day Laborer site contravenes federal and Virginia law.⁴¹ Count I of the complaint argued that Herndon and Fairfax County are violating federal law against the unlawful employment of undocumented workers (the employment clause) and federal law against harboring undocumented individuals (the harboring

³⁹ See Lisa Rein, *N.Va Leaders Advise Kilgore to Stay Out of Laborer Debate*, WASH. POST, Aug. 9, 2005, at A9 (urging former gubernatorial candidate Jerry Kilgore to refrain from weighing in on "a local zoning issue" in order to gain political capital for his immigrant-hostile campaign).

⁴⁰ See All Questions and Responses, *supra* note 29, at Question 110 (asking a question many residents are pondering).

⁴¹ See Am. Bill of Compl. For Declaratory and Injunctive Relief, ¶¶ 43-57 (arguing in four counts that Herndon and Fairfax are violating laws which should render the decision to support the Center void).

clause).⁴² The complaint contended that, in violation of the harboring clause, the Center encourages and induces undocumented immigrants to come to, enter, or live in the United States, knowing that they are undocumented.⁴³ The complaint also charged that Herndon and Fairfax County are aiding or abetting in the previously listed immigration violations.⁴⁴

Lastly, Judicial Watch charged Herndon and Fairfax County with violating federal and Virginia law prohibiting the

⁴² See Immigration Reform and Control Act of 1986 § 274a, 8 U.S.C.A. § 1324a(a)(1)(A) (2006) (rendering unlawful hiring and recruiting or referring 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).

⁴³ 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).

⁴⁴ 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).

provision of benefits to undocumented immigrants.⁴⁵ Judicial Watch consequently concluded that the town and county's illegal use of taxpayer resources is an ultra vires act,⁴⁶ and in violation of a Herndon zoning ordinance requiring that all activities taking place in an approved site be lawful.⁴⁷

⁴⁵ 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).

⁴⁶ See Am. Bill of Compl. For Declaratory and Injunctive Relief ¶¶ 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 day laborer 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).

⁴⁷ See Am. Bill of Compl. For Declaratory and Injunctive Relief

J. Relevant Federal Immigration Law

1. 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.⁴⁸ The legislation sought to curtail illegal immigration by curbing the enticement of available employment through employer sanctions for hiring undocumented workers.⁴⁹ With the stated intention "to remove a fearful, easily exploitable subclass from our society," the legislation⁵⁰ created

¶¶ 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").

⁴⁸ See HELENE HAYES, U.S. IMMIGRATION POLICY AND THE UNDOCUMENTED: AMBIVALENT LAWS, FURTIVE LIVES 4 (2001) (analyzing the impact of IRCA on Haitian, Irish, and Salvadoran immigrants).

⁴⁹ See *id.* at 4, 47 (describing the second prong of IRCA, which provided amnesty to a limited population of undocumented immigrants).

⁵⁰ 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* HAYES, *supra* note 48, at 5 (quoting Alan Simpson's explanation of the compassionate intent of IRCA).

civil and criminal penalties for hiring, recruiting and referring for a fee persons unauthorized to work in the United States.⁵¹

IRCA mandates the verification of work authorization of every employee hired after November 6, 1986, by requiring employees to produce particular documents demonstrating their immigration status.⁵² Compliance is predicated on a "good faith standard" and employers are not liable for hiring someone with fraudulent documents.⁵³ Only employers need to verify status, while state employment agencies, for instance, have the option not to check work eligibility.⁵⁴

⁵¹ See Immigration Information, Immigration Reform and Control Act of November 6, 1986 (IRCA), <http://uscis.gov/graphics/shared/aboutus/statistics/legishist/561.htm> (listing the provisions of IRCA, including the temporary worker program).

⁵² See Control of Employment of Aliens, 8 C.F.R. § 274(a)(2) (2006) (listing the documents required for employment authorization, including a U.S. passport, Alien Registration Card, and an Employment Authorization Document).

⁵³ See *id.* (allowing an affirmative, rebuttable defense for employers who have demonstrated good faith compliance with the verification requirements).

⁵⁴ See *id.* (giving agencies a choice to verify and certify

IRCA eliminated the "Texas Proviso," a 1952 employers' exemption to prosecution for concealing, harboring, or shielding undocumented immigrants.⁵⁵ Employers are now criminally liable for knowingly bringing, transporting, concealing, harboring, or shielding from detection an undocumented immigrant.⁵⁶

2. Bringing in and Harboring of Undocumented Immigrants: The Encouraging Clause

Federal immigration law prohibits the encouraging or inducing of undocumented immigrants to enter or remain in the United States.⁵⁷ In *U.S. v. Oluwole Oloyede*, the court held that

worker's immigration status for employers).

⁵⁵ 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).

⁵⁶ See Immigration and Nationality Act of 1952 § 274, 8 U.S.C.A. § 1324(a)(1) (2006) (penalizing persons who knowingly or in reckless disregard of another person's lack of immigration status, engage in the aforementioned activities).

⁵⁷ See *id.* (cracking down on all perceived enablers of illegal immigration, including those that encourage already present

the encouragement clause applied to "any person" not just employers, as it was previously construed.⁵⁸ 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."⁵⁹ The Fourth Circuit 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.⁶⁰ The court held that the defendants' actions to reassure their clients that they would be able to secure status for them

undocumented immigrants to remain).

⁵⁸ See *U.S. v. Oluwole 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).

⁵⁹ See *id.* (including a description of the undocumented individuals' testimony about their urgent need to remain in the United States and how they paid \$1600 and \$3500 to the defendants for their assistance).

⁶⁰ See *id.* (stating that "encouraging relates to actions taken to convince the illegal alien to come to this country or to stay in this country").

through fraudulent means, and that they would not risk detection and deportation, amounted to "encouragement."⁶¹

i. 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.⁶² The elements of aiding or abetting for harboring an undocumented immigrant include the following: (1) that the person entered or remains in the U.S. unlawfully; (2) that the defendant transported, concealed, harbored, sheltered the person, or encouraged or induced the person to enter or remain in the United States; (3) that the defendant knew or recklessly disregarded that the person entered or remains in the United States unlawfully; and (4) that the defendants conduct "tended to substantially facilitate" the undocumented person in remaining in the United States

⁶¹ See *id.* (holding that selling fraudulent documents fits neatly within the category of unlawful encouragement).

⁶² 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).

unlawfully.⁶³ In *U.S. v. De Jesus-Batres*, three family members were convicted of aiding and abetting the harboring of undocumented immigrants.⁶⁴ The three defendants arranged for transportation and state-side pick-up of seven undocumented Mexican citizens.⁶⁵ The defendants then held the immigrants hostage with weapons until their families, already in the United States, agreed to pay the defendants \$1500 per person, instead of the agreed upon smuggling fee of \$1200-\$1300 per person.⁶⁶ The court affirmed the defendants' conviction and stated that with respect to aiding and abetting, (1) it is unnecessary to

⁶³ See *U.S. v. De Jesus-Batres*, 410 F.3d 154, 160 (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).

⁶⁴ See *id.* (charging a mother and two sons with a hostage taking conspiracy in addition to the harboring charge, based on the testimony that the mother and son guarded the immigrants with guns and made threatening statements).

⁶⁵ See *id.* (summarizing that the seven immigrants were guided to the border, picked up along I-35 by one of the defendants' relatives, and driven to the defendants' Houston home).

⁶⁶ See *id.* (describing the hostage scenario and one immigrant's escape, which alerted authorities to the situation).

prove whether the aiding or abetting was for financial gain; and (2) it is unnecessary to prove specific intent to violate immigration laws.⁶⁷

ii. Federal Law on Principals

Courts have also applied a different aiding or abetting analysis, as per federal law concerning principals, interpreted in *United States v. Romero-Cruz*.⁶⁸ *Zavala v. Wal-Mart* employed the *Romero-Cruz* analysis in determination of whether Wal-Mart was guilty of aiding or abetting in the transporting, hiring, harboring and encouraging of undocumented workers.⁶⁹ The court explained that aiding or abetting occurred when the defendant (1) "associates with a criminal venture"; (2) "participates" in

⁶⁷ See *id.* (rejecting the defendant's arguments that the aiding and abetting charge should be dropped because the government did not prove knowledge, financial gain, or specific intent).

⁶⁸ See 201 F.3d 374, 378 (5th Cir. 2000) (adjudicating defendant's appeal of convictions for two counts of transporting undocumented immigrants).

