IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

INGRID BUQUER, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:11-cv-0708 SEB-MJD
	)	
CITY OF INDIANAPOLIS, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

But for the issuance of a preliminary injunction in this cause (ECF No. 79), the plaintiffs and the certified classes would be subject to the provisions of Senate Enrolled Act 590 ("SEA 590") that are challenged in this case. Section 20 of SEA 590 (codified at Indiana Code § 35-33-1-1(1)(a)(11)–(13)) permits law enforcement officials in Indiana to arrest an individual for (a) the mere possession of a removal order issued by a federal immigration court; (b) the receipt of a "detainer" or "notice of action" issued by the United States Department of Homeland Security; or (c) a previous indictment for or conviction of an "aggravated felony," as defined by federal law. However, these are simply not current criminal activities. The statute thus authorizes law enforcement officials to arrest persons despite the fact that there is no probable cause that such persons have committed crimes; as such, it is violative of the Fourth Amendment to the United States Constitution. Moreover, by authorizing warrantless arrests based on a determination of immigration status—in many cases where the individual would not be subject to arrest by federal immigration authorities—the statute is also preempted by federal law.

And, if anything, Section 18 of SEA 590 (codified at Indiana Code § 34-28-8.2-1, *et seq.*) represents an even greater intrusion into federal authority. This provision creates a new infraction whereby persons offering or accepting a consular identification card (which are issued by foreign nations) will be subject to civil sanctions, even when the card is used for non-fraudulent purposes. Not only is this provision preempted by the exclusively federal responsibility to regulate non-citizens and to conduct relations with foreign governments—indeed, this provision arguably renders the United States non-compliant with an international treaty—but it will lead to the absurd and irrational consequence of criminalizing the use and acceptance of such identification when, for instance, an individual is cashing a check at a convenience store or attempting to receive medical services at the emergency room. This irrationality violates due process.

In entering a preliminary injunction in favor of the plaintiffs, this Court previously reached all issues presented by this case. There is no reason for these issues to be revisited, and these provisions of SEA 590 are every bit as illegal and unconstitutional now as they were five (5) months ago. The previously entered preliminary injunction should accordingly be made permanent.[1]

THE CHALLENGED STATUTES

On July 1, 2011, the provisions of Senate Enrolled Act 590 (SEA 590) took effect in Indiana. Two (2) sections of SEA 590 are at issue in this case:

1. Section 20 of SEA 590 amends Indiana Code § 35-33-1-1(1) by adding new sub-sections (a)(11) –(a)(13), and provides as follows:

[1] Because the issues presented by this case were previously addressed in the context of the plaintiffs' preliminary injunction motion, portions of this brief are taken, substantially verbatim, from the briefing on that motion (ECF Nos. 18 & 65).

(a) A law enforcement officer may arrest a person when the officer has:

* * *

(11) a removal order issued for the person by an immigration court;

(12) a detainer or notice of action for the person issued by the United States Department of Homeland Security; or

(13) probable cause to believe that the person has been indicted for or convicted of one (1) or more aggravated felonies (as defined in 8 U.S.C. 1101(a)(43)).

2. Section 18 of SEA 590 is codified as Indiana Code § 34-28-8.2-1, *et seq.*, and provides as follows:

Chapter 8.2. Offenses Related to Consular Identification

Sec. 1. As used in this chapter, "consular identification" means an identification, other than a passport, issued by the government of a foreign state for the purpose of providing consular services in the United States to a national of the foreign state.

Sec. 2. (a) This section does not apply to a law enforcement officer who is presented with a consular identification during the investigation of a crime.

(b) Except as otherwise provided under federal law, a person who knowingly or intentionally offers, accepts, or records a consular identification as a valid form of identification for any purpose commits a Class C infraction.[2] However, the person commits:

(1) a Class B infraction for a second offense; and
(2) a Class A infraction for a third or subsequent offense.

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

I. FACTS CONCERNING THE PLAINTIFFS

A. The Named Plaintiffs

[2] Under Indiana law a civil infraction can lead to (a) a judgment of up to ten thousand dollars ($10,000) (Class A infraction); (b) a judgment of up to one thousand dollars ($1,000) (Class B infraction); or (c) a judgment of up to five hundred dollars ($500) (Class C infraction). IND. CODE § 34-28-5-4.

Ingrid Buquer is a citizen of Mexico and a resident of Johnson County, Indiana, although she spends a significant amount of time in Marion County. (Corrected & Supp. Aff. of Ingrid Buquer [ECF No. 56-1], ¶¶ 1–2). She has applied for a U-visa—which she is eligible for because she is a victim of, and witness to, a violent crime, and has been helpful to the government in prosecuting the case—and has received an I-797 Notice of Action issued by USCIS informing her of the pendency of her application. (*Id.*, ¶¶ 3–4). She also regularly uses a consular identification card ("CID"), issued by the Mexican Consulate in Indianapolis, for non-fraudulent purposes. (*Id.*, ¶ 5). She regularly offers her CID when banking, shopping, and in other situations where identification is required in both Johnson County and Marion County. (*Id.*, ¶ 6). She also offered this card to consular officials at the Mexican Consulate in Indianapolis as proof of her Mexican citizenship. (*Id.*, ¶ 7). This CID is Ms. Buquer's only method of photo identification because she is not able to obtain an identification card or a driver's license from the State of Indiana, and because her Mexican passport is expired. (*Id.*, ¶ 8). In fact, Ms. Buquer does not possess, nor can she obtain, any of the documents listed in 140 IAC 7-1.1-3(b)(1)(A) – (H) or in 140 IAC 7-1.1-3(b)(2) (both concerning Indiana's documentary requirements for the obtaining of a driver's license or identification card). (Second Supp. Aff. of Ingrid Buquer [ECF No. 65-1], ¶ 2 & Attachment).

Berlin Urtiz is also a Mexican citizen and has been a permanent resident of the United States since 2001. (Aff. of Berlin Urtiz [ECF No. 41-2], ¶ 1). He currently resides in Marion County. (Supp. Aff. of Berlin Urtiz [ECF No. 122-1], ¶ 2). In 2005, he was convicted of theft in Johnson County and sentenced to two (2) years in the Indiana Department of Correction, which were suspended to probation. (Aff. of Berlin Urtiz, ¶ 2). In 2010, approximately three (3) years after his sentence was served, Mr. Urtiz was taken into custody by the United States Immigration

and Customs Enforcement ("ICE") on the grounds that he had a record for an aggravated felony. (*Id.*, ¶ 3). He was detained for roughly four (4) months pending his removal, although shortly after he was detained he filed a motion for post-conviction relief to have his conviction reduced to a misdemeanor, pursuant to his plea agreement. (*Id.*, ¶¶ 4–5). On or about September 20, 2010, he was granted post-conviction relief and was released from detention by federal immigration officials. (*Id.*, ¶ 6). On November 4, 2010, his theft conviction was thus vacated, and he was sentenced to the misdemeanor offense of conversion. (*Id.*, ¶ 7). He was not required to serve any additional time, and there are no removal proceedings pending against him; rather, he remains a lawful permanent resident of the United States. (*Id.*, ¶¶ 8–10).

