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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

UTAH COALITION OF LA RAZA, et.al, and UNITED STATES of AMERICA, et al, Plaintiffs v. The State of UTAH; GARY R. HERBERT, Governor of the State of Utah, in his Official Capacity; & MARK SHURTLEFF, Attorney General of the State of Utah, in his Official Capacity, Defendants.	CASE NOS. 02:11-CV-0401-CW; 02-11-CV-1072-CW (Consolidated)

BRIEF OF *AMICUS CURIAE*, IMMIGRATION REFORM LAW INSTITUTE, INC. IN SUPPORT OF DEFENDANTS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION[1]

[1] This brief is filed upon Motion to the Court. No counsel for any party authored in whole or in part this brief and no monetary contribution to the preparation of this brief was received from any person or entity other than *amicus curiae* IRLI.

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INTEREST OF AMICUS CURIAE

The Immigration Reform Law Institute, Inc. is America's only public interest legal education and defense organization exclusively dedicated to advocating for the rights and interests of United States citizens in immigration-related matters. IRLI is incorporated in the District of Columbia as a 501(c)(3) charitable organization. IRLI is dedicated to the development of modern legal advocacy and legisprudential measures to control illegal immigration and reduce legal immigration to levels consistent with the national interest of the United States. To that end, IRLI has worked to design and defend state and local legislation that empowers communities to effectively address problems resulting from illegal immigration where federal agencies have failed or refused to respond. IRLI helped develop the "attrition through enforcement" legisprudential model for the sustainable control of illegal immigration. IRLI was consulted by Utah legislators and civic groups on preemption, Fourth Amendment, and immigration questions in framing the state law now before the Court.

Plaintiffs in both consolidated cases ("United States" and the "La Raza plaintiffs") -- supported by 16 foreign governments whose interests are hostile to those of the U.S. citizens represented by the Utah state legislature-- are asking this court to enjoin the exercise by the Utah state legislature of its sovereign power in an entire area of law, the police power of state or local

law enforcement agencies in the field of immigration control law. United States Cmplt., p. 30; La Raza Cmplt., ¶¶ 82-9, p. 43; see Amended Brief of Amicus United Mexican States in Support of Plaintiffs, Docket No. 139 (Dec. 12, 2011).[2] The legisprudential interests of IRLI are thus aligned with, but independent of and distinct from, the political interests of Defendants Attorney General Shurtleff and Governor Herbert.

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[2] Other foreign interest parties to the amicus brief filed by Mexico include the governments of Argentina, Brazil, Chile, Columbia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Peru, and Uruguay. The governments of Bolivia and the Dominican Republic have moved to join the Mexican government brief as well. See Docket Nos.140 and 142.

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INTRODUCTION

Two consolidated conflict preemption cases are before the court, on motions for a preliminary injunction. Three federal agencies, first among them the U.S. Department of Homeland Security ("DHS"), have joined a proceeding brought by a coalition of advocacy and labor organizations, including members who are illegal aliens ("La Raza plaintiffs"). Plaintiffs seek to nullify an act of the Utah state legislature prior to implementation. The act authorized Utah law enforcement agencies to verify the immigration status of persons encountered in lawful stops, detentions, or arrests, mandate state-wide uniformity in law police agency enforcement of federal immigration control laws, and authorize certain arrests pursuant to these status verification and uniform enforcement standards. H.B. 497, codified as Utah Code Ann. Part 10, §§ 76-9-1001 to 1009.

Plaintiffs claim that H.B. 497 "violates the prohibition on state regulation of immigration," and "conflicts with federal laws and policies," La Raza Cmplt., ¶¶ 95-96; and also "represent[s] an impermissible effort by Utah to establish its own immigration policy and to directly regulate the status of aliens," United States Cmplt, ¶¶ 72. Amicus Immigration Reform Law Institute (IRLI) supports and adopts by reference the State Defendant's analysis of H.B. 497 and arguments against preemption. See Memorandum in Opposition to the United States' Motion for Preliminary Injunction, Docket No. 146 (Jan. 17, 2012). IRLI presents additional points and authorities to respectfully urge the court not to accept a major argument in the Plaintiffs' briefs, that Congress has made a sweeping albeit un-codified delegation of agency prosecutorial discretion to the United States Department of Homeland Security ("DHS").[3]

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[3] See e.g. United States MPI Memo, p. 4 ("The federal immigration scheme … provides for considerable exercise of discretion to direct enforcement in a manner consistent with broad congressional objectives. This discretion—concentrated in the relevant federal administering

BACKGROUND

Plaintiffs base their claim that DHS has promulgated an un-codified federal "immigration policy" which preempts the requirements of H.B. 497 almost entirely on internal executive agency memoranda circulated at DHS. The most representative of these documents are:

(1) Daniel H. Ragsdale, Executive Associate Director for Management and Administration, US ICE, Declaration (August 1, 2011) Docket No. 116-3, also 137-1 ("Ragsdale Declaration"). See e.g. United States MPI Memo, at pp. 3, 8, 27, 34, 36, 37, 38, 45, 46, 47; 50, 54; La Raza MPI Memo, at 21.

(2) U.S. Department of Homeland Security, Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters, (unsigned 2012 online policy document) ("DHS Guidance").[4] See e.g. United States Cmplt., ¶¶ 39; United States MPI Memo, at pp. 26, 34; La Raza MPI Memo, at 21; La Raza MPI Reply, at 8.

(3) John Morton, Director, U.S. Immigration and Customs Enforcement, Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) Docket No. 116-4 ("Morton Discretion Memo").[5] See e.g. United States Cmplt., ¶¶ 30; La Raza MPI Reply Memo, at 7.