⁶⁹ See *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 305 (D. N.J. 2005) (ruling on charges by undocumented immigrant workers against Wal-Mart under the Racketeering Influenced and Corrupt Organizations Act [RICO], the Fair Labor Standards Act [FLSA], § 1985, and common law).

this venture; and (3) takes action to further the venture's success.⁷⁰ *Romero-Cruz* defined "associated" as sharing in the criminal intent of the principal, while defining "participated" as engaging in affirmative conduct designed to further the venture.⁷¹

K. Personal Responsibility and Work Opportunity Act

The Personal Responsibility and Work Opportunity Act (the Welfare Act), passed in 1996, eliminated most public benefits for undocumented immigrants.⁷² The statute generally renders "not qualified aliens" ineligible for State or local public benefits, yet qualifies this ineligibility with far-reaching exceptions.⁷³ The statute lists four different public service

⁷⁰ See *id.* (holding that Wal-Mart's conduct was not culpable).

⁷¹ See *Romero-Cruz*, 201 F.3d at 378 (holding that these elements were satisfied by the people-smuggling activities of the defendant).

⁷² 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).

⁷³ See 8 U.S.C.A. § 1621; see also Seam Park, Comment, *Substantial Barriers in Illegal Immigrant Access to Publicly-Funded Health Care: Reasons and Recommendations for Change*, 18 GEO. IMMIGR. L. J. 567, 585 (2004) (advocating for the repeal of

program areas to which the prohibition does not apply: (1) emergency health care services; (2) short-term, non-cash, in-kind emergency disaster relief; (3) immunizations and prevention and treatment for symptoms of communicable diseases; and (4) "programs, services, or assistance (such as soup kitchens, crisis counseling and intervention, and short-term shelter) specified by the Attorney General."⁷⁴

L. Relevant Virginia Law

In March of 2005, 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.⁷⁵ The statute follows

the welfare reform legislation limiting the public health benefits to undocumented immigrants and analyzing the social policy pitfalls associated with the current law).

⁷⁴ See 8 U.S.C.A. § 1621(b) (listing the four exception areas to the statute, preventing the elimination of basic life-saving services and protecting public health).

⁷⁵ 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).

the lead of the Welfare Reform Act and exempts the life-saving services mandated under the 1996 legislation.⁷⁶ As of January 1, 2006, Virginia law requires proof of immigration status for all benefit applicants over the age of nineteen.⁷⁷ However, the Virginia Code also contains a statute that allows local boards to disburse funds "for the purpose of aiding needy persons within their respective counties, cities, or districts."⁷⁸ This statute allows certain public grants to disregard the

⁷⁶ 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, 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...").

⁷⁷ See VA. CODE ANN 63.2-503.1 (2006) (demanding identification or the provision of an affidavit attesting to legal status).

⁷⁸ 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).

requirements of the Commonwealth public assistance programs.⁷⁹

III. ANALYSIS

Assuming that the court accepts Judicial Watch's argument that their plaintiffs have standing to challenge the legality of town and county tax-payer expenditures, the court should dismiss Judicial Watch's charges.⁸⁰ Herndon and Fairfax County have not contravened federal or state law in their support of the H.O.W. Center.⁸¹ Firstly, the H.O.W. Center does not create an employer-employee relationship with its patrons, and therefore has no obligations under IRCA.⁸² Secondly, the Center's

⁷⁹ See *id.* (privileging the aid of "needy persons" over state benefit regulations tape).

⁸⁰ See Pls.' Mem. In Op. To Def. County of Fairfax Dem. And Plea In Bar to Am. Bill of Compl. 4 (arguing that Plaintiffs are not seeking to enforce federal law, which would require a private right of action, but instead are challenging the legality of the town and county actions).

⁸¹ See *infra* Part III.A-E (analyzing IRCA, the Immigration and Nationality Act, the Welfare Act, and Virginia law and concluding that the H.O.W. Center complies with the law).

⁸² See *infra* Part III.A (arguing that because the Center does not fit the federal regulations' definition of employer or employer's agent and because they do not hire, recruit or refer

activities do not amount to a violation of the harboring clause.⁸³ Thirdly, the Center's activities do not amount to aiding or abetting illegal activity.⁸⁴ Finally, the H.O.W. Center is exempt from federal laws prohibiting public benefits to undocumented workers, and is thus in full compliance with federal and Virginia state law.⁸⁵

A. Herndon, Fairfax County, and Project Hope and Harmony Do Not Violate the Employer Sanctions Section of IRCA Because the H.O.W. Center Has No Obligations under IRCA

Contrary to Judicial Watch's charge that Herndon and

for a fee, the Center has no obligations under IRCA).

⁸³ See *infra* Part III.B (illustrating that the Center's activities do not amount to encouraging under the harboring clause and that the requisite knowledge element of the charge is not satisfied).

⁸⁴ See *infra* Part III.C (analyzing the aiding or abetting section of the harboring clause and the principal clause and concluding that charges under both laws should be dismissed for not satisfying the requisite elements).

⁸⁵ See *infra* Part III.D-E (arguing that per the Attorney General's guidance, the Center is exempt from the prohibition against providing federal and local benefits to undocumented immigrants because it provides services that (1) protect workers and (2) protect life and safety).

Fairfax County contravene IRCA's employment clause, the H.O.W. Center has no affirmative obligations under the statute and the associated regulations because (1) the Center is not an employer or an employer's agent; and (2) the Center activities do not amount to hiring, recruiting or referring for a fee.⁸⁶ Due to the fact that the Center does not fall in 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.⁸⁷

1. The H.O.W. Center Is Not an Employer or an Agent of an Employer

The H.O.W. Center, a self-described non-profit community coalition, is not an employer, employer's agent, nor is the

⁸⁶ 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. § 274(a)(2) (2006) (specifying employer requirements and defining terms used in the statute).

⁸⁷ 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 for a fee," but not considering other situations, such as a workers' assembly site).

center acting directly in the interest of an employer.⁸⁸ Employer is defined by the associated regulations as a person or entity that exchanges wages for employee services.⁸⁹ The regulations' employee definition also includes an employer's agent or anyone who acts in the direct interest of an employer.⁹⁰ The Center is not engaging the labor of any employee by

⁸⁸ See Project Hope and Harmony, *Making Day Labor Work*, Jan. 11, 2006, <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).

⁸⁹ See 8 C.F.R. 274a(1)(g) (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").

⁹⁰ 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).

providing an assembly space and social services for the workers.⁹¹ The Center cannot be considered an agent of potential employers who hire the workers at the Center, given that the Center staff and volunteers are not authorized to act on behalf of the potential employers.⁹² Lastly, the Center is not acting in the direct interest of the potential employers by operating the Center.⁹³ In fact, the Center policy of record keeping works

⁹¹ See, e.g., *City Counsel's Memo Covers Opinions on Day-Labor Issues*, THE GAZETTE (Maryland), Nov. 16, 2005 (excerpting a memorandum prepared by the Gaithersburg city attorney as to the legality of operating a day labor center, which concludes "no employment relationship is created" between the County, the day labor center, and the people served at the center).

⁹² See RESTATEMENT (THIRD) OF AGENCY § 1.01 (2000) (defining agency as "the fiduciary relationship that arises when one person (the "principal") manifests consent to another person (the "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent consents so to act").

⁹³ See Project Hope and Harmony, Mission and Organization, http://www.projecthopeharmony.org/pages/page.asp?page_id=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).

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.⁹⁴ In order 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.⁹⁵ 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.⁹⁶ The Center's mission statement explains that they work in the

⁹⁴ See Project Hope and Harmony, Worker Request Form, <http://209.213.109.212/uploads/Worker%20Request.pdf> (requiring employers to submit detailed contact information).

⁹⁵ See Project Hope and Harmony, Liability Form, <http://209.213.109.212/uploads/Disclaimer-Info.pdf> (clarifying the limits to the Center's confidentiality, the responsibilities of the employer in terms of status verification, and the Center's non-liability for potential worker-employer problems).

⁹⁶ See Town Meeting, Panel Q & A, *supra* note 35 (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).

general interest of the community, not in the direct interest of employers.⁹⁷ For the foregoing reasons, the H.O.W. Center is not an employer or agent of an employer and has no obligations under IRCA.

2. The H.O.W. Center Does Not Hire, Recruit, or Refer for a Fee

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.⁹⁸ 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.⁹⁹ No part of this activity is

⁹⁷ See Project Hope and Harmony, Mission and Organization, *supra* note 93 (containing no reference to working in the interest of employers).