Louisa Adair is a citizen of Nigeria and a resident of Marion County, Indiana. (Aff. of Louisa Adair [ECF No. 41-3], ¶ 1). She has a removal order, which was issued against her by an immigration court in 1996. (*Id.*, ¶ 2). However, she is currently released on an Order of Supervision, whereby she reports to ICE every six (6) months. (*Id.*, ¶ 3). She has received a valid employment authorization card from the Department of Homeland Security, which authorizes her to work in the United States, and each time she applies to renew her employment authorization card she receives an I-797 Notice of Action. (*Id.*, ¶¶ 4–5). She is also the beneficiary of another I-797 Notice of Action issued by USCIS, establishing her relationship with her U.S. citizen mother. (*Id.*, ¶ 6). Ms. Adair has a pending request for prosecutorial discretion before the ICE Chief Counsel's office to join her Motion to Reopen and Terminate Removal Proceedings. (*Id.*, ¶ 7). If this request is granted, she will be eligible to apply for lawful permanent residency because her mother is a U.S. citizen and she has an approved and current I-130 visa petition. (*Id.*, ¶ 8).

B. The Certified Classes

On July 14, 2011, this Court—pursuant to the parties' stipulation (ECF No. 82)—certified this cause as a class action, with two (2) separate classes, pursuant to Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure.

Class A is defined as follows:

> All persons in Marion and Johnson Counties, Indiana, or who will be in Marion and Johnson Counties, Indiana, who are or will be subject to warrantless arrest pursuant to Section 19 of SEA 590[3] based on a determination that: a removal order issued against them by an immigration court; have or will have, a detainer or notice of action issued against them by the United States Department of Homeland Security; or they have been, or will be, indicted for or convicted of one (1) or more aggravated felonies, as defined in 8 U.S.C. § 1101(a)(43).

(ECF No. 84, at 1). Several attorneys who practice immigration law in Indiana have estimated that, at the very least, thousands of persons represented by an immigration fall within this class definition.[4]

Class B is defined as follows:

> All persons in Marion and Johnson counties, Indiana, or who will be in Marion and Johnson Counties, Indiana, who possess, or will possess, a valid consular identification card and are using it, or will use it, for non-fraudulent identification purposes.

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[3] As indicated previously, both parties erroneously referenced Section 20 of SEA 590 as Section 19 throughout much of this litigation. The class definition should refer to Section 20. The parties have therefore filed their Joint Motion to Amend Definition of Class A (ECF No. 121) in order to correct this error in the class definition.

[4] *See* Aff. of Jason Flora (ECF No. 39-1), ¶¶ 4–6 (300 clients falling within class definition, and at least 15 immigration attorneys in Marion and Johnson Counties with similar case-loads); Aff. of Steven L. Tuchman (ECF No. 39-2), ¶¶ 4–6 (no fewer than 200 clients falling within class definition, and at least 35 attorneys in Marion and Johnson Counties with similar case-loads); Aff. of Sarah L. Moshe (ECF No. 39-3), ¶¶ 4–6 (at least 150 clients falling within class definition, and at least 25 immigration attorneys in Marion and Johnson Counties with similar case-loads); Aff. of A. Michelle Gutierrez (ECF No. 39-4), ¶¶ 4–6 (at least 150 clients falling within class definition, and at least 20 immigration attorneys in Marion and Johnson Counties with similar case-loads); Aff. of Thomas G. Robbin (ECF No. 39-5), ¶¶ 3–5 (at least 49 clients falling within class definition, and at least 20 immigration attorneys in Marion and Johnson Counties with similar case-loads).

(ECF No. 84, at 2). Again, there are at least hundreds, if not thousands of persons falling within this class definition.[5] Indeed, according to information published by the Mexican Consulate in Indianapolis, from June 2006 through May 2011 that consulate alone issued 72,950 consular identification cards. (Aff. of Jessica M. Englert [ECF No. 39-6], ¶¶ 2–6 [translating information available at http://consulmex.sre.gob.mx/Indianapolis/index.php/documentacion/4-d octos/34-mc as]).[6]

II. FACTS CONCERNING CONSULAR IDENTIFICATION CARDS

Consular identification cards (CIDs) (*matriculas consular* in Spanish) are issued by consulates to foreign nationals residing within the area of their circumscription. (Aff. of Sergio Aguilera [ECF No. 41-4], ¶ 6).[7] The Mexican CID serves as official identification for Mexican authorities, as well as proof of nationality, and is issued in accordance with Mexican

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[5] *See* Aff. of Jason Flora, ¶¶ 3, 5–6 (200 clients falling within class definition, and at least 15 immigration attorneys in Marion and Johnson Counties with similar case-loads); Aff. of Steven L. Tuchman, ¶¶ 3, 5–6 (approximately 25 clients falling within class definition, and at least 35 attorneys in Marion and Johnson Counties with similar case-loads); Aff. of Sarah L. Moshe, ¶¶ 3, 5–6 (at least 100 clients falling within class definition, and at least 25 immigration attorneys in Marion and Johnson Counties with similar case-loads); Aff. of A. Michelle Gutierrez, ¶¶ 3, 5–6 (at least 60 clients falling within class definition, and at least 20 immigration attorneys in Marion and Johnson Counties with similar case-loads).

[6] Ms. Englert last visited this webpage on June 7, 2011. (Aff. of Jessica M. Englert, ¶ 2). Undersigned counsel has confirmed that this information is still available as of November 7, 2011.

[7] Sergio Aguilera served as the appointed Mexican Consul in Indianapolis from 2002 through early 2007. (Aff. of Sergio Aguilera, ¶ 2). The Mexican Consulate has been located in Indianapolis since November 26, 2002. (*Id.*, ¶ 3). This Consulate is subordinate to the Mexican Embassy—which is located in Washington, D.C.—and is responsible for, among other things, protecting the interests of Mexican nationals residing temporarily or permanently in the United States (or merely visiting the United States), issuing passports and CIDs to Mexican nationals, and engaging in public diplomacy. (*Id.*). There are several Mexican consulates located through the United States, and the consulate in Indianapolis is responsible for performing these duties on behalf of Mexican nationals in a region encompassing central and southern Indiana, Kentucky, central and southern Ohio, and southern Illinois. (*Id.*).

confidentiality laws. (*Id.*). The CID is issued pursuant to a foreign nation's rights as a sovereign country and pursuant to the 1963 Vienna Convention on Consular Relations—to which the United States and Mexico are both signatories. (*Id.*, ¶ 8). Indeed, under the Mexican Constitution, CIDs are one (1) of three (3) documents that constitute legal proof of Mexican nationality (the others are a Mexican birth certificate and a Mexican passport). (*Id.*). Due to their highly sophisticated security measures, CIDs are extremely difficult to forge. (*Id.*, ¶ 9). They will not be issued to persons with a criminal record, persons subject to prosecution, or persons facing a judicial or administrative process. (*Id.*). The Mexican CID data base is linked to the Mexican National Security data bases. (*Id.*).

Mexican CIDs are issued by the Mexican Consulate, and are accepted for a variety of purposes by the Consulate. (*Id.*, ¶ 10). However, most employees of the Consulate who issue and/or accept CIDs do not partake of diplomatic immunity. (*Id.*). Although the CIDs do not grant the bearer any immigration status in the United States, they are useful to locate Mexican nationals in case of emergencies. (*Id.*, ¶ 6). They therefore serve the important purpose of allowing the Consulate to keep track of and to serve Mexican nationals. (*Id.*, ¶ 7). In fact, persons who have been issued CIDs are required to get new ones in the event that their address changes. (*Id.*).

