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.	)	

PLAINTIFFS' REPLY 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 challenged provisions of Senate Enrolled Act 590 ("SEA 590"). They would therefore be subject to Section 20 of SEA 590 (codified at Indiana Code § 35-33-1-1(1)(a)(11)–(13)), which permits local law enforcement officials in Indiana to arrest persons if the officer has a detainer or notice of action issued by the Department of Homeland Security or a removal order issued by an immigration court concerning the persons (despite the fact that these notices are not remotely indicia of a criminal offense) or if the officials have probable cause to believe that the persons have been convicted or indicted in the past for a list of crimes identified by federal law as "aggravated felonies" (although past convictions or indictments certainly do not amount to probable cause concerning current offenses). They would also be subject to Section 18 of SEA 590 (codified at Indiana Code § 34-28-8.2-1, *et seq.*), which makes it an offense, an infraction, to use or accept a consular identification card, issued pursuant to the sovereign power of a foreign government, for any identification purpose.

In arguing against the plaintiffs' summary judgment motion and memorandum (ECF Nos. 122-123) the Marion and Johnson County Prosecutors ("the State") offer no cogent arguments that justify this Court reversing its preliminary conclusions that the challenged provisions are unconstitutional and preempted. *See Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905 (S.D. Ind. 2011). Summary judgment should issue in favor of the plaintiffs.[1]

CLASS CERTIFICATION

In the introduction to its memorandum, and unmentioned elsewhere, the State appears to argue that not all of the claims in this case are brought on behalf of the two (2) certified classes that it stipulated to. No textual support for this argument is provided, and the argument is therefore waived. *Harper v. Vigilant Ins. Co.*, 433 F.3d 521, 528 (7th Cir. 2005) (arguments not properly presented in response to summary judgment are waived). Regardless, the order certifying the classes in this case notes that Class A consists of persons in Marion and Johnson Counties who have, or will have, removal orders, detainers, or notices of action, or who have been convicted or indicted for at least one aggravated felony. (ECF Nos. 84, 129). The facts are undisputed that Ms. Buquer has received notices of action, Mr. Urtiz was convicted of an aggravated felony, and Ms. Adair has received notices of actions and has an outstanding removal order issued against her. (ECF Nos. 56-1, ¶¶ 3-4; 41-2, ¶¶ 2-5; 41-3, ¶¶ 2-3). In certifying Class A this Court noted that the law or fact common to the class is whether the statute, "which provides law enforcement with discretion to arrest individuals with a notice of action, detainer,

[1] The State has not filed a cross-motion for summary judgment. Nonetheless, in response to the plaintiffs' summary judgment motion it requests the judgment be entered in its favor. (*See* ECF No. 172, at 1, 33). Pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, the Court may not enter judgment in favor of a nonmovant without affording notice and an opportunity to respond. Insofar as the State has not included in its brief a "Statement of Material Facts Not in Dispute"—instead deciding to intersperse references to its evidentiary submissions throughout the body of its argument—the plaintiffs do not waive their right to this notice and opportunity to respond. Absent a succinct statement of the facts that the State believes necessary to entitle it to judgment, the plaintiffs have been left in the dark as to which of the State's facts should be controverted.

or removal order, is preempted by Federal law and is unconstitutional. (ECF No. 84, 121). Somehow based on this the State argues that "[t]he Fourth Amendment . . . challenge [raised concerning Class A] are only raised by Buquer, Adair and Urtiz," and presumably not the class. (ECF No. 172, at 2). The State makes this argument despite stipulating that the claims of the representative parties, identified as plaintiffs Buquer, Adair and Urtiz, are typical of the class and that they will fairly and adequately represent the class. (ECF Nos. 39, ¶¶ 2-3; 82, ¶¶ 2-3, 121 ¶¶ 4-6), and despite the clear statement that the challenge is to whether the provision is preempted by Federal law and is unconstitutional, which certainly encompasses the Fourth Amendment challenge. The State has also admitted in its Answer, filed after the class stipulation, that "there are questions of law or fact common to the proposed class including: (1) whether SEA 590 violates the Fourth Amendment of the U. S. Constitution; and (2) whether SEA 590 is preempted." (ECF No. 1, ¶16; ECF No. 86, ¶ 16).[2]

The State does note that the stipulated-to description of common questions in Class A, while referring to both preemption and unconstitutionality, omits reference to aggravated felonies, although that is certainly referred to in the class definition. The Seventh Circuit has noted that "the most important part of . . . [the class certification] order is the place where it defines the class," *Spano v. The Boeing Co.*, 633 F.3d 574, 583-84 (7th Cir. 2011), so the significance of the omission of all the aspects of the unconstitutionality of the statute subsumed within commonality is not clear and is not elucidated in any way by the State. Moreover, the

[2] Perhaps the State is saying that in order to inform it of the precise scope of the class's claims the order of class certification should state that the common question of law or fact is whether the statue is "preempted by federal law *or* unconstitutional." To suggest that the State somehow did not understand that both the preemption and Fourth Amendment argument are within the class claims is curious given the State's admission in its answer as well as the litigation posture of the parties over the last year. On a more scholarly plane, inasmuch as the Supremacy Clause does not secure a specific constitutional right, the fact that a state law is preempted and unconstitutional refers to two separate substantive problems. *See, e.g.*, *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 614 (1979) (noting that a three-judge district court hearing cases concerning the "unconstitutionality" of state statutes necessarily excludes cases based on the Supremacy Clause, but instead includes only cases based on substantive provisions of the Constitution) (citing *Swift & Co. v. Wickham*, 382 U.S. 111 (1965)).

