UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

RESPONSE IN OPPOSITION TO
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Defendants Marion County Prosecutor in his official capacity and Johnson County Prosecutor in his official capacity (hereinafter "Defendants"), by counsel, respectfully submit this response in opposition to Plaintiffs' Motion for Summary Judgment. For the reasons set forth below, Defendants respectfully request the Court deny the Plaintiffs' Motion for Summary Judgment and enter judgment in favor of Defendants.

In support of this response, Defendants designate the following:

a. Excerpts of the Deposition of Ingrid Buquer with supporting exhibits;

b. Excerpts of the Deposition of Berlin Urtiz with supporting exhibits;

c. Excerpts of the Deposition of Louisa Adair;

d. Excerpts of the Deposition of Sergio Aguilera;

e. Declaration of Brian Gensel;

f. Declaration of Ronald Leffler;

g. Immigration and Customs Enforcement Documents from FOIA request;

h. Immigration Detainer - Notice of Action; and

i. Declaration of John Schroeder.

INTRODUCTION

This litigation involves preemption challenges to Senate Enrolled Act 590 by a class of persons represented by Buquer, Adair and Urtiz, a Fourth Amendment challenge brought by Buquer, Adair and Urtiz, and a due process attack asserted by these three individuals. Basically, Plaintiffs posit that I.C. § 35 -33-1-1(a)(11)-(13) is preempted and violates the Fourth Amendment and that I.C. § 34 -28-8.2-2(b) is preempted and violates the Substantive Due Process Clause of the Fourteenth Amendment. Plaintiffs, based on their own allegations and assertions, obtained a Preliminary Injunction early on in this matter. Armed with that victory -- and recycling their previous affidavits and arguments -- Plaintiffs quickly moved for summary judgment to invalidate these provisions of Indiana law. For any of the following reasons, Plaintiffs have not sustained their summary judgment burden and, as a result, their motion must be denied.

First, we must be clear in the precise challenges being raised and by whom. To that end, the two preemption challenges are raised on behalf of the class. The Fourth Amendment and due process challenge, however, are raised only by Buquer, Adair and Urtiz. *See* Docket No. 84 (noting that the class is certified with regards to (1) whether Section 20 of SEA 590, which provides law enforcement with discretion to arrest individuals with a notice of action, detainer, or removal order is preempted and (2) whether Section 18 of SEA 590, which provides the use of consular identification cards[1] as a form of identification is unlawful is preempted).[2] And, Plaintiffs' alleged challenge to the consular identification card ("CID") provision of the law is

[1] On the evening of April 9, 2012, Plaintiffs' counsel informed Defendants that Buquer's U-Visa application was granted and she has now received her Employment Authorization Card. This may affect Buquer's ability to continue as class representative and will be reviewed.

[2] The challenge to the provision relating to previous indictment for, or conviction of, an aggravated felony is not identified as part of the class issues.

based on a purported violation of due process; although, their argument seems to have shifted to equal protection -- which was not pled by them and which is not part of this case.

Second, Plaintiffs, in their rush to invalidate sections of Senate Enrolled Act 590, have ignored the legal principles governing this case, have opposed reasonable attempts to develop a factual record that would guide this Court's review, have proffered hypothetical scenarios rather than logical analysis based on real-world facts, and have painted with the broadest of brushes. The simple fact is that Plaintiffs have not met their heavy burden of demonstrating that the specifically challenged provisions of Indiana law are facially unconstitutional. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (holding that to succeed on a facial challenge to a state law, the challenger must show "that the law is unconstitutional in all of its applications") (citing *United States v. Salerno*, 481 U.S. 739 (1987)). Accordingly, Plaintiffs' Motion must be denied.

STATEMENT OF MATERIAL FACTS IN DISPUTE

A. FACTS CONCERNING THE PLAINTIFFS IN DISPUTE

The Plaintiffs state that Ingrid Buquer "regularly" uses her CID for nonfraudulent purposes. *See* Docket 123 at 4. Buquer testified that she has used, or attempted to use, her CID to bank, obtain an apartment lease, visit her son at school, and buy medicine, cigarettes and alcohol. *See* Buquer Dep. at 24:23-25; 25:1-3, 27:21-25, 28:4-6, 13-16, 29:8-12. However, when asked about the frequency of her use of her CID, she stated that she did not use it regularly. *See* Buquer Dep. at 25:13-16 ("Q[:] On a regular day how often do you use your consular identification card as identification? A[:] I don't. I don't really do anything that would require me to show my ID."). The Plaintiffs stated that Ms. Buquer's CID was her only method of identification because she could not obtain a driver's license from Indiana and because her passport was expired. *See* Docket 123 at 4. However, as of February 2012, Ms. Buquer was

able to obtain a passport from the Mexican Consulate, and thus has an alternative method of photo identification. *See* Buquer Dep. at 13:13-18, 14:3-9; Buquer Dep., Ex. B.

Urtiz is a Mexican citizen and came to the United States when he was three years old. Urtiz Dep. at 9:10-10:4. Urtiz lives in Indianapolis and has lived at his current address for the past five years. Urtiz Dep. at 7:7-7:11. Urtiz rents this house. Urtiz Dep. at 7:12-7:18. When Urtiz first became a tenant, he had to provide no documentation to establish his identity. Urtiz Dep. at 7:19-7:22. To get electric and gas service at his home, Urtiz needed to show his social security card and his Indiana driver's license. Urtiz Dep. at 22:3-22:16. For other utilities (dish TV, internet, water) Urtiz needed to provide no identification. Urtiz Dep. at 22:17-22:25. Urtiz has a bank account with PNC and to open this account he provided his Indiana driver's license, his social security card, and his resident card. Urtiz Dep. at 15:15-16:22.