One of the concerns that motivated the decision to issue CIDs was the desire to assist persons with opening bank accounts and transferring funds from reputable institutions. (*Id.*, ¶ 11). In many situations, Mexican nationals were forced to keep monies in their homes or on their persons because they did not have identification, leading to the loss of monies. (*Id.*). Indeed, due to a prior inability to access banks (because of a lack of identification), Mexican nationals served by the Indianapolis Consulate were preyed on by unscrupulous persons who,

rather than perform the promised service of transferring monies from Indiana to Mexico, stole the monies. (*Id.*).[8] Presently, therefore, while the principle use of CIDs occurs at banking or other check-cashing institutions and at hospitals in order to obtain medical attention, Mexican nationals utilize CIDs for a wide variety of other purposes, including the following: identifying themselves to law enforcement officers[9]; enrolling their children in school; renting an apartment or other residence; entering federal buildings or other institutions requiring picture identification; obtaining an Individual Tax Identification Number (ITIN) from the Internal Revenue Service (IRS) for the purpose of paying taxes in the United States; and even identifying themselves to the U.S. Citizenship and Immigration Services (USCIS). (*Id.*, ¶ 12). In short, many Mexican nationals utilize CIDs as their primary form of identification in all situations in which

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[8] This concern was also noted during congressional hearings concerning CIDs. One Congresswoman stated as follows:

> [B]ecause [the CID] is an identification card, it provides Mexican nationals in the United States with access to banking services. Is that not better . . . than moneys that can be held in places where these individuals become victims because they know their money is under a mattress or somewhere else? Isn't it better to have the banking institutions of America to be able to have these resources and, of course, to track whether or not any of these accounts are being used for illegal activities?

Consular Identification Cards: Hearing on the Federal Government's Response to the Issuance and Acceptance in the United States Before the House Subcommittee on Immigration, Border Security, and Claims (hereinafter, "*CID Hearing*"), 108th Cong. 44–45, at 18 (2003) (Testimony of Representative Sheila Jackson Lee) (*available at* http://commdocs.house.gov/committees/judiciary/hju87813.000/hju87813_0f.htm (last visited Nov. 7, 2011); *see also id.* at 43–45 (Testimony of Representative Luis V. Gutierrez).

[9] Mexican nationals who are arrested for alleged crimes by state law enforcement have certain rights given to them by treaties concerning notice to, and contact by, the Consulate. (Aff. of Sergio Aguilera, ¶ 14). Therefore, the Consulate encourages Mexican nationals to use the CID to identify themselves as Mexican citizens to authorities in such a situation. (*Id.*). Consequently, at least in the past, the Consulate often received notices that Mexican nationals had been arrested because these individuals had identified themselves using a CID. (*Id.*). These notices, and the CID, were essential to allow the Consulate to fulfill its responsibility as the representative of Mexico in Indiana. (*Id.*).

identification is required. (*Id.*, ¶ 13). Although some such persons may have other forms of identification, such as passports, this latter identification is generally more costly to obtain or replace and thus persons will leave it at their homes and not use it on a regular basis. (*Id.*). For these reasons, some Mexican nationals may not have any form of identification on them other than the CID. (*Id.*).

During his tenure as Mexican Consul in Indianapolis, former-Consul Aguilera met with then-Governor Frank O'Bannon and his staff to gain recognition of the ability of Mexican nationals to use the CID for these wide array of purposes. (*Id.*, ¶ 4). In July of 2003, former-Consul Aguilera received a letter from then-Governor O'Bannon in which the Governor stated as follows:

> The *matricula* [CID] serves the important purpose of providing verification of the identity of Mexican nationals in Indiana.
>
> As you know, various state agencies have accepted the *matricula* for some time. The Bureau of Motor Vehicles accepts the *matricula* as a secondary form of identification toward obtaining drivers' licenses, although separate proof of legal presence also is required. Various state law enforcement agencies, including the Indiana State Police, accept the *matricula* as proof of identity for law enforcement purposes. Positive identification is especially important in encounters with law enforcement officers, and recognizing the *matricula* is likely to increase cooperation between law enforcement organizations and Mexican nationals. Law enforcement acceptance of the *matricula* will save time and money that law enforcement agencies otherwise would have to spend on establishing positive identities.
>
> The *matricula* contains security features that generally give it a high degree of reliability. Although some questions have been raised about the integrity of the *matricula*, it incorporates the best available technology, including both visible and invisible security features, some of which are visible only in special light or by use of a special decoder. I know that many private organizations, including banks and financial institutions, have found the *matricula* useful in establishing positive identity. I am happy to acknowledge the *matricula* as a form of identification in Indiana . . . .

(*Id.*, ¶ 4 & first attachment). Shortly thereafter, then-Governor O'Bannon issued a press release indicating that "state government will accept the *matricula consular* . . . as a form of identification for Mexican nationals." (*Id.*, ¶ 4 & second attachment). After this release, former-Consul Aguilera continued to work with both former-Governor O'Bannon and current-Governor Mitch Daniels to assure the continued acceptance of CIDs. (*Id.*, ¶ 5). He spoke directly with Governor Daniels about this issue, and was assured that there would be no change in policy. (*Id.*).

STANDARD OF REVIEW

> The standard for the granting of summary judgment in the Seventh Circuit is clear:
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> [S]ummary judgment is warranted only if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.
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> The initial burden of production rests upon the moving party to identify those portions of the pleadings depositions, answers to interrogatories, and admissions on file, together with the affidavits, in any, which it believes demonstrate the absence of a genuine issue of material fact. Once the moving party satisfies this burden, the nonmovant must set forth specific facts showing that there is a genuine issues for trial. The nonmovant must do more, however, than demonstrate some factual disagreement between the parties; the issue must be "material."

Logan v. Commercial Union Ins. Co., 96 F.3d 971, 978 (7th Cir. 1996) (internal citations and quotations omitted).

ARGUMENT

As indicated at the outset, all issues presented by this case were resolved by this Court in the context of the plaintiffs' preliminary injunction motion. The challenged statutes are illegal and unconstitutional, and must now be permanently enjoined.

Arrest Provisions (Section 20 of SEA 590)

I. BACKGROUND TO IMMIGRATION LAW AND REGULATION IN THE UNITED STATES

The United States Constitution bestows on Congress both the authority to "establish an uniform Rule of Naturalization" (U.S. CONST. art. I, § 8, cl. 4) and the authority to "regulate Commerce with foreign nations" (U.S. CONST. art. I § 8, cl. 3). Additionally, the Constitution gives the President the leading role in the conduct of foreign affairs. (U.S. CONST. art. II, § 2). Control over immigration is thus constitutionally committed to the federal government: as the Supreme Court has stated, the regulation of immigration is "unquestionably exclusively a federal power." *DeCanas v. Bica*, 424 U.S. 351, 354 (1976). Pursuant to its constitutional authority, Congress has enacted a detailed statutory scheme to regulate immigration known as the Immigration and Nationality Act (INA), which empowers the U.S. Department of Homeland Security (DHS), the U.S. Department of Justice (DOJ), and the U.S. Department of State—among other federal agencies—to enforce and administer immigration law. *See* 8 U.S.C. § 1101, *et seq.* Within DHS, various sub-agencies all have roles to play in enforcing and administering the INA. These include the U.S. Immigration and Customs Enforcement (ICE), the U.S. Customs and Border Protection (CBP), and the U.S. Citizenship and Immigration Services (USCIS). *See* 8 U.S.C. § 1103.

