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21 UNITED STATES DISTRICT COURT

22 DISTRICT OF ARIZONA

23 Friendly House; et al.

24 Plaintiffs,

25 v.

26 Michael Whiting; et al.

27 Defendants.

Case No. CV-10-01061-MEA

**MEMORANDUM OF POINTS AND
AUTHORITIES OF AMICUS CURIAE
INTERNATIONAL LONGSHORE
AND WAREHOUSE UNION IN
SUPPORT OF PLAINTIFFS' MOTION
FOR PRELIMINARY INJUNCTION**

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1 citizens, including those outside the targeted group of individuals suspected of unlawful
2 presence in the United States. The process of distinguishing suspect persons from
3 everyone else necessarily requires police authorities to proactively scrutinize everyone,
4 and when police so choose, make anyone stand and deliver his/her identity papers.
5 History teaches that when a suspect or minority group is subject to plenary police
6 demands to produce identity papers, the entire population falls under broad and
7 pernicious government surveillance and control:

8 Identification and fear of reprisal might deter perfectly peaceful discussions
9 of public matters of importance ... Deplorably, apprehension of reprisal by
10 the average citizen is too often well founded. The national scene in recent
11 times has regrettably provided many instances of penalties for controversial
12 expression in the form of vindictive harassment, discriminatory law
enforcement, executive abuse of administrative powers, and intensive
government surveillance.

13 *Hynes v. Borough of Oradell*, 425 U.S. 610, 625-626 (1976) (Brennan, J. concurring).

14 Further, SB 1070 unlawfully targets day laborers—regardless of their immigration
15 status—and criminalizes their only method of seeking employment. As a union created
16 primarily by casual day laborers, ILWU has a special perspective on the impact of SB
17 1070 on day laborers’ Fourteenth Amendment right to pursue their chosen occupation
18 free from unreasonable governmental interference and on their ability to exercise their
19 First Amendment rights of free speech and assembly to organize and secure fair
20 treatment, safe work, and a decent standard of living.

21 **I. SB 1070 Is Unconstitutionally Vague Because It Provides No Standards For**
22 **Enforcement And Will Subject Persons Lawfully Present In Arizona To**
23 **Arbitrary And Discriminatory Treatment**

24 Two provisions of SB 1070 virtually guarantee that Arizona police will stop, and
25 possibly detain or arrest individuals who subjectively appear to the officer to be foreign-
26 born. §11-1051(B) provides “For any lawful contact made by a law enforcement official
27 ... where reasonable suspicion exists that the person is an alien who is unlawfully present
28 in the United States, a reasonable attempt shall be made ... to determine the immigration

1 status of the person.” §11-1051(E) provides that “A law enforcement officer, without a
2 warrant, may arrest a person if the officer has probable cause to believe that the person
3 has committed any public offense that makes the person removable from the United
4 States.” These provisions are unconstitutional not only as violations of both the federal
5 supremacy and equal protection doctrines, but also on the grounds of vagueness:

6 Vague laws may trap the innocent by not providing fair warning. Second,
7 if arbitrary and discriminatory enforcement is to be prevented, laws must
8 provide explicit standards for those who apply them. A vague law
9 impermissibly delegates basic policy matters to policemen, judges, and
10 juries for resolution on an ad hoc and subjective basis, with the attendant
11 dangers of arbitrary and discriminatory application. Third, but related,
12 where a vague statute abuts upon sensitive areas of basic First Amendment
freedoms, it operates to inhibit the exercise of those freedoms. Uncertain
meanings inevitably lead citizens to steer far wider of the unlawful zone
than if the boundaries of the forbidden areas were clearly marked.

13 *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972) (internal quotations omitted)

14 Further, “the more important aspect of vagueness doctrine is ... the requirement
15 that a legislature establish minimal guidelines to govern law enforcement.” *Kolender v.*
16 *Lawson*, 461 U.S. 352, 358 (1983). “Where a legislature fails to provide such minimal
17 guidelines, a criminal statute may permit a standardless sweep that allows policemen,
18 prosecutors and juries to pursue their personal predilections.” *Id.* (internal quotations
19 and citations omitted). “[E]ntrusting lawmaking to the moment to moment judgment of
20 the policeman on his beat furnishes a convenient tool for harsh and discriminatory
21 enforcement by local prosecuting officials, against particular groups deemed to merit
22 their displeasure.” *Id.* at 360, quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974).

23 SB 1070 suffers from all of the offenses against American values identified by
24 *Grayned*, *Kolender* and *Smith*. Persons lawfully present in the State of Arizona have no
25 way of knowing whether their appearance somehow gives probable cause that they are
26 illegal aliens immediately and continuously subject to police demands for proof of
27 identity and legal residency.