Urtiz currently works for Sign Services as a service technician; before that, Urtiz worked in landscaping for IMI and before that he worked for a cleaning service. Urtiz Dep. at 7:23-8:25. Urtiz supplied each of his employers with his social security card, his Indiana driver's license, and his residence card. Urtiz Dep. at 13:17-14:5. In terms of photo identification, Urtiz has a Mexican passport, an Indiana driver's license, and a residence card. Urtiz Dep. at 11:8-12:8. To get his Indiana driver's license, Urtiz supplied his social security card, his proof of address, and his resident card. Urtiz Dep. at 12:23-13:5. Urtiz has never had a CID card. Urtiz Dep. at 13:13-13:16.

When Urtiz needs to show identification, he uses his Indiana driver's license. Urtiz Dep. at 18:5-18:15; Urtiz Dep. at 18:23-19:21:6 (testifying that the only transactions he uses identification for is to buy alcohol and to cash his paycheck and that he uses his Indiana driver's license for both).

Urtiz pled guilty to theft and was sentenced to two years in the Indiana Department of Correction. Urtiz Dep. at 24:13-24:18. Urtiz served two days in jail. Urtiz Dep. at 24:19-24:21. From his release until 2010, Urtiz was never detained by any state law enforcement officer. Urtiz Dep. at 36:3-36:10. In 2010, Urtiz was at his house and Immigration and Customs Enforcement ("ICE") agents had a warrant for his arrest and took him into custody. Urtiz Dep. at 25:1-25:9; Urtiz Dep. at 26:3-26:7; Urtiz Dep. Exh. 8 (federal notice to appear and federal warrant for arrest of alien signed by Urtiz); Urtiz Dep. at 37:19-38:13. Significantly, Urtiz admitted that local law enforcement (Indianapolis Police) were with the federal agents at Urtiz's home when he was taken into custody. Urtiz Dep. at 25:10-25:18.

After spending a day at the immigration building in Indianapolis, Urtiz was transferred to a facility in Ullin, Illinois and held there for a month; this facility housed persons in custody for immigration violations as well as "regular inmates" and the officers at the facility were local officers. Urtiz Dep. at 26:23-28:1. After Illinois, Urtiz was transferred to a facility in Kenosha, Wisconsin and was held there for four months; the facility housed both immigration violators and state law offenders and the officers were both federal and state/local. Urtiz Dep. at 28:2-28:18; Urtiz Dep. at 36:17-36:20. Urtiz successfully moved for post-conviction relief and the next day he was released. Urtiz Dep. at 30:8-30:10. Urtiz never filed any type of lawsuit against the ICE agents or the state/local officers that held him. Urtiz Dep. at 32:18-33:2. And, since his release, Urtiz has not been picked up by federal agents or by state/local law enforcement officers. Urtiz Dep. at 30:11-30:16.

Louisa Adair was arrested on September 20, 2002. Adair Dep. at 20:3-5. Adair was arrested by immigration officials and held in the Marion County Jail for the weekend. Adair Dep. at 21:19-25; 22:1. After leaving Marion County, Adair stayed in a county jail in Chicago

for three days and was transported to Wisconsin. Adair Dep. at 22:4-6. The jail in Wisconsin contained individuals detained for immigration issues and others confined for non-immigration issues. Adair Dep. at 22:16-25; 23:1. Some of the individuals working in the Wisconsin jail were members of local law enforcement. Adair Dep. at 23:9-14.

Urtiz did not know what a "detainer order" is. Urtiz Dep. at 30:17-30:18. Urtiz has received notices from federal immigration and he turned them over to his attorney; he has no facts or evidence to suggest that local or state law enforcement was provided with such notices. Urtiz Dep. at 36:21-37:14.

B. FACTS CONCERNS IMMIGRATION MATTERS

States have a clear interest in ensuring that immigration laws are enforced. Indiana's interest stems from both a commitment to the economic well-being of its citizens and their safety. The identification of removable, criminal aliens is one area where Indiana has an indisputable interest. On a recent "mini-surge" spearheaded by the U.S. Immigration and Customs Enforcement, agents identified over 138 removable aliens while investigating only three Indiana county jails over only a four day period. (Exhibit G.)

Federal agencies tasked with the enforcement of immigration-related matters frequently cooperate with local enforcement officials in Indiana. For example, Ricardo Wong, Field Office Director for the Immigration and Customs Enforcement in Chicago, in an October 17, 2011 memorandum describes a "mini-criminal alien surge" in three Indiana county jails in October of 2011. After identifying criminal aliens, ICE removed six criminal offenders who were then transferred to the Marion County Jail. (Exhibit G.)

In addition to 287(g) agreements, there are additional agreements between local and federal enforcement officials. For example, as detailed in an excerpt from a table received through a FOIA request from ICE, local detention facilities have differing levels of cooperation

with ICE. (Exhibit G.) The Porter County Juvenile Detention Center has a 100% screening agreement with the federal government which is described in another ICE document obtained through a FOIA request as a facility where "ICE has an understanding with the facility that it will refer to ICE all self-proclaimed foreign born nationals booked into the facility. ICE in turn will review facility referrals for removability." (Exhibit G.) In contrast, the Porter County Jail has "Limited Coverage," where "ICE does not have an understanding that the facility will refer to ICE all self-proclaimed foreign born nationals booked into the facility. (Exhibit G.)

