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Attorneys for Amici Curiae AMERICAN IMMIGRATION LAWYERS ASSOCIATION and the AMERICAN IMMIGRATION LAWYERS ASSOCIATION UTAH CHAPTER

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

Utah Coalition of La Raza; Service Employees International Union; Workers' United Rocky Mountain Joint Board; Centro Civico Mexicano; Coalition of Utah Progressives; Latin American Chamber of Commerce; Salt Lake City Brown Berets; Jane Doe #1; John Doe #1; Milton Ivan Salazar-Gomez; Eliana Larios; Alicia Cervantes; John Doe #2

Plaintiffs,

v.

Gary R. Herbert, Governor of the State of Utah, in his official capacity; Mark Shurtleff, Attorney General of the State of Utah, in his official capacity,

Defendants.

Case No. 2:11-cv-00401-BCW

LODGED: PROPOSED *AMICI CURIAE* BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION-UTAH CHAPTER IN SUPPORT OF PLAINTIFFS MOTION FOR DECLARATORY AND INJUNCTIVE RELIEF

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INTRODUCTION

On March 15, 2011, Governor Gary R. Herbert signed into law HB 497[1] in conjunction with other bills that mark Utah's entrance into the arena of immigration regulation. The bills seek to accomplish a variety of objectives, including the establishment of a guest-worker program, a waiver of the federal employment authorization requirement, and enforcement of immigration laws against people who Utah suspects are illegally present in the state.[2] At issue in the instant litigation is HB 497, the Utah Illegal Immigration Enforcement Act. Among other things, HB 497 imposes citizenship and alienage verification requirements on state and local law enforcement officers, and authorizes in certain situations warrantless arrests of individuals suspected to be aliens. Such provisions reflect a fundamental misunderstanding of federal immigration law, as well as the outer limits of a state's authority when attempting to regulate immigration.

The American Immigration Lawyers Association and the American Immigration Lawyers Association Utah Chapter (collectively referred to as "AILA"), write as *Amici Curiae* to correct the misconceptions that underlie the basis of the Utah statute, and to demonstrate that, when placed in context of federal immigration law, the Utah system is unworkable. There is no argument from AILA that our current immigration system functions smoothly.[3] It is, however,

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[1] Utah State Legislature Website, *H.B. 497 Substitute*, Bill Documents, *available at* http://le.utah.gov/~2011/htmdoc/hbillhtm/hb0497s01.htm.

[2] *See e.g.*, Mariano Castillo, *Judge blocks enforcement of Utah immigration law*, CNN Politics (May 22, 2011), http://cgi.cnn.com/2011/POLITICS/05/11/utah.immigration.bill/index.html.

[3] *See* AILA Position Paper, Comprehensive Immigration Reform, AILA InfoNet Doc. No. 08052257, 1-2 (May 22, 2008), http://www.aila.org/ content/default.aspx?docid=25501

a federal system that requires a federal solution. HB 497 runs afoul of the federal system. Accordingly, the law should be enjoined.

STATEMENT OF INTEREST OF *AMICI CURIAE*

AILA is a national association with more than 12,000 members throughout the United States, with seventy-seven members involved in the AILA Utah Chapter. Members include lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of these appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the United States Citizenship and Immigration Services and the Executive Office for Immigration Review as well as before the United States District Courts, Courts of Appeals, and the Supreme Court of the United States.

STATUTORY OVERVIEW

HB 497 imposes a complex and confusing set of status verification requirements on Utah law enforcement officers. The requirements vary depending on the severity of the offense charged. Officers *must* request verification of United States *citizenship or immigration* status of all individuals arrested for an alleged offense that is a felony or class A misdemeanor. *See* Utah Code Ann. § 76-9-1003(1)(a)-(d), added by HB 497, Section 3. Officers *may* attempt to verify the *immigration* status of someone arrested for an alleged offense that is a class B or C

(explaining that "[o]ur current immigration system is badly broken and in dire need of a top-to-bottom overhaul.").

misdemeanor, unless the person is arrested and booked, in which case the officer *must* attempt to verify the *immigration* status of the individual. *See* § 76-9-1003(1)(a)(ii), added by HB 497, Section 3. Peculiarly, the statute does not require or allow an officer to verify the *citizenship* status of someone arrested for a class B or C misdemeanor, regardless of whether they are booked. Under the plain language of the statute, citizenship status is only be verified for individuals charged with a felony or class A misdemeanor.

The statutory scheme is further complicated by a preliminary determination that must be made by any law enforcement officer conducting a lawful stop, detention or arrest of a person, subject to the narrow exceptions mentioned above in (1)(b),(c), and (d), before requesting verification of status from the federal authorities. *See* § 76-9-1003(1)(a), added by HB 497, Section 3. The preliminary determination allows an officer to avoid verification by the federal authorities if the person stopped, detained, or arrested, can provide one of certain enumerated documents to the officer, or if the officer is otherwise able to verify the identity of the person. *Id*. No guidelines are provided for such identity verifications by an officer.