28

1 S.B. 1070 fails to provide any standards or criteria, objective or otherwise, for the
2 police to make such determination. Consequently, it is virtually impossible for either the
3 cop on the beat or a court upon later review to gauge whether "probable cause" exists to
4 conclude that a particular person looks like someone who might have "committed a
5 public offense that makes the person removable from the United States." Indeed, SB
6 1070 does not define such offenses, or even provide guidance as to where (or even
7 whether) they might be defined in federal law. "No one may be required at peril of life,
8 liberty or property to speculate as to the meaning of penal statutes," *Lanzetta v. New*
9 *Jersey*, 306 U.S. 451, 453 (1939), but SB 1070 does exactly that.

10 The unconstitutional vagueness inherent in SB 1070's mandate for police to
11 determine whether one is "an alien who is unlawfully present in the United States"
12 becomes especially stark when considering the factual complexities and legal subtleties
13 of federal immigration law. In particular, 8 U.S.C. §1227(a) defines various "classes of
14 deportable aliens," to include (1) those who were inadmissible at time of entry or of
15 adjustment of status or who violate the terms of their immigration status, (2) those
16 convicted of certain criminal offenses, (3) those who fail to register or who falsify
17 documents, (4) those deemed deportable on "security and related grounds," (5) those who
18 become a "public charge," and (6) unlawful voters. Additionally, §1227(a) authorizes
19 waivers of removal on various grounds, including for victims of domestic violence,
20 §1227(a)(7), and to keep families together, e.g. §1227(a)(1)(E)(iii). It is obviously
21 impossible for a local police officer to have any information, before approaching and
22 directing a person to stand and deliver identity papers, whether that individual is an "alien
23 who is unlawfully present in the United States" within the meaning of complex, federal
24 immigration law.

25 The use of vague statutory terms to persecute political dissidents is something with
26 which ILWU is intimately familiar. The U.S. government twice attempted to deport
27 ILWU President Harry Bridges, an immigrant from Australia, based on his alleged
28 "affiliation" with the Communist Party—a deportable offense under then- §137(e) of

1 Title 8, U.S.C. *Bridges v. Wixon*, 326 U.S. 135, 140 n.1 (1945). After noting that
2 deportation may “visit as great a hardship as the deprivation of the right to pursue a
3 vocation or a calling” and may “result in a loss of all that makes live worth living,” *id.* at
4 147, the Court declared:

5 We cannot assume that Congress meant to employ the term ‘affiliation’ in a
6 broad, fluid sense which would visit such hardship on an alien for slight or
7 insubstantial reasons. ... [W]e cannot believe that Congress intended to cast
8 so wide a net as to reach those whose ideas and program ... fell far short of
overthrowing the government by force or violence.

9 *Id.* at 147-148.

10 Because SB 1070 contains no objective guidelines for enforcement, and permits
11 local police officers to arbitrarily stop and arrest anyone based on a subjective opinion as
12 to who appears to be "an alien who is unlawfully present in the United States," it contains
13 the same risk of arbitrary and discriminatory enforcement as did the vaguely-defined term
14 “affiliation” in *Bridges, supra*, and is, therefore, unconstitutionally vague.

15 **II. SB 1070 Will Deprive U.S. Citizens And Legal Aliens Of Their Constitutional**
16 **Right To Use Public Space For Lawful Purposes**

17 It is well-established that “the freedom to loiter for innocent purposes is part of the
18 ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.” *City of*
19 *Chicago v. Morales*, 527 U.S. 41, 53 (1999). “Indeed, it is apparent that an individual’s
20 decision to remain in a public place of his choice is as much a part of his liberty as the
21 freedom of movement inside our frontiers that is a part of our heritage, or the right to
22 move to whatsoever place one’s own inclination may direct.” *Id.* at 54 (internal quotation
marks omitted).

23 SB 1070 clearly interferes with the right of all individuals lawfully present in the
24 State of Arizona to enjoy public spaces or move about as they please. §13-1509(A) of
25 SB 1070 provides that an alien is guilty of trespassing if he/she is present on any private
26 or public land in the state and has either willfully failed to register with US immigration
27 authorities or fails to have his/her alien registration card in his/her personal possession.
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1 Arizona police officers will thus be tasked with the duty of determining whether any
2 individual in any public space, simply by presence, appearance and status, is violating SB
3 1070—a determination that can be made only by stopping the person and requesting
4 identification.¹ Under SB 1070, every single man, woman and child in the State of
5 Arizona falls under surveillance and becomes potentially subject to a police stop to prove
6 legal residence or visitation simply for going about his or her business:

7 Official surveillance, whether its purpose be criminal investigation or
8 ongoing intelligence gathering, risks infringement of constitutionally
9 protected privacy of speech. Security surveillances are especially sensitive
10 because of the inherent vagueness of the domestic security concept, the
11 necessarily broad and continuing nature of intelligence gathering, and the
12 temptation to utilize such surveillances to oversee political dissent.