⁹⁸ 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).

⁹⁹ See Resolution for a Conditional Use Permit for a Temporary Day Worker Assembly Site, *supra* note 38 (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).

equivalent to hiring, recruiting or referring for a fee as defined by IRCA's employment clause.¹⁰⁰

The associated regulations define hiring as "the actual commencement of employment of an employee for wages or other remuneration."¹⁰¹ The actual "hire" occurs when a worker enters into a contract, subcontract, or exchange.¹⁰² 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.¹⁰³ 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.¹⁰⁴

¹⁰⁰ See Control of Employment of Aliens, 8 C.F.R. § 274(a)(1)(c)-(e) (2006) (defining hiring, recruiting and referring for a fee).

¹⁰¹ See *id.* § 274a(1)(c); see also *infra* Part III.A.2 (discussing judicial interpretation of 8 C.F.R. § 274a(1)(c), which determined that a worker was hired when labor commenced).

¹⁰² See 8 C.F.R. § 274(a)(1)(c) (stating that renegotiation or extension of a contract is also considered "a hire").

¹⁰³ See 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).

¹⁰⁴ See *id.* (deciding the time of hire according to the strict

The regulations define referring for a fee as sending an individual or their documentation to another person in order to find the individual employment and receive remuneration.¹⁰⁵ Recruiting for a fee involves "soliciting" a person and then referring them for employment on a fee basis.¹⁰⁶ 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.¹⁰⁷ As

regulatory definition, and rejecting the petitioner's argument that he and the workers were still in negotiation).

¹⁰⁵ See 8 C.F.R. § 274a(1)(d) (defining referring for a fee, including fees from a retainer and contingency basis).

¹⁰⁶ See *id.* (including both "direct" and "indirect" solicitation in the definition).

¹⁰⁷ See Project Hope and Harmony, Making Day Labor Work, *supra* note 88 (stating that Project Hope and Harmony is a non-profit coalition); Project Hope and Harmony, HOW to Hire, http://www.projecthopeharmony.org/pages/page.asp?page_id=4629 (instructing business and homeowners on how to hire workers at the Center and explaining the process of coming to the site and seeking workers by lottery, past relationship, or specific skill

stated in the Center liability waiver, the Center limits its involvement in the worker-employee relationship to operating a meeting place and matching skill needs and skill sets.¹⁰⁸ The H.O.W. Center activities are therefore not equivalent to hiring, recruiting, or referring for a fee.

B. 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

Contrary to Judicial Watch's charges that Herndon and Fairfax County are in contravention of the encouraging section of the harboring clause, the operation of the Center does not violate federal law.¹⁰⁹ Successful prosecutions of the

set); 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).

¹⁰⁸ See Project Hope and Harmony, Liability Form, *supra* note 95 (disclaiming responsibility and involvement in worker-employer discord by explaining the Center's simple matching policy).

¹⁰⁹ See Immigration and Nationality Act of 1952 § 274, 8 U.S.C.A. § 1324(a)(1) (2006) (punishing with fines and imprisonment any person who encourages or induces undocumented immigrants to come to, enter, or remain in the United States).

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.¹¹⁰ 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.¹¹¹

1. Center Operations Do Not Amount to Encouraging

Judicial Watch, in Count I of their Amended Bill, claimed that operation of the Center "encourages immigrants to enter and stay in this country illegally."¹¹² Judicial Watch argued that

¹¹⁰ See, e.g., U.S. v. Oluwole Oloyede, 982 F.2d 133, 134 (4th Cir. 1992) (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, 538 (7th Cir. 2002) (holding that smuggling people for "private financial gain" constituted encouraging people to live in the United States illegally).

¹¹¹ 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).

¹¹² See Pls.' Mem. In Op. To Def. County of Fairfax Dem. And Plea In Bar to Am. Bill of Compl. 4. (defending the Amended Bill

by providing an assembly site for workers in order for them to obtain employment, the Center facilitates employment for undocumented immigrants, which encourages their stay.¹¹³ 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.¹¹⁴ The provision of false documents and assurances that the undocumented individuals would not be found out or deported in *Oloyede* is not comparable to the provision of a publicly available employment service.¹¹⁵ Under Judicial Watch's desired application of the encouraging section of the

against the demurrer filed by Herndon and Fairfax County, reasserting each count).

¹¹³ See *id.* (arguing that the provision of employment services, including matching employer to employee, encourages undocumented immigrants to remain in the United States).

¹¹⁴ See, e.g., *U.S. v. Yoshida*, 303 F.3d 1145, 1150 (7th Cir. 2002) (articulating that without the assistance of the defendant leading the individuals to the airport, through the terminal, and onto the plane, they would not have known where to go).

¹¹⁵ See Interview with Joel Mills, *supra* note 107 (emphasizing that the Center's services are open to all members of the public, and are not intended to help any one community sector).

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.¹¹⁶ 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.¹¹⁷ The Center, on the other hand, is making a service available to the public, whose population inevitably includes individuals that lack work authorization.¹¹⁸

¹¹⁶ Cf. Pls.' Mem. In Op. To Def. County of Fairfax Dem. And Plea In Bar to Am. Bill of Compl. 4 (asserting that the facilitation of employment encourages undocumented immigrants to enter and stay in the United States, violating the encouraging clause).

¹¹⁷ See *U.S. v. Oluwole 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).

¹¹⁸ 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 eighty-six percent of survey respondents would prefer permanent employment, and approximately eighty-five percent of that group answered that lack of

2. Herndon and Fairfax County Do Not Satisfy the Knowledge Element of the Statute

Knowledge of unlawful immigration status is an essential element to the encouraging section of the harboring clause.¹¹⁹ 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.¹²⁰ Three principal facts are provided to substantiate that 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

documentation prevented them from seeking permanent employment).

¹¹⁹ 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).

¹²⁰ See Am. Bill Of Compl. For Declaratory and Injunctive Relief ¶ 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).

distribute information informing employers that the hiring of undocumented workers is illegal.¹²¹ However, this evidence of knowledge is attenuated, unlike the clear indication of knowledge demonstrated in *Oloyede*.¹²²

Unlike Judicial Watch's tenuous evidence, from which the court would have to strain to infer knowledge, 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.¹²³ While Herndon and Fairfax County are charged with having knowledge of unlawful status partly because of an anonymous survey, the salient facts of *Oloyede* contrast sharply: (1) the defendants were informed that their clients were undocumented with fraudulent documents and; (2) the defendants

¹²¹ See *id.* at ¶¶ 24-27 (listing circumstantial evidence, including statements from newspaper articles to demonstrate town and county knowledge).

¹²² See *Oloyede*, 982 F.2d at 137 (holding that the evidence unambiguously demonstrated that the defendants knew their clients did not have legal immigration status).

¹²³ See *id.* at 137 (holding that the evidence regarding defendant's knowledge was clear from their client's testimony about deliberately fabricated paperwork).

assured their clients that paperwork fabrication was necessary to remain in the United States.¹²⁴ Further distinguishing Judicial Watch's evidence from that in *Oloyede* is the fact that Herndon and Fairfax County distribute material instructing Center users on how to obey the law, while the *Oloyede* defendants instructed an individual to break the law by committing fraud in an immigration hearing.¹²⁵

Judicial Watch may contend that other courts have inferred knowledge from behavior.¹²⁶ However, in successful prosecutions

¹²⁴ *Cf.* Am. Bill Of Compl. For Declaratory and Injunctive Relief ¶¶ 22-27 (referring to Judicial Watch's relatively insubstantial evidence that Herndon and Fairfax County were aware that the H.O.W. Center's patrons were largely undocumented).

¹²⁵ See 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).

¹²⁶ See, e.g., *U.S. v. Rubio-Gonzales*, 674 F.2d 1067, 1071 (5th Cir. 1982) (ruling that defendants' efforts to warn undocumented workers to flee the area because the Immigration and Naturalization Service was present provided sufficient inferential evidence to establish defendants' knowledge of the workers' unlawful immigration status); *U.S. v. Avila-Dominguez*, 610 F.2d 1266 (5th Cir. 1980) (holding that "the surreptitious

where the court inferred knowledge, the evidence creating the knowledge inference was far stronger than what Judicial Watch has thus far proffered.¹²⁷ Inferential evidence that Herndon and Fairfax know that the Center will likely service a population including undocumented immigrants contrasts with the inferential evidence in *U.S. v. Avila-Dominguez*, where the defendant furtively guided undocumented individuals to the border and was remunerated for his assistance.¹²⁸ While the court in *Avila-*

manner" in which the defendant guided immigrants across the border supported an inference satisfying the knowledge element of the immigrants' undocumented status); *U.S. v. Yoshida*, 303 F.3d 1145, 1150 (7th Cir. 2002) (inferring knowledge of immigrants' status through evidence that defendant instructed and led undocumented individuals into the United States illegally).