C. FACTS CONCERNING CONSULAR IDENTIFICATION CARDS IN DISPUTE

The Plaintiffs state that "[d]ue to their highly sophisticated security measures, CIDs are extremely difficult to forge." Docket 123 at 8 (citing Docket 41-4, ¶ 9). However, the source of this statement, Sergio Aguilera, testified that he was only familiar with the security of Mexican CIDs, not CIDs issued by every country. *See* Aguilera Dep. at 34:4-10. Thus, the Plaintiffs have failed to establish a foundation for, or alternatively that Mr. Aguilera has personal knowledge of, the broad proposition that "CIDs are extremely difficult to forge." Similarly, there is no foundation that Mr. Aguilera has personal knowledge concerning the CID issuing practices of all countries in order to make the statement that "[CIDs] will not be issued to persons with a criminal record, persons subject to prosecution, or persons facing a judicial or administrative process." Docket 123 at 8 (citing Docket 41-4, ¶ 9). While this may be true for the Mexican consulate (which is arguable based upon Mr. Aguilera's testimony), there was no foundation made that Mr. Aguilera is familiar with the CID practices in such a way that would qualify him to testify as to the practices of all other countries. *See* Aguilera Dep. at 13:1-19.

ARGUMENT

A. Indiana Code § 35-33-1-1

Plaintiffs challenge the amendments to Indiana Code § 35-33-1-1. Plaintiffs assert that these provisions violate the Fourth Amendment of the United States Constitution and are preempted by federal law. Plaintiffs improperly rely on an untenable reading of this provision to cast the law in the harshest light possible and Plaintiffs' gloss on the law becomes tarnished when the particular language is analyzed.

As properly viewed, and contrary to Plaintiffs' (mis)characterization, these provisions do not mandate that local law enforcement arrest persons in a willy-nilly fashion based on the mere suspicion that the person may not legally be in the United States. To that end, these provisions make clear that: "a law enforcement officer *may arrest* a person when the officer *has*: . . . (11) a removal order issued for the person by an immigration court; (12) a detainer or notice of action for the person issued by the United States Department of Homeland Security; or (13) probable cause to believe that the person has been indicted for or convicted of one (1) or more aggravated felonies (as defined in 8 U.S.C. 1101(a)(43))." I.C. § 35-33-1-1(a)(11)-(13) (emphasis added). In short, these provisions merely enable the officer to exercise his/her discretion and only when specific information (probable cause to believe…) or documents (removal order or detainer) are provided to him/her.

Indeed, these provisions merely codify what was taking place in Indiana before passage of these provisions and provide clarity to law enforcement. For example, Mr. Urtiz pled guilty to an aggravated felony. A few years after he had served his sentence, he was arrested by federal agents at his home. Significantly, these federal agents had a warrant for his arrest and also a notice to appear before an immigration judge to begin removal proceedings. These federal

agents were assisted in this arrest by Indianapolis police officers. Once arrested, Mr. Urtiz was housed for a month in a state facility in Illinois (where he was kept with state offenders and guarded by state and local officers) and then Mr. Urtiz was housed for four months in a state facility in Wisconsin (again, where he was kept with state offenders and guarded by state and local officers). Once his conviction was vacated, he was released. He has not been picked up by federal agents or local law enforcement since that time and he never filed any type of lawsuit against the federal agents or the local police as a result of his arrest.

Additionally, the fact is that law enforcement does not receive removal orders nor does law enforcement arrest people merely because of a suspicion regarding his/her immigration status. As Brian Gensel, Prosecuting Attorney for Porter County, has declared, the scenario is that a person is arrested because there is probable cause that the person committed a crime unrelated to immigration. (Declaration of Brian Gensel, ¶ 5.) Once in custody, law enforcement will try and verify the person's identity and criminal history. If this check reveals that the person may not be here legally, ICE is contacted and in cases where the person has committed a serious criminal offense (a crime of violence or serious drug related crime) a detainer will be issued. As it relates to the Indiana Department of Correction ("DOC"), 180 days before the person is to be released from prison, the release process starts. (Declaration of Ronald Leffler ¶ 3.) During that process, DOC runs reports through the National Crime Information Center and a Triple I check to search for any outstanding warrants or detainers. (Declaration of Ronald Leffler ¶¶ 4-5.) When DOC learns that an individual has a detainer on him/her, ICE is notified of his/her pending release date. (Declaration of Ronald Leffler ¶¶ 5-6.) Typically, before the release date, ICE will send the detainer to the DOC facility housing the individual. (Declaration of Ronald Leffler ¶

7.) If the release date for a prisoner (who is subject to a detainer) comes, he/she is released even if ICE is not there to pick up the person. (Declaration of Ronald Leffler ¶¶ 8-9.)

Compliance with immigration detainers, moreover, is already specifically authorized by federal law. 8 C .F.R. § 287.7. T hus, it should be manifestly clear that such cooperation is perfectly acceptable under federal and state law, but organizations have raised questions about the legality of compliance with immigration detainers. *See, e.g.* http://www.aclufl.org/news_events/ ?action=viewRelease&email_AlertID=3763 (Florida ACLU threatening local law enforcement officers with litigation if they comply with federal immigration detainers). Rather than some grand authorization for Indiana law enforcement officers to unconstitutionally arrest persons, the amendments at issue simply codify and clarify cooperation between federal and state officials that is already happening in Indiana.

B. As Properly Viewed, Plaintiffs Have Not Demonstrated That I.C. § 35-33-1-1(a)(11)-(13) Is Unconstitutional

1. State Laws Are Presumed To Be Constitutional And Plaintiffs Bear A Heavy Burden To Establish Their Claims Of Preemption

Whether a s tate law "is invalid under the Supremacy Clause depends on the intent of Congress. 'The purpose of Congress is the ultimate touchstone.'" *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). This Court may not find that the provisions challenged by Plaintiffs are preempted "in the absence of clear evidence that Congress so intended." *California v. FERC*, 495 U.S. 490, 497 (1990). "Only a demonstration that complete ouster of state power including state power to promulgate laws not in conflict with federal laws was 'the clear and manifest purpose of Congress' would justify th[e] conclusion" that Indiana's law is preempted. *See DeCanas v. Bica*, 424 U.S. 351, 357 (1976) (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963)).