Federal immigration authorities utilize a standard form to inform persons with pending petitions before the government of the status of their cases. This form is known as the Notice of Action Form, and has been designated as Form I-797.[10] This form may be used to notify a person simply that a petition or application with the agency has been received or it may be used to inform the person of a decision on his or her petition or application (whether that decision is

[10] The United States Code of Federal Regulations contains numerous references, promulgated by DHS, to the Notice of Action Form as Form I-797. *See, e.g.*, 8 C.F.R. § 204.5(n)(1); 8 C.F.R. § 207.7(f)(1); 8 C.F.R. § 208.21(c); 8 C.F.R. § 212.7(c)(9)(ii)(A); 8 C.F.R. § 214.2(e)(8)(iv)(B); 8 C.F.R. § 214.11(o)(11); 8 C.F.R. § 214.14(c)(5)(i)(A); 8 C.F.R. § 214.15(f)(2);

favorable or unfavorable). *See, e.g.*, 8 C.F.R. § 207.7(f)(1) (establishing Form I-797, a notice of action form used to inform refugees that their application to admit spouse or child has been approved); 8 C.F.R. § 214.15 (approval for visa application); 8 C.F.R. § 245.2(c) (establishing receipt of visa application). Thus, a Notice of Action may be issued to inform an individual that he or she has now been granted lawful status. Receipt of a Notice of Action is not an indicator of an individual's immigration status and is not an indicator of unlawful activity or presence in the United States.

For those individuals who federal authorities have reason to believe may not be lawfully present in the United States, the INA contains detailed and comprehensive provisions establishing civil penalties for immigration violations and granting DHS the discretion to place non-citizens into removal proceedings. *See* 8 U.S.C. §§ 1225–1231. The mere presence of a non-citizen within the United States without lawful status does not subject the person to criminal penalties and incarceration, although it can lead to the civil remedy of removal. *See* 8 U.S.C. §§ 1182(a)(6)(A)(i), 1227(a)(1)(B)–(C).[11] These removal proceedings take place within an administrative immigration court system over which DOJ has authority. *See* 8 C.F.R. § 1003.0, *et seq.*

If the federal government elects to place a non-citizen into removal proceedings, he or she may be released during the pendency of removal proceedings—or even after a removal order has been issued by an immigration judge. For example, 8 U.S.C. § 1226(a) provides that, based on a warrant issued by the Attorney General of the United States, a non-citizen may be arrested

[11] A non-citizen does, however, commit a crime if he or she returns to the United States after having been formally removed or after voluntarily departing from the United States pending the execution of a final removal order. *See* 8 U.S.C. § 1326. Moreover, unlawful entry into the United States, which is distinct from unlawful presence, is a misdemeanor under federal law. *See* 8 U.S.C. § 1325.

and detained pending a final removal decision. However, the statute also provides that the non-citizen may be released on bond or conditional parole and may, under various circumstances, be provided with work authorization. *See* 8 U.S.C. § 1226(a)(3). And, even if a removal order is issued by the immigration judge, the individual has the right to seek reconsideration and administrative and judicial review of the determination, and the non-citizen may be released on bond until the case is finally resolved. *See* 8 U.S.C. § 1229a(c)(5); 8 C.F.R. § 1241.1. Under various circumstances, an individual may also seek to re-open removal proceedings, even after the issuance of a final removal order, and this may stay the removal pending final disposition of the motion. *See* 8 U.S.C. § 1229a(c)(7). Additionally, if the Attorney General fails to remove the non-citizen for ninety (90) days after a removal order becomes final, the non-citizen is released from detention, subject to supervision by the Attorney General. *See* 8 U.S.C. § 1231(a)(3). In lieu of deportation, the Attorney General may also "permit an alien voluntarily to depart the United States" during a predetermined period of time. *See* 8 U.S.C. § 1229c.

The INA provides that an alien convicted of an "aggravated felony" is subject to removal and may not receive asylum in the United States, become a citizen, lawfully reenter the United States, or have any removal order cancelled by the Attorney General. *See* 8 U.S.C. §§ 1158(b)(2)(A)(ii), 1158(b)(2)(B)(i), 1227(a)(2)(A)(iii), 1229b(a)(3). However, the determination of when a particular crime constitutes an "aggravated felony" under federal immigration law is enormously complex. The definition of "aggravated felony" encompasses twenty-one (21) subsections, most of which in turn contain references to numerous crimes. *See* 8 U.S.C. § 1101(a)(43).[12] As Justice Alito has previously opined, "[d]efense counsel who consults a

[12] A few examples of "aggravated felonies" will suffice to illustrate the complexities involved in ascertaining whether any given crime qualifies an alien for removal. Pursuant to 8 U.S.C. § 1101(a)(43), the term "aggravated felony" includes, but is certainly not limited to, the

guidebook on whether a particular crime is an 'aggravated felony' will often find that the answer is not 'easily ascertained.'" *Padilla v. Kentucky*, __ U.S. __, 130 S.Ct. 1473, 1489 (2010) (Alito, J., concurring). Because of this complexity, it is not uncommon for federal appellate courts to reach different conclusions as to whether an offense constitutes an "aggravated felony" for immigration purposes. *See, e.g.*, *Leocal v. Ashcroft,* 543 U.S. 1 (2004) (resolving a conflict amongst the circuits by finding that felony driving under the influence [DUI] causing serious

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following:

- "an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000" (§ 1101(a)(43)(D));

- "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year" (§ 1101(a)(43)(F));

- "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year" (§ 1101(a)(43)(G));

- "an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed" (§ 1101(a)(43)(J));

- "an offense that (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000, or (ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000 (§ 1101(a)(43)(M)); and

- "an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter" (§ 1101(a)(43)(N)).

The term "aggravated felony" also applies to enumerated offenses whether they violate federal or state law, and also applies to such offenses in violation of the law of a foreign country for which the term of imprisonment was completed within the previous fifteen (15) years. 8 U.S.C. § 1101(a)(43).

bodily injury did not constitute an "aggravated felony" for immigration purposes).

If ICE receives information from federal or local law enforcement officials that a non-citizen is already in criminal-justice custody on non-immigration-related charges, it may issue a detainer requesting that the law enforcement agency hold the alien for up to forty-eight (48) hours (not including weekend days and holidays) past the time that the detainee would otherwise be released so that ICE may assume custody. *See* 8 C.F.R. § 287.7(d). The detainer, however, immediately and automatically expires at the end of the 48-hour period. *See id.* It is not a criminal warrant, but is simply a voluntary request to the local agency that the "agency advise the Department, prior to release of the alien, in order for the Department [of Homeland Security] to arrange to assume custody." 8 C.F.R. § 287.7(a).

Federal law permits the delegation of authority to enforce civil immigration law to state and local law enforcement officials only in certain specific, limited circumstances. For example, DHS may authorize state or local law enforcement officers to assist with enforcement of immigration laws "[i]n the event the Attorney General determines that an actual or mass influx of aliens arriving . . . presents urgent circumstances requiring an immediate Federal response." 8 U.S.C. § 1103(a)(10). In addition, federal law also provides that DHS may enter into written agreements with states or political subdivisions of a state to allow qualified officers or employees of the state or subdivision to serve as immigration officers. *See* 8 U.S.C. § 1357(g)(1). These contracts are known as "287(g) agreements," although currently neither the State of Indiana nor any political subdivision therein has entered into such an agreement with the federal government. *See* U.S. Immigration and Customs Enforcement, Fact Sheet: Delegation of Immigration Authority Section 287(g) Immigration and Nationality Act, *at* http://www.ice.gov/news/library/factsheets/287g.htm (data as of Sept. 2, 2011) (last visited Nov. 7, 2011).