Seventh Circuit has stressed that Rule 23(c)(1)(B) of the Federal Rules of Civil Procedure, requiring definition of the class and the class claim s and issues requires onl y that the claims and issues be "readily discernible from the text eith er of the certification order itself or of a n incorporated memorandum opinion." *Ross v. RBS Citizen s, N.A.*, 667 F.3d 900, 905 (7 th Cir. 2012) (internal quotation and citation omitted). The State does not argue that the class claims are not readily discernible.

Similarly, the State argues that the due process challenge to Indiana Code § 34-28-8.2-1 is "raised only by Buquer, Adair an d Urtiz" (ECF No. 172 at 2), again because the certificatio n order for Class B states that the common questi on of law or fact is whether the s tatute "is unlawful, is preempted by Federal law and is unc onstitutional." (ECF No. 84). Once m ore, no further argument is made. Again, the State ign ores the fact that in its Answer it a dmitted that Class B, represented by Ms. Buquer, presents common questions "including: (1) whether SEA 590 is preempted by the U.S. Constitution and federal law and (2) whether SEA 59 0 violates the Due Process Clause of the U.S. Constitu tion," and it ignores the fact th at, for the reasons noted above, the common legal claims are "readily discernible" from the text of the certification order. *Ross*, 667 F.3d at 905.[3]

ISSUES CONCERNING THE FACTS

The State includes in its response brief a lengthy recitation of facts that it believes to be both material and in dispute. (*See* ECF No. 172, at 3–7). The facts that it recites, however, are

[3] As noted by the State, Ms. Buquer has now receive d her employment authorization card. The State's counsel was informed of this on the same day that plaintiffs' counsel became aware of this. Shortly thereafter Ms. Buquer received a Notice of Action approving her U-Nonimmigrant Status and this information has also been sent to the State's counsel. Pursuant to the Protective Order in this case (ECF No. 67), these documents will be filed under seal on this date and the Statement of Material Facts Not in Dispute in plaintiffs' original memorandum (ECF No. 123, at 4) should be deemed to be amended. This in no way affects Ms. Buquer's ability to represent the class. In any event, given that the class was certified months ago, anything affecting Ms. Buquer does not affect the justiciability of the case. *See, e.g.*, *Sosna v. Iowa*, 419 U.S. 393, 402 (1985) (The "case or controversy" requirement of Article III may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot.").

either not material or not in dispute or both.

I. FACTS CONCERNING THE PLAINTIFFS

Initially, although the State argues that several facts concerning the named plaintiffs are disputed, it ignores the fact that this case has been certified as a class action. The State has stipulated, and does not challenge this stipulation, that, among other things, commonality, adequacy, and typicality are met. *Supra.* Given this, the individual facts of the named plaintiffs are simply not material to this facial challenge. Regardless, the facts that the State claims to be disputed are simply not in dispute.

Ingrid Buquer: The State argues that there exists a disputed material fact concerning the frequency with which Ms. Buquer utilizes her consular identification card (CID). (ECF No. 172, at 3). In support of this assertion, the State notes that Ms. Buquer indicated in her affidavit that she "regularly" utilizes her CID (ECF No. 56-1, ¶¶ 5–7), although in her deposition she indicated that she did not use her CID on a "regular day" (ECF No. 172-1, at 25). Obviously, there is nothing inconsistent about using a CID regularly but not daily, and the State's apparent contention to the contrary is not well-taken. It is undisputed in this case that Ms. Buquer regularly offers her CID when banking, shopping, and in other situations where identification is required (including to consular officials). (ECF No. 56-1, ¶¶ 5–7). These other situations include leasing an apartment and picking up her son's medications from the pharmacy. (ECF No. 172-1, at 24–25).[4]

Berlin Urtiz and Louisa Adair: The State next includes a lengthy recitation of the deposition testimony of Mr. Urtiz and Ms. Adair in its statement of facts purportedly "in

[4] Plaintiffs also do not dispute, as noted by the State, that as of February of this year, Ms. Buquer was able to obtain a Mexican passport. This in no way affects her ability to continue in the case as a plaintiff and class representative. *See* n. 3, *supra.*

dispute." (ECF No. 172, at 4–6).[5] While most of these facts would not be particularly relevant to this case even if it were not a class action, the plaintiffs do not dispute any of these facts and they therefore cannot serve to preclude the entry of summary judgment.[6]

II. FACTS CONCERNING IMMIGRATION MATTERS

The portion of the State's response brief devoted to allegedly disputed facts concerning "immigration matters" (ECF No. 172, at 6–7) again contains neither material nor disputed facts (and consists primarily of argument). Nonetheless, the State asserts that "local detention facilities have differing levels of cooperation with ICE." (ECF No. 172, at 6–7). Its support for this is a table appended to a FOIA response received from ICE officials. However, without any explanation, this table is nothing more than gibberish: it contains the names and contact information of only two (2) institutions in Porter County as well as columns for the entry of data such as "RA Records," "Ranking," "Threshold," "Sub-Threshold," "FBRECODE," "Population Density," and "RankAOR." (*See* ECF No. 172-7 [Exh. G], at 6–11).

III. FACTS CONCERNING CONSULAR IDENTIFICATION CARDS

Finally, in responding to the plaintiffs' assertions concerning CIDs, the State admits that

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[5] The State argues that Ms. Adair's removal order "has been superseded by subsequent federal decisions." (ECF No. 172, at 16 n.6). The precise "federal decisions" that the State references are not detailed, and it is not even clear whether the State believes Ms. Adair's removal order to have been superseded by occurrences in her own immigration case or by since-issued case law. The lack of elaboration dooms this argument at the outset, for it is waived. Regardless, the plaintiffs assume that the State is simply reiterating its argument—advanced on preliminary injunction—that Ms. Adair's removal order has been superseded by her Order of Supervision. (ECF No. 63, at 9–10). As the plaintiffs previously pointed out, an "order of supervision" does not "supersede" a removal order; rather, it merely imposes conditions on an individual's release, and is made "pending removal." (*See* ECF No. 65, at 9–10 [citing 8 U.S.C. § 1231(a)(3)]). This Court previously detailed the errors in the State's assertion, and the State now adds nothing new to its argument. *See Buquer*, 797 F. Supp. 2d at 916 ("Defendants' characterization is in error, however, because, rather than superseding a removal order, an order of supervision is issued 'pending removal' and merely imposes conditions on an individual's release in cases where the person neither leaves nor is removed within the statutory period.").