In all preemption cases, there is a presumption that "the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quotation marks and ellipses omitted). *See also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992). The United States Supreme Court has found that state and local police power is "an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people." *Manigault v. Springs*, 199 U.S. 473, 480 (1905). The sovereign powers retained by the States "proceed, not from the people of America, but from the people of the several states; and remain, after the adoption of the Constitution, what there were before." *Sturges v. Crowningshield*, 17 U.S. 122, 193 (1819).

Indeed, this Court must begin its preemption analysis with the "presumption that the state statute is valid" and, from this presumption, this Court must then ask whether Plaintiffs have "shouldered the burden of overcoming that presumption." *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 661-62 (2003). Plaintiffs, as the challenging parties, must overcome a "high threshold" if they are to prove that the provisions are preempted. *Chamber of Commerce of U.S. v. Whiting*, 131 S.Ct. 1968, 1985 (quoting *Gade v. National Solid Wastes Mgmt.*, 505 U.S. 88, 110 (1992) (Kennedy, J., concurring)). Plaintiffs must point to some congressional act that does the preempting and the preemption analysis "does not justify a 'freewheeling judicial inquiry into whether a state statute is in tension with federal objectives.'" *Id*. (quoting *Gade*, *supra*, at 111).

2. Contrary To Plaintiffs' Claims, Federal Immigration Law Does Not Preempt All State Laws That May Impact Citizens From Another Country

Predictably, Plaintiffs point to federal immigration law -- the Immigration and Nationality Act ("INA") -- as the basis for their preemption arguments.[3] Plaintiffs spend a lot of time and space claiming that the states cannot regulate immigration because the exclusive authority to do so rests with the federal government. *See*, *e.g.*, Docket No. 123 at 20, 21. Of course this is an oversimplification of the law and a mischaracterization of the issue presented here.

The INA has been amended many times -- most notably for this case by the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"). Taken as a whole, federal immigration law expresses the "public policy against an alien's unregistered presence" in the United States. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1047 (1984). Despite federal authority to regulate "immigration" -- meaning the "determination of who should or should not be admitted into th[is] country, and the conditions under which a legal entrant may remain" -- the Supreme Court "has never held that every state enactment which in any way deals with aliens is a regulation of immigration and thus per se pre-empted." *DeCanas*, 424 U.S. at 355 ("the fact that aliens are the subject of a state statute does not render it regulation of immigration"). In fact, *DeCanas* ended any notion that the INA fully occupies the field with regards to the regulation of unlawfully present aliens as the Court upheld a California statute that "sought to strengthen its economy by adopting federal standards in imposing criminal sanctions against state employers who knowingly employ aliens who have no federal right to employment." *Id*. at 355.

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[3] Plaintiffs also point to general powers found within the Constitution. *See* Docket No. at 12 (referencing the foreign Commerce Clause, the authority to establish a uniform Rule of Naturalization, and the President's role in conducting foreign affairs). These provisions do not advance the preemption analysis since the relevant inquiry is whether an enactment of Congress preempts the specific provisions challenged. Further, Plaintiffs have not raised a foreign Commerce Clause challenge to Indiana's law nor have they argued that the challenged provisions relate to the naturalization of persons as U.S. citizens.

In short, *DeCanas* held that the INA does not preempt a State's regulation of illegal aliens that is "harmonious with federal regulation." *Id*. at 356. *See also Plyler v. Doe*, 457 U.S. 202, 225, 228 n.23 (1982) (recognizing that States have "authority to act with respect to illegal aliens, at least where such action mirrors federal objectives and furthers a legitimate state goal" and also acknowledging that, despite "the exclusive federal control of this Nation's borders, we cannot conclude that the States are without any power to deter the influx of persons entering the United States against federal law, and whose numbers might have a discernible impact on traditional state concerns").

And, as relevant to the present dispute:

> *Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State of political subdivision of a State* (A) to communicate with the Attorney General regarding the immigration status of any individual…; or (B) otherwise *to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States*.

8 U.S.C. § 1357(g)(10) (emphasis added). In sum, federal immigration law -- as evidenced by statute and by the Supreme Court's holdings -- specifically authorizes a system of cooperative federalism between states, counties, municipalities, and the federal government when it comes to the "identification, apprehension, detention, or removal of aliens" that are not lawfully in the United States. *See also Mabey Bridge & Shore v. Schoch*, 666 F.3d 862 (3d Cir. 2012) (rejecting preemption challenge because federal law allowed the Commonwealth of Pennsylvania to enact a more stringent requirement relating to the purchase of domestic steel).

The Department of Homeland Security ("DHS") has stated regarding immigration matters: "DHS has long viewed state and local governments as valuable partners that can serve a helpful role in assisting DHS in fulfilling its responsibilities with respect to immigration enforcement. DHS continues to welcome that participation and does not intend by this guidance

to disturb the longstanding pattern of cooperation on a day-to-day basis with state and local law enforcement agencies." *See* Guidance on State and Local Governments' Assistance in Immigration Enforcement and Related Matters, http://www.dhs.gov/xlibrary/assets/guidance-state-local-assistance-immigration-enforcement.pdf (last visited April 9, 2012).

3. I.C. § 35-33-1-1(a)(11)-(13) Is Not Preempted

With these principles and maxims in mind, we turn to Plaintiffs' arguments. Plaintiffs challenge, on preemption grounds, I.C. § 35-33-1-1(a)(11)-(13):

> (a) A law enforcement officer may arrest a person when the officer has:
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> ***
>
> (11) a removal order issued for the person by an immigration court;
> (12) a detainer or notice of action for the person issued by the United States Department of Homeland Security; or
> (13) probable cause to believe that the person has been indicted for or convicted of one (1) or more aggravated felonies (as defined in 8 U.S.C. 1101(a)(43)).

I.C. § 35-33-1-1(a)(11-13). Plaintiffs argue that these provisions "directly conflict with federal decision-making" and that these provisions "stand as an obstacle to the full implementation of federal law." Docket No. 123 at 21 (further quotations and citations omitted).