The statute directs that possession of one of certain enumerated documents creates a presumption of lawful presence, unless the officer has a reasonable suspicion that the document is false or identifies another person. *See* § 76-9-1004(1), added by HB 497, Section 4. Likewise, an individual's assertion of U.S. citizenship creates a presumption of U.S. citizenship, unless the officer has reasonable suspicion to believe the assertion is false. *Id*. The statute lacks terms that govern "reasonable suspicion," or that direct how an officer may determine that a proffered document is false or fraudulent, or that an assertion of citizenship is false. These are crucial omissions in that these determinations are to be made by the officer prior to verifying, or

attempting to verify, immigration or citizenship status with the federal authorities specified in Utah Code Ann. § 76-9-1002(6), added by HB 497, Section 2.

HB 497 additionally authorizes warrantless arrests in situations where a law enforcement officer has reasonable cause to believe that a person is an alien subject to a removal order or a "civil detainer warrant," or who has been charged with or convicted of an aggravated felony, as defined in federal immigration law, in another state. *See* § 77-7-2(5)(b) and (c), added by HB 497, Section 11. The statute does not authorize warrantless arrests of individuals charged with or convicted of such aggravated felonies in Utah.

ARGUMENT

The law's assumption that verification of citizenship or immigration status is readily ascertainable in law-enforcement encounters is incorrect. Moreover, the process prescribed in the statute is so opaque and convoluted as to be impractical in ordinary police stops. The list of documents that are deemed to create a presumption of lawful presence is inadequate; indeed some of the documents on the list lack meaningful correlation to a person's citizenship or immigration status. That officers are empowered to make their own determinations of status before consulting federal authorities invites determinations based on race, ethnic appearance, or language, notwithstanding the prohibition of Utah Code Ann. § 76-9-1003(5), as added in HB 497, Section 3, which prohibits consideration of "race, color, or national origin in implementing this section." The warrantless arrest provision is equally misguided and unworkable. In short, it creates a substantial likelihood that someone whose status is authorized by the federal government will be subject to warrantless arrest and detention by Utah authorities. As AILA explains in more detail below, the law should be enjoined.

I THE STATUS VERIFICATION SCHEME MANDATED BY HB 497 IS FLAWED AND IMPRACTICAL; IT ALSO CONFLICTS WITH FEDERAL LAW.

HB 497 assumes that a finite set of documents exist to prove, or that factual observations may establish, an individual's citizenship or immigration status. This is simply not so. Citizenship and immigration status are inherently legal, not factual, determinations. Law enforcement officers carrying out their duties will be unable to accurately assess claims of United States citizenship and immigration status in all but a relatively narrow category of situations where an individual, usually an alien, possesses valid, unequivocal proof of status, such as a "green card." U.S. citizens, of course, have never been required to carry papers to prove their citizenship status. Rarely will a citizen possess dispositive proof of citizenship during a law enforcement encounter.

A. Citizenship Status Cannot Be Readily Ascertained During a Police Encounter.

The statute allows an individual to assert a claim of United States citizenship during questioning by a law enforcement officer that creates a presumption of citizenship, unless the officer possesses a reasonable suspicion that the assertion is false. HB 497, Section 4. If the individual is charged with a felony or class A misdemeanor, the statute also directs an arresting officer to verify the citizenship of the individual, if the individual lacks a document listed in Section 4 or the officer is otherwise unable to verify the identity of the person. HB 497, Section 3. It is not clear how these two sections are supposed to work together during daily law enforcement encounters. Their ambiguity, and misapplication of citizenship law, fatally undermines their effectiveness.

1. HB 497 does not establish what might give an officer "reasonable suspicion" that an assertion of United States citizenship is false.

The vast majority of all U.S. citizens asserting their citizenship will lack proof of it during a police encounter. Citizenship may be definitively established through a birth certificate, passport, certificate of naturalization, or a certificate of citizenship. But it is highly unlikely that a United States citizen will possess one of these documents during a routine stop by the authorities.

HB 497 allows officers to presume that an individual is a citizen if the individual makes an affirmation that she is such, unless the officer has reasonable suspicion to believe that the assertion is false. *See* HB 497 Section 4(2). Essentially, anyone can *assert* that she is a United States citizen, and a law enforcement officer may be hard-pressed to identify a legitimate reason why such an assertion is untrue. Race, ethnic appearance, and language are not reliable indicators of alienage. *See, e.g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-87 (1975) (holding that apparent Mexican ancestry alone did not furnish reasonable grounds to believe that the occupants of a vehicle were aliens, nor a reasonable belief that the car concealed other aliens who were illegally in the country); *United States v. Alarcon-Gonzalez*, 73 F.3d 289, 293-94 (10th Cir. 1996) (finding that government agents did not have a reasonable basis for suspecting that the defendant might be an illegal alien when they saw him unloading a roofing tool from a truck at a job site when there was no visible criminal activity, no evidence that he was visibly nervous or gave a false name, and no attempt to hide or escape). *Cf. United States v. Sperow*, 551 F.2d 808, 810-11 (10th Cir. 1977) (specifying that probable cause existed to search a

vehicle, not because of the occupant's apparent Mexican ancestry, but because it was a heavily loaded camper close to the border at 2:00 a.m. and there was an odor of marijuana).