[6] Elsewhere, the State notes that Ms. Adair has never been asked by law enforcement to provide her removal order, nor been arrested because she has an outstanding removal order. (ECF No. 172, at 16). Of course, given this Court's injunction, issued prior to the effective date of the statute, there is no reason for law enforcement ever to have made this inquiry.

Sergio Aguilera is qualified to testify as to the reliability of and procedures surrounding Mexican CIDs; however, it insists that he lacks knowledge as to the reliability of CIDs issued by other foreign governments or the procedures for issuing CIDs to non-Mexican foreign nationals. (*See* ECF No. 172, at 7). The plaintiffs concede that former-Consul Aguilera is only qualified to provide testimony concerning the Mexican CID. However, the State never explains the relevance of this observation: certainly it is not relevant to the plaintiffs' preemption claim, and as set forth below it is also not relevant to their substantive due process claim. Regardless, there are simply no facts in dispute related to CIDs.

ARGUMENT

I. INDIANA CODE § 35-33-1-1(A)(11-13), WHICH ALLOWS ARREST FOR NON-CRIMINAL IMMIGRATION RELATED MATTERS VIOLATES THE FOURTH AMENDMENT AND IS PREEMPTED BY FEDERAL LAW

A. The statute violates the Fourth Amendment

The plaintiffs of course agree, as the State reminds the Court, that statutes are presumed constitutional. However, when a statute—as does this one—grants authority to law enforcement to "'arrest' individuals for conduct that all parties stipulate and agree is not criminal," *see Buquer*, 797 F. Supp. 2d at 918, the presumption is easily overcome. This is not "hyperbole," as the State asserts (ECF No. 172 at 21): it is the text of the statute. The only escape from the inevitable conclusion that this Court reached in its preliminary injunction decision is for the State to once again argue, in various ways, that the statute does not mean what it says and that it will be used only if there is other probable cause to arrest a person. Simply put, "this interpretation [is] entirely fanciful . . . given that it completely ignores the plain language of the statute." *Buquer*, 797 F. Supp. 2d at 918.

The State finds significance in the fact that the statute grants discretionary authority to

law enforcement to arrest persons without probable cause, as opposed to mandating arrest, as well as in the fact that the statute requires that law enforcement have an actual removal order or notice of action o actual probable cause concerning indictment of conviction of an aggravated felony before the arrest is made. (ECF No. 172 at 21–22). The significance of this is not explained. Certainly, as far as discretion is concerned, "[i]t is the high office of the Fourth Amendment to constrain law enforcement discretion," *Hedgepeth ex rel. Hedgepeth v. Washington Metro. Area Transit Auth.*, 386 F.3d 1148, 1159 (D.C. Cir. 2004), and the State gains nothing from its discretion argument.

The State argues that the fact that the statute requires that law enforcement "have" the documents is a "*higher* standard than probable cause." (ECF No. 172 at 14) (emphasis in original). This misses the rather obvious point that, even if "have" is interpreted as physical possession only, having a notice of action or a removal order does not equate to lawful cause under the Fourth Amendment to arrest anyone for anything. "[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)).

The State's argument that the text of the statute must be interpreted as requiring that the officer have the actual removal order, notice of action, or detainer prior to the arrest, is undermined by the fact that Indiana courts have not hesitated to allow arrests under comparable situations when the officer had knowledge of a document, as opposed to the document itself. For example, Indiana Code § 35-33-1-1(a)(1) permits the arrest of a person when an officer "has a warrant commanding that the person be arrested." Yet, cases are legion allowing arrests when the officer has knowledge of the warrant, without possessing it. *See, e.g.*, *Shotts v. State*, 925

N.E.2d 719, 721 (Ind. 2010) (Indiana arrest based on computer search revealing outstanding arrest warrant in Alabama); *Nolan v. City of Indianapolis*, 933 N.E.2d 894, 898 (Ind. Ct. App. 2010) (arrest lawful when based on a "reasonable belief" that an individual "was the subject of [an] arrest warrant"), *trans. denied*; *Bush v. State*, 925 N.E.2d 787, 788 (Ind. Ct. App.) (arrest based on computerized search at scene of a traffic stop revealing outstanding arrest warrants of a vehicular passenger), *clarified on reh'g*, 929 N.E.2d 897 (Ind. Ct. App. 2010); *Rice v. State*, 916 N.E.2d 296, 299 (Ind. Ct. App. 2009) (arrest based on knowledge of outstanding arrest warrant), *trans. denied*.