II. SECTION 20 OF SEA 590 AUTHORIZES WARRANTLESS ARRESTS WHEN THERE IS NO PROBABLE CAUSE TO BELIEVE THAT A CRIME HAS OCCURRED, AND THUS VIOLATES THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

By its terms, Section 20 of SEA 590 permits law enforcement official in Indiana to make "arrests" under certain, enumerated circumstances. As such, there can be no doubt that these provisions implicate the Fourth Amendment. *See, e.g.*, *Tennesse v. Garner*, 471 U.S. 1, 7 (1985) ("Whenever an officer restrains the freedom of a person to walk away, he has seized that person."). As has often been said, "[t]he ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Kentucky v. King*, __ U.S. __, 131 S.Ct. 1849, 1856 (2011) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). "[A]n arrest is reasonable under the Fourth Amendment so long as there is probable cause to believe that *some* criminal offense has been or is being committed." *Fox v. Hayes*, 600 F.3d 819, 837 (7th Cir. 2010) (emphasis in original) (citing *Devenpeck v. Alford*, 543 U.S. 146, 153–56 (2004)). However, Indiana Code § 35-33-1-1(a)(11) through (13)—by permitting arrests solely on the bases of a removal order, a detainer or Notice of Action, or an indictment for or conviction of an aggravated felony—explicitly allows law enforcement officials to arrest persons without probable cause of any unlawful conduct whatsoever.

After all, as is indicated above, not only is it not a crime for a person to have a removal order issued against him or her, but a person with such an order may not be subject to immigration detention at all: he or she may not be deportable, or federal authorities may have released him or her on bond or supervision during the pendency of removal proceedings (or even after a removal order issues). Similarly, a detainer—which is a 48-hour administrative request issued when an alien is in custody on an unrelated charge—is neither a crime nor evidence of a crime. This is simply a "civil administrative detainer," which is entirely distinct from a criminal

arrest warrant. *See United States v. Flores-Sandoval*, 422 F.3d 711, 713 (8th Cir. 2005). The regulations authorizing issuance of ICE detainers do not require any showing of probable cause to believe that a person is deportable, and they do not require any neutral judicial officer to approve the issuance of a detainer. *See* 8 C.F.R. § 287.7. A Notice of Action is likewise nothing more than a notice from the federal government that it has taken some action, including favorable action, on a case. Issuance of a detainer or a Notice of Action therefore does not signify that any crime has been committed, or even that the subject is deportable: a favorable Notice of Action may actually signify the contrary. Finally, having been indicted or convicted in the past of an aggravated felony does not constitute probable cause to believe that any current crime has been committed. Indeed, this includes persons who have fully served their sentences, persons who have been acquitted of any wrong-doing, persons against whom indictments were dismissed, persons who were adjudicated guilty of or pled guilty to a lesser offense that does not qualify as an "aggravated felony," and persons released on bond by a criminal court during the pendency of the proceedings.

In order for there to be a lawful arrest, "the Fourth Amendment requires that police have probable cause to believe a person has committed or is committing a crime." *United States v. Scheets*, 188 F.3d 829, 836 (7th Cir. 1999). The challenged statute, however, mandates warrantless arrests for conduct that is explicitly not criminal. This violates the Fourth Amendment and is unconstitutional. (*See* ECF No. 79, at 20–22).

III. SECTION 20 OF SEA 590 CONSTITUTES THE IMPERMISSIBLE STATE REGULATION OF, AND INTERFERENCE WITH, IMMIGRATION AND IS ACCORDINGLY PREEMPTED.

Because Indiana Code § 34-22-1-1(a)(11) through (13) represents a clear violation of the Fourth Amendment, there is no need for this Court to proceed any further in addressing the permissibility of these provisions. However, if it chooses to do so, it is also apparent that the

statute is preempted by virtue of the Supremacy Clause, U.S. CONST. art. VI, § 2, and it must be enjoined for that reason as well. Section 20 impermissibly regulates immigration by allowing warrantless arrests for individuals based purely on immigration-related determinations, outside of the control of the federal government. It also intrudes on a field that Congress has occupied, and it conflicts with the federal scheme for immigration enforcement.

A. Background to Preemption Doctrine

By virtue of the Supremacy Clause, it is "[a] fundamental principle of the Constitution . . . that Congress has the power to preempt state law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000). Preemption requires an examination of congressional intent, and federal regulations have no less preemptive effect than federal statutes. *Fid. Fed. Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 152–53 (1982). A state statute may thus be preempted in three (3) ways: "by express language in a congressional enactment, by implication from the depth and breadth of a congressional scheme that occupies the legislative field, or by implication because of a conflict with a congressional enactment." *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001) (citations omitted). The last two (2) forms of preemption, field and conflict preemption, are both considered "implied." *Lozano v. City of Hazelton,* 620 F.3d 170, 203 (3d Cir. 2010). "Implied field preemption occurs when state or local governments attempt regulation in a field which Congress has implied an intent to exclusively occupy." *Id.* at 204. This intent can be inferred when the federal scheme is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (internal quotations omitted). The last category of preemption—"implied conflict preemption"—occurs when "compliance with both federal and state regulations is a physical impossibility" or when state law "stands as an obstacle to the accomplishment and

execution of the full purposes and objectives of Congress." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983) (internal quotations omitted).

As noted above, the United States Constitution leaves to the federal government the exclusive authority to establish immigration policy and regulate immigration. *See* U.S. CONST. art. I, § 8, cl. 3–4. The Supremacy Clause forbids any state "regulation of immigration." *DeCanas v. Bica*, 424 U.S. 351, 353–54 (1976). This flat prohibition on state regulation of immigration is required because immigration regulation is "unquestionably exclusively a federal power." *Id.* at 354; *see also id.* at 355 (federal "constitutional power" to regulate immigration preempts state law "whether latent or exercised"); *Truax v. Raich*, 239 U.S. 33, 42 (1915) ("The authority to control immigration . . . is vested solely in the Federal Government."). Therefore, only the federal government may establish immigration policy and the process of "determin[ing] who should or should not be admitted into the country," *DeCanas*, 424 U.S. at 355, and the "conditions lawfully imposed by Congress upon . . . residence of aliens," *Takahashi v. Fish and Game Comm'n*, 334 U.S. 410, 419 (1948). *See also Toll v. Moreno*, 458 U.S. 1, 11 (1982). "[T]he regulation of aliens is so intimately blended and intertwined with responsibilities of the national government that where it acts, and the state also acts on the same subject . . . the law of the state . . . must yield to it." *Hines v. Davidowitz*, 312 U.S. 52, 66 (1941).

However, this complete preemption of the immigration field does not prohibit state laws that touch on immigration matters if they address legitimate state interests with only a speculative and indirect impact on immigration. *DeCanas*, 424 U.S. at 355–56.