(4) John Morton, Director, U.S. Immigration and Customs Enforcement, Civil Immigration Enforcement: Priorities of the Agency for the Apprehension, Detention, and

agencies—ensures both a nationally uniform approach to immigration enforcement and appropriate regard for the many aims of the immigration system."

[4] Available at http://www.dhs.gov/xlibrary/assets/guidance-state-local-assistance-immigration-enforcement.pdf (viewed January 15, 2012).

[5] Available at http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (viewed January 18, 2012).

Removal of Aliens (March 2, 2011) ("Morton Priorities Memo").[6] See e.g. La Raza MPI Memo, at 21; La Raza MPI Reply Memo, at 7.

These agency memoranda express three general justifications for preemptive executive agency authority. First, plaintiffs assert that the memoranda identify independently formulated agency priorities that subordinate civil control of immigration in the interior to DHS enforcement of federal national security and criminal laws. See e.g. Morton Priorities Memo, at 1 ("highest [ICE] enforcement priorities [are], namely national security, public safety, and border security" and, "In *addition to* our important criminal investigative responsibilities, ICE is charged with enforcing the nation's civil immigration laws") (emphasis added).

Second, Plaintiffs rely on the memoranda to substantiate their claim that Congress has delegated to DHS, as an unreviewable exercise of prosecutorial discretion, the power to permit an alien who has never been inspected to remain in the United States, to decline to commence removal proceedings against an alien whom the agency cannot admit by law, and to decline to remove an alien subject to a final order of removal under the INA. See e.g. DHS Guidance, at 4 ("Whenever authority to enforce any Act of Congress is assigned to an officer of the Executive Branch, the responsible officers are understood to be vested with broad and presumptively unreviewable discretion in deciding whether or how to enforce the Act in given circumstances. That is true whether the agency is invoking criminal civil or administrative process. See e.g. *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985)" and, "Consistent with the broad range of enforcement discretion infused in the INA, [DHS] officers appropriately exercise discretion in their daily activities in the field."). See also Ragsdale Declaration, at 3, 10, 11 ("ICE exercises prosecutorial discretion throughout all stages of the removal process…"; "ICE also requires the

[6] Available at http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf (viewed January 18, 2012).

flexibility and discretion to adjust its efforts as enforcement priorities shift…"); see also Morton Discretion Memo, at 5 ([Prosecutorial discretion] may be exercised at any stage of the proceedings"); Id., at 2 ("Prosecutorial discretion applies to a broad range of discretionary enforcement decisions, including but not limited to… deciding to issue, reissue, serve, file or cancel a Notice to Appear (NTA); … settling or dismissing a proceeding;… granting deferred action, granting parole, or staying a final order of removal; …executing a removal order…").

Third, Plaintiffs claim that inadequate DHS resources to carry out congressional mandates in the area of immigration control justify preemption of H.B. 497 as an exercise of non-codified agency discretion. See e.g. Morton Priorities Memo, at 1-2 ("ICE … only has resources to remove … less than 4 percent of the estimated illegal alien population in the United States" and, " the agency is confronted with more administrative violations than its resources can address…."). See also Ragsdale Declaration, e.g. at 3, 10, 16("DHS exercises a large degree of discretion in determining how best to carry out its enforcement responsibilities given the limited resources it receives for enforcement").

This court must reject Plaintiff's claims. As explained, *infra*, these memoranda cannot constitute the benchmark for measuring preemptive Congressional action or intent. The memoranda (1) do not have the force of law and are not entitled to Chevron Deference, and (2) are not lawful authority because they are not authorized by and directly conflict with unambiguous federal statutes and clear legislative history.

ARGUMENT

I. DHS "PROSECUTORIAL DISCRETION" MEMORANDA CANNOT FORM THE BASIS FOR PLAINTIFFS' PREEMPTION CLAIMS AGAINST H.B. 497.

IRLI agrees that "Congress has enacted and refined a detailed statutory framework governing immigration…." United States MPI, 3; *Chamber of Commerce v. Whiting*, 131 S. Ct. 1968, 1973 (2011); *Elkins v. Moreno*, 435 U.S. 647, 664 (1978). However, the pleadings and briefs of both the United States and the La Raza plaintiffs have misrepresented and distorted that statutory framework. The actual statutory framework legislated by Congress does not preempt H.B. 497, under any of the various preemption theories argued by the Plaintiffs.

Plaintiffs argue that "HB 497 must be struck down" because it "imposes requirements on Utah police officers to verify immigration status and to detain persons they deem to be unauthorized immigrants…not for the purpose of enforcing any separate state-law criminal violations." La Raza MPI, 12. The parties are wrong to focus on the intent of Utah.[7] To prevail on a conflict preemption claim, Plaintiffs must prove that Congress "unmistakably" intended to preempt the challenged provisions of H.B. 497 at issue. *De Cana v. Bicas*, 424 U.S. 351, 356 (1976).

Plaintiffs must identify **an Act of Congress** that evinces "unmistakable" intent to preempt, in order to prevail on this claim. *Id.* If Congress were entirely silent on the question, Defendants would prevail. Plaintiffs cannot identify a single federal statute indicating such preemptive intent, much less one that that does so in "unmistakable" terms.

[7] In particular, the so-called three-bill "Utah solution" is not properly before this court. Plaintiffs threaten that H.B. 116 and H.B. 496 (creating a state alien labor program) show state intent to regulate immigration in H.B. 497, but then state in their briefs that the issue is not yet ripe in this proceeding. See e.g. United States MPI, 11, fn 3; La Raza MPI., 3. While IRLI agrees that these two measures constitute preempted state regulation of immigration, an advisory opinion in this circumstance would be improper.