Therefore, HB 497's provision allowing officers to make presumptions regarding citizenship violates basic constitutional standards because other than the factors listed above, which are impermissible indicators of alienage, officers will have few other reasons to suspect that an affirmation of citizenship is false.

2. Some United States citizens may not even know that they are citizens and citizenship can be impossible to ascertain by an officer during a stop.

The citizenship question is further obscured because some U.S. citizens may not even know that they are citizens. While birth in the United States is a clear indicator that a person is not an alien, *see* U.S. Const. Amend. XIV, § 1, foreign-birth is not a certain indicator of alienage. Accordingly, birth outside of the United States would be an inappropriate factor for Utah police to utilize in trying to determine an individual's citizenship status.

There are a number of instances in which a person born abroad could have acquired United States citizenship. For example, a foreign-born child automatically derives U.S. citizenship if a parent naturalizes before the child reaches the age of eighteen and certain other conditions are met. *See* 8 U.S.C. § 1431(a). Yet, that individual may not possess a certificate of citizenship, a U.S. passport, or other document as evidence of his status. Indeed, he may not even realize he is, in fact, a U.S. citizen. *See United States v. Smith-Baltiher*, 424 F.3d 913, 920-21 (9th Cir. 2005) (rejecting government's claim in an illegal reentry case that an individual could not assert derivative citizenship status because, *inter alia*, he did not have a certificate of citizenship). *See also* 8 U.S.C. §§ 1401, 1409 (setting out various conditions whereupon

individuals may acquire U.S. citizenship at birth); *Miller v. Albright*, 523 U.S. 420, 429-30 (1998) (plurality opinion) (acknowledging that 8 U.S.C. § 1401(g) provides for citizenship at birth abroad to one U.S. citizen parent and one alien parent). *Accord* 8 U.S.C. § 1431(b) (setting forth conditions whereupon adopted alien children acquire U.S. citizenship automatically).

Derivative citizenship depends on the parents' respective citizenship (8 U.S.C. § 1401(c)-(e), (g)-(h)); the duration and timing of their residence in the United States (*id*. at § 1401(d)-(e), (g)-(h)); their marital status at the time of the individual's birth (*id*. at § 1409); the year in which the person was born (*id*. at § 1401(h)); the place where the person was born (*id*. at § 1401(c)-(e), (g)-(h)); and in some situations, even the date on which a child born out of wedlock was legitimated (*id*. at § 1409). Moreover, since the Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (Oct. 30, 2001), is not retroactive, officers would need to know both the old law and current law, as well as when each applies. *Matter of Rodriguez-Tejedor*, 23 I. & N. Dec. 153 (BIA 2001). None of these factors can be ascertained or observed by the police during any contact, or can give rise, constitutionally, to any suspicion of alienage.

B. The List of Documents that Establish a Presumption of "Lawful Presence" is Inaccurate, Misleading and Creates Problems for United States Citizens as well as for a Variety of Categories of Aliens who Have Permission from the Federal Government to Be in the Country.

For individuals who do not claim to be United States citizens, HB 497 creates a presumption of "lawful presence" that is tethered to possession of at least one specified document. HB 497, Section 4. The documents include a Utah driver's license or identification card issued on or after January 1, 2010; a tribal enrollment or other tribal membership

identification document with a photograph; and other federal, state or local identification documents that require a photograph or other biometric identifier and proof or verification of "legal presence" in the United States. *Id*.

The list of documents which create a presumption of lawful presence is wildly inaccurate and misleading. Many of the documents on that list bear no relationship to an individual's immigration status, while documents that may reflect valid status are omitted from the list. They also reflect the mistaken notion that immigration status is static, when in fact it is a malleable concept, subject to change by Congress, agency decision-makers, and the courts. The list also omits documents issued by the federal government that can be used as proof of status in the United States.

Failure to possess one of the listed documents requires an officer to verify the identity of a person through a federal agency or law enforcement officer authorized by a federal agency to determine an alien's immigration status, or the officer otherwise may verify an individual's identity. HB 497, Sections 2 and 3. If a person is verified to be an "illegal alien," the law enforcement agency with custody of the person shall request DHS to issue a detainer for transfer of the individual into federal custody. HB 497, Section 3, adding Utah Code Ann. § 76-9-1003(4).

There are a number of problems with HB 497's authorization for law enforcement to make presumptions regarding lawful presence. First, it assumes, incorrectly, that immigration status is either "lawful" or "unlawful," and that law enforcement may readily determine in which of these transient categories an alien belongs. Second, tribal membership is not a reliable indicator of a person's immigration or citizenship status. Third, not all states require proof of

lawful presence in the United States to receive a driver's license or state identification card. Fourth, many categories of aliens are issued documents from the federal government that do not include a photographic or biographic identifier.

1. Immigration status is not easily identifiable as "lawful" or "unlawful" and law enforcement cannot readily determine into which category an individual falls because the list is both over-inclusive and under-inclusive.