Moreover, even if possession of the documents were required, law enforcement officials could easily obtain them. First (and aside from the obvious fact that all defendants have been provided with copies of these documents through discovery in this case), documents contained within individuals' immigration files are subject to request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, *et seq.* *See, e.g.*, *Cooper v. Exec. Office for Immigration Review*, 694 F. Supp. 1278, 1279–80 (S.D. Tex. 1988); *Badran v. U.S. Dep't of Justice*, 652 F. Supp. 1437, 1440 (N.D. Ill. 1987). Second, even without a FOIA request, both immigration hearings and immigration files are open to and accessible by the public (subject to certain limitations and exceptions).[7] Third, the State's argument does not begin to account for the plethora of less formal manners in which a law enforcement officer might obtain either an immigration-related document or knowledge that such a document exists, which range from simply asking an individual (or a third party, such as immigration personnel) if s/he has such a document (or to obtain a copy of it) to viewing the document on the passenger seat of a parked vehicle or in the

[7] *See* 8 C.F.R. § 1003.27 (immigration hearings); 8 C.F.R. § 1003.31(d) (permitting filings under seal, a clear indication that filings are otherwise public); *cf. Cooper*, 694 F. Supp. at 1279–80 ("The government has already begun to implement a computerized system that will enable the public to retrieve [immigration] case files by an alien's name.").

hands of a person leaving an immigration attorney's office (or the immigration court). And, of course, to the extent that the statute focuses on past convictions or indictments for aggravated felonies, this information is easily obtainable by law enforcement if a criminal history check is run, presumably even from a mobile vehicle. (ECF No. 172-5, ¶ 5).[8]

The point is that the information and statuses articulated in Indiana Code § 35-33-1-1(a)(11)–(13) are obtainable by and will be known to law enforcement and, without the injunctive power of this Court persons will be subject to arrest for non-criminal behavior. Nothing more need be shown to establish a Fourth Amendment violation. *Fox*, 600 F.3d at 837.

B. The statute is preempted by federal law

Without referencing the fact that this Court has already resolved all legal issues presented by this case, the State nonetheless argues that its warrantless arrest provisions are not preempted by federal law. It is clear that these provisions "alter[] th[e] balance [struck by federal law] by authorizing the arrest for immigration matters of individuals within the State of Indiana only whom, in many cases, the federal government does not intend to be detained." *Buquer*, 797 F. Supp. 2d at 921–22. The State has presented no compelling reason to revisit this decision.

In arguing that Indiana Code § 35-33-1-1(a)(11)–(13) is not preempted by federal law,

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[8] This citation is to a declaration submitted by the State from the Porter County Prosecutor. The utility of this declaration to the State's position is not immediately apparent in that it, the declaration of the "Extradition Coordinator" of the Indiana Department of Correction ("DOC") (ECF No. 172-6), and documents produced pursuant to the Freedom of Information Act (ECF No. 172-7) appear to be used by the State to create the contradictory argument, advanced in different portions of the State's memorandum, that (a) it routinely cooperates with federal officials but (b) it has no way to access immigration-related documents. Moreover, the Prosecutor's substantive assertion is that persons in Porter County are arrested "based on having probable cause that the individual committed the offense arrested for"—in other words, they are arrested for any of the reasons permitted by Indiana law that have not been preliminarily enjoined by this Court. *See* IND. CODE § 35-33-1-1(a)(1)–(10). It is also curious that the State defendants in this case—the prosecutors of Marion and Johnson counties—have chosen to rely for a prosecutorial affidavit on one submitted by the prosecutor of Porter County, rather than their own affidavits as to their offices. Therefore, an assertion by the Porter County Prosecutor that "[t]o my knowledge, law enforcement in Porter County has not received removal orders or notices of action from the federal government or from anybody" (ECF No. 172-5, ¶ 4), is of tangential interest in this case that consists of a class exclusively of persons in Marion and Johnson counties. Moreover, given this Court's preliminary injunction before the law became effective there was, and currently is, no need for law enforcement to seek or receive this information.

the State barely raises an actual preemption argument. Rather, its arguments are almost entirely limited to issues related to the interpretation of the challenged provisions. As already indicated, the State's proposed reading of the challenged statutory provisions is both strained and counter-intuitive—and at odds with the plain language of the statute (and the State neglects to consider that the statute will be interpreted by law enforcement officers in the field).

One theme running throughout its preemption argument, however, is its notion that the State simply wishes to "cooperate" with federal officials and that, inexplicably, this desire allows it to create a statute that may run directly counter to federal purposes. Initially, the statute that is challenged in this case does not require any cooperation with federal officials for its enforcement: as the plaintiffs have argued at length (and as the Court has previously held), the fundamental flaw in the statute is that it authorizes the arrest of individuals simply because they are involved in the immigration system, even though their involvement may be nothing more than applying for a visa, and even though the federal government does not desire that they be detained. *See id.* at 919–22. This is not "cooperation" in any sense of the word.

Regardless, the State attempts to find support for its exceedingly broad definition of "cooperation" in 8 U.S.C. § 1357(g)(10), which simply provides that state and local officials need not enter into a formal agreement with the Attorney General in order to "cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully president in the United States." (*See* ECF No. 172, at 13). But by its plain terms, § 1357(g)(10) does not affirmatively provide authority for state or local officers to engage in any immigration enforcement activity. And indeed, the State's sweeping interpretation of § 1357(g)(10) as somehow authorizing states to enact unilateral legislation on immigration enforcement would render superfluous the specific INA provisions providing limited authority for state and local

immigration enforcement in specified circumstances. *See, e.g.,* 8 U.S.C. § 1103(a)(10) (allowing Attorney General to authorize local authorities to exercise immigration responsibilities if Attorney General determines there is "an actual or imminent mass influx of aliens" threatened; 8 U.S.C. § 1357(g)(1) (allowing the Attorney General to enter into written agreements with states or political subdivisions, if the Attorney General determines that the agreeing parties are qualified to perform immigration functions); *United States v. Arizona*, 641 F.3d 339, 349 (9th Cir. 2011) ("Giving subsection (g)(10) the breadth of its isolated meaning would completely nullify the rest of § 1357(g), which demonstrates that Congress intended for state officers to aid in federal immigration enforcement only under particular conditions, including the Attorney General's supervision."), *cert. granted.*

Further, the State's position is inconsistent with the U.S. Department of Homeland Security's own interpretive guidance on the type of permissible cooperation by local officials:

> The term "cooperate" . . . mean[s] the rendering of assistance by state and local officers to federal officials, in the latter officials' enforcement of the INA [Immigration and Nationality Act], in a manner that maintains the ability to conform to the policies and priorities of DHS and that ensures that individual state and local officers are at all times in a position to be—and, when requested, are in fact—responsive to the direction and guidance of federal officials charged with implementing and enforcing the immigration laws.