A. The agency memoranda lack the force of law and are not entitled to Chevron deference.

The memoranda supporting the plaintiffs' preemption claims lack the force of law, and are not entitled to Chevron deference by this court. "Interpretations such as those in opinion letters, like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Instead, the court must search the relevant statutes and any properly promulgated regulations to find authority for the United State's position. In *Chevron* the Supreme Court deferred to an agency's resolution of a statutory ambiguity that had been finalized through notice-and-comment rulemaking. *Hernandez-Carrera v. Carlson*, 547 F.3d 1237, 1246 (10th Cir. 2008). The plaintiffs in this case can point to no such authority for their preemption theories, which are based on prosecutorial discretion, not statutes or regulations.

Congress has not set agencies free to disregard legislative direction in the statutory scheme that the agency administers. *Heckler v. Chaney*, 470 U.S. 821, 833 (1985). The Supreme Court and the Tenth Circuit have made clear that "when a statute uses the word 'shall,' Congress has imposed a mandatory duty upon the subject of the command." *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1998); *U.S. v. Monsanto*, 491 U.S. 600, 607 (1989). On the other hand, to confer discretionary authority upon agencies, "Congress must lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform." *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 972 (10th Cir. 2005).

B. The policies in the agency memoranda conflict with federal statutes that mandate specific DHS and DOJ immigration control duties and circumscribe agency discretion.

Fundamental and irreconcilable conflicts exist between controlling federal law and the views expressed by DHS officials in the memoranda. *Heckler* established a two-part test for

finding limitations on agency discretion. Where Congress has (1) "indicated an intent to circumscribe agency enforcement discretion," and (2) "provided meaningful standards for defining the limits of that discretion," courts may require that the agency follow that law. *Heckler v. Chaney*, 470 U.S. at 834-35. Since 1994, Congress has repeatedly circumscribed the authority of former INS and DHS to decline to enforce immigration control laws.[8] These congressional acts provide carefully defined limits on agency non-enforcement discretion that are suitable for judicial review, consistent with the second prong of the *Heckler* test.

Failure by DHS to comply with the mandates from Congress relating to immigration control identified by IRLI cannot constitute a basis for state law preemption, because such failures constitute defiance by the executive branch of the "clear and manifest purpose of Congress." *Wythe v. Levine*, 555 U.S. 555, 565 (2009).

1. The "prosecutorial discretion" memoranda policies conflict with the mandatory immigration control duties imposed upon DHS by Congress.

Admission requires "a lawful entry … into the United States after inspection and authorization by an immigration officer." 8 U.S.C. §1101(a)(13)(A). In 1996, Congress mandated that the Department of Homeland Security inspect every alien applicant for admission as to their entitlement to admission to the United States. 8 U.S.C. § 1225(a)(3)(added by IIRAIRA § 302) ("all aliens … who are applicants for admission … **shall be** inspected by immigration officers."). The INA clarifies that "an alien present in the United States who has not been admitted… **shall be** deemed for purposes of this Act an applicant for admission." 8 U.S.C. § 1225(a)(1). Prior to 1996, the INA required inspection only of "aliens arriving at ports… at the

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[8] The Secretary of Homeland Security's authority to administer and enforce the immigration laws, including her discretionary powers, derive from 8 U.S.C. § 1103, as transferred from the former INS to DHS by the Homeland Security Act of 2002, Pub. L. No. 107-296.

discretion of the Attorney General." 8 USCS § 1225 p. 56 (2007). In other words, in 1996 Congress expanded the duties of INS/DHS from discretionary inspections at ports of entry to include mandatory inspection of every alien found to be physically present in the United States (which includes the state of Utah) who cannot establish a prior lawful admission.

The INA now requires DHS to inspect every applicant for admission detained by Utah police during a lawful stop, if the police notify DHS of the presence of the alien, for example through a status verification request pursuant to H.B. 497 §3. The mandatory inspection requirement directly conflicts with Plaintiffs claims' that DHS need not make a formal status determination. By contrast, the police status verification requirement in H.B. 497 and the federal inspection requirement are entirely compatible cooperative enforcement functions.

Congress also circumscribed DHS authority to exercise discretion over the disposition of aliens *subsequent* to their mandatory inspection. In 1996, Congress imposed a default uniform rule for the conduct of inspections of aliens found inside the boundaries of the United States: "[I]n the case of an alien who is an applicant for admission, if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien **shall be detained** for a proceeding under [INA] section 240." 8 U.S.C. § 1225(b)(2)(A).[9]

Nonetheless, DHS memoranda on which Plaintiffs rely suggest that although the agency lacks discretion to *admit* an inadmissible alien, it has un-codified discretion not to commence removal proceedings by filing a Notice to Appear (NTA) with the immigration court. See e.g. Morton Discretion Memo, at 2. The distinction is fallacious. Post-1996, neither statutory,

[9] Expedited removal is an even more circumscribed summary inspection and removal procedure, mandated since 1997 against certain aliens who arrive at the border without documents or make material misrepresentations. 8 U.S.C, § 1225(b)(1)(enacted as IIRAIRA §302(b)(1)(1996)).

regulatory, nor judicial[10] authority exists to authorize DHS to simply decline to serve an NTA on an inadmissible alien found in the interior. The Secretary of Homeland Security lacks authority to grant admission by discretion where it is not "authorized by law." 8 C.F.R. § 2.1. DHS regulations require that "service of a notice to appear shall be in accordance with [INA] section 239." 8 C.F.R. § 1239.1. Immigration officers will "**sign and deliver a Form I-862** [Notice To Appear] to the alien" if required to do so by §235(b)(2)(A) of the INA. 8 CFR § 1235.6(a)(1)(i), citing 8 U.S.C. §1225(b)(2)(A). Section §1225(b)(2)(A) requires that "the alien shall be detained for a proceeding under section 240." DHS must detain an alien "for a [removal] proceeding," and the only procedure provided to do so under the INA is to file the NTA with the immigration court.