¹²⁷ See Am. Bill Of Compl. For Declaratory and Injunctive Relief ¶¶ 24- 27 (lacking strong circumstantial evidence of knowledge that any particular patron of the H.O.W. Center is undocumented).

¹²⁸ See 610 F.2d at 1266 (including testimony from witnesses that defendant met immigrants across the border, helped move them across the river, scouted the area for law enforcement and then signaled to the immigrants that it was a safe time for

Dominguez allowed that the evidence of defendant's behavior provided substantial support to infer that the defendant had knowledge of the individuals' status, Judicial Watch's evidence against Herndon and Fairfax would not enable a court to come to the same conclusion.¹²⁹

Judicial Watch has not, thus far, presented evidence on par with either *Oloyede* or *Avila-Dominguez*, in that neither concrete nor inferable facts demonstrate knowledge of any one Center service-recipient's immigration status.¹³⁰ Anonymous surveys, an individual Council member's conjectures, and a liability waiver

crossing).

¹²⁹ *Cf. id.* (holding that inference from highly suspicious behavior can satisfy the element of knowledge); *U.S. v. Espinoza-Franco*, 668 F.2d 848, 850 (5th Cir. 1982) (concluding again that very suspicious behavior, meeting individuals in a park, leading them to a river along the border, and asking \$300 for assistance, created an inference of awareness satisfying the statute's element of knowledge).

¹³⁰ *Cf. Oloyede*, 982 F.2d at 136 (finding ample direct evidence demonstrating knowledge of unlawful status of undocumented persons); *Alvila-Dominguez*, 610 F.2d at 1272 (having inferable facts based on highly suspicious behavior demonstrating knowledge of unlawful status of undocumented persons).

only indicate that the individuals in the population served by the Center *may* lack immigration status.¹³¹ This is not equivalent to having clear knowledge of unlawful status, having seen false immigration papers, or having led individuals to Mexico's border for payment.¹³² Because the Center's activities do not amount to 'encouraging' and because Herndon and Fairfax County lack the requisite knowledge element, the Town and County are not encouraging or inducing undocumented immigrants to come to, enter, or reside in the United States under the harboring clause.

**C. Herndon and Fairfax County Are Not Aiding or Abetting
Illegal Activity**

Judicial Watch unsuccessfully argues that Herndon and Fairfax County are aiding and abetting in the commission of

¹³¹ See Am. Bill Of Compl. For Declaratory and Injunctive Relief ¶ 25 (failing to provide any example of Herndon, Fairfax County, or Project Hope and Harmony having knowledge regarding the immigration status of any worker using the Center's services).

¹³² *Cf. Oloyede*, 982 F.2d at 136 (holding that the evidence was "overwhelming" that defendants knew their clients lacked immigration status); *Alvila-Dominguez*, 610 F.2d at 1272 (finding the inference of knowledge from circumstantial evidence sufficient to conclude that the defendant encouraged or induced entry of undocumented immigrants into the United States).

unlawful hiring and encouraging or inducing undocumented immigrants to come to, enter or remain in the United States.¹³³ Presumably, Judicial Watch considered the workers and employers the criminal principals and Herndon and Fairfax County the aiders and abettors.¹³⁴ However, Herndon and Fairfax County are not aiding or abetting illegal activity according to the standards in the aiding or abetting clause in Title 8 of the U.S. Code, nor the principals clause in Title 18.¹³⁵ The

¹³³ See Pls.' Mem. In Op. To Def. County of Fairfax Dem. And Plea In Bar to Am. Bill of Compl. 5 (claiming that Herndon and Fairfax County support the Center in order to aid and abet undocumented immigrants to find employment "and otherwise induc[e] violations of federal immigration laws").

¹³⁴ See Am. Bill Of Compl. For Declaratory and Injunctive Relief ¶ 35 (asserting that federal law prohibits hiring undocumented workers and encouraging and inducing undocumented immigrants to come to, enter, or reside in the United States and that "aiding or abetting the commission of such acts" violates federal law).

¹³⁵ See Immigration and Nationality Act of 1952 § 274, 8 U.S.C.A. § 1324(a)(1)(A)(v)(II) (2006) (stating that any person who "aids or abets" in any of the bringing in and harboring acts will be punished with fines and imprisonment, as detailed in 8 U.S.C.A. § 1324(a)(1)(B)); Principals, 18 U.S.C.A. § 2 (2006) (stating

activities of the H.O.W. Center do not satisfy the requisite elements of an offense under either of these standards.¹³⁶

1. Herndon and Fairfax County Are Not Aiding or Abetting Encouraging or Inducing Undocumented Immigrants to Come to, Enter, or Reside in the United States under the Harboring Clause

Judicial Watch unwarrantedly charged Herndon and Fairfax County with aiding and abetting the encouragement or inducement of undocumented immigrants to come, enter, or reside in the United States, as per the harboring clause.¹³⁷ Unlike the defendant in *De Jesus-Batres*, Herndon and Fairfax County do not satisfy the elements of an aiding and abetting offense.¹³⁸

that whoever violates federal law or "aids, abets, counsels, commands, or induces or procures its commission" can be punished as a principal).

¹³⁶ See *supra* Part II.E.2.i-ii (listing the two possible analyses of aiding and abetting, under Title 8 or Title 18, and the case law that interprets the requisite elements in an offense).

¹³⁷ See Am. Bill Of Compl. For Declaratory and Injunctive Relief ¶¶ 35, 44 (charging Herndon and Fairfax with aiding and abetting the encouraging and inducement of undocumented immigrants to come to, enter, or reside in the United States); 8 U.S.C.A. 1324(a)(1)(A)(v)(II).

¹³⁸ See *United States v. De Jesus-Batres*, 410 F.3d 154 (5th Cir. 2005) (affirming the defendants' conviction of harboring

Judicial Watch cannot establish the first element, that the undocumented immigrant entered or remains in the United States unlawfully, without definitive evidence of H.O.W. Center patrons' unlawful status.¹³⁹ Judicial Watch has, thus far, attempted to demonstrate the unlawful status of H.O.W. Center patrons with the statistics in the Fairfax County Day Labor Survey, which is insufficient proof.¹⁴⁰ Firstly, survey admissibility is limited to instances where other forms of evidence are highly impracticable or impossible, such as determinations of consumer opinion.¹⁴¹ Secondly, courts are

undocumented immigrants for financial gain and holding immigrants hostage).

¹³⁹ See *id.* at 158 (noting that the person smuggled and taken hostage escaped and told law enforcement his situation, which revealed his lack of immigration status).

¹⁴⁰ See DAY LABOR SURVEY, *supra* note 118 (providing statistics from an anonymous survey that demonstrate that the majority of day laborers are undocumented, but not revealing any information about the specific workers utilizing the H.O.W. Center).

¹⁴¹ See *Eighth Ave. Coach Corp. v. City of N. Y.*, 170 Misc. 243, 251 (N.Y. County Ct. 1939) (holding that the admission of a public survey was "dictated by necessity" because there was no other means to determine the quantities in question); 29 AM. JUR.

highly unlikely to base a conviction on probability alone.¹⁴²

The second element, that the defendant engaged in the illegal activity, in this case encouraging or inducing an undocumented immigrant to come to, enter, or reside in the United States, is also unsatisfied.¹⁴³ As stated in Part III.B, the H.O.W. Center activities do not amount to “encouraging” and

2D *Evidence* § 1015 (2005) (summarizing that survey admissibility has been recognized on the grounds such as “sheer necessity”).

¹⁴² See, e.g., *People v. Collins*, 68 Cal. 2d 319, 320 (Cal. Sup. Ct. 1968) (reversing defendants’ convictions that were based on probability, stating that “Mathematics...while assisting the trier of fact in the search for truth, must not cast a spell over him...Defendant should not have had his guilt determined by the odds”); Annotation, *Admissibility, In Criminal Case, of Statistical or Mathematical Evidence Offered for the Purpose of Showing Probabilities*, 36 A.L.R.3d 1194 (2005) (recognizing that in all cases raising the issue of probability, the court determined that it was reversible error to allow an expert witness to testify on mathematical probabilities used to demonstrate that the defendant was guilty).