The term "lawful presence" is not defined or found in the Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.* ("INA").[4] Nevertheless, Utah has seized upon this phrase as a relevant focus for state and local law enforcement, providing a list of documents by which, presumably, an officer may ferret out the "legal" from the "illegal" when it comes to aliens, for the purpose of turning them over to the federal government for deportation. This is a false and risky proposition that is likely to net individuals who are aliens authorized to be in the United States, as well as United States citizens.

The list of documents provided in Utah Code Ann. § 76-9-1004, added by HB 497, Section 4, that create a presumption of lawful presence in the United States is both over-inclusive and under-inclusive. It includes people whose presence may not be authorized in the

[4] The terms "unlawful presence" and "unlawfully present" are found in 8 U.S.C. § 1182(a)(9)(B) and (c). These terms are found in a section of law setting forth various inadmissibility grounds to the United States, and apply only in limited circumstances. The Utah scheme contemplating "lawful presence" does not align with the federal design, because "unlawful presence" lacks a statutory counterpart of "lawful presence" under the INA. Moreover, not every alien who lacks valid immigration status is "unlawfully present" under INA § 212(a)(9)(B) or (C). *See* Donald Neufeld, Lori Scialabba, and Pearl Chang, *Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212 (a)(9)(B)(i) and 212(a)(9)(C)(i)(I)* (May 6, 2009) *available at* http://www.uscis.gov/files /nativedocuments/revision_redesign_AFM.PDF.

United States, and excludes many more who are either United States citizens or lawful resident aliens.

The most glaring example of under-inclusiveness is that Utahns with driver's licenses or state identification cards issued before January 1, 2010, cannot meet the law's requirements to establish lawful status in the United States. Untold numbers of U.S. citizens residing in Utah would need to carry a passport to establish citizenship until they were issued a new Utah driver's license or state identification card. Federal law does not require U.S. citizens to carry proof of citizenship, and it is estimated that fewer than twenty-five percent of Americans possess a passport.[5] In any case, prudence militates against carrying a passport for the sole purpose of establishing citizenship in the event of a stop by a police officer. However, a natural-born U.S. citizen without a qualifying driver's license or state identification card would have few other options. Even a birth certificate would not give rise to a presumption of lawful presence in the United States under the Utah law, because it lacks a photograph or other biometric identifier.

2. Tribal membership is not a reliable indicator of a person's immigration or citizenship status.

Certain individuals who are recognized as members of North American tribes may be entitled to lawfully reside in the United States. However many will not be entitled to U.S. citizenship or even lawful permanent resident status. *See* 8 U.S.C. §1359; 8 C.F.R §§ 289.1-3. Accordingly, it is peculiar that people with proof of tribal membership are not subject to additional identity verification, as are other U.S. citizens and aliens.

[5] *See* U.S. Department of State Bureau of Consular Affairs, *Passport Statistics*, *available at* http://travel.state.gov/passport/ppi/stats/stats_890.html (last visited Jun. 10, 2011).

3. Not all states require proof of lawful presence in the United States to receive a driver's license or state identification card.

Washington and New Mexico issue driver's licenses and identification cards to individuals regardless of their citizenship or immigration status.[6] Therefore, a resident of Washington who is a U.S. citizen, but is not carrying a passport, would be unable to establish a presumption of lawful presence in the United States if he were stopped in Utah because he would lack the requisite documents required under HB 497. There would be no record of his citizenship in Department of Homeland Security (DHS) databases, and no way to verify his citizenship, if he did not have a passport. Thus HB 497 will effectively subject U.S. citizens to undue interrogation by law enforcement because many of them cannot establish a *presumption* of lawful presence since they do not possess the documents required by Section 4 to create such presumption.

4. Many categories of aliens are issued documents from the federal government that do not include a photographic or biographic identifier.

Many categories of aliens are issued status identification by DHS that may not include a photograph or other biometric identifier.[7] Such groups of people include: lawful visitors

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[6]N.M. Stat. Ann. § 66-5-9(B) (1978); N.M. Code R. § 18.19.5.12(D) (allowing foreign national to obtain driver's license with federal tax identification number and valid foreign passport or Matrícula Consular card); Wash. Rev. Code 46.20.035(3) (allowing use of "other available documentation," on a discretionary basis, for issuance of driver's license).

[7] HB 497 requires that a photograph or biometric identifier for a document to qualify as proof of lawful presence. *See* Utah Code Ann. 76-9-1004(1)(d). This requirement necessarily disqualifies immigration documents that may establish lawful status. Federal regulations at 8 C.F.R. § 264.1(a)-(b) prescribe over twenty (20) different types of immigration registration forms or documents that do not necessarily include a photo or picture. *See also* Pl's Mem. Supp. Prelim. Inj. Fernandez Decl. Ex. K, citing to Decl. of Michael Aytes ¶ 2, filed in *United States v. Arizona*, 10-CV-1413 (D. Ariz. filed July 7, 2010).

admitted to the United States under the visa waiver program; persons subject to final orders of removal who cannot be deported because their countries of origin refuse to repatriate them; individuals granted "withholding of removal" due to the probability of persecution if they were to return to their countries of origin; certain victims of domestic violence, crime, or severe forms of human trafficking;[8] or certain immigrant juveniles, who may be entitled to remain permanently in the United States. Other individuals who are not deportable may not possess any documents from DHS as valid proof of status, such as people who have not yet applied for an immigration benefit. Nevertheless, the Utah law would ensnare them as so-called "illegal aliens" to be delivered to DHS for removal from the United States.