U.S. Department of Homeland Security, Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters ("DHS Guidance"), at 8 (emphasis omitted).[9] In the United States' view, this requires that "DHS . . . have exclusive authority to set

[9] This publication is available at https://www.dhs.gov/xlibrary/assets/guidance-state-local-assistance-immigration-enforcement.pdf (last visited Apr. 11, 2012). Curiously, although the State cites the publication for a general purpose statement (*see* ECF No. 172, at 13–14), it does not mention that the publication offers an interpretation of the very statute that forms the basis for its argument. This interpretation is no doubt entitled to at least some deference under *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001), and *Skidmore v. Swift & Co.*, 323 U.S. 134, 139–40 (1944). *See United States v. South Carolina*, __ F. Supp. 2d __, 2011 WL 6973241, at *19 (D.S.C. Dec. 22, 2011) (finding that the DHS Guidance "comports with the overall structure of the INA" and affording it deference), *appeal pending*. The State has not argued to the contrary, and it has not argued that the federal government's interpretation of the INA is unreasonable.

enforcement priorities" and that all "[s]tate or local laws or actions [be] responsive to federal control or direction." *Id.* Nothing in federal law "gives state or local officials authority to . . . investigat[e] [or] apprehen[d] . . . aliens in ways that are not coordinated with and responsive to federal authorities and discretion." *Id.* at 11. Local cooperation, therefore, might include participation in joint federal-state task forces, assistance in the execution of federal warrants, seizing an individual where independent state-law grounds exist for doing so, and sharing information with federal officials for purposes authorized by law.. *Id.* at 13–14. However, no reasonable interpretation of "cooperation" could include the creation of independent "state prohibitions" or "sanctions" for conduct within the scope of the Immigration and National or for a suspected violation of federal immigration law. *Id.* at 14. Indiana's law goes far beyond the "cooperation" addressed in § 1357(g)(10).

The statute relied upon by the State (8 U.S.C. § 1357(g)(10)) thus does not "contemplate a locality enacting its own scheme of immigration enforcement . . . to deal with illegal aliens in whatever manner the locality deems fit." *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, __ F.3d __, 2012 WL 952252, at *9 (5th Cir. Mar. 21, 2012); *see also, e.g.*, 8 U.S.C. § 1357(g)(3) (requiring that any state or local cooperation in immigration enforcement "be subject to the direction and supervision of the Attorney General").[10] This, however, is precisely what the State has done: it has authorized the arrest of individuals who are not detainable under federal law or who the federal government has no desire to detain. The State's protestations

[10] In addition to 8 U.S.C. § 1357(g)(10), the State for its preemption argument also relies on 8 U.S.C. § 1373, which concerns information-sharing between state and local officials and the federal government. (*See* ECF No. 172, at 21). Again, the State does not appear to recognize that this argument severely undercuts its assertion that local officials will not have access to immigration-related information. Moreover, there is clearly a fundamental distinction—unaddressed by the State—between simply sharing information and actually arresting individuals that the federal government does not desire detained and who are not detainable.

notwithstanding, the statute is preempted.[11]

II. THE STATUTORY PROVISION PREVENTING THE USE OR ACCEPTANCE OF CONSULAR IDENTIFICATION CARDS AS IDENTIFICATION (INDIANA CODE § 34-28-8.2-1, *ET SEQ.*) IS PREEMPTED AND IS UNCONSTITUTIONAL

A. This provision is preempted given that it represents a profound and significant interference in foreign affairs and relations

The State's argument against the preemption of the provision outlawing the use or acceptance of CIDs may be summarized in a single sentence: "this provision does not possess

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[11] The State laboriously addresses each of the three (3) sub-sections of Indiana Code § 35-33-1-1(a)(11)–(13), arguing that the language of the sub-sections must be interpreted contrary to its plain meaning in order to counteract what the State apparently recognizes to be serious constitutional deficiencies. There is no need to dissect each effort. It is enough to note, as the Seventh Circuit has stated (and as this Court in its preliminary injunction decision noted), that "a federal court may not slice and dice a state law to 'save' it; we must apply the Constitution to the law the state enacted and not attribute to the state a law we could have written to avoid the problem." *K-S Pharmacies, Inc. v. Am. Home Prods. Corp.*, 962 F.2d 728, 730 (7th Cir. 1992); *see also Buquer*, 797 F. Supp. 2d at 918 (quoting *K-S Pharmacies*).