This congressional roll-back of agency discretion is conceded in some DHS memoranda: "Congress made it clear in IIRAIRA that, in order to ensure the removal of certain aliens, it **intended to limit the enforcement discretion** previously provided by the INA to INS decisions to not detain aliens under the INA's detention authority." Bo Cooper, INS General Counsel, INS Exercise of Prosecutorial Discretion, Memorandum for the Commissioner, HQCOU 90/16-P, Legal Opn. No 99-5, 2001 WL 1047687 (INS), at 5. Granting admission is an affirmative act, and a decision not to commence a removal proceeding for an alien who cannot be admitted through inspection, even if the alien were paroled, would knowingly perpetuate a continuing violation of the immigration laws. A continuing violation of the immigration laws, even if perpetuated with impunity by DHS, cannot form the basis of a preemption challenge to H.B. 497.

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[10] In 1996 Congress circumscribed the authority of federal *courts* to hear removal and detention appeals. See e.g. 8 U.S.C. § 1252(g). But IIRAIRA court-stripping laws only bar judicial review of claims "on behalf of any alien arising from the decision or action" by DHS to commence proceedings against the individual alien, The bar is construed narrowly, *Reno v. American-Arab Anti-discrimination Comm.*, 525 U.S. 471 (1999), and cannot form the basis of an implied preemption claim by DHS against Utah.

2. Congress also circumscribed the discretion of DOJ to grant relief from removal for aliens placed in proceedings.

Upon filing of the NTA, the discretionary authority of the Secretary to determine the status or removability of the alien shifts to an immigration judge, who serves under the jurisdiction of the Executive Office for Immigration Review of the U.S. Department of Justice (DOJ), not the Secretary of Homeland Security. 8 USC § 1229a(a)(3) (Removal proceedings are "the sole and exclusive procedure for determining whether an alien may be admitted to … or… removed from the United States").

Congress circumscribed the pre-1996 discretion of the immigration judge to grant relief from removal. 8 USC § 1229a(a)(1) (enacted by IIRAIRA § 304(a)(3))("an immigration judge **shall conduct proceedings** for deciding the inadmissibility or deportability of an alien."). Congress imposed very exacting standards of proof on the alien in proceedings to establish eligibility for admission or relief from removal. See 8 U.S.C. § 1229a(c)(2) ("in the proceeding **the alien has the burden** of establishing – (A) if the alien is an applicant for admission, that the alien is **clearly and beyond doubt entitled** to be admitted and is not inadmissible under [INA] section 212; or (B) by **clear and convincing** evidence, that the alien is lawfully present in the United States pursuant to a prior admission.") [11]

3. Congress circumscribed DHS discretion to grant relief from removal to aliens outside of immigration court proceedings.

Parole is a primary means of relief from detention established by Congress for alien applicants for admission. 8 U.S.C. § 1182(d)(5)(A). Congress has historically been unambiguous that agency discretion to grant parole was to be carefully circumscribed: "The parole provisions

[11] "Beyond doubt" is a higher standard of proof than that required for even the most serious criminal convictions, which typically require "beyond a reasonable doubt." Mailman, IMMIGRATION LAW & PRACTICE, rel. 133, §64.03[2][b](2011).

were designed to authorize the Attorney General to act only in emergent, individual, and isolated situations, such as the case of an alien who requires immediate medical attention, and not for the immigration of classes or groups outside of the limit of the law." Senate Rep. No. 89-748, at 17 (1965); accord H.R. Rep. No. 89-745, at 15-16 (1965).

In 1996 Congress further circumscribed DHS discretion to temporarily parole an alien applicant for admission. Congress replaced its prior more lenient standard, "for emergent reasons or for reasons deemed strictly in the public interest," by restricting its exercise to (1) "a case-by-case basis" and (2) "for urgent humanitarian reasons or significant public benefit…." 8 U.S.C. § 1182(d)(5)(A). See IIRAIRA, Pub. L. No. 104-208, § 602(a)(1996). The legislative history indicates that Congress undertook this statutory restriction because of "concern that parole under § 1182(d)(5)(A) was being used by the executive to circumvent congressionally established immigration policy." *Cruz-Miguel v. Holder*, 650 F.3d 189, 198-200 (2d Cir. 2011) (citing H.R. Rep. No. 104-169, pt. 1, at 140-41 (1996)).

For aliens who "shall be detained" after inspection pursuant to a civil warrant, Congress in 1996 circumscribed DHS discretion to one of three actions: Continue to detain the alien, release the alien on a bond with security and conditions approved by the Secretary, or release the alien under the very restricted terms of a "conditional parole." 8 U.S.C. § 1226(a).[12] A grant of conditional parole is "in the nature of a voluntary stay of the agency's [removal] mandate *pendente lite....*" *Velasco-Gutierrez v. Crossland*, 732 F.2d 792, 795 (10th Cir. 1984). Similarly, deferred inspection, a regulatory variant of § 1226(a)(2)(B) conditional parole, only

[12] Conditional parole under § 1226(a)(2)(B) cannot defer removal. As with bail release in criminal cases, conditional parole merely permits an alien to remain at liberty based upon a determination that he poses no risk of danger or flight while his removal is actively sought. *Cruz-Miguel*, 650 F.3d at 198.

allows the alien applicant for admission who is not a flight risk to complete his inspection before another DHS office or port-of-entry. 8 C.F.R. § 1235.2.