In sum, HB 497 incorrectly assumes that citizenship or immigration status is easily determined and readily ascertainable during every-day encounters with law enforcement. In reality, the complexities of immigration law make determination of such status, which is a legal rather than factual determination, very difficult, even for the federal government. Moreover, the list of documents provided in Section 4 is inadequate and will cause citizens as well as lawfully present aliens to be unduly interrogated and detained while law enforcement attempts to identify

[8]Congress has permitted visas or lawful status to be given to crime victims in return for their cooperation with law enforcement in attempts to prosecute the perpetrator. A person may qualify for the U visa or status even if he or she has committed an aggravated felony offense or has an outstanding order of removal. *See* 8 C.F.R. §214.14(c)(5)(i). HB 497 would allow State actors to arrest some U applicants regardless of federally contemplated incentives and protections for such aliens. By circumventing federal protections granted to U applicants, HB 497 directly undermines congressional intent by deterring an already vulnerable and reluctant victim demographic from reporting crimes or cooperating with police. *See* Decl. of Police Chief Chris Burbank ¶ 8 (included as Exh. 12 in Plaintiff's Memorandum in Support of Preliminary Injunction).

their status because they will not be able to provide any of the enumerated documents which establish a presumption of lawful presence. Thus the verification scheme mandated by HB 497 is flawed, impractical and conflicts with federal law; it should therefore be enjoined.

II. THE WARRANTLESS ARREST PROVISIONS OF HB 497 VIOLATE FEDERAL LAW.

Several provisions in HB 497 permits state officers to arrest non-citizens when federal officers would not be authorized to do so. First, HB 497 authorizes a warrantless arrest when an officer has reasonable cause to believe a person is an alien (1) subject to a civil removal order issued by an immigration judge, (2) subject to a "civil detainer warrant" issued by DHS, or (3) who has been charged or convicted in another state with one or more aggravated felonies, as defined in the Immigration and Nationality Act at 8 U.S.C. § 1101(a)(43). Perhaps most importantly, these determinations do not require that an officer act in coordination with DHS before taking action. *See* HB 497, Section 11, adding Utah Code Ann. § 77-7-2(5); *compare* 8 U.S.C. § 1252c (authorizing state and local law enforcement to arrest and detain certain aliens following coordination with DHS). The statute is not exactly clear about what ~~as~~ to do with people after they are arrested under Section 11. AILA thus surmises that Utah wishes through this law to round-up "illegal" troublemakers and turn them over to DHS. The statute conflicts with federal immigration law, and creates serious constitutional concerns regarding unlawful deprivations of liberty.

A. Many Aliens Subject to Removal Orders Cannot Be Deported.

Not everyone with a removal order issued by an immigration judge[9] is deportable. The order may be on appeal with the Board of Immigration Appeals, and not yet be final. *See* 8 U.S.C. §1101(a)(47) (explaining that an order becomes final upon decision by the BIA or where the time to seek BIA review lapses). Or it may be the subject of a stay by a federal court of appeals during a petition for review. *See Nken v. Holder*, 129 S.Ct. 1749, 1756–57 (2009) (describing federal court authority to grant a stay). Or a federal district court may have issued a writ of habeas corpus, or granted a temporary restraining order or a preliminary injunction thereon, preventing the execution of a removal order. *See, e.g., Orantes-Hernandez v. Thornburgh*, 919 F.2d 549, 558 (9th Cir. 1990) (explaining that district courts have broad discretionary power to fashion equitable relief). Or the BIA or an immigration judge may have granted a stay of removal pending review of a motion to reopen or motion to reconsider. *See* INA §240(b)(5)(C) (explaining that the filing of a motion to reopen for exceptional circumstances stays deportation until the immigration judge rules); *Matter of Rivera*, 21 I&N Dec. 232 (BIA 1996) (deportation will be automatically stayed until the BIA rules on an appeal). Or the Attorney General may have granted a stay of removal for an individual who is needed as a witness in a prosecution or whose removal is otherwise not practicable or proper. *See* 8 U.S.C. §1231(c)(2). There are many possible reasons why a removal order from an

[9] The statute uses the phrase "civil removal order." All removal orders issued by immigration judges are civil, not criminal, orders. *See, e.g., Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) (deportation proceedings are civil, not criminal, proceedings); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-39 (1984) (same).

immigration judge may not be executed by DHS.[10] In any event, an outstanding removal order on its own is an insufficient basis for a Utah law enforcement officer to arrest an individual without a warrant as provided in HB 497.