An example of the dramatic re-writing of the statute that is encouraged by the State will suffice: the State argues that the reference in Indiana Code § 35-33-1-1(a)(12) to "a detainer or notice of action" actually refers to a single document. (*See* ECF No. 172, at 17–19). However, "or" means "or," and the statute is clearly written in the disjunctive. This apparently is not enough for the State, for it continues its argument by asserting that, if the statute were to refer to multiple documents, the legislature would have included an article in front of both "detainer" and "notice of action"—"*a* detainer or *a* notice of action." Of course, it is both entirely permissible and exceedingly common for a single article to modify multiple nouns that are listed in the disjunctive (or in the conjunctive). This is evident from another sub-section of the same statute, which permits an individual's arrest when an officer has probable cause to believe the person has committed "*a* battery resulting in bodily injury under IC 35-42-2-1 *or* domestic battery under IC 35-42-2-1." IND. CODE § 35-33-1-1(a)(5) (emphasis supplied). The list of similarly worded statutes is virtually endless, and the first two (2) chapters of Title 35, Article 33 of the Indiana Code alone find the following (all emphasis supplied): "*a* domestic violence counselor, local family member, *or* friend" (IND. CODE § 35-33-1-1.5(a)(1)); "*the* firearm, ammunition, *or* deadly weapon" (IND. CODE § 35-33-1-1.5(b)(2), (c)); "*the* date *and* county" (IND. CODE § 35-33-2-2(a)(4)); "*the* day or night" (IND. CODE § 35-33-2-3(a)(3)); "*the* indictment *or* information" (IND. CODE § 35-33-2-3(c)); "*the* circuit court *or* superior court" (IND. CODE § 35-33-2-3(d)); and "*an* information *or* indictment" (IND. CODE § 35-33-2-5). Running out of ammunition, the State finally attempts to find relevance in the fact that some notices of action are issued by sub-agencies of DHS whereas the statute itself refers simply to DHS (the only example given is 8 C.F.R. § 214.14(c)(5)(i)(A), while other regulations concerning notices of action are not specific to any sub-agency of DHS, *see, e.g.*, 8 C.F.R. § 204.5(n)(1) (related to visas); 8 C.F.R. § 214.2(e)(8)(iv)(B) (related to E-treaty status)). The State does not explain the relevance of this distinction, and it is entirely unremarkable that DHS regulations concerning immigration forms would make reference to the sub-agency (USCIS) responsible for processing immigration-related documentation and petitions, rather than the sub-agencies (CBP and ICE) that possess largely law-enforcement and trade-related functions. The State's arguments clearly lack merit.

Finally, at one point in its argument the State cites the declaration of the DOC's Extradition Coordinator in a futile attempt to argue that federal cooperation in providing information to State officials suffices to establish that the challenged statute is not preempted. (ECF No. 172 at 16). The contours of this argument are neither clear nor developed, for again there is a significant disconnect between the provision by an executive agency of requested information and the congressional expression that a person with a removal order or other documents may be arrested without a warrant by a non-federal official.

foreign-policy implications, but rather concerns only intra-state identification requirements." (*See* ECF No. 172, at 22–27). This is incorrect, and the State's argument therefore founders at the outset. At no point does the State even address the fundamental importance that CIDs possess both to foreign nations charged with assisting and monitoring their own nationals and to foreign nationals who may possess no other form of identification and who rely on the CID to engage in a vast array of routine activities. (*See* ECF No. 123, at 4, 7–11, 28). Nor does the State address the congressional testimony of an official from the U.S. Department of State outlining the manner in which action against CIDs is likely to impact dramatically on national interests. (*See* ECF No. 123, at 29–30). The "kind of state involvement in foreign affairs and international relations—matters which the Constitution entrusts solely to the Federal Government"—that is involved here simply "is not sanctioned" by precedent, *see Zschernig v. Miller*, 389 U.S. 429, 436 (1968), and the regulation of CIDs is not an intra-state issue.[12]

Nonetheless, the State argues that the challenged CID provision does not contravene the obligations of the United States under the Vienna Convention on Consular Relations insofar as

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[12] The State attempts to bolster its argument by relying on the circuit courts' decisions in *Dunbar v. Seger-Thomschitz*, 615 F.3d 574 (5th Cir. 2010), *cert. denied*, 131 S.Ct. 1511(2011), and *Museum of Fine Arts v. Seger-Thomschitz*, 623 F.3d 1 (1st Cir. 2010), *cert. denied*, 131 S.Ct. 2176 (2011)—both of which concerned generally applicable state statutes or rules imposing limitations periods on certain claims. The State's previous attempt to rely on these decisions failed, *see Buquer*, 797 F. Supp. 2d at 923, and the State offers no new gloss on its argument. In each of these cases, the court "found state laws not preempted which deal with matters of traditional state regulation and had only an indirect impact on foreign policy." *Id.* However, as this Court previously concluded,

> [t]he problem with [the State's] argument here is that [the CID provision] is anything but a neutral law of general application that just happens to have a remote and indirect effect on foreign relations. Rather, it targets only one form of identification—CIDs issued by foreign governments. Moreover, [this provision] regulates CIDs in the broadest possible terms, restricting not just what state agencies may accept as valid identification but prohibiting what identification may be shown and accepted for purely private transactions. . . . These sweeping regulations, targeted solely at foreign government-issued identification that consulates are, by treaty, entitled to issue, and which restrict the manner in which foreign citizens may travel, live, and trade in the United States have a direct effect on our nation's interactions with foreign nations. Such interactions cannot be dictated or restricted by individual states.

Id. at 923–24. The State offers no compelling reason for this Court to revisit its previous conclusions. (*See also* ECF No. 65, at 17 [addressing *Dunbar* and *Museum of Fine Arts*]).

this treaty "does not authorize countries to issue CIDs." (ECF No. 172, at 24). While it is true that CIDs are not specifically mentioned in the text of the Vienna Convention, this document does authorize the issuance by foreign consulates of "appropriate documents," the protection by consulates of foreign nationals, and the assistance to and registration of foreign nationals. *See* Vienna Convention on Consular Relations and Optional Protocol on Disputes ("Vienna Convention"), Dec. 14, 1969, art. V(a),(d)–(f), 21 U.S.T. 77, *available at* 1969 WL 97928. The plaintiffs have previously detailed the manner in which the issuance of CIDs is fundamental to the ability of a consulate to fulfill its obligations to foreign nationals (ECF No. 123, at 26–27), and the Congressional Research Service has published a report describing CID issuance as likely part-and-parcel of the Vienna Convention. *See* Congressional Research Services, *Implications of the Vienna Convention on Consular Relations upon the Regulation of Consular Identification Cards*, at CRS-3–5, *available at* http://www.fas.org/sgp/crs/misc/RS21627.pdf (last visited Apr. 11, 2012).[13] "The issuance of identification documents is a function recognized as being among the powers exercised by consular officials by the Vienna Convention on Consular Relations." *Risk v. Kingdom of Norway* , 707 F. Supp. 1159, 1165 (N.D. Cal. 1989), *aff'd sub nom. Risk v. Halvorsen*, 936 F.2d 393 (9th Cir. 1991); *see also Buquer*, 797 F. Supp. 2d at 922 ("Issuing CIDs is one of the prerogatives of a foreign government that is protected by the Vienna Convention o[n] Consular Relations.").