In 1996 Congress also created cancellation of removal (COR) as a procedure for relief from removal for aliens who have eluded inspection in Utah for many years. But the exercise of agency discretion in COR cases is far more circumscribed than under the pre-1996 suspension of deportation statutes. COR requires that the alien concede inadmissibility or deportability, and with few exceptions is subject to a quota of 4,000 eligible aliens per year. 8 U.S.C. § 1229b (enacted by IIRAIRA §304, repealing INA § 212(c)).

Congress recently delegated to DHS discretion to grant humanitarian parole to certain relatives of trafficking victims who have applied for a "T" visa, but circumscribed that discretion to insure that it was based on local police priorities, not presidential politics. 8 U.S.C. § 1229b(6)(enacted by P.L. 110-457§205(b)(2008)). Parole for relatives of trafficking victims may be granted only "upon written request of a law enforcement official," 8 U.S.C. § 1229b(b)(6)(A). By subordinating this discretionary authority to law enforcement agency priorities, Congress reaffirmed its intent to circumscribe any un-codified DHS general discretion over immigration control in Utah.

Not until the ultimate stage of a removal proceeding, where the immigration judge has issued a final order of removal, has Congress delegated to DHS any significant discretion, to administratively select the combination of fines, prison sentences, and suspension of such sentences that will most efficiently effect the removal or voluntary departure of such aliens. See 8 U.S.C. § 1253(a)-(b); 8 U.S.C. § 1229c.

4. Congress circumscribed DHS discretion to consider the foreign relations concerns of foreign governments in performing its immigration control functions.

Plaintiffs also assert that DHS officials have general non-enforcement discretion authority based on the "the federal government's exclusive constitutional authority over foreign relations issues that are inexorably intertwined with immigration enforcement issues." United States Cmplt., ¶ 29; MPI Memo, at 27. [13] However, the authority conferred by Congress on the President "in the international realm cannot be said to invite" domestic agency action concerning aliens. *Medellin v. Texas*, 552 U.S. 491, 529 (2008). United States treaty obligations require local and state police to verify the nationality of every "detained alien" under their jurisdiction, in order to determine if the detainee's country is on the treaty list for consular notification pursuant to the Vienna Convention, and in particular whether consular notification is mandatory or at the option of the detainee. Vienna Convention on Consular Relations, Art. 36(1)(b), 21 U.S.T. 77, 100-101(1969).[14] In any case, Congress has regularly considered the foreign relations concerns of Mexico in enacting immigration law. For example, Congress expressly requested "the President" to "consult with the President of Mexico regarding the implementation of [IRCA] and to **report to Congress** any legislative or administrative changes that may be necessary…." IRCA, §407 (1986).

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[13] IRLI urges the court to look skeptically at the claims of amicus Mexico. That nation's immigration laws are among the most literally xenophobic in the international community of nations. See Jorge A. Vargas, Rights and Obligations of Americans in Mexico Under Immigration Law and Other Areas of Mexican Law, 42 U. Richmond L.Rev. 839, 844-865 (2008)(Mexican immigration law designed to restrict entry of foreign nationals and strips foreigners of human rights afforded to Mexican nationals present in the United States).

[14] The inquiry also requires the arresting police agency to determine whether the alien is an asylum applicant. Id.

By enacting IIRAIRA, Congress provided a very specific way for DHS to "avoid removals that are likely to ruffle diplomatic feathers." *Jama v. ICE*, 543 U.S. 335, 348 (2005) (explaining 8 U.S.C. § 1231(b), as amended by IIRAIRA §305(a), designating countries to which aliens may be removed). As for the conduct of foreign relations with nations that deny or delay the removal of their nationals from the United States, Congress has provided DHS with unambiguous statutory direction that United States policy in relations with these nations is one of corrective comity. If the Secretary of Homeland Security notifies the Secretary of State that the government of the foreign country in which the alien is a citizen, subject, national or resident has denied or unreasonably delayed acceptance of the alien, the Secretary of State "**shall order**" U.S. consular officers to discontinue granting visas to citizens, subjects, nationals or residents of that country, until the foreign country has accepted the alien. 8 U.S.C. § 1253(d) (enacted as IIRAIRA §307(d)(1996)).[15]

Utah's mandate to comply with Vienna Convention treaty obligations, and the congressional policy for mobilizing the Department of State to clamp down on recalcitrant foreign governments in the removal process, are sufficient in themselves to refute claims that foreign policy sensitivities reflect an "unmistakable" congressional intent for DHS liaison contacts with foreign governments to preempt laws such as Utah H.B. 497.

C. DHS interest in managing agency resources has no preemptive effect where Congress has established priorities and mandates for DHS enforcement of immigration control laws.