¹⁴³ See *supra* Part III.B.1 (arguing that the elements of the encouraging statute, as interpreted by *Oloyede* in the Fourth Circuit, are not met).

the knowledge element is not met, eliminating grounds for conviction under harboring law.¹⁴⁴ The third element, that the defendant knew or recklessly disregarded that the undocumented immigrant(s) entered or remain in the United States unlawfully, is lacking definitive proof, also as explained above.¹⁴⁵ Although the court in *De Jesus-Batres* inferred knowledge from evidence of the defendant's actions, the probative value of that evidence was significantly higher than what Judicial Watch has included in its court submissions.¹⁴⁶

¹⁴⁴ See *supra* Part III.B.1 (analyzing why Herndon and Fairfax County's support of the H.O.W. Center does not violate the encouragement clause because there is no actual proof that Herndon, Fairfax County, and the H.O.W. Center are aware of H.O.W. Center patrons' immigration status and because the assistance provided to patrons is not targeted towards undocumented workers, but to the public as a whole).

¹⁴⁵ See *supra* Section II.B.1 (arguing that because Judicial Watch has attenuated evidence from which knowledge of the undocumented status of its patrons cannot reasonably be inferred, the knowledge element of the harboring clause is not satisfied).

¹⁴⁶ See *U.S. v. De Jesus-Batres*, 410 F.3d 154, 158 (5th Cir. 2005) (holding that the circumstantial evidence that the defendants were part of a smuggling ring and that they guarded

The final element, that the defendant's conduct "tended to substantially facilitate" the undocumented immigrant to remain in the United States illegally, is unsatisfied.¹⁴⁷ In *De Jesus-Batres*, the defendants' actions would have independently created the opportunity for the undocumented immigrant to remain in the United States, had the plan come to fruition.¹⁴⁸ However, in this situation, Herndon and Fairfax County's funding of the H.O.W. Center does not provide a comparable facilitation of residing in the United States.¹⁴⁹ The H.O.W. Center patrons resided in the United States prior to the inception of the

the immigrants at issue until they received a smuggling fee was sufficient).

¹⁴⁷ See *id.* at 160-161 (stating that the government is required to prove the four elements of aiding and abetting, but that proof of financial gain is immaterial to an aiding and abetting conviction).

¹⁴⁸ See *id.* at 157 (describing the defendants' picking up, transporting, holding, and concealing of the smuggled people in their home before one of the immigrants escaped the prison-like conditions).

¹⁴⁹ Cf. *id.* (noting that the defendants' associates met the group of undocumented immigrants in Mexico, waded across the Rio Grande with them, and accompanied them to the I-35 Highway).

Center's establishment, and will likely remain if it ceases functioning.¹⁵⁰ Additionally, future immigrants are highly unlikely to be encouraged to enter the United States because of the H.O.W. Center.¹⁵¹ The Center provides a safe, orderly environment in which workers can connect with employers, but this does not amount to substantially facilitating residence in the United States.¹⁵² For the foregoing reasons, Herndon and Fairfax County are not aiding or abetting encouraging or inducing undocumented immigrants to come, enter, or reside in the United States.

2. Herndon and Fairfax County Are Not Aiding or Abetting the Unlawful Hiring of Undocumented Workers under the Principal Clause

Judicial Watch has also incorrectly charged Herndon and

¹⁵⁰ *Cf. id.* (showing that the defendants composed the United States side of the smuggling operation, intercepting the undocumented immigrants directly across the border, therefore enabling their entry).

¹⁵¹ See VALENZUELA ET AL., *supra* note 26, at 23 (contesting the depiction of day labor centers as "magnets" that encourage immigrants to come to the United States).

¹⁵² See *De Jesus-Batres*, 410 F.3d at 158 (5th Cir. 2005) (demonstrating a standard where substantial facilitation is equivalent to enablement).

Fairfax County with aiding and abetting the unlawful employment of undocumented workers under the principal clause.¹⁵³

Presumably, Judicial Watch considers the undocumented workers, and possibly the employers, the principals.¹⁵⁴ The criminal venture at issue would be the unlawful hiring of undocumented workers.¹⁵⁵

Judicial Watch does not satisfy the first element of

¹⁵³ See Am. Bill Of Compl. For Declaratory and Injunctive Relief ¶¶ 44; Pls.' Mem. In Opposition To Def. County of Fairfax's Dem. And Plea In Bar To Am. Bill of Compl. 2 (stating that Herndon and Fairfax County are using taxpayer funds to support a center whose purpose is "aiding and abetting illegal aliens to procure employment").

¹⁵⁴ See Pls.' Mem. In Opposition To Def. County of Fairfax's Dem. And Plea In Bar To Am. Bill of Compl. 4 (referring to the aiding and abetting of unlawful hiring, thereby including both employee and employer as potential principals).

¹⁵⁵ See *id.*; see also U.S. v. Burgos, 94 F.3d 849, 873 (4th Cir. 1996) (holding that a defendant is guilty of aiding and abetting if he has knowingly associated and participated in a criminal venture, such as facilitating the distribution of cocaine by providing travel tickets and food for the principals and sitting near the cocaine base to protect it).

proving aiding and abetting under the principal clause, that the defendant "associates with a criminal venture."¹⁵⁶ Because Herndon and Fairfax County do not share the criminal intent of either the potentially undocumented workers or employers disregarding employer verification, they do not associate with a criminal venture.¹⁵⁷ Fairfax County and Herndon are not aware of the principals' criminal intent and any violations of the law, and they therefore do not share in the criminal intent of unlawful hiring.¹⁵⁸ To meet this requirement, Fairfax County and

¹⁵⁶ See *supra* Part II.E.2.ii (referring to the *Romero-Cruz* definition of association with a criminal venture: sharing criminal intent with the principal); Principals, 18 U.S.C.A. § 2 (2006) (stating that any person aiding and abetting is punishable as a principal).

¹⁵⁷ See Project Hope and Harmony, Mission and Organization, *supra* note 93 (discussing the Center's community goals of reconciliation and resolution, not promoting employment of patrons).

¹⁵⁸ See *U.S. v. Winstead*, 708 F.2d 925, 927 (4th Cir. 1983) (stating that criminal intent must be proven by knowledge of principals' criminal activity, which was unproven in this case involving a tobacco warehouseman who unknowingly furthered an agreement to falsely identify tobacco contrary to federal law).

Herndon would need to be aware of a worker or employer who was intending not to comply with employment eligibility verification under IRCA and who followed through with this intent; Judicial Watch has asserted no such proof.¹⁵⁹ Even if Fairfax County and Herndon provided the occasion for illegal hiring to take place, this fact alone does not satisfy the requirement that the defendant was aware of the criminal activity.¹⁶⁰

The Center's stated intent is to establish a public service to connect employer and employee in an orderly, accountable

¹⁵⁹ See 18 U.S.C.A. § 2 (requiring an actual offense against the United States for a finding of aiding or abetting); see also Am. Bill Of Compl. For Declaratory and Injunctive Relief ¶¶ 24- 27 (referencing town council member comments at a town council meeting and the H.O.W. Center policy of distributing literature to employers about their legal obligations as evidence that Herndon and Fairfax County were aware that the H.O.W. Center would be used to "assist persons not legally present or authorized to work in the United States").

¹⁶⁰ See *Winstead*, 708 F.2d at 927 (concluding that even though the defendant introduced the principals, who later agreed to falsely identify tobacco, his unknowing facilitation of their crime did not support a finding that he shared their criminal intent).

fashion to promote community harmony.¹⁶¹ The H.O.W. Center requires the registration of both workers and employers, and distributes information about the legal requirements of IRCA.¹⁶² Reminding the 'principals' of legal obligations and creating a record of all parties involved in case of future litigation, is directly contrary to the criminal intent of employees and employers evading federal law.¹⁶³

Judicial Watch also fails to satisfy the second element, that Herndon and Fairfax County participated in a criminal

¹⁶¹ See TOMA & ESPENSHADE, *supra* note 23, at 7 (comparing three types of day laborer projects, and describing a staffed, designated site, like the H.O.W. Center, as providing an orderly hiring system and likely to reduce community discontent).

¹⁶² See Project Hope and Harmony, HOW to Hire, *supra* note 107 (warning employers that it is their responsibility to determine work status and to set the terms of employment; the disclaimer form includes links to United States Citizenship and Immigration Services and Department of Labor websites for more information).