The State attempts to bolster its argument by noting that the federal government has

[13] The United Mexican States, as articulated in an amicus brief subsequently joined by four (4) other nations, certainly recognizes the issuance of CIDs as protected by the Vienna Convention. (*See* ECF No. 76, at 4 ["Mexico has issued {CIDs} to Mexican nationals living abroad for more than 130 years, as part of a recognized consular function, codified since 1963 in the Vienna Convention on Consular Relations."]; *see also id.* at 5 n.6 ["By outlawing the presentation of consular identification, SEA 590 . . . frustrates compliance with treaty obligations."]; ECF No. 41-4 [Aff. of former-Consul Aguilera], ¶ 8). To the extent that any dispute exists as to whether the issuance of CIDs is protected by the Vienna Convention, this merely underscores that the dispute is one that must be resolved at the national level.

declined to enumerate CIDs as acceptable identification for various purposes. (*See* ECF No. 172, at 25 & n.8).[14] However, it does not explain the relevance of this fact, nor is its relevance apparent: throughout this case the plaintiffs have contended that the State may not regulate CIDs in the manner that it has chosen to do because the issue is one of international dimensions that is not susceptible to state-by-state prohibitions. Federal regulation of CIDs merely underscores that the United States of America, and not the State of Indiana, plays a role in determining these international priorities, and the challenged statute is preempted.[15]

B. The CID prohibition is irrational and violates substantive due process

Finally, in arguing that the CID prohibition does not violate substantive due process, the State spends approximately two (2) pages of its memorandum insisting that the fact that the plaintiffs have no liberty or property interest in the CID "dooms the Plaintiffs' claims." (ECF No. 172 at 27). Of course, a liberty or property interest is necessary for a *procedural* due process claim. *See, e.g.*, *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 569 (1972). However, the plaintiffs have never claimed that the statute violates procedural due process. As

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[14] The State insists that this "implicitly question[s] the reliability and purposes of the [CID]." (ECF No. 172, at 25). No support for this unwarranted assumption is provided, and former-Consul Aguilera's testimony concerning the reliability of the CID remains uncontroverted.

[15] The State's argument that its CID provision does not conflict with the regulations of the U.S. Department of the Treasury (*see* ECF No. 172, at 24–25) is difficult to decipher. As indicated previously, these regulations permit financial institutions to accept as identification any "government-issued document evidencing nationality or residence and bearing a photograph or similar safeguard," which includes CIDs. 31 C.F.R. § 1020.220(a)(2)(i)(A)(4)(ii); *see also* 68 Fed. Reg. 55335, 55336 (Sept. 25, 2006). The State argues simply that the CID provision "does not stand as an obstacle to the implementation or execution of these regulations." (ECF No. 172, at 24–25). This is plainly untrue: of course a statute *prohibiting* persons from using or accepting CIDs stands as an obstacle to a federal regulation *permitting* their use and acceptance. *See Buquer*, 797 F. Supp. 2d at 923.

The State also provides the Court with a declaration from an official with the Indiana Department of Financial Institutions (DFI) (ECF No. 172-9 [Exh. I]), and insists that the DFI's cooperation with federal authorities in various matters somehow bolsters its preemption argument. The relationship between this declaration and the legal issues presented by this case is severely attenuated. The plaintiffs have no doubt that the State cooperates with federal authorities on issues such as investigating suspected money laundering (¶ 2), auditing financial institutions (¶ 7), sharing information (¶¶ 10, 19), engaging in mortgage-related activities (¶¶ 12–13), and reviewing alleged cyber-terrorism (ECF No. 172, at 26). None of this is the least bit relevant to the plaintiffs' claim concerning the State's prohibition on the use or acceptance of CIDs.

this Court has already noted, the CID prohibition is not rational, *see Buquer*, 797 F. Supp. 2d at 924, and a statute that is not "rationally related to legitimate government interests" violates *substantive* due process, *see, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997). This statute violates substantive due process.

The State repeatedly asserts that the statute is rational because there is a legitimate government interest in ensuring reliability of identification used by individuals within the State of Indiana. But, the State of Indiana prohibits no other forms of identification that persons may wish to use in private transactions, and allows such things as a doctor, hospital or credit card bill, an insurance policy, a motor vehicle payment book, or a pay stub (as well as other items) as proof of residency that may assist a person in obtaining a driver's license or identification card. IND. ADMIN. CODE tit. 140, r. 7-1.1-3(b)(4). What is the legitimate government interest that is served by allowing a motor vehicle payment book to assist with a formal state identification requirement, but prohibiting the showing of an identification card issued by a foreign government at a convenience store, for example, to prove that a person is older than 18 and therefore allowed to buy tobacco? There simply is none.[16]

Moreover, the State ignores the real Catch-22 in which the statute places foreign nationals. One of the primary purposes of the CID is to assist and identify foreign nationals who are stopped by law enforcement. (ECF No. 41-4, ¶ 12). When this happens the foreign national will be asked to provide identification. Although the statute immunizes the police officer who