Other non-citizens with removal orders may be protected against deportation in part by binding agreements sanctioned by federal courts, such as the settlement reached in *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796 (N.D. Cal. 1991) (hereafter referred to as "ABC Agreement"). The ABC agreement is just one example of agreement struck in federal courts that bind federal agencies from deporting certain aliens with final orders of removal. *See* Memo, INS, Pearson HQASY120/12/11 (Feb. 23, 2001), reprinted in 78 No. 9 Interpreter Releases 444, 455–64 (Mar. 5, 2001). *See also* 8 C.F.R. Part 1241 Subpart A (Post-hearing Detention and Removal) at §1241.8(d).

In other instances, federal courts have granted special protections to individual non-citizens against government action. *See e.g. Truong v. Holder*, No. 2:10-cv-797 CW (D. Utah April 18, 2011) (unpublished) (attached as Addendum A). The *Truong* case was heard in this very Court just a few weeks ago. Mr. Truong is an alien who committed an aggravated felony, was ordered removed by an immigration judge, and then detained by DHS for fifteen months pending his deportation to Vietnam. *Id.* Petition for Writ of Habeas Corpus (Dkt. No. 2, Exhibits 1-4). However, federal officers were unable to obtain travel authorization from the

[10] Other reasons may include: a grant of withholding of removal or deferral of removal by an Immigration Judge, either of which would be issued in tandem with a removal order, *see* 8 C.F.R. §§ 208.16 and 208.17; a grant of deferred action by DHS as a matter of administrative discretion in declining to execute a removal order, *see Johnson v. INS*, 962 F.2d 579 (7th Cir. 1992); or a refusal of repatriation by an alien's country of citizenship or nationality, *see Zadvydas v. Davis*, 533 U.S. 678 (2001).

Vietnamese government. ICE released Truong shortly after he filed a petition for habeas corpus relief. Judge Clark Waddoups then dismissed the habeas petition on the condition that ICE not re-detain him unless it actually obtained a travel document for him or Truong violated a condition of his release (as per his Order of Supervision). *Id.* Memorandum Decision and Order (Dkt. No. 26). Despite this Court's order, HB 497 now authorizes State officers to detain Truong due to his outstanding removal order and aggravated felony.[11]

Allowing state actors to enter into this mix of federal court agreements[12] is preempted under the Supremacy Clause, as Plaintiffs' brief in support of their preliminary injunction request has explained. Federal law prohibits Utah from creating such a chaotic result.

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[11]*Truong*, therefore, is a prime example of "'conflict preemption, which occurs … when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *See US Airways, Inc. v. O'Donnell*, 627 F.3d 1318, 1324 (10th Cir. 2010) (citing *Mount Olivet Cemetery Ass'n v. Salt Lake City*, 164 F.3d 480, 486 (10th Cir. 1998)).

[12]The ABC agreement is only one of many examples where contractual obligations created in federal courts bind federal agencies administering immigration law. *See e.g., Northwest Immigrant Rights Project v. USCIS*, No. 88-379R (W.D. Wash. Sept. 9, 2008) (unpublished) found on the U.S. Citizenship and Immigration Services website, http://www.uscis.gov (follow "LAWS" hyperlink; then follow "Legal Settlement Notices" hyperlink) (last visited May 31, 2011) (agreeing to remedy unlawful delays in processing the applications of naturalization of hundreds of legal permanent residents by allowing an application period of one year for individuals who meet very specific criteria, including entering the United States on a nonimmigrant visa prior to January 1, 1982); *Newman v. USCIS*, 81 No. 9 Interpreter Releases 275–77 (Mar. 1, 2004) (unpublished) found on the U.S. Citizenship and Immigration Services website, http://www.uscis.gov (follow "LAWS" hyperlink; then follow "Legal Settlement Notices" hyperlink) (last visited May 31, 2011) (providing a final application period for eligible individuals to file simultaneous applications for class membership and application for legalization as temporary residents); *Perez-Olano, et al. v. Holder et al.*, No. CV 05-3604 (C.D. Cal. 2010) (unpublished) found on the U.S. Citizenship and Immigration Services website, http://www.uscis.gov (follow "LAWS" hyperlink; then follow "Legal Settlement Notices" hyperlink) (last visited May 31, 2011) (agreeing that certain persons who applied for Special Immigrant Juvenile classification on or after May 13, 2005 and whose petitions were denied or

B. The "Civil Detainer Warrant" Discussed in HB 497 Does Not Exist in Federal Immigration Law.

HB 497's provision about arresting someone for whom a "civil detainer warrant" has been issued by DHS makes no sense. There is no document in immigration law known as a "civil detainer warrant," so use of that novel term is confusing. The Immigration and Nationality Act does authorize the federal government to issue a "detainer" for certain aliens in federal, state or local custody following an arrest for a controlled substance violation. 8 U.S.C. § 1187(d). Detailed regulations govern the issuance of detainers. 8 C.F.R. § 287.7. In essence, a detainer may be issued by DHS for aliens already in the custody of a law enforcement agency following an arrest; it requires an alien to be delivered to DHS custody following any period of criminal confinement. It is not a "warrant" for arrest. An alien subject to a DHS detainer will be in the custody of a law enforcement agency already. By law, the detainer serves as an order to the criminal custodian to detain an alien for up to 48 additional hours, excluding weekends and holidays, following the end of criminal detention. 8 C.F.R. § 287.7(d). At the end of the 48-hour period, the detainer expires and has no legal effect, even if DHS has not acted on the detainer to take an alien into custody.