Plaintiffs' argument relies on the misguided preconception that Indiana lawmakers intended to run rampant over rights of individuals and completely disregard federal immigration efforts. Plaintiffs repeatedly decry the fact that sub-sections 11 and 12 fail to require probable cause to arrest an individual. But subsections 11 and 12 actually require a *higher* standard than probable cause. The statute clearly states that a law enforcement officer may arrest a person only "when the officer *has* . . . a removal order issued for the person by an immigration court" or "a

detainer or notice of action for the person issued by the United States Department of Homeland Security." I.C. § 35-33-1-1-(a)(11), (12) (emphasis added).[4]

Rather than presenting any facts to support their view of how the law works or their preemption arguments, Plaintiffs spin a series of far-fetched hypothetical scenarios:

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

Docket No. 123 at 24 (emphasis added). Looking at each provision, and the facts that actually have been supplied to this Court, demonstrate that position is without merit and their Motion must be denied.[5]

a. I.C. § 35-33-1-1(a)(11) Is Not Preempted

With regards to I.C. § 35-33-1-1(a)(11), Plaintiffs' contention can be summarized as follows: Indiana has no legitimate interest in arresting a person who has a removal order issued against them because the federal government may exercise discretion to allow those who may

[4] Indeed, the legislative history exhibits a general heightening of the burden on officers which includes, for example, the shift from requiring an officer merely having probable cause to believe that, for example, a removal order had been issued, to actually requiring the officer to *have* the removal order. Journal of the House, State of Ind. 2011 Reg. Sess. No. 52,622 (April 15, 2011).

[5] Plaintiffs' facts cannot be supported by any record evidence because Plaintiffs did not take discovery in this case prior to filing their motion and, indeed, they opposed Defendants' efforts to build a complete factual record that could have been considered by this Court. Since Plaintiffs' claims are facial in nature, they win only if they demonstrate that there is no constitutional application of the law. Clearly, the facts presented show that there are ways that the law can be constitutionally applied and, as a result, Plaintiffs' challenges fail. If, in the future, this statute is used to improperly arrest a specific individual, that individual can being claims to vindicate his/her rights. Invalidating the law wholesale is improper.

have had removal orders issued against them in the past to remain in the United States. As such, Plaintiffs conclude that the Indiana law would be an obstacle to the federal government's discretion. Docket No. 123 at 21.

Plaintiffs' theory is riddled with many holes. First, and contrary to what they have represented to this Court, local law enforcement is not mandated or required to arrest persons who have been issued a removal order from an immigration court. The verb used is "may" -- this certainly means that their power is discretionary. Second, the law enforcement officer must physically have the removal order. Plaintiffs offer no evidence to demonstrate if or how or when a local law enforcement officer will physically have such an order. To that end, Ms. Adair has never been asked to provide her removal order to local law enforcement, nor has she ever been arrested or detained by any local law enforcement official because she received a removal order in the past.[6] Third, Defendants have submitted Declarations making clear that local law enforcement does not receive removal orders from immigration courts prior to arresting somebody. *See* Gensel Declaration. As shown by the evidence in this case, the only way in which a law enforcement officer or the DOC would receive removal orders or detainers is through the federal government, thus implying cooperation. *See* Leffler Declaration. Indeed, the facts presented make clear that persons are arrested because there is probable cause that they have committed some other crime and it is only after the person is in custody that immigration status may be checked with ICE.[7]

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[6] Ms. Adair's removal order has been superseded by subsequent federal decisions. Thus, it is doubtful whether she is actually subject to a removal order at this time and, if not, she certainly lacks standing to pursue this claim.

[7] Plaintiffs pose a hypothetical as to how they believe the statute may operate. Docket 123 at 24. Of course, their belief is not grounded in any facts and is nothing more than rank speculation. Rather than jumping the gun and seeking summary judgment on the heels of their PI victory, perhaps Plaintiffs would have been better served to take discovery as to how local law enforcement actually do their jobs.

In the end, all this provision does is enable local law enforcement to cooperate with federal law enforcement when it comes to identifying and detaining those who are not here legally. Such cooperation is specifically authorized by federal law. *See* 8 U.S.C. § 1357(g)(10). Given this provision of federal law, the Indiana law does not conflict with federal immigration law in all respects and is not an obstacle to federal immigration law in all respects. There is no facial preemption.

b. I.C. § 35-33-1-1(a)(12) Is Not Preempted

As for I.C. § 35-33-1-1(a)(12), Plaintiffs argue that Indiana Code § 35-33-1(1)(a)(12) authorizes law enforcement officers to arrest a person when the officer has a detainer **or** a notice of action. Plaintiffs' expansive reading of the statute fails due to factual, grammatical, structural, and logical reasons. Properly viewed under real-world facts, subsection 12 merely permits law enforcement to cooperate with ICE and hold a person pursuant to ICE's issuance of a Detainer -- Notice of Action. The following points are made.

First, to support their claim of unreasonableness, Plaintiffs improperly explain that the "Notice of Action" is Form I-797. While a "Notice of Action" may include Form I-797, a "Notice of Action" is not limited to that particular form. Indeed, such "Notices of Action" include other forms issued by the Department of Homeland Security, including Form 29, which is issued to importers by Customs and Border Protection (a subagency within DHS). Yet another Notice of Action is Form I-247, which is an Immigration Detainer – Notice of Action. In fact, the use of the phrase in subsection 12 makes clear that the General Assembly did not intend to give law enforcement the ability to arrest persons merely because he/she may have a run-of-the-mill Notice of Action.

