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INTERNATIONAL LONGSHORE AND WAREHOUSE UNION

16  
17 UNITED STATES DISTRICT COURT

18 DISTRICT OF ARIZONA

19  
20 Friendly House; et al.

21 Plaintiffs,

22 v.

23 Michael Whiting; et al.

24 Defendants.  
25  
26

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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**STATEMENT OF INTEREST OF AMICUS ILWU  
AND SUMMARY OF ARGUMENT**

ILWU represents approximately 50,000 longshore, warehouse, mining, hotel, maritime and allied workers in California, Oregon, Washington, Alaska, Hawaii and British Columbia, Canada. Long involved in the promotion of constitutional rights and liberties, including with respect to immigration laws, ILWU can offer a special perspective on the unconstitutionality of SB 1070, based in part on its own legal history of successfully defending its members and officers from unconstitutional enforcement of immigration laws. *See, e.g., U.S. v. Brown*, 381 U.S. 437 (1965) (overturning criminal conviction of ILWU officer for membership in Communist Party as unconstitutional bill of attainder); *In re Sawyer*, 360 U.S. 622 (1959) (vacating disciplinary suspension of ILWU attorney for publicly criticizing, during trial, the prosecution of ILWU officials accused of communist affiliations); *ILWU Local 37 v. Boyd*, 347 U.S. 222 (1954) (ILWU suit to enjoin INS from treating aliens domiciled in continental United States, returning from temporary work in Alaska, as if they were aliens entering United States for the first time); *Bridges v. U.S.*, 346 U.S. 209 (1953)(reversing criminal convictions against the three titled officers of ILWU for allegedly testifying fraudulently in naturalization proceeding of ILWU President); *Bridges v. Wixon*, 326 U.S. 135 (1945) (granting habeas corpus petition by ILWU President, an alien detained under an order of deportation for alleged Communist Party affiliation, based on unconstitutional infringement of free speech and free association rights); *Bridges v. California*, 314 U.S. 252 (1941)(reversing contempt fine against ILWU President for public criticism of a court ruling as violative of First Amendment rights).

ILWU fully agrees with Plaintiffs’ contentions that SB 1070 is unconstitutional on grounds of federal preemption, equal protection (e.g., discrimination) and interference with freedom of speech. However, ILWU believes that SB 1070 suffers from even greater constitutional deficiencies that will impact all Americans. SB 1070 expands general police powers to unconstitutionally allow for routine identification checks on all

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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.

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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.<sup>1</sup> 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

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23 <sup>1</sup> 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](http://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](http://www.libertarian.co.uk).

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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.”<sup>2</sup>

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

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

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

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

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

<sup>3</sup> 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.”<sup>5</sup>

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28 <sup>4</sup> 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.

<sup>5</sup> 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 15<sup>th</sup> day of June, 2010.

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**CERTIFICATE OF SERVICE**

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I hereby certify that on the 15<sup>th</sup> 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](mailto:sedwick_chambers@akd.uscourts.gov)

I hereby certify that on the 15<sup>th</sup> 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  
United States District Court Anchorage  
222 W. 7<sup>th</sup> Avenue, #4  
Anchorage, AK 99513

s/Danette Valencia

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