The "civil detainer warrant" provision of HB 497 is vague, conflicts with federal law, and is incapable of being enforced.

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revoked may be eligible to file a motion to reopen the denied petition or application for adjustment of status).

C. Determining What Constitutes an Aggravated Felony is a Complex Task that Cannot be Accomplished During a Law Enforcement Stop.

HB 497 impermissibly allows the warrantless arrest of a non-citizen who has been charged or convicted of an aggravated felony as defined under federal law. This provision cannot withstand legal scrutiny for several reasons.

As a preliminary matter, HB 497 § 11 is problematic because it permits a warrantless arrest if the peace officer has probable cause to believe that an individual has "committed" an aggravated felony. *See* Utah Code Ann. § 77-7-2 as added by section HB 497 § 11. However, under federal law, an aggravated felony requires an actual *conviction.* 8 U.S.C. § 1227(a)(2). As per federal law, if there is no conviction, there is no aggravated felony.

Moreover, in order for an aggravated felony to be a ground for removal, the non-citizen must have been "admitted" to the U.S. Specifically, removal grounds in 8 U.S.C. § 1227(a)(2) only apply to convictions occurring after a non-citizen's "admission." An "admission" is a term-of-art with specific legal meaning. 8 U.S.C. § 1101(a)(13)(C). Congress enacted specific policy determinations that aggravated felony, crimes of domestic violence, and firearm convictions predating a non-citizen's admission are not removable offenses. *Compare* 8 U.S.C. § 1182(a)(2) (not including these offenses as grounds of inadmissibility) *with* § 1227(a)(2) (listing offenses as grounds to remove alien who has been "admitted").

Setting these matters aside, determining what constitutes an aggravated felony as a matter of law in one state alone is a daunting task that often takes years of litigation. *See e.g.*, *Carachuri- Rosendo v. Holder,* 130 S.Ct. 2577 (2010) (resolving circuit split over whether multiple misdemeanor controlled substance offenses should be treated as an aggravated felony).

Yet HB 497 assumes that state officers will be able to accurately identify aggravated felonies from all fifty states within a matter of minutes during routine encounters. The complexity and nuance associated with determining aggravated felonies cannot be understated. Entire treatises have been dedicated solely to the topic of aggravated felonies. *See Padilla v. Kentucky*, 130 S.Ct. 1473, 1489 (2010). Indeed, the Supreme Court recognized the complexity of determining what constitutes a "crime involving moral turpitude" or an "aggravated felony," for "[n]othing is ever simple in immigration law." *Id.* (Alito, J. concurring). Therefore enforcement of HB 497 Section 11 is impractical.

There is ambiguity in the contours of federal immigration law on the question of what state law offenses might make an individual removable. Under federal immigration law an individual might be removable for having been convicted of a crime involving moral turpitude ("CIMT"), 8 U.S.C. §§ 1182(a)(2)(A)(i)(I) and 1227(a)(2)(A)(i) and (ii); an aggravated felony, 8 U.S.C. §§ and 1227(a)(2)(A)(iii) (listing more than 21 different types of aggravated felonies); a controlled substance offense, 8 U.S.C. §§ 1182(a)(2)(A)(i)(II) and (a)(2)(C) and 1227(a)(2)(C); a firearms offense, 8 U.S.C. § 1227(a)(2)(C); a prostitution-related offense, 8 U.S.C. § 1182(a)(2)(D); or a crime of domestic violence, stalking, child abuse, child neglect, or child abandonment, 8 U.S.C. § 1227(a)(2)(E)(i). Most criminal grounds of removability are addressed in 8 U.S.C. §§ 1101(a)(43), 1182, and 1227.

Seemingly identical crimes may or may not constitute aggravated felonies depending on the state statute of conviction, and the law of the circuit in which a removal case is litigated. For example, a forgery committed in Colorado or Delaware may qualify as an aggravated felony, whereas a forgery committed in California may not. *Compare Lucero-Carrera v. Holder*, 349

Fed.Appx. 260, 265 (10th Cir.2009) (finding forgery under Colo.Rev.Stat. § 18-5-102(1)(c) to be an aggravated felony under 8 U.S.C. § 1101(a)(43)(R); *Drakes v. Zimski*, 240 F.3d 246 (3rd Cir. 2001) (second degree forgery pursuant to 11 Del.C. § 861 qualified as aggravated felony), *with Vizcarra-Ayala v. Mukasey*, 514 F.3d 870 (9th Cir. 2008) (forgery under California Penal Code § 475(c) is not categorically an offense "relating to ... forgery" within the meaning of INA § 101(a)(43)(R)).