Plaintiffs also claim that inadequate appropriations by Congress excuse the Secretary of Homeland Security from performance of mandatory immigration control duties under the INA. United States Cmplt., ¶ 30; La Raza MPI Reply Memo, 7. This claim "is essentially a 'repeal by

[15] This underutilized authority is remarkably efficient. Denial of U.S. visas to the political classes of uncooperative nations (e.g. Guyana) has produced almost immediate cooperation with removals.

implication' argument, or more precisely, a 'suspension by implication' argument. Repeals (or suspension) of legislation by implication are disfavored, especially 'when the claimed repeal rests solely on an Appropriations Act.'" *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1192 (10th Cir. 1998) (citing *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 190 (1978). As the Tenth Circuit noted, the Administrative Procedure Act removed from the courts the function of equitable balancing of agency interests, such as DHS concerns in this case over inadequate resources, against "unfunded mandates" imposed by Congress on the agency. *Id.* In the face of Congress' commands to limit DHS prosecutorial discretion, the United States' inadequate resource argument must fail with respect to the equitable remedy of a preliminary injunction against a third party, the state of Utah. *Id.*, citing 5 U.S.C. § 706 ("Section 706 requires us to compel the unlawfully withheld agency action.")

Congress not only mandated performance by DHS of its core immigration control functions, but it provided methods for DHS to manage resource restraints that might arise from a "vigorous" agency response to immigration status requests from Utah law enforcement agencies under H.B. 497. Conditional parole is the primary tool provided by Congress, through which DHS may exercise limited discretion in the allocation of agency resources, in clearing backlogs of removable aliens, and managing demand for detention space. *Cruz-Miguel*, 650 F.3d, at 195. At DOJ, Congress by statute provided immigration judges with traditional tools of judicial caseload management, such as continuances, to prioritize the adjudication of immigration court caseloads. See 8 U.S.C. § 1229a, 8 C.F.R. § 1003.29. But neither agency has the discretion to adjust the status of these populations through an extra-regulatory amnesty, or place them in an open-ended immigration control limbo. See 8 U.S.C. § 1255; *Herrera-Castillo v. Holder*, 573 F.3d 1004, 1009 (10th Cir. 2009) ("in every case where Congress has extended eligibility for

adjustment of status to inadmissible aliens, it has done so unambiguously"). DHS and EOIR administrative discretion only extends to rearranging administrative "queues," by moving individuals or subpopulations from low to high priority for removal proceedings, detention, or physical expulsion from the United States, and vice versa.

DHS may have a responsibility to apprehend aliens who pose national security risks or who menace public safety. But it is a joint responsibility, not an exclusive power, and is shared with the Departments of Justice, Defense, intelligence agencies, and federal, state and local law enforcement agencies nationwide. See 6 U.S.C. § 255(b) (requiring DHS to consult with the FBI and state and local law enforcement agencies "to determine how to most efficiently conduct enforcement operations").

Congress has never given DHS exclusive or even primary authority for enforcement of federal criminal laws against aliens, even the criminal sanctions found in the INA. See e.g. 8 U.S.C. § 1324(c) (authorizing enforcement of Title 8 alien smuggling felonies by "all other officers whose duty it is to enforce criminal laws"). The enforcement-related statutes contained in INA Title II, Chapters 4 and 7, only require that criminal aliens be given top priority for *detention* purposes. Nothing in the plaintiffs' briefs establishes that DHS authority to detain criminal aliens supercedes or de-prioritizes its core immigration control mission to inspect, register, and monitor the status and location of the entire population of aliens in the United States.[16]

[16] Congressional appropriations acts have not "charged [DHS] … with setting priorities for the identification and removal of certain classes of aliens" as claimed. United States Cmplt.,¶ 14 (citing P.L. 111-83, 123 Stat. 2142, 2149 (2009). That Appropriations Act merely required DHS to prioritize the removal of aliens already convicted of a crime "by the severity of the crime."

II. CONGRESS INVITED STATE AND LOCAL GOVERNMENTS TO PARTICIPATE IN THE IMMIGRATION CONTROL FUNCTIONS CODIFIED IN H.B. 497.

A. Congress mandates that aliens in the interior carry DHS-issued registration documents that identify their status and current address.

The second immigration control function imposed by Congress on DHS is to operate a nationwide system of mandatory alien registration. Virtually every alien present "in the United States" for more than thirty days, including aliens admitted for lawful permanent residence, has the mandatory "duty" to register directly, or in the case of an alien child, through the child's parent or legal guardian. 8 U.S.C. § 1302. See also 8 U.S.C. § 1201(b); 8 U.S.C. § 1301 (registration of every alien seeking a visa to enter the U.S. from abroad).

The "essential" purpose of the alien registration card is "to identify the bearer as a lawfully registered alien residing in the United States." *U.S. v. Campos-Serrano*, 404 U.S. 293, 300 (1971). Nothing in the plain language of the INA or case law bars local and state police from examining alien registration documents to verify identity and status during a lawful encounter or stop.[17] Congress has mandated since enactment of the INA in 1952 that every adult alien aged 18 and over, certain accredited representatives of foreign governments and international organizations excepted, shall "at all times carry and have in his personal possession" the document issued to him or her pursuant to subsection (d). 8 U.S.C. § 1304(e). DHS is required to issue a certificate or receipt card evidencing alien registration. 8 U.S.C. § 1304(d). Congress mandated official publication of the list of designated registration documents. Id. The list includes I-551 stamps in foreign passports, for tourists and transients, and NTA notices, for aliens in removal proceedings but not detained by the federal government. 8 C.F.R. §

[17] While such blanket ID document presentation requirements could raise Fourth Amendment or Due Process concerns if imposed on United State citizens, no court has held that such requirements infringe on constitutional protections in the case of aliens.

264.1. In other words, DHS has a mandatory duty to issue to virtually every alien whom a Utah police officer might encounter-- and the alien has a corresponding duty to carry and present-- an immigration status document. Plaintiffs who are lawfully admitted aliens but who are afraid of encounters with Utah police because they have not received registration documents to which they are entitled must sue DHS for relief, not the state of Utah.