B. Section 20 of SEA 590 is preempted and is therefore void.

Not only is the federal government granted the exclusive authority to regulate immigration, but "Congress provided the Executive with a fair amount of discretion to determine how *federal* officers enforce immigration law." *United States v. Arizona*, 641 F.3d 339, 351 (9th Cir. 2011), *cert. pending* (emphasis in original). The arrest provisions (Section 20) of SEA 590 directly conflict with federal decision-making—both discretionary and non-discretionary—necessary to effectuate immigration law and immigration proceedings, and these provisions thereby "'stand[] as an obstacle' to the full implementation of federal law." *Gade*, 505 U.S. at 103. (quoting *Hines*, 312 U.S. at 67). This may be easily seen with respect to each of the items regulated by Section 20:

a. *Removal Order* (IND. CODE § 35-33-1-1(1)(a)(11)) – Indiana has no legitimate interest in arresting persons who have removal orders issued against them. The federal removal process is exclusively a concern of federal immigration authorities and is not a criminal proceeding. Moreover, having a prior removal order is not proof that the person is subject to detention by federal authorities.[13] As Ms. Adair's situation demonstrates, a person may have been issued a removal order, but—with permission of federal authorities—nonetheless be allowed to be free from custody, obtain work authorization, and even possibly receive lawful permanent status. However, notwithstanding the fact that the federal government may exercise its discretion to release a person with a removal order, Indiana has now announced that they are subject to arrest for having been issued that removal order. This is clearly an "obstacle" to the accomplishment of federal objectives.

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[13] Even if having a pending removal order subjected a person to detention by federal authorities, the law is clear that federal law preempts the authority of state and local officers to make arrests for civil violations of federal immigration law absent specific authorization by federal law. *See United States v. Arizona*, 641 F.3d 339, 362–63 (9th Cir. 2011), *cert. pending*; *United States v. Urrieta*, 520 F.3d 569, 574 (6th Cir. 2008).

b. *Detainer* (IND. CODE § 35-33-1-1(1)(a)(12)) – Next, given that an immigration detainer is by definition lodged against persons who are already in custody, *see* 8 C.F.R. § 287.7(a) ("A detainer serves to advise another law enforcement agency that the Department seeks custody of an alien *presently in the custody of that agency*.") (emphasis added), it is not clear when (if ever) state and local law enforcement will have the opportunity to enforce this portion of Section 20. Regardless, it is clear that a detainer is not proof of criminal activity: it is merely a request to temporarily hold an individual in detention for up to an additional forty-eight (48) hours. *See* 8 C.F.R. § 287.7(a),(d). It is a "civil administrative detainer." *Flores-Sandoval*, 422 F.3d at 713. Indiana, by authorizing arrest for the mere issuance of an immigration detainer is converting these immigration detainer requests into arrest warrants. Under federal law, ICE has discretion to decline to take custody of individuals that initially have immigration detainers placed on them, and certainly removal proceedings may never be initiated against these individuals. But under Indiana law, these individuals are now subject to arrest. Indiana is attempting to criminalize something that the federal government clearly intends to be civil. This represents a direct conflict with federal law and policy.

c. *Notice of Action* (IND. CODE § 35-33-1-1(1)(a)(12)) – Similarly, the allowance of arrest based on nothing more than receipt of a Notice of Action represents a profound conflict with federal immigration law. These notices are inherently non-criminal and merely indicate that a person has received some information from the DHS (or one of its sub-agencies) concerning any of a wide array of immigration matters. Clearly federal immigration policy does not intend that persons in possession of these Notices of Action be subject to arrest, for, in the eyes of the federal government, those who receive the notices have done nothing wrong—let alone anything justifying arrest. The Supreme Court in *DeCanas* noted that a state can enter the otherwise

preempted immigration field only if it is advancing its own legitimate interests and there is only a speculative and indirect impact on immigration. 424 U.S. at 355. But, Indiana has no interest in arresting persons who receive this notice and this obviously has a significant impact on the policy of the federal government of providing notices—but not arresting—persons involved in immigration matters. This arrest provision, too, is preempted.

d. *Aggravated felonies* (IND. CODE § 35-33-1-1(1)(a)(13)) – The same is true with arresting those who have been indicted or convicted of "aggravated felonies." Initially, it is clear that the language of the statute allows even for the arrest of United States citizens who have been convicted or indicted for these crimes. "'Obstacle' conflict pre-emption . . . requires a broader inquiry into the purposes underlying a federal statute, and whether a state law stands as an obstacle to effectuation of those purposes." *Lozano*, 620 F.3d at 204. Obviously, arresting citizens stands as an obstacle to effectuating the purpose of immigration law. Moreover, federal law specifies that the immigration penalties associated with aggravated felonies arise only if the person has been convicted of the offense. *See* 8 U.S.C. § 1101(a)(43). Yet Section 20 authorizes the arrest of those who may only have been indicted, and the statute runs counter to the federal intent to limit these penalties to those with convictions. And, finally, if the United States has fully resolved, to its satisfaction, the issue of an alien's conviction of an aggravated felony and has determined that no penalty will be imposed, it stands as an obstacle to effectuating the federal purposes to allow the arrest by state authorities. The fact that Mr. Urtiz, with the knowledge of DHS, is free and walking the streets, but subject to arrest by state law because of a

since-modified conviction starkly illustrates the conflict between state and federal law and demonstrates that the statute is preempted.[14]

* * *

Ultimately, the easiest way to demonstrate the preemptive effect of federal law here is to focus on how the statute will operate. Perhaps local law enforcement will suspect that a person is subject to the statute and will contact federal authorities or review law enforcement databases to discover that a Notice of Action was issued or that the person was indicted for an aggravated felony in the past. Law enforcement will then arrest the person. However, these are not crimes, so the person will not be taken to state court for an initial hearing. Instead, local law enforcement officers will contact federal immigration authorities to announce that they have arrested someone who had an aggravated felony indictment dismissed long in the past, or who received a Notice of Action when being informed of his or her lawful status, or who has a removal order that has been stayed by order of an immigration judge. The federal immigration authorities will then, undoubtedly, disclaim any interest in assuming custody over the person.[15]

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[14] Furthermore, the determination of whether a given state crime qualifies as an "aggravated felony" is a complex one, as detailed above; immigration judges make this determination based on statutory analysis and the application of case-law. Yet Section 20 would give this task to local law enforcement officers in the field, a fact that might predictably lead to erroneous legal determinations in conflict with the federal scheme.

[15] This highlights another basis for preemption; the challenged statute will impose an impermissible burden on federal resources. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Egelhoff v. Egelhoff ex rel. Breiner*, 532 U.S. 141, 150 (2001) (holding that "differing state regulations affecting an ERISA plan's 'system for processing claims and paying benefits' impose 'precisely the burden that ERISA pre-emption was intended to avoid'") (internal citation omitted).

The fact that these provisions directly conflict with, and far exceed, state authority can be seen by reviewing 8 U.S.C. § 1357(a)(2), which limits the powers of a *federal* officer to arrest aliens without a warrant to those

> who in his presence or view is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of law regulating the admission, exclusion, expulsion, or removal of aliens, or to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest.

Indiana law therefore purports to give to Indiana law enforcement officials greater power to arrest non-citizens than they would have were they federal officials. This is a clear sign that the challenged law is preempted.[16]

The challenged statute seeks to implement precisely what the Supreme Court struck down more than seventy (70) years ago—the subjection of non-citizens to "indiscriminate and repeated interception and interrogation by public officials" and "the possibility of inquisitorial practices and police surveillance." *Hines*, 312 U.S. at 66, 74. As in *Hines*, "this legislation deals with the rights, liberties, and personal freedoms of human beings, and is in an entirely different category from [non-preempted legislation such as] state tax statutes or state pure food laws regulating labels on cans." *Id*. at 68. By subjecting individuals to warrantless arrests for immigration purposes, the challenged statute directly regulates the conditions under which non-citizens may remain in the country. *DeCanas*, 424 U.S. at 355; *see also Chy Lung v. Freeman*, 92 U.S. 275, 281 (1875) (invalidating statute regulating arrival of passengers from foreign port); *Villas at*

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[16] This serves to emphasize that the challenged provisions will also have a direct impact on the primary role and day-to-day operations of Indiana police officers, shifting their focus from local concerns to one of federal significance. State laws that impact aliens are preempted unless the regulation is passed pursuant to state "police powers" that are "focuse[d] directly upon" and "tailored to combat" what are "essentially local problems." *DeCanas*, 424 U.S. at 356-57. The challenged statute does not concern any locally-based priorities or state police power.