Indeed, it would be absurd to assume, as Plaintiffs do, that the General Assembly intended to authorize the arrest of any persons who receive a relatively routine Notice of Action. It is equally absurd to assume that the General Assembly intended to authorize the arrest of *any* foreign national who has received communication from the United States Citizenship and Immigration Services, benign or otherwise. A much more reasonable interpretation of subsection 12 is that the legislature intended to authorize the arrest only in instances where an Immigration Detainer, DHS Form I-247 has been issued, and where the officer has the detainer. Looking at the form itself clarifies the legislative intent. The heading of the form reads "Department of Homeland Security," "Immigration Detainer – Notice of Action." Reading subsection 12 as relating to one form is more efficient and logical than trying to interpret the legislature as intending to authorize the arrest for every "Notice of Action" that may be issued by CBP, FEMA, ICE, TSA, USCIS, the Coast Guard or the Secret Service or any other agency within DHS.

Second, the structure of the provision itself aligns with an interpretation that the legislature did not intend to authorize arrests related to the issuance of a Notice of Action I-797 in that a Notice of Action is not given a separate subsection. Subsection 11 pertains to a single type of document, the Final Order of Removal. Plaintiffs assert that subsection 12 refers to two documents, the Immigration Detainer, DHS Form I-247 and form I-797, Notice of Action. It is much more reasonable to read subsection 12, like subsection 11, as only referring to a single type of document, the Immigration Detainer, DHS Form I-247. Further, while United States Customs and Immigration Services ("USCIS") is within the Department of Homeland Security, the form I-797 is typically issued specifically by USCIS. *See, e.g.* 8 C.F.R. § 214.14(b)(5)(i)(A). In contrast, an I-247 Detainer-Notice of Action is more generally labeled as issuing from DHS.

(Exhibit H.) Subsection 12 specifies that the document in question is one issued by DHS, once again indicating that there is only one document in question – the I-247 Detainer.

Third, to accept Plaintiffs' position, the legislature would have included an article prior to "notice of action" if they had intended to refer to a separate document. Subsection 11 and 12 refer to "**a** removal order" or "**a** detainer." Notably, "notice of action" in subsection 12 lacks an article, indicating further that the legislature did not even consider the Form I-797, Notice of Action, much less intend to authorize any arrests because of its issuance.

Fourth, Plaintiffs have provided no facts to demonstrate how (or if) law enforcement ever receives a Notice of Action. As the party with the summary judgment burden, this lack of factual evidence precludes summary judgment for Plaintiffs. As a factual matter, State Defendants have submitted facts showing that law enforcement officers do not receive Notices of Action. Law enforcement officers do receive Detainers -- Notice of Action from ICE; however, the facts submitted reflect that prisoners in state custody are not kept for any additional time because of such Detainers. This merely reflects the cooperative nature of subsection 12. *See also* 8 U.S.C. § 1357(g)(10).

c. I.C. § 35-33-1-1(a)(13) Is Not Preempted

As for I.C. § 35-33-1-1(a)(13), again, it must be stressed that the authority is not mandatory and it requires an officer to actually have probable cause. Further, Plaintiff has offered no factual basis to establish how local officers may obtain such information. The circumstances surrounding Mr. Urtiz demonstrate how this provision is intended to work.

Mr. Urtiz pled guilty to a crime that is an aggravated felony under 8 U.S.C. § 1101(a)(43). He was sentenced to two years in jail; however, he served only two days. Years later, ICE agents had a federal warrant for his arrest because he had been convicted of an

aggravated felony. They enlisted the help of Indianapolis police and picked up Mr. Urtiz. After spending a night at the federal immigration building in Indianapolis, Mr. Urtiz was sent to Illinois and later to Wisconsin. Both facilities housed immigration offenders as well as offenders who violated state laws and the officers at both facilities included local officials. Mr. Urtiz had his criminal conviction vacated and he was released from the Wisconsin facility the very next day. Between his release from serving his two days in jail and the ICE agents and Indianapolis police showing up at his house in 2010, Mr. Urtiz was never detained or arrested by local law enforcement. Since the time he was released from the Wisconsin facility, Mr. Urtiz has never been detained or arrested by local law enforcement. In sum, ICE provided information to local law enforcement and asked for help in apprehending and holding Mr. Urtiz. This cooperation is clearly authorized by federal immigration law. *See* 8 U.S.C. § 1357(g)(10).

4. Summary

In sum, these provisions clarify the obligation Indiana local law enforcement have to cooperate with other enforcement agencies, particularly federal agencies, with respect to the enforcement of laws related to immigration. The provisions must be read in conjunction with other, unchallenged, provisions enacted by SEA 590, including Indiana Code § 5-2-18.2-7 -- "Every law enforcement agency (as defined in IC 5-2-17-2) shall provide each law enforcement officer with a written notice that the law enforcement officer has a duty to cooperate with state and federal agencies and officials on matters pertaining to enforcement of state and federal laws governing immigration" -- and Indiana Code § 11-10-1-2 -- requiring the Indiana Department of Correction officials to evaluate the "citizenship or immigration status of the offender by making a reasonable effort to verify the offender's citizenship or immigration status with the United

States Department of Homeland Security under 8 U.S.C. 1373(c)." I.C. § 5-2-18.2-7; I.C. § 11-10-1-2(c)(4).

Cooperation between the federal and state governments is clearly contemplated by 8 U.S.C. § 1373(c) which states that "a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual" and further obligates the federal immigration enforcement agency to "respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency for any purpose authorized by law, by providing the requested verification or status information." 8 U.S.C. § 1373(a), (c). This statute not only makes it abundantly clear that Congress contemplates and endorses cooperation between federal and state enforcement officials, but that Congress recognizes that states have a legitimate interest in the enforcement of immigration laws. *See also* 8 U.S.C. § 1357(g)(10).