Congress also integrated criminal penalties enforceable by Utah police into this civil enforcement scheme. See 8 U.S.C. § 1304(e) (failure to carry registration document "at all times"); 8 U.S.C. § 1306(a) (willful failure to register); 8 U.S.C. § 1306(b) (failure to notify change of address); 8 U.S.C. § 1306(c) (using false or fraudulent statements to procure registration); and 8 U.S.C. § 1306(d) (intentional counterfeiting of an alien registration document). Other than authorization to waive fingerprinting requirements, Congress has never granted DHS or any other federal agency general discretion to ignore or not enforce alien registration laws.[18]

H.B. 497 Section 6 simply prohibits Utah law enforcement agencies from arbitrarily restricting, per a local agency policy or local government ordinance, a police investigation or enforcement of two of these federal misdemeanors. UT Code Ann. § 76-9-1006(2). Such local enforcement actions are not barred under the conflict preemption ruling in *Hines v. Davidowitz*, 312 U.S. 52 (1941), because the carry requirement and misdemeanor criminal penalty in 8 U.S.C. § 1304(e) were not imposed by Congress until 1952. INA § 264, 66 Stat. 224 (1952).

B. Congress chose to rely on state and local law enforcement agencies rather than an exclusively federal immigration control force.

Through the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1994, IIRAIRA in 1996, the Homeland Security Act in 2002, and the REAL ID Act of 2005, *inter alia*, Congress

[18] The exception proving the rule is special group emergency registration under 8 U.S.C. § 1303.

made clear its concern that the federal agencies were not adequately controlling illegal immigration. In enacting its illegal immigration solutions, Congress could have chosen to rely exclusively on a paramilitary force of federal immigration officers, and appropriated massive sums to ensure that DHS and DOJ deployed this federal force throughout the interior.

Instead, Congress rationally invited states like Utah to exercise its preexisting state law enforcement authority. *U.S. v. Santana-Garcia*, 264 F.3d 1188, 1193 (10th Cir. 2001) ("federal law evinces a clear invitation from Congress for state and local agencies to participate in the process of enforcing federal immigration laws"). The Utah legislature relied on its police power over public safety and welfare to enact H.B. 497. See *Santana-Garcia*, 264 F.3d at 1193 (Utah law enforcement officers "have the general authority to investigate and make arrests for violations of federal immigration laws); *U.S. v. Salinas-Calderon*, 728 F.2d 1298, 1301-02 & n.3 (10th Cir. 1984)(the fact that an officer in a lawful stop "did not know with certainty that there was a violation of the immigration laws is not controlling"); *U.S. v. Vasquez-Alvarez*, 176 F.3d 1294, 1300 (10th Cir. 1999)(claim that allowing state and local police to arrest illegal aliens pursuant to preexisting state and local authority would impede the accomplishment of Congress' purposes and objectives is "particularly unconvincing.").

In 1996, Congress imposed multiple statutory mandates on DHS to facilitate state and local law enforcement agency efforts to control the unlawful presence of aliens within their jurisdictions. The Defendants have carefully described the purpose and function of the three "seminal" statutes in this area of the law, 8 U.S.C. § 1357(g)(10), 8 U.S.C. § 1373(c), and 8 U.S.C. § 1252c. *See* Defendants' Memorandum in Opposition to the United States' Motion for Preliminary Injunction, Docket No. 146, *passim*.

IRLI calls the court's attention to an even broader range of complementary statutes enacted between 1994 and 1996 which underline the unequivocal purpose and intent of Congress to invite state and local participation in the control of illegal immigration. See e.g. 8 U.S.C. §1226(d)(1) (DHS must assist state and local police to identify aliens arrested for aggravated felonies); §1226(d)(3) (DHS must assist state courts identify unlawfully present aliens in state "pending" prosecution; §1373(a)-(b) (prohibiting any government entity from restricting investigation of the immigration status of any individual, lawful or unlawful); §1357(d) (requiring DHS to promptly determine whether to issue a detainer for any alien arrested by state or local police for violation of any law relating to controlled substances); §1358 (recognizing state and local police law enforcement jurisdiction in federal immigration facilities); §1377 (mandating state and local law enforcement access to federal biometric datebases for alien visa applicants); and §1644 (barring "any" restriction on state or local government information-sharing regarding the immigration status of any "alien in the United States").

Congress also mandated in 1996 that INS [now DHS] "shall operate" a "criminal alien identification system," and directed that the "system shall be used to assist Federal, State, and local law enforcement agencies in identifying and locating aliens who may be subject to removal by reason of … *not [being] lawfully present in the United States* or otherwise removable." IIRAIRA §326(a) (1996) (amending §130002 of the Violent Crime Control and Law Enforcement Act of 1994) (emphasis added).

The Senate Report accompanying IIRAIRA reiterated Congress's objective of encouraging states to participate in immigration control functions in the interior:

> The acquisition, maintenance, and exchange of immigration-related information by State and local agencies is consistent with, and potentially of considerable assistance to, the Federal regulation of immigration and the *achieving of the purposes and objectives of the Immigration and Nationality Act*.

S. Rep. No. 104-249, 104th Cong., 2d Sess., at 19-20 (1996) (emphasis added).

To implement its mandate that every alien be inspected, Congress directed DHS to respond to all police inquiries about the immigration status "of any individual within the jurisdiction of the agency,"-- United States citizens, permanent resident aliens, lawfully present non-immigrants, and illegal aliens alike. 8 U.S.C. § 1373(c). This mandatory language expressly authorizes state and local police to use federal status information for both immigration and non-immigration related purposes, i.e. "any purpose" that is authorized under even an expansive reading of H.B. 497 §§ 3, 6, 10 or 11.