Parkside Partners v. City of Farmers Branch, 701 F.Supp.2d 835, 855 (N.D. Tex. 2010) (invalidating ordinance requiring non-citizens to demonstrate immigration status prior to renting housing). Federal law strikes a balance that gives discretion to the United States to determine whether or not to arrest persons without status. The challenged law destroys this balance. "The Supreme Court has consistently found state and local laws which alter the careful balancing of objectives accomplished by a federal law to be pre-empted." *Lozano*, 620 F.3d at 212. The challenged statute here is preempted as well. (*See* ECF No. 79, at 23–28).

Consular Identification Card Provisions (Section 18 of SEA 590)

Section 18 is an impermissible state regulation of immigration because it criminalizes the use of consular identification by foreign nationals in the United States, including those who are lawfully present. It is also preempted because it conflicts with the federal role in conducting affairs with foreign nations. Finally, it violates the Due Process Clause of the Fourteenth Amendment.

I. LEGAL BACKGROUND TO CONSULAR IDENTIFICATION CARDS

Under the Vienna Convention on Consular Relations, to which the United States is a signatory, a foreign consulate is granted permission to issue travel documents, visas, or other appropriate documents to its citizens and to otherwise protect and assist its citizens in the foreign country. *See* Vienna Convention on Consular Relations and Optional Protocol on Disputes (hereinafter, "Vienna Convention"), Dec. 14, 1969, art. V(a),(d)–(e), 21 U.S.T. 77, *available at* 1969 WL 97928. Pursuant to these powers, CIDs are issued by many "embassies and consulates of foreign states, including the United States, to encourage their citizens abroad to register with the consulates so that they can receive standard consular services, be notified if necessary, and be located upon inquiry by relatives and authorities." Congressional Research Service, *Consular*

Identification Cards: Domestic and Foreign Policy Implications, the Mexican Case, and Related Legislation, at CRS-1 (2005), *available at* http://www.fas.org/sgp/crs/misc/RL32094.pdf (last visited Nov. 7, 2011).

Under the Vienna Convention, a foreign national arrested or detained in the United States must be advised of his or her right to request that appropriate consular officials be notified of their detention without delay. *See* Vienna Convention, *supra* art. 36. Thus, in congressional testimony, a U.S. State Department official testified that the Department views CIDs as a useful tool for law enforcement officers to help facilitate observance of the United State's treaty obligations. *See CID Hearing*, *supra*, at 142–43 (Testimony of Acting Deputy Assistant Secretary of State Roberta Jacobson). The uses and value of CIDs are detailed above. However, for present purposes it is noteworthy that the U.S. Treasury Department has adopted regulations that specifically permit financial institutions to accept CIDs and other foreign government-issued documents. *See* 31 C.F.R. § 1020.220(a)(2)(i)(A)(4)(ii) (requiring banks to obtain an "identification number" from persons, which may be an "alien identification card number" or the "number and country of issuance of any other government-issued document"); *see also* Customer Identification Programs for Financial Institutions, 68 Fed. Reg. 55335, 55336 (proposed Sept. 25, 2003) (now codified at 31 C.F.R. pt. 103) ("As issued, the final rules neither endorse nor preclude reliance on particular forms of foreign government issued identification.").[17]

II. TO THE EXTENT THAT IT MAKES THE USE AND ACCEPTANCE OF CIDS UNLAWFUL, SECTION 18 OF SEA 590 INTERFERES WITH THE EXCLUSIVELY FEDERAL ROLE IN CONDUCTING FOREIGN POLICY, AND IS PREEMPTED.

[17] The cited regulation implements 31 U.S.C. § 5318(l), which requires the U.S. Treasury Department to promulgate regulations that provide minimum standards for the identification and verification of account holders.

Any restriction on the use of CIDs therefore impacts directly on the United States' treaty obligations as well as on United States' foreign relations. Notwithstanding this impact, however, Indiana has now taken the extraordinary step of making it unlawful to offer or accept consular identification as a valid form of identification for any purpose. Therefore, if a Mexican national such as Ms. Buquer shows her CID when she is shopping after being asked to produce identification so she can use a charge card or cash a check, she will violate the law—as will the person who accepts the identification. Indeed, if she shows the Mexican Consulate her identification, as she has done in the past, she will likely violate the law.[18] Indiana has therefore insinuated itself into the relationship between the United States and foreign countries and has proceeded to attempt to dictate that relationship. This is no more tenable than it would be were Indiana to unilaterally enter (or dissolve) a treaty with Mexico. *Cf. United States v. Arizona*, 641 F.3d 339, 367 (9th Cir. 2011), *cert. pending* (Noonan, J., concurring) ("That fifty individual states or one individual state should have a foreign policy is absurdity too gross to be entertained. In matters affecting the intercourse of the federal nation with other nations, the federal nation must speak with one voice.").

Ultimately, it is the President who is given the constitutional authority to act in the areas of relations with other countries. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003)

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[18] The statute does provide that showing or accepting the CID is an infraction "[e]xcept as otherwise provided under federal law." IND. CODE § 34-28-8.2-2(a). Although the Vienna Convention implicitly allows foreign governments to issue CIDs, it says nothing about the propriety of offering or accepting them as identification, and not all employees of the Mexican consulate are protected by immunity. Moreover, it appears that embassies and consulates constitute territory of the nation in which they are located, and the Mexican Consulate is thus likely subject to Indiana laws. *See McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 587–89 (9th Cir. 1983) (concluding that the United States embassy in Iran is not subject to United States jurisdiction insofar as embassies "remain[] the territory of the receiving state," and citing the Restatement (Second) of the Foreign Relations law of the United States).

(finding that California law attempting to regulate insurance policies sold in Europe during the Holocaust impermissibly interfered with executive power and was preempted). "Although the source of the President's power to act in foreign affairs does not enjoy any textual detail, the historical gloss on the 'executive Power' vested in Article II of the Constitution has recognized the President's 'vast share of responsibility for the conduct of our foreign relations.'" *Id.* (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)). Congress also has responsibilities through its war and foreign commerce powers. *Id.* Therefore, "[n]o State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively." *United States v. Pink*, 315 U.S. 203, 233 (1942). Thus, the Supreme Court has long held that "[f]or local interests the several states of the Union exist, but for national purposes, embracing our relations with foreign nations, we are but one people, one nation, one power." *Chae Chan Ping v. United States*, 130 U.S. 581, 606 (1889). Consequently, a law that has a direct impact on foreign relations is preempted and void, even if not directly conflicting with a treaty. *See Zschernig v. Miller*, 389 U.S. 429, 441 (1968) (finding that Oregon statute that imposed conditions on non-resident aliens taking property by succession or testamentary disposition was invalid as intruding on foreign affairs that is entrusted to the President.).