¹⁶³ See CASA de Maryland, How CASA Helps, http://www.casademaryland.org/Employment_md.htm (last visited Apr. 19, 2006) (offering the same level of accountability with a mission to prevent exploitation of workers by ensuring that day laborers are paid by employers).

venture by engaging in affirmative conduct to further the venture.¹⁶⁴ Whereas in *Romero-Cruz* the defendant invited an undocumented worker in Mexico to the United States and later instructed several undocumented workers to lie down in the back of his truck at a motel infamous for people smuggling, the H.O.W. Center has not engaged in conduct furthering a criminal venture.¹⁶⁵ The H.O.W. Center only matches workers and employers whose hiring process has the potential of violating federal law, if both worker and employer disregard status verification requirements.¹⁶⁶ This does not amount to affirmative conduct to substantially further a criminal venture, such as in *Romero-Cruz*.¹⁶⁷ Similar to *Wal-Mart*, where the court held that

¹⁶⁴ See *United States v. Romero-Cruz*, 201 F.3d 374, 378 (5th Cir. 2000) (affirming sufficiency of evidence to prove that defendant participated in the venture).

¹⁶⁵ See *Romero-Cruz*, 201 F.3d at 378 (rejecting Romero's testimony that he was an undocumented worker being transported due to the overwhelming evidence that Romero participated in the harboring and transporting of undocumented workers).

¹⁶⁶ See *Control of Employment of Aliens*, 8 C.F.R. § 274(a)(2) (2006) (enumerating requirements for work authorization in compliance with federal law).

¹⁶⁷ *Cf. Romero-Cruz*, 201 F.3d at 379 (holding that Romero's role

“furthering an illegal presence” involved more than the transportation of undocumented workers to their place of employment, the court should recognize that establishing an assembly center for day laborers does not amount to furthering a criminal venture.¹⁶⁸

The final element, that the defendant takes action to further the criminal venture’s success, is also not satisfied.¹⁶⁹ The H.O.W. Center does not take proactive steps to ensure that those who seek to hire illegally succeed in doing so.¹⁷⁰ By

in the smuggling operation amounted to affirmative conduct designed to aid in the criminal venture).

¹⁶⁸ See *Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp 2d 295, 305 (D. N.J. 2005) (holding that even though the workers in question were undocumented and the defendants knew or recklessly disregarded the fact that the workers were in violation of the law, defendant Wal-Mart was still not guilty of aiding and abetting the transportation of undocumented immigrants).

¹⁶⁹ See *Romero-Cruz*, 201 F.3d at 279 (reasoning that defendant’s actions to transport the undocumented workers north satisfied the element that he took steps to make the criminal venture succeed).

¹⁷⁰ See *Project Hope and Harmony, HOW to Hire*, *supra* note 107 (asserting that employers are responsible for following

providing a transparent, fixed hiring site with employees and employers who are registered, the Center promotes organization and contracting, not criminality.¹⁷¹ If Immigration, Customs, and Enforcement (ICE) sought to investigate the work status and hiring practices of the workers and employers, the Center's system would provide greater accountability than the previous informal parking-lot gathering.¹⁷² By virtue of the Center's transparency, fixed location, and record-keeping, the court should recognize that they do not further the success of illegal hiring.

applicable federal law).

¹⁷¹ See Project Hope and Harmony, Worker Request Form, *supra* note 94 (creating a quasi-contract in order to track employers and employees and encouraging fair treatment and honest practices).

¹⁷² See Immigration Customs and Enforcement, News Releases, Worksite, available at <http://www.ice.gov/graphics/investigations/worksite/newsreleases.htm> (listing press releases regarding ICE worksite raids since March 2005; no day labor sites were included; see also *At Home in Herndon*, *supra* note 35 (reporting that ICE told town officials that they have limited regional agents and only pursue "major players" such as smuggling rings and gangs)).

**D. Herndon, Fairfax County, and Project Hope and Harmony
Do Not Violate the Personal Responsibility and Work
Opportunity Reconciliation Act**

Judicial Watch also charged that the Center operations violate the Welfare Act, which prohibits the provision of state and local benefits to undocumented individuals.¹⁷³ However, this charge is baseless because the Welfare Act exempts the exact category of public services into which the Center falls.¹⁷⁴ 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 upon recipient's income or resources; and (3) are necessary for the protection of life or safety.¹⁷⁵ The 2001 notice of final order from the Attorney

¹⁷³ 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).

¹⁷⁴ 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).

¹⁷⁵ See 8 U.S.C.A. § 1621(b)(4) (describing the final discretionary category, prohibiting the provision of services to undocumented individuals based on their level of indigence).

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.¹⁷⁶ The Center fits directly within both of these categories. The Center delivers non-cash, in-kind services to the community at large.¹⁷⁷ The services of the Center are open to all members of the public seeking daily employment, and are not contingent upon financial need.¹⁷⁸ Most importantly, the Center's operations protect the lives and safety of the Herndon public and the workers seeking

¹⁷⁶ 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).

¹⁷⁷ See Project Hope and Harmony, Mission and Organization, *supra* note 93 (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).

¹⁷⁸ See Interview with Joel Mills, *supra* note 107 (stating that the H.O.W. Center welcomes all people to use its services).

day labor.¹⁷⁹

1. The H.O.W. Center Provides Services That Are Designed To Protect Workers and Community Residents

The H.O.W. Center protects the life and safety of workers and community residents by providing a safe location with appropriate facilities for day laborers to assemble.¹⁸⁰ The H.O.W. Center was specifically designed to eliminate the safety hazards of workers and employers congregating at the Herndon 7-Eleven, a busy area of downtown Herndon where the assembly caused traffic congestion and residents and workers risked car

¹⁷⁹ See NATIONAL DAY LABORERS' ORGANIZING NETWORK, SUE McCARTY, AND GEORGE FARADAY, COMMON GROUND 6-7, <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).

¹⁸⁰ See TOMA & ESPENSHADE, *supra* note 23, at 5 (listing community complaints about informal day laborer gatherings, largely resulting from "mismatching" a place's use with its facilities).

accidents and injury.¹⁸¹ Facilities and Center guidelines address other safety concerns voiced by residents, including littering, intimidating patrons, and urinating and drinking in public.¹⁸² Additionally, by providing workers and employers an enclosed space, both residents and workers can feel less threatened by unwanted attention.¹⁸³

The H.O.W. Center also reduces safety risks to workers on the job by increasing employer accountability.¹⁸⁴ Day labor

¹⁸¹ See Interview with Joel Mills, *supra* note 107 (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); Rein, *supra* note 36 (quoting worker Eric Arauz, "We want a secure site because our lives are in danger when contractors leave us on the road.").

¹⁸² See At Home in Herndon, *supra* note 35 (summarizing the Mayor's safety concerns about the previous informal site and discussing the Center's location, funding, and legal issues).

¹⁸³ See Morello, *supra* note 30 (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).

¹⁸⁴ See Interview with Joel Mills, *supra* note 107 (explaining

itself is one of the most dangerous occupations in the United States: a 2006 national study stated that one in five workers had been injured on the job and that seventy-five percent of day laborers found their work to be unsafe.¹⁸⁵ In the midwest, where day laborers engage in more roofing activities, ninety-two percent of workers reported unsafe working conditions.¹⁸⁶ Many of these unsafe conditions are not revealed to workers until they discover them upon arrival at the work site.¹⁸⁷ As stated

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 H.O.W. Center practices).

¹⁸⁵ See VALENZUELA ET AL., *supra* note 26, at 12, 14 (revealing shockingly high levels of exploitation and safety hazards for day laborers).

¹⁸⁶ *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).

¹⁸⁷ See KERR & DOLE, *supra* note 186, at 21 (summarizing workers' accounts of unsafe conditions of which they were not warned; one

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.¹⁸⁸ 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.¹⁸⁹ The Center therefore helps prevent employers from taking advantage of an informal employment relationship and the worker's precarious financial position.¹⁹⁰

worker was sent to "crush barrels" that emitted "unidentified noxious fumes" and there was no protective mask available).

¹⁸⁸ See VA. CODE ANN. § 65.2-101 (2006) (defining "employee", for the purposes of determining eligibility for workers compensation, as "every person, including aliens and minors...whether lawfully or unlawfully employed").