D. I.C. § 35-33-1-1(a)(11-13) Does Not Facially Violate The Fourth Amendment.

Plaintiffs also argue that these provisions violate the Fourth Amendment. Once again, Plaintiffs resort to hyperbole rather than reason as they conclude that the "challenged statute, however, mandates warrantless arrests for conduct that is explicitly not criminal." Docket No. 123 at 18. As noted above, this statement just is not true. I.C. § 35-33-1-1-(a)(11-13) uses the word "may" and not "shall" -- thus, making clear that the law is discretionary and not mandatory. Further, the law requires the local law enforcement official to have certain things -- an actual removal order from an immigration court, an actual Detainer/Notice of Action from the Department of Homeland Security, and actual probable cause that an individual was indicted or

convicted of an aggravated felony. Again, Plaintiffs provide no facts to support their parade of horrors that may happen in the future. Such speculation is insufficient to invalidate a duly enacted state law.

Indeed, the reasonableness of I.C. § 34-33-1-1(a)(11-13) is seen through the facts that Defendants have presented. Persons are arrested because there is probable cause that another crime has been committed. While the person is being held, his/her identity is verified as is past criminal history. During that process, if law enforcement has reason to believe that the individual is here illegally, ICE is contacted. In cases of serious crime (murder, rape, serious drug offenses, etc.) ICE may issue a Detainer on the person. As it relates to Mr. Urtiz, local law enforcement was present with ICE agents when he was arrested and, thereafter, he was held at facilities housing both immigration violators and state law violators and he was guarded by local officials. When he was arrested, it was pursuant to a federal warrant. And, when prisoners are being processed for release from DOC, ICE is contacted and detainers may be issued; however, the facts reflect that the prisoners are released on their release date and not held longer than that for ICE to collect them. Such facts demonstrate that the conduct of local officials is reasonable and, thus, does not violate the Fourth Amendment.

E. Indiana Code § 34-23-8.2-1 is not preempted by federal law or any other authority.

Indiana Code § 34-28-8.2-1 is not preempted by federal immigration law, the Vienna Convention on Consular Relations, or by Presidential constitutional authority. The authorities regarding preemption have been set forth above.

Indiana Code § 34-28-8.2-1 states:

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

> (2) (a) This section does not apply to a law enforcement officer who is presented with a consular identification during the investigation of a crime.
>
> (b) Except as otherwise provided under federal law, a person who knowingly or intentionally offers, accepts, or records a consular identification as a valid form of identification for any purpose commits a Class C infraction. However, the person commits:
>
> (1) a Class B infraction for a second offense; and
>
> (2) a Class A infraction for third or subsequent offense.

The fact that the statute in question regulates the use of consular identification does not necessarily render it a regulation of immigration, but rather a regulation of acceptable forms of identification to be used within the state. The state statute at issue is intended to both assist the federal government in the enforcement of immigration laws and also to provide guidance to state law enforcement and other entities regarding valid forms of identification.

In this case, the subject of the law is consular identification and the law does not make a determination of who should or should not be admitted into the country or the conditions under which a legal entrant may remain. Further, the Act promotes that Indiana residents obtain a reliable form of identification, which allows state law enforcement officers, financial institutions, businesses and a myriad of other entities in the state to verify the identity of people with whom they interact.

Federal law does not preempt Indiana Code § 34-28-8.2-1 either explicitly or impliedly. For express preemption, the court must first consider the plain wording of a preemption clause; however no express preemption clause is it at issue in this case. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62 (2002) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). Implied preemption may exist "where it is impossible for a private party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Spreitsma*, 537 U.S. at 65. Mere

tension between the federal and state law is not enough to establish implied conflict preemption. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984). In this case, a person is capable of complying with both state and federal requirements and the state law prohibiting a person from offering, accepting or recording of a consular identification card as a valid form of identification does not present an obstacle to any federal law.

Plaintiffs claim restrictions on CIDs "impacts directly on the United States' treaty obligations as well as on United States' foreign relations." Docket No. 123 at 28. It is unclear how the restrictions in Indiana Code § 34-28-8.2-1 affect the United States' treaty obligations. Plaintiffs seem to assert that this is based upon the Vienna Convention; however, the Vienna Convention does not authorize countries to issue CIDs. It provides authority for countries to issue passports and travel documents. *See* Vienna Convention on Consular Relations art. 5, April 24, 1963, T.I.A.S. No. 6820, 21 U.S.T. 77, 1969 WL 97928. Plaintiffs implicitly add authority to the Vienna Convention, which simply is not there. Therefore, Indiana Code § 34-28-8.2-1 is not preempted by federal law.

Plaintiffs also direct the Court to consider U.S. Treasury Department regulations relating to the verification of the identity of account holders; however, there is no express or implied conflict between these regulations and the state law at issue. *See* 31 C.F.R. § 1020.220 (providing minimum standards for identification and verification of financial account holders); 68 Fed. Reg. 55335, 55336 (Sept. 25, 2003) (addressing proposed rules regarding customer identification for financial institutions which neither endorse nor preclude reliance on particular forms of foreign government issued identification). Neither of these regulations expressly provides that any state law touching on the subject is preempted and Indiana Code § 34-28-8.2-1 is not impliedly preempted because it does not stand as an obstacle to the implementation or

execution of these regulations. Both of the above regulations allow for the presentation of many different forms of identification and the regulations do not forbid the use of CIDs. S imply because the United States Treasury has not forbade the use of CIDs does not mean that Indiana Code § 34-28-8.2-1 is preempted.