The challenged statute has this direct impact and is prohibited. The question of whether a consulate can issue CIDs is certainly addressed by the Vienna Convention, an international treaty ratified by Congress. The State Department, cognizant of the federal interest in consular relations, has also cautioned as follows:

> [T]he U.S. Government must carefully avoid taking action against consular identification cards that foreclose our options to document or assist Americans overseas. The Department itself issues documentations other than passports for U.S. citizens abroad and at times issues similar identity cards or travel documents.

> Should a foreign country decide to limit acceptance of such documentation or other traditional documentation such as State-issued IDs or driver's licenses, the actions of American citizens abroad could be seriously restricted.

CID Hearing, *supra*, at 143 (Testimony of Ms. Jacobson). Thus, the risk exists, at the *federal* level, that if actions are taken against CIDs, there could be serious international repercussions. The risk is no less at the state level and demonstrates that Indiana is entering an area where federal interests are exclusive. While it should require no further citation to demonstrate this, it is certainly noteworthy that the sovereign nations of Mexico, Brazil, Guatemala, El Salvador, and Columbia have appeared in this cause in opposition to the State's restrictions on the use of CIDs (ECF No. 76; *see also id.* at 5 ("SEA 590 . . . infringes on Mexico's ability to assist and protect its nationals in a manner inconsistent with treaty obligations under the Vienna Convention."), and the Mexican government also issued multiple public statements expressing its concerns over the challenged law (ECF Nos 76-1 & 76-2). This further emphasizes that the challenged statute implicates the exclusive powers of the federal government in an area where federal control must be exclusive—"[i]f it be otherwise, a single State can, at her pleasure, embroil us in disastrous quarrels with other nations," *Chy Lung v. Freeman*, 92 U.S. at 275, 280 (1875). As noted above, the caution with which the federal government has chosen to proceed with regard to consular identification is apparent also from the regulations adopted by the U.S. Department of Treasury, which do not preclude financial institutions from accepting CIDs and other foreign government-issued documents—and, as noted by the nation of Mexico, numerous financial institutions in Indiana have chosen to accept CIDs (ECF No. 76, at 13 n.16).[19]

[19] Although the Department of Treasury has adopted regulations that appear to endorse the propriety of banks accepting CIDs as a form of identification, there is nothing in these regulations that permit customers to offer the CIDs. Therefore, even if the bank is immunized by

The "sweeping regulation[]" of SEA 590's CID provision—which is "targeted solely at foreign government-issued identification that consulates are, by treaty, entitled to issue" and which "restrict[s] the manner in which foreign citizens may travel, live, and trade in the United States"—has "a direct effect on our nation's interactions with foreign nations" and "cannot be dictated or restricted by individual states" (ECF No. 79, at 32). The carefully crafted role that the federal government has adopted with respect to CIDs, which is intended to maintain relations with foreign countries and satisfy national treaty obligations, has nonetheless been abandoned by the State. Indiana has no right, or ability, to attempt to regulate this matter of national concern.

III. SECTION 18 OF SEA 590 IS ARBITRARY AND IRRATIONAL, AND THEREFORE VIOLATES DUE PROCESS.

Finally, the State's attempt to preclude the use of CIDs in all interactions, including those between private parties, drifts so far afield that it violates the Fourteenth Amendment to the United States Constitution. State action violates substantive due process and equal protection where the state action is not "rationally related to a legitimate government interest." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 406 (1992). While scrutiny under rational-basis review is not particularly rigorous, there are numerous instances in which courts have found that governmental action fails to satisfy even this minimal standard of review. *See, e.g.*, *Romer v. Evans*, 517 U.S. 620 (1996) (state constitutional amendment barring homosexual and bi-sexual residents from protection under anti-discrimination laws); *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (zoning ordinance excluding a group home for the mentally retarded); *U.S. Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973) (statute denying food stamp benefits to families with unrelated persons); *Berger v. City of Mayfield Heights*, 154 F.3d 621

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federal law from liability for accepting the identification, the CID-holder is not immunized for offering it.

(6th Cir. 1998) (ordinance requiring clearing of growth from vacant lots that have less than a certain length of street frontage).

The irrationality of the CID provision of SEA 590 is apparent from its text. On the one hand, it recognizes that police officers may request identification and receive CIDs when they are investigating criminal activity, and it therefore immunizes the officers. *See* IND. CODE § 34-28-8.2-2(a). On the other hand, however, the minute that a person responds to the request from the officer and actually provides a CID, he or she will have committed a crime. This is not rational. The statute also criminalizes the showing of Mexican CIDs at the Mexican consulate, and it prohibits the offering or accepting of this form of identification in numerous transactions between private parties—ranging from the cashing of a check to the renting of an apartment to the enrolling of a child in school. What possible rational purpose can be served by criminalizing the offering or use of the CID in these circumstances, particularly where the private parties involved are free to accept a wide array of inherently unreliable or informal identification, such as a utility bill, a student identification card, or even oral self-identification?

The State can certainly decree that a CID cannot be used as official identification to obtain a driver's license or to enter (state) governmental buildings. However, as this Court previously held,

> the legislature's decision to single out for punishment individuals using CIDs for identification purposes from all other individuals, many of whom are using other, arguably more unreliable forms of identification simply does not rationally further the goal of the prevention of fraud or otherwise ensure the reliability of identification. Regrettably in our view, the distinction more accurately appears to have been designed simply to target foreign nationals.

(ECF No. 79, at 34). There is no rational reason why the State should be allowed to proscribe what type of identification can be used between private parties in the manner that it has done. In addition to its other faults, the challenged statute is irrational.

CONCLUSION

For the foregoing reasons, there are no disputed issues of material fact in this cause, summary judgment should be entered in favor of the plaintiffs and the certified class, and the previously entered preliminary injunction should be made permanent.

/s/ Gavin M. Rose
Gavin M. Rose
No. 26565-53
Kenneth J. Falk
No. 6777-49
ACLU of Indiana
1031 E. Washington St.
Indianapolis, IN 46202
317/635-4059
fax: 317/635-4105
kfalk@aclu-in.org
grose@aclu-in.org

Angela D. Adams
No. 24959-49
LEWIS & KAPPES, P.C.
One America Tower, Suite 2500
Indianapolis, IN 46282-0003

Lee Gelernt, *Pro Hac Vice*
Omar C. Jadwat, *Pro Hac Vice*
Andre I. Segura, *Pro Hac Vice*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
125 Broad Street, 18th Floor
New York, New York 10004

Cecillia D. Wang, *Pro Hac Vice*
Katherine Desormeau, *Pro Hac Vice*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, California 94111

Linton Joaquin, *Pro Hac Vice*
Karen C. Tumlin, *Pro Hac Vice*
NATIONAL IMMIGRATION LAW CENTER
3435 Wilshire Boulevard, Suite 2850
Los Angeles, California 90010

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2011, a copy of the foregoing was filed electronically with the Clerk of this Court. The following parties will be served by operation of the Court's electronic system:

Betsy M. Isenberg
Deputy Attorney General
betsy.isenberg@atg.in.gov

Wade Dunlap Fulford
Deputy Attorney General
wade.fulford@atg.in.gov

Robert Howard Schafstall
CUTSINGER & SHAFSTALL
robhschafstall@gmail.com

Patricia Erdmann
Deputy Attorney General
patricia.erdmann@atg.in.gov

Adam Clay
Deputy Attorney General

Adam.Clay@atg.in.gov
Justin F. Roebel
Assistant Corporation Counsel
jroebel@indy.gov

/s/ Gavin M. Rose
Gavin M. Rose
Attorney at Law