13 *U.S. v. U.S. District Court for E. Dist. of Mich.*, 407 U.S. 297, 320 (1972).

14 SB 1070 clearly opens the door to officially-sanctioned harassment of anyone in
15 Arizona who advocates for an unpopular cause—such as the repeal of SB 1070 or a
16 change in federal immigration law. *Hynes*, 425 U.S. 625-626. In *Bridges v. California*,
17 314 U.S. 252 (1941), the ILWU secured the constitutional principle that aliens residing in
18 the United States -- there, it was the founding President of the ILWU -- are entitled to the
19 same First Amendment freedoms as U.S. citizens., Unless SB 1070 is enjoined, these
20 freedoms will be denied to aliens residing in Arizona. Further, even if the immigration
21 status of every person stopped could be verified through an identity check -- and it
22 cannot, *see, e.g. Nijhawan v. Holder*, 129 S.Ct. 2294, 2297-2298(2009) -- SB 1070 will

23 ¹ Indeed, history shows that the mandatory possession of identification papers for
24 inspection upon demand quickly leads to a police state and even genocide. . In Germany
25 in the 1930s, the system of national ID cards enabled the Nazis to find and identify not
26 only Jews, but also the “work-shy”—strikers, people who “took too many days sick
27 leave, changed their job to get better pay, or showed ‘disloyalty’ to their trained career,
28 by working at something different.” Allonby, Nathan ID Cards; an Historical View,
2009, found at www.globalresearch.ca. Similarly, in the 1990s Rwanda used national
identification cards to distinguish between Hutu and Tutsi, otherwise physically
indistinguishable, to commit genocide. Gabb, Sean, A Libertarian-Conservative Case
Against Identity Cards, Political Notes No. 98, 1994, found at www.libertarian.co.uk.

1 undoubtedly deprive U.S. citizens and lawful immigrants of their First Amendment rights
 2 to freedom of speech and assembly, and their Fourth, Fifth and Fourteenth Amendment
 3 rights to go about their business unhindered. Like similar statutes ruled unconstitutional,
 4 SB 1070 will “result[] in a regime in which the poor and the unpopular are permitted to
 5 ‘stand on a public sidewalk ... only at the whim of any police officer.’” *Id.* at 170,
 6 quoting *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965).

7 **III. SB 1070 Deprives Day Laborers Of Their Liberty To Seek Employment In**
 8 **Violation Of The Fifth And Fourteenth Amendments**

9 It has become increasingly common in major cities for informal day-labor hiring
 10 sites to develop “in front of home improvement stores and gas stations, along busy
 11 thoroughfares and near expressway onramps, and in parks and other public spaces.”²

12 The use of public space to seek employment undoubtedly enjoys constitutional
 13 protection. “In a Constitution for a free people, there can be no doubt that the meaning of
 14 ‘liberty’ must be broad indeed.” *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972).
 15 The “liberty” guaranteed by the Fourteenth Amendment “denotes not merely freedom
 16 from bodily restraint but also the right of the individual to contract, to engage in any of
 17 the common occupations of life, to acquire useful knowledge, to marry, establish a home
 18 and bring up children” and other activities “essential to the orderly pursuit of happiness
 19 by free men.” *Id.*, quoting *Meyer v. Nebraska*, 262 U.S. 390, 299 (1923). Further, “the
 20 right to hold specific private employment and to follow a chosen profession free from
 21 unreasonable governmental interference comes within the ‘liberty’ and ‘property’
 22 concepts of the Fifth Amendment[.]” *Greene v. McElroy*, 360 U.S. 474, 492 (1959).

23 SB 1070 effectively criminalizes street-corner, day labor markets, regardless of the
 24 participant's immigration status, by making it unlawful: 1) “for an occupant of a motor
 25 vehicle that is stopped ... to attempt to hire or hire and pick up passengers for work ... if
 26

27 _____
 28 ² Abel Valenzuela Jr., Nik Theodore, Edwin Melendez and Ana Luz Gonzalez, On the
 Corner: Day Labor In The United States, Center for the Study of Urban Poverty, Institute

1 the motor vehicle blocks or impedes the normal movement of traffic” (§13-2928(A)); 2
2 “for a person to enter a motor vehicle that is stopped ... in order to be hired by an
3 occupant of the motor vehicle ... if the motor vehicle blocks or impedes the normal
4 movement of traffic.” §13-2928(B); and 3) “for a person who is unlawfully present in the
5 United States and who is an unauthorized alien to knowingly apply for work, solicit work
6 in a public place or perform work as an employee or independent contractor in this state.”
7 §13-2928(C). Enforcement of these provisions would, therefore, unconstitutionally
8 preclude day laborers from seeking employment in public areas.