To that end, Utah police may inquire into citizenship or immigration status during a lawful stop without having reasonable suspicion that the subject of the stop is unlawfully present, pursuant to their authority to establish the identity of the detainee. *Muehler v. Mena*, 54 U.S. 93, 100 (2005); *U.S. v. Flores-Olmos*, 438 Fed. Appx. 713, 716 (10th Cir. 2011). Failure of a suspected alien to present a registration document during the stop constitutes probable cause to extend the detention to verify the detainee's identity and confirm with DHS whether a criminal violation of § 1304(e) or § 1306(a) has occurred. See e.g. *U.S. v. Lara-Garcia*, 478 F.3d 1231, 1233 (10th Cir. Utah 2007) (failure by Utah police to identify detainee through ICE IDENT database was probable cause to detain for investigation of violation of immigration laws); *U.S. v. Ritter*, 752 F.2d 435, 438 (9th Cir. 1985) (valid arrest of legal resident alien for failure to carry registration card); *U.S. v. Vasquez-Ortiz*, 344 Fed. Appx. 551, 555 (11th Cir. 2009) (in informal encounter, officer with reasonable suspicion that person is an alien had probable cause to arrest if person cannot present registration card).

H.B. 497 requires in every instance that Utah police officials rely upon the federal government's determination of immigration status. See e.g. §76-9-1001(6) (definition of "verify

immigrations status"). Where this condition is met, no regulation of immigration occurs and no preemption exists: "Importantly, the State defers to the federal government's response to a lawful request under 8 U.S.C. § 1373(c) to make this determination. … This is harmonization with federal law, not conflict." *Ariz. Contractors Ass'n v. Candelaria*, 2007 U.S. Dist. LEXIS 96194, *38 (D. Ariz. 2007), *aff'd sub nom. CPLC v. Napolitano*, 544 F.3d 976 (9th Cir. 2008), *aff'd sub nom. Chamber of Commerce v. Whiting*, 131 S. Ct. 1968 (2011).

III. PLAINTIFFS HAVE NOT MET THEIR BURDEN OF PLEADING FOR A PRELIMINARY INJUNCTION BASED ON A FACIAL CONSTITUTIONAL CHALLENGE TO H.B. 497.

Plaintiffs' motions for a preliminary injunction have not met the high burden of pleading for a facial challenge. To prevail in a facial challenge, a plaintiff must establish "that the law is unconstitutional in all of its applications." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (emphasis added). "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exists under which the Act would be valid." *U.S. v. Salerno*, 481 U.S. 739, 745 (1987). In *Cal. Coastal Com. v. Granite Rock Co.,* a unanimous Supreme Court applied *Salerno* by analyzing whether the defendant could demonstrate even one set of circumstances in which the challenged law was constitutional. 480 U.S. 572, 593 (1987). Specifically, the Court held that to "defeat Granite Rock's facial challenge, the Coastal Commission needed merely to identify a possible set of permit conditions not in conflict with federal law." *Id.*

As Defendants in this case have identified a broad "possible set of … conditions" in which H.B 497 would be valid, the Court must find that H.B. 497 is not preempted on its face,

and deny the preliminary injunction motions. Without facial preemption, at this juncture there can be no irreparable harm to plaintiffs, and no public interest in further obstructing the implementation of a duly enacted statute.

Plaintiffs may bring an "as applied" challenge if implementation does in fact realize their currently speculative fears. The La Raza plaintiffs have articulated various hypothetical equal protection violations that might occur in the future, to themselves or (mostly) third parties. See e.g. La Raza Cmplt., ¶ 17 (illegal aliens afraid to attend future UCLR events); ¶ 18 (SEIU members regardless of status will be afraid to attend meetings and rallies); ¶¶24-29 (individuals afraid of future encounters with Utah police). However, Plaintiffs in this case elected to bring a facial challenge, and the court should not issue an advisory opinion based on these hypothetical conflicts. *U.S. v. Raines*, 362 U.S. 17, 22 (1960) (in deciding a facial challenge, courts must be careful not to go beyond the statute's facial requirements and speculate about hypothetical cases).

CONCLUSION

Absent Congressional delegation, the United States' claimed discretionary authority is nothing more than a partisan quest for the expansion of Presidential political power, in this case at the expense of both Congress and the Utah state legislature.

In *Whiting* the Supreme Court made it clear that a conflict preemption claim that is based not on an unmistakable conflict with the terms of a federal statute but rather-- like the United States and La Raza plaintiffs' claims-- upon mere "tension" with purported federal objectives included in internal agency memoranda, will *always* be rejected. The *Whiting* Court emphatically rejected this approach, elevating to an opinion of the Supreme Court what had previously been a concurrence by Justice Kennedy: "Implied preemption analysis does not justify a 'free-wheeling judicial inquiry into whether a state statute is in tension with federal

objectives'; such an endeavor 'would undercut the principle that it is Congress rather than the courts that preempts state law.'" *Whiting*, 131 S. Ct. at 1985 (*quoting Gade v. Nat'l Solid Wastes Management Assn*, 505 U.S. 88, 111 (1992)(Kennedy, J., concurring)).

In 1952 the Supreme Court rejected a less expansive power grab by the Truman Administration. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952) (finding unconstitutional a "President's order [that] does not direct that a congressional policy be executed in a manner prescribed by Congress [but] directs that a presidential policy be executed in a manner prescribed by the President"). This court has the duty to do the same and should, therefore, deny all motions for preliminary relief.

Dated this 24th day of January, 2012.

/s/ Frank D. Mylar

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