[16] The State cites to congressional testimony in June of 2003 in support of the argument that the Mexican CID is not reliable. (Doc. No. 172 at 30). However, this was prior to Governor O'Bannon's 2003 letter recognizing that "[t]he *matricula* contains security features that generally give it a high degree of reliability." (ECF No. 41-4, first attachment). Subsequently, both Governor Kernan and Governor Daniels continued to recognize the Mexican CID. (*Id.*, ¶ 5). Moreover, the Mexican CID features a digital photograph taken at the consulate, fingerprints that are kept in a national database, and is not issued without documentary identification. (ECF No. 172-4, at 11 –13). Fingerprinting is not necessary in order to obtain an Indiana license or identification card. *See* IND. ADMIN. CODE tit. 140, r. 7-1.1-3 (listing requirements to obtain a license, permit or identification card in Indiana).

asks for the identification in the course of a criminal investigation, the person who shows the officer his or her CID, and thus "knowingly or intentionally offers . . . a consular identification as a valid form of identification" commits an infraction. IND. CODE § 34-28-8.2-2(a),(b).[17] Therefore, if the foreign-national uses the CID for its precise purpose, he or she commits an infraction. And, given that the police officer's immunity extends only to accepting the CID during investigation of a crime, if the officer asks for identification during a non-criminal investigation—to get the name of a witness at a traffic accident, for instance—the officer is committing an infraction as well.

The State does not deny that some persons may not have actual or practical access to any other forms of identification. Some foreign nationals may, for whatever reason, not have a current passport from their country of origin. Moreover, as a practical matter, most persons do not carry their passports with them. Yet, Indiana has taken the extraordinary step of prohibiting, from the entire array of potential identification documents that individuals may possess, many of

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[17] The State points out that a number of places in its earlier memorandum the plaintiffs referred to violation of the statute as a "crime." It is not: it is an infraction, and counsel apologizes for the error. However, there is no constitutional significance to the distinction. Also not apparent is the point that the State tries to make that the person who shows (and presumably accepts) the CID is not guilty of the infraction unless he or she does so "knowingly and intentionally." It is difficult to perceive a situation where a person will take an identification card out of his or her pocket in order to produce identification and unknowingly or unintentionally offer it.

Finally, the State engages in a lengthy discourse addressing the plaintiffs' argument that the use of CIDs by foreign nationals at the consulate itself is prohibited by the challenged provision. (*See* ECF No. 172, at 31–32). This point is tangential at best to the legal issues presented by this case. Regardless, the prevailing view is that a foreign consulate or embassy is the territory of the host country (although diplomatic norms constrain the host state from exercising authority within the consulate without the consent of the foreign state), and Indiana law therefore governs activities at the consulate. *See, e.g.*, *United States v. Corey*, 232 F.3d 1166, 1182 (9th Cir. 2000) (citing 1 Oppenheim's International Law § 494, at 1977 (9th ed. 1992)). The State merely cites cases standing for the undisputed proposition that some consular officials partake in diplomatic immunity (although many do not, *see* ECF No. 41-4 [Aff. of former-Consul Aguilera], ¶ 10) and foreign states may partake in sovereign immunity under specific circumstances. However far these immunities extend, they do not extend so far as to protect foreign nationals who show their CIDs at the consulate. (The State also appears to seek solace in the fact that Indiana law does not proscribe the use of foreign passports, *see* ECF No. 172, at 32; although clearly irrelevant, this argument also suffers from a significant logical fallacy in sofar as photo-identification is necessary to obtain a Mexican passport [and presumably other foreign passports as well], *see* Embajado de México, *Requirements for the issuance of a Mexican passport*, *at* http://embamex.sre.gob.mx/libano/index.php?option=com_content&view=article&id=34&Itemid=32&lang=es [last visited Apr. 12, 2012], and many foreign nationals lack photo-identification other than their CID, *see* ECF No. 41-4 [Aff. of former-Consul Aguilera], ¶ 13.)

which are undoubtedly less reliable than a CID, only one identification document (which is prohibited in even purely private transactions)—the CID.

The plaintiffs are, of course, conscious of the fact that at the rational-basis level, the scrutiny is deferential. However, a classification can be so "underinclusive or overinclusive as to be irrational." *United States v. Sampson*, 275 F. Supp. 2d 49, 89 n.19 (D. Mass. 2003) (referring to a violation of equal protection) (citing *Burlington N.R. Co. v. Ford*, 504 U.S. 648, 653–54 (1992)). This is not a case where this Court is being asked to find that what the legislature did was merely unwise. Instead, the statute presents the extraordinary case where a State has so drastically over-reached (or under-reached) as to be irrational and therefore violative of due process.[18]

CONCLUSION

There are no disputed issues of material fact in this case and the State's response to plaintiffs' arguments is unavailing. The challenged statutes are preempted and unconstitutional on their face.[19] Summary judgment should be entered for the plaintiffs and the previously entered preliminary injunction should be made permanent.

/s/ *Kenneth J. Falk*
Kenneth J. Falk

[18] As this Court noted, the one explanation for the Indiana General Assembly targeting only the CID is an intent to single-out and target foreign nationals. This is hardly a rational constitutional justification. *Buquer*, 797 F. Supp. 2d at 924. *See also, e.g.*, *Romer v. Evans*, 517 U.S. 620, 633 (1996) (holding that a state constitutional amendment that prohibits actions designed to protect homosexuals from discrimination was irrational, and therefore violative of equal protection, despite low-level scrutiny).

[19] Without making an argument supported by authority, the State notes in passing that inasmuch as the plaintiffs' claims are facial the claims fail because "[c]learly, the facts presented show that there are ways that the law can be constitutionally applied." (ECF No. 172, n.5). There is no further elucidation and the State does not explain how statutes that are clearly preempted and clearly violate the Fourth Amendment and due process can be constitutionally applied to anyone. A statute permitting the arrest of anyone wearing a purple shirt is facially unconstitutional even though some persons wearing purple shirts may also be engaged in criminal activity. Here, there are "no set of circumstances under which the [provisions] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

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