9 A 2006 study found that, nationwide, although the day labor workforce was
10 overwhelmingly male and Latino, a substantial portion (about 25%) are not
11 "undocumented migrants."³ SB 1070 contains no findings regarding the immigration
12 status of individuals seeking work as day laborers in Arizona. This is constitutionally
13 fatal. In *Doe v. Village of Mamaroneck*, 462 F.Supp.2d 520 (S.D.N.Y. 2006), the court
14 held that day laborers could proceed with a §1983 claim against the mayor and police
15 chief on an equal protection theory, in part, because the officials did not know whether
16 day laborers were immigrants or what their immigration status might be before beginning
17 a “campaign of harassment and intimidation” against them. Many U.S. communities
18 have recognized that day labor markets are a permanent feature of our economy and that
19 there is a need to protect the rights of workers, employers, and the community at large.⁴
20 SB 1070 effectively and unconstitutionally outlaws day labor activities.

21 SB 1070's criminalization of day labor markets is an issue of particular concern to
22 ILWU whose members consist of waterfront day laborers. Longshore work—loading
23 and unloading of seagoing vessels—is inherently casual, that comes and goes, shift by
24 shift, with the ships. As described in an early decision of the National Labor Relations
25

26
27 of Social Research, University of California, Los Angeles, 2006, p. 4 (hereafter, “On the
28 Corner”).

³ On the Corner at 17.

1 Board, the market for longshore labor originated from a day labor system similar to that
2 made unlawful under SB 1070:

3 A longshoreman seeking employment must report each morning at one of
4 the “shape up” points which have been established by custom as the places
5 of hiring. To these points, which are located centrally or at docks, the
6 shipping company or stevedoring companies which require longshoremen
7 for the loading or unloading of a boat on the particular day send their
8 foremen to secure the needed labor. The foremen choose from the
9 assembly of longshoremen as many gangs of men as are necessary and tell
10 them where and when to report for work. If they are satisfactory,
11 longshoremen thus employed will have employment until the particular
12 operation for which they have been employed is completed. They must then
13 report back at the “shape up” in order to secure further employment.

14 *Aluminum Line*, 8 NLRB 1325, 1340(1938), 1938 WL 9080.

15 It was only when unionized longshore workers were able to wrest control of daily
16 hiring away from employers that the work become allocated in a fair manner. *See, e.g.*
17 *Waterfront Employers’ Association of the Pacific Coast*, 90 NLRB 1021, 1037 (1950).
18 1950 WL 8913. The combined effect of the restrictions of SB 1070 will be to prevent
19 day laborers in Arizona from associating or acting together to better their conditions,
20 depriving U.S. citizens and other persons, lawfully permitted to work in the United
21 States, of their fundamental right to organize. *NLRB v. Jones & Laughlin Steel Corp.* 301
22 U.S. 1, 33 (1937). SB 1070 will subject workers to, at a minimum, police surveillance
23 and stops to verify that they are not “trespassing” on public lands, §13-1509(A), or
24 improperly gesturing or nodding at passing vehicles. §13-2928(E)(1). SB 1070 is clearly
25 designed to have the same effect as the vagrancy ordinance voided by the Supreme Court
26 in *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1971), “to make criminal
27 activities which by modern standards are normally innocent.”⁵

28 ⁴ On the Corner at 23-24; Kettles, Gregg W. Day Labor Markets and Public Space,
University of Missouri-Kansas City Law Review, Fall 209, 78 UMKCLR 139.

⁵ Indeed, vague laws attempting to prohibit use of public space by disfavored groups have
their roots in “vagrancy laws [that] that were used after the Civil War to keep former
slaves in a state of quasi-slavery.” *Morales, supra* at 54 n. 20.

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CONCLUSION

For the foregoing reasons, ILWU requests that the Court grant Plaintiff's Motion for Preliminary Injunction enjoining all Defendants from enforcing SB 1070.

Respectfully submitted this 15th day of June, 2010.

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CERTIFICATE OF SERVICE

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I hereby certify that on the 15th day of June, 2010, I electronically transmitted the attached Notice to the U.S. District Court Clerk’s office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

sedwick_chambers@akd.uscourts.gov

I hereby certify that on the 15th day of June, 2010, I served the attached Notice via Regular Mail on the following, who is a registered participant in the CM/ECF System, but requested a paper copy:

The Honorable John W. Sedwick
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s/Danette Valencia

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