While the Treasury Department neither endorses nor prohibits the use of consular identification cards for banking purposes, the federal government has limited the acceptability of consular identification cards, implicitly questioning the reliability and purposes of the card. For example, USCIS prohibits the use of consular identification cards for purposes of the I-9 Employment Eligibility Form. *See* http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=d6c08318c9c64310VgnVCM100000082ca60aRCRD&vgnextchannel=5c1f8318c9c64310VgnVCM100000082ca60aRCRD. (last visited April 9, 2012) . In addition, federal legislation limited the use of foreign issued documents to passports, effectively prohibiting states from accepting consular identification cards for identification purposes for driver's licenses. Pub. L. 109-13 Section 202(c)(3)(b).[8]

To the extent Plaintiffs claim the statute affects banking and issues of national security, relative to foreign affairs, the federal government continues to cooperate with the State of Indiana. The federal government gave authority to the Indiana Department of Financial

[8] As stated above, Defendants learned this evening that Ingrid Buquer received her employment authorization and that her U visa had been approved by the USCIS. While Defendants did not have time at this late date to fully address this issue, particularly with respect to class certification, Defendants would like to note that Buquer's changed immigration status does render moot many of her arguments regarding the need for a consular identification card. While the Real ID Act does prohibit the acceptance of consular identification cards by participating states, foreign passports are accepted for identification purposes and a valid employment authorization card is acceptable for purposes of establishing lawful status in the United States. With these forms of identification, Buquer should now be able to obtain an Indiana drivers license. See http://www.in.gov/bmv/files/SecureID_Documents_List.pdf (last visited April 9, 2012).

Institutions to conduct audits of financial institutions, including reviews for cyberterrorism. Declaration of John Schroeder.

Indiana Code § 34-28-8.2-1 does not impede on the authority of the executive branch over matters of foreign affairs. The authority of the executive branch over matters of foreign affairs is an implied constitutional power of the branch. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952). Where there is evidence of a clear conflict between the policies adopted by the federal executive authority and the state, the state law must give way. *American Insurance Assn. v. Garamendi*, 539 U.S. 396, 421 (2003). While *Garamendi* provides an example of a state's internal regulation of commerce impermissibly affecting foreign policy, courts have subsequently held that in a matter of traditional state regulation, a matter that touches on the executive's federal powers is allowable. *See Dunbar v. Seger-Thomschitz*, 615 F. 3d 574 (5th Cir. 2010) *cert. denied*, 131 S. Ct. 1511 (U.S. 2011) (distinguishing the statute in *Garamendi*, which was an impermissibly independent policy objective favoring Holocaust victims, with the statute at issue, which was concerned primarily with the state's valid interest in property regulation); *Museum of Fine Arts, Boston v. Seger-Thomschitz*, 623 F. 3d 1 (1st Cir. 2010) *cert. denied*, 131 S.Ct. 1612 (U.S. 2011) *reh'g denied*, 10-901, 2011 WL 1529816 (U.S. Apr. 25, 2011) (holding that while the statute in *Garmendi* effectively singled out only policies issued by European companies, in Europe, to European residents, the statute in question was one of general regulation regarding the statute of limitations on conversion). Indiana Code § 34-28-8.2-1 does not impede the federal government's authority to manage foreign affairs because it does not single out any identifiable immigration policy or regulation, but rather outlines acceptable forms of identification within the State of Indiana.

Ultimately, Indiana Code § 34-28-8.2-1 is an internal regulation by the State of Indiana to ensure residents of the State have proper and valid forms of identification, and does not impermissibly tread on the powers of the federal government regarding immigration matters. The goal of ensuring that individuals have valid forms of identification assists not only state law enforcement in being able to effectively identify individuals.

F. There is no property interest in using a Consular Identification card; therefore, Indiana Code § 34-28-8.2-1 does not violate the Fourteenth Amendment.

Plaintiffs assert Indiana Code § 34 -38-8.2-1 violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution because there is allegedly no rational basis for the statutory provision. However, Plaintiffs fail to acknowledge a key step in proving a Fourteenth Amendment violation – a liberty or property interest. This failure dooms the Plaintiffs' claim.

The Fourteenth Amendment provides that the State cannot deprive "any person of life, liberty or property without due process of law." U.S. Const. Amend XIV. "The touchstone of due process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

A property interest is "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U .S. 564, 577 (1972). Defendants are aware of no court ever holding that a fundamental right exists to use CIDs. In a challenge to a similar law in Georgia, the court determined that "Plaintiffs cannot create a constitutionally protected property interest simply by showing that they have used Consular Identification Documents in the past." *Georgia Latino Alliance for Human Rights v. Deal*, 793 F.Supp.2d 1317, 1339 (N.D. Ga. 2011).

Cases have held that there is no property interest in other licenses or forms of identification. *See, e.g., Cheek v. Gooch*, 779 F.2d 1507, 1508 (11th Cir. 1986) (finding no due process violation because state law did not grant property interest in applying for liquor license); *Brown v. Cooke*, CIV.A.06-CV-01092MSK, 2008 WL 638418 at *9 (D. Colo. Mar. 6, 2008) ("The court's research has not uncovered any reported decisions that establish a fundamental right to a state identification card."); *accord Miller v. Reed,* 176 F.3d 1202, 1206 (9th Cir.1999) (noting that the Supreme Court has not "afford[ed] the possession of a driver's license the weight of a fundamental right").

To the extent the Plaintiffs are attempting to rely upon the Vienna Convention on Consular Relations to create a property interest, the Vienna Convention simply does not create an obligation or grant permission for countries to issue CIDs. Plaintiffs continually cite to the Vienna Convention as authority for issuing CIDs; however, the Vienna Convention does not provide such permission. The Vienna Convention allows consuls to "issu[e] passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State[.]" *See* Vienna Convention on Consular Relations, Art. 5, § d (1965). There is no evidence that CIDs are needed for travel to another country. Reviewing Plaintiff's evidence in a favorable light would show that CIDs are used while in another country, but certainly not for travel to another country.

Plaintiffs cannot and have not stated a claim of a violation of the Fourteenth Amendment and their motion for summary judgment should be denied. Defendants are entitled to judgment as a matter of law on this claim.

G. There are rational purposes for the enactment of Indiana Code § 34-28-8.2-1 and it does not violate the Fourteenth Amendment.

Indiana Code § 34-28-8.2-1 clearly is rationally related to