In addition, determining aggravated felonies often requires nuanced knowledge of federal statutes defining specific crimes which are unfamiliar to local police. For example, some assault offenses may be aggravated felonies if they are "crimes of violence" as defined in 18 U.S.C. § 16, and 8 U.S.C. §§ 1101(a)(43)(F) (referencing 18 U.S.C. § 16 for a definition). Some state convictions for assault-related crime can meet this definition while others do not. *Compare Matter of Sanudo*, 23 I. & N. Dec. 968, 973-75 (BIA 2006) (California domestic battery is not a crime of violence) *with Matter of Martin*, 24 I. & N. Dec. 491 (BIA 2002) (Connecticut third degree assault is a crime of violence).

Further complicating matters, the specific facts or the actual conduct of an individual – the stock and trade of police work – may not be relevant in determining whether an offense constitutes an aggravated felony under federal immigration law, because the aggravated-felony determination is *legal* not *factual*. Even in cases where facts matter, they matter only *after* conviction and only when contained in the criminal record of proceedings. *See Nijhawan v. Holder*, 557 U.S.__, 129 S. Ct. 2294, 2300-01 (2009).

In many instances, certain offenses such as crimes of violence and theft offenses are not aggravated felonies unless the resulting term of imprisonment is at least one year. 8 U.S.C. §§

1101(a)(43)(F), (G). Other grounds of removability require convictions under specific sections of law. 8 U.S.C. § 1227(a)(3)(B). The complexity of the law to be applied in the hyper-technical field of immigration law is demonstrated by the explosion in federal court litigation on immigration questions.[13]

CONCLUSION

When placed in the context of federal immigration law, HB 497 presents an unworkable and unconstitutional "solution" to our nation's broken immigration system. The Utah Legislature has failed to understand the many nuances of immigration law, that verification of citizenship or immigration status is not readily ascertainable during law enforcement encounters, and that the statute impermissibly purports to allow state law enforcement broader authority to arrest aliens than federal officers possess. HB 497 should be enjoined because it cannot be implemented in a fair, efficient or constitutional manner.

DATED: June 13, 2011

Respectfully Submitted,

/s/ Aaron Tarin
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[13]In fiscal year 2009, circuit courts received 8,890 new petitions for review challenging BIA decisions. U.S. Courts, *Judicial Business*, 9 (2009) http://www.uscourts.gov/ uscourts/Statistics/FederalJudicialCaseloadStatistics/2009 /front/MarJudBus2009.pdf. By the time the circuit court renders a decision, the entire removal process could take four or more years. *See Alvarez--Reynaga v. Holder*, 596 F.3d 534 (9th Cir. 2010) (conviction for receipt of stolen property is not a CIMT, proceedings pending for four years); *Nunez v. Holder*, 594 F.3d 1124 (9th Cir. 2010) (indecent exposure not a CIMT, proceedings pending for seven years).

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of June 2011, I electronically filed the foregoing ***AMICI CURIAE BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION-UTAH CHAPTER IN SUPPORT OF PLAINTIFFS MOTION FOR DECLARATORY AND INJUNCTIVE RELIEF*** and its supporting attachments with the Clerk of the Court using the CM/ECF system, which sent notification to the following:

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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH, CENTRAL DIVISION

BUU VAN TRUONG, Petitioner, v. ERIC H. HOLDER, JR. et al., Respondents.	**MEMORANDUM DECISION AND ORDER** Case No. 2:10-cv-797 CW Judge Clark Waddoups

On August 13, 2010, Petitioner Buu Van Truong filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2241. At that time, Petitioner was being held at the Weber County Correctional facility in Ogden, Utah, under custody of the U.S. Immigration and Customs Enforcement ("ICE"). On September 16, 2010, ICE released Petitioner from custody, but the release was conditional due to removal proceedings against Petitioner.[1] Because Petitioner has been released, Respondents[2] have moved to dismiss the petition as moot. Petitioner opposes the motion and has moved to compel ICE to affirm it will not detain Petitioner again unless he violates a condition of his release.

A hearing on both motions was held on April 15, 2011 before the Honorable Clark Waddoups. Durwood Heinrich Riedal ("Riedal") appeared on behalf of Respondents and Aaron Tarin appeared on behalf of Petitioner. Riedal represented at the hearing that ICE's authority to detain Petitioner again is limited to the following two circumstances: (1) Petitioner violates a condition of his release or (2) there is a change in circumstances such that a significant likelihood

[1] Release Notification (Dkt. No. 11, Ex. A).

[2] Respondents are Eric H. Holder, Jr., Janet Napolitano, Brad Slater, and Steve Branch.

exists that Petitioner "may be removed in the reasonably foreseeable future."[3] Riedal represented that the "changed circumstances" provision refers to Petitioner obtaining travel documents and not to a change in ICE policy or other similar matter.

Based on Riedal's representation that ICE will not take Petitioner back into custody unless at least one of the two specified conditions exists, the court hereby GRANTS Respondents Motion to Dismiss[4] and DENIES AS MOOT Petitioner's Motion to Compel.[5] Because Riedal's representations were specific to Truong and his unique circumstances, the court's ruling is expressly limited to Truong and shall not be applied to a person other than Truong.

DATED this 18th day of April, 2011.

BY THE COURT:

Clark Waddoups
United States District Judge

[3] 8 C.F.R. § 241.13(i)(2).

[4] Docket No. 10.

[5] Docket No. 13.