¹⁸⁹ See NATIONAL DAY LABORERS' ORGANIZING NETWORK, MCCARTY, & FARADAY, *supra* note 179 (proposing the implementation of informant's suggestions that verbal and physical abuse on the job end and that employers provide instruction and information on work-site safety hazards to improve the state of day laborer safety).

¹⁹⁰ See VALENZUELA ET AL., *supra* note 26 (stating that forty-nine percent of workers surveyed had been denied payment for work completed in the two months prior to the survey and forty-eight

The H.O.W. Center record-keeping establishes an air of accountability that is, thus, "necessary for the life and safety" for all day laborers.¹⁹¹ For the foregoing reasons, the H.O.W. Center is exempt from the prohibition on providing public benefits to undocumented immigrants.

2. The H.O.W. Center Provides Services That Are Necessary For the Protection of Life and Safety

The H.O.W. 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.¹⁹² Because undocumented workers are

percent were underpaid); KERR & DOLE, *supra* note 186, 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).

¹⁹¹ See Final Specification of Community Programs, *supra* note 176 (containing no language requiring legal immigration status of the workers that the exemption protects).

¹⁹² See David Cho and Tom Jackman, *Law Raises Immigrants' Suspicions; Va. Arrests Possible Without Warrants*, WASH. POST, July 11, 2005, at C1 (reporting that the Virginia immigrant community's alienation from police and fear of reporting crimes

generally frightened that police and local authorities will arrest and eventually deport them for lacking documentation, they face a powerful disincentive to report crimes.¹⁹³ Undocumented workers frequently witness crimes and are themselves victimized, but their fear prevents local authorities from benefiting from assailant descriptions, identifications, and physical evidence.¹⁹⁴ The H.O.W. Center encourages workers to become community stakeholders and report instances of

causes serious public safety concerns).

¹⁹³ 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).

¹⁹⁴ 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, 111 (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").

witnessed or personally experienced victimization.¹⁹⁵ Recently, two workers at the H.O.W. Center confided in the Coordinator that they were victims of a violent armed robbery.¹⁹⁶ The coordinator explained to the workers that they should report what they know to the police, as there had been a series of violent robberies in the area.¹⁹⁷ The workers cooperated with the police and positively identified the robbers on a surveillance video and in person.¹⁹⁸ The alleged robbers have

¹⁹⁵ See Interview with Joel Mills, *supra* note 107 (discussing unexpected developments in operating the center, including the promotion of public safety through crime reporting).

¹⁹⁶ See *id.* (demonstrating the unanticipated public safety benefits of the H.O.W. Center).

¹⁹⁷ See HERNDON POLICE DEPARTMENT ACTIVITY REPORT (Jan. 30, 2006) (reporting two robberies and one attempted robbery carried out by the workers' assailants; the report details that the assailants were arrested and charged with robbery, abduction, and using a firearm in commission of a felony and that police are investigating connections to related cases).

¹⁹⁸ See Interview with Joel Mills, *supra* note 107 (stating that the workers identified the assailants from the McDonalds' surveillance video and then saw their assailants out on the street while still with police).

since confessed to at least ten robberies and assaults in the area.¹⁹⁹ In this one example, after being in operation for a mere two months, the H.O.W. Center has provided a critical service to protect the lives and safety of all Virginia residents, citizen and non-citizen alike.²⁰⁰ The H.O.W. Center is building community trust and creating stake-holders out of all community members, regardless of socioeconomic or immigration status.²⁰¹ This program serves the exact social purpose that the Attorney General intentionally exempted from the Welfare Act prohibitions.

E. Virginia Law Further Authorizes the County Director to Disburse Funds to Needy People

Contrary to Judicial Watch's complaint, Herndon and Fairfax

¹⁹⁹ See *id.* (explaining that the H.O.W. Center decided not to publicize this victory in public safety because the workers are experiencing media fatigue from all of the unwanted press coverage of the Center's legal battle).

²⁰⁰ See Fee, *supra* note 194 (speculating on the serious consequences of a large sector of society not reporting crimes).

²⁰¹ 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).

have not contravened the Virginia statute prohibiting the provision of state or local benefits to undocumented individuals for two reasons.²⁰² Firstly, the statute stipulates that state or local public assistance mandated by the Welfare Act is excepted from the statute's reach.²⁰³ As demonstrated above, the Attorney General excluded the category of programs in which the Center falls, making the Center a protected program under the Welfare Act and outside the Virginia statute's authority.²⁰⁴ Secondly, the Virginia Code contains an additional statutory authorization for the Center under the Local Board Fund Disbursement clause.²⁰⁵ This clause allows Herndon and Fairfax

²⁰² See VA. CODE ANN. § 63.2-503.1 (2006); Am. Bill Of Compl. For Declaratory and Injunctive Relief ¶¶ 39, 47 (charging Herndon and Fairfax with violating Virginia law, thus committing an ultra vires act by approving and funding the Center).

²⁰³ See VA. CODE ANN. § 63.2-503.1 (2006) (excepting "public assistance that is mandated by Federal Law pursuant to 8 U.S.C. § 1621").

²⁰⁴ See *supra* Part III.D (analyzing the Attorney General's pronouncement of program exemption categories, determining that the H.O.W. Center qualifies as an exempted program).

²⁰⁵ See VA. CODE ANN 63.2-314 (2006) (authorizing local boards to "disburse funds derived...for the purpose of aiding needy

County to receive and disburse funds to provide public assistance to aid needy persons, irrespective of eligibility requirements in Virginia.²⁰⁶ Needy has two common meanings, needful and indigent.²⁰⁷ Both meanings apply to the H.O.W. Center patrons. Day laborers are needful of an organized program to reduce the high levels of exploitation and safety hazards that plague them as a group.²⁰⁸ Day laborers are also among the poorest residents in the state, many of whom

persons within their...counties, cities, or districts”).

²⁰⁶ See *Dem. By County of Fairfax, Va., To Counts I, II, and III of Am. Bill of Compl. and Plea in Bar By County of Fairfax, Va. To Counts I, II, and III of Am. Bill of Compl.* 4 (arguing that the limitations of section 63.2-503.1 of the Virginia Code do not affect the disbursement of funds for the H.O.W. Center due to the leeway granted the County pursuant to section 63.2-314).

²⁰⁷ See *BLACK'S LAW DICTIONARY* 1060 (8th ed. 2004) (defining needy as: (1) needful, necessary; and (2) indigent and very poor, noting that needy has a more permanent and less urgent sense than the word “necessitous”).

²⁰⁸ See *VALENZUELA ET AL.*, *supra* note 26, at 31-32 (expressing the urgency of informed policy debates about day laborers given the level of exploitation, injury, violence, harassment and vulnerability faced by workers).

experience financial insecurity without broader public assistance safeguards.²⁰⁹ Given that Herndon and Fairfax County disbursed funds to create a program that aids a population sector that is both needful and indigent, the stipulations of the Local Board Fund Disbursement clause justify the expenditure.²¹⁰ Herndon and Fairfax County have therefore not violated federal or Virginia law in providing a public service to a population including undocumented immigrants.

IV. IMPLICATIONS AND RECOMMENDATIONS

A. Local Governments and Social Workers Are Not Appropriate Targets for Those Dissatisfied with United States Immigration Policy

Judicial Watch sued Fairfax County and Herndon because of a fundamental difference of opinion about how to deal with a broken system.²¹¹ To Judicial Watch, this local government is

²⁰⁹ See *id.* at 3 (reporting that day labor pays poorly, with annual earnings unlikely to exceed \$15,000, putting day laborers at or below the federal poverty threshold).

²¹⁰ See Dem. By County of Fairfax, Va., To Counts I, II, and III of Am. Bill of Compl. and Plea in Bar By County of Fairfax, Va. To Counts I, II, and III of Am. Bill of Compl. (arguing that the Center's activities are shielded from Virginia code 63.2-503.1 due to section 63.2-314).

²¹¹ See Interview with Paul Orfanedes, Judicial Watch Director of

using tax payer resources to propagate a defunct immigration policy.²¹² To Fairfax County, Herndon, and Project Hope and Harmony, the H.O.W. Center is a critical measure to minimize social problems created by an ineffective immigration policy.²¹³ However, Judicial Watch, along with national and Virginia legislators, believe that the provision of interim social services to undocumented workers is just one more carrot encouraging people to come to and work in the United States illegally.²¹⁴ This approach of targeting local governments and

Litigation (Feb. 24, 2006) (notes on file with author)

(conceding that Judicial Watch and Project Hope and Harmony ultimately want the same thing: immigration reform).

²¹² See *id.* (stating that operating a day laborer center only encourages more illegal immigration and is therefore a 'solution' that exacerbates the original problem).

²¹³ See *id.* (acknowledging that day labor is a serious problem for communities and that the H.O.W. Center's goal may well be community reconciliation).

²¹⁴ See Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005, H.R. 4437, 109th Cong. § 205 (2005) (broadening federal smuggling laws to subject those that assist and conceal undocumented immigrants to prosecution, including social workers providing humanitarian aid); H.R. 1051, 2006

social workers who take action to help *all* community members is terribly misguided.²¹⁵ This law suit and potential legislation criminalizing the provision of social services to undocumented immigrants is equivalent to criminalizing the treatment of a disease's symptoms when there is not obvious or immediate cure on the horizon. The disease menacing the United States is its dysfunctional national immigration policies; the symptoms necessitating treatment are community strife, and the exploitation and marginalization of eleven million people.²¹⁶

Sess. (Va. 2006) (prohibiting funding employment centers that do not verify and electronically post workers names and work authorization status).

²¹⁵ See Rachel L. Swarns, *Bill on Illegal-Immigrant Aid Draws Fire*, N.Y. TIMES, Dec. 30, 2005, at A1 (relaying dismay voiced by churches, social work agencies, and immigration advocates that Congress could criminalize basic humanitarian assistance of undocumented immigrants).

²¹⁶ See Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497, 524 (2004) (concluding that undocumented workers are part of the United States future and that they and their advocates will press on for rights in the workplace regardless of policies aimed at attrition).

B. The Impact of Attacking Those Treating the Symptoms of a Broken Immigration Policy

1. Symptom Number One: Social Disruption

Attacking local governments and social workers that aim to restore community harmony leaves the worsening problem of public discord unattended.²¹⁷ The social disruption that approximately one hundred workers gathering at the local 7-Eleven caused in Herndon, Virginia, and throughout the United States is remarkable.²¹⁸ It is not, however, unique.²¹⁹ Communities do not adjust over-night to rapidly changing demographics, and the adjustment process presents grave concerns.²²⁰ Xenophobia and

²¹⁷ See LeDuff, *supra* note 22 (describing escalating hostility between residents and immigrant workers in Farmingville, New York, where a hate-crime was perpetrated against two Mexican workers).

²¹⁸ See *Analysis: Day Laborer Centers Spark Immigration Debate*, *supra* note 1 (reporting about the national attention devoted to Herndon's day labor debate, which created deep fissures among sectors of the population).

²¹⁹ See VALENZUELA ET AL., *supra* note 26, at 23 (naming Phoenix, Arizona and Farmingville, New York as examples of places where day labor has become a socially divisive phenomenon).

²²⁰ See Rein, *supra* note 2 (reporting that the Herndon Town Hall's switchboard was unplugged after being barraged with anti-

hate crimes are not a rare occurrence, and can result from high-tension immigration issues, such as the gathering of day laborers.²²¹ Encouraging programs, such as day laborer centers, that re-establish community harmony and address residents' concerns in a realistic time frame can avert the social destruction resulting from hate-speech and violence.²²²

2. Symptom Number Two: Worker Exploitation and Abuse

Punishing local governments and social workers who assist diverse immigrant populations allows worker exploitation and abuse to remain the norm in the day labor industry.²²³

immigrant hate calls that Town Manager Steve Owens described as "vile and resembl[ing] hate speech").

²²¹ See FARMINGVILLE, *supra* note 6 (detailing the community discord and outrage that set the stage for white supremacists to savagely attack two Mexican day laborers).

²²² See TOMA & ESPENSHADE, *supra* note 23, at 10 (pinpointing the fear and stereotyping that underlies some residents' opposition to day laborers and explaining that day labor center organizers can dispel much of this discomfort through public education and increasing positive community dialogue).

²²³ See VALENZUELA ET AL., *supra* note 26, at 12, 14 (recounting gross violations of labor practices and civil rights at work sites, where eighteen percent of day laborers were subjected to

Unscrupulous employers are emboldened by many workers' lack of immigration status, withholding pay and failing to provide a safe work environment.²²⁴ Workers endure unacceptable treatment and conditions out of fear and ignorance of their rights.²²⁵ Day laborers centers serve the critical purpose of providing accountability and transparency to the day labor industry in a realistic, time-efficient manner.²²⁶ The level of abuse experienced by day laborers demands immediate attention, not

physical violence by their employer in the past two months).

²²⁴ See MALDEF, NATIONAL EMPLOYMENT LAW PROJECT, USED AND ABUSED: THE TREATMENT OF UNDOCUMENTED VICTIMS OF LABOR LAW VIOLATIONS SINCE HOFFMAN PLASTIC COMPOUNDS v. NLRB 2 (2003) (finding that the Supreme Court holding that undocumented workers were not entitled to back-pay following a wrongful firing has caused employers to argue that undocumented workers have no labor rights whatsoever).

²²⁵ See *id.* (exposing the fact that undocumented workers will not complain about even shocking abuses out of fear of employer retaliation and confusion over their rights).

²²⁶ See VALENZUELA ET AL., *supra* note 26, at 23 (enumerating the benefits of formalized hiring centers and debunking the myth that hiring sites are an immigrant magnet by providing the statistic that 83% of day laborers learned of the day labor market after arriving in the United States).

just a place in the queue for future legislative action.²²⁷

C. Recommendations: Encouragement of Local Community Solutions and Comprehensive Immigration Reform

In order to resolve the social disruption and worker exploitation and abuse resulting from the burgeoning day labor industry, national and state governments should seek both interim local community solutions and long-term legislative reform.²²⁸ Day labor centers and other programs that aim to heal divided communities and improve worker safety and dignity should be encouraged and supported.²²⁹ Additionally, Congress must enact comprehensive immigration reform that incorporates a plan

²²⁷ See KERR & DOLE, *supra* note 186, at 21 (recounting day laborers' stories of work conditions, such as one worker sent to a paint shop where he worked without protective gear alongside permanent workers equipped with industrial respirators).

²²⁸ See Jane Lampman, *Faith Groups Press for Balanced Approach to Immigration*, CHRISTIAN SCI. MONITOR, Feb. 2, 2006 (discussing a faith-based petition, signed by dozens of organizations, for moral, comprehensive immigration reform that includes worker protections and regularization of status for the undocumented).

²²⁹ See VALENZUELA ET AL., *supra* note 26, at iii (calling day labor hiring centers "the most comprehensive response to the challenges associated with the growth of the day labor industry").

to eventually regularize the status of the millions of undocumented workers.²³⁰

V. CONCLUSION

Herndon is another 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: (1) the demands of the American economy; (2) the rights of the immigrants who supply its labor; (3) the concern of communities facing rapidly changing demographics; and (4) the federal government's capacity and will to enforce immigration law.²³¹ Herndon's solution, a day labor hiring site, does not contravene federal or state law.²³² Opponents to day labor hiring sites should not sue Herndon for

²³⁰ See, e.g., Land Border Security and Immigration Improvement Act, H.R. 2899, 109th Cong. (2006) (combining a path to legal immigration status and permanent residency with a work-based visa that enables immigrants to fill positions that American workers will not take).

²³¹ 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).

²³² See *supra* Part III.A-E (analyzing federal and state statutes, determining that the H.O.W. Center offends no applicable law).

using lawful means to ameliorate social turbulence; they should lobby Congress for a comprehensive legislative solution.²³³

There is more at stake in Herndon than the 7-Eleven and I-9 forms.²³⁴ The safety and dignity of each member of the diverse Herndon community is jeopardized when misperceptions and fear trump social utility.²³⁵ 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.

²³³ See, e.g., National Immigration Forum, Take Action, Tell Your Representatives to Act on Immigration Reform This Session, <http://www.immigrationforum.org/DesktopDefault.aspx?tabid=580> (providing information about pending immigration legislation).

²³⁴ See Control of Employment of Aliens, 8 C.F.R. § 274(a)(2) (2006) (requiring employers to complete Form I-9, supplying employee information and work authorization verification to the federal government).

²³⁵ See *Analysis: Day Laborer Centers Spark Immigration Debate*, *supra* note 1 (quoting the bigoted remarks of one Herndon resident who was opposed to the hiring site, stating "it's time for all nationalities to learn to live like Americans...learn how to speak English...learn how to have good hygiene...and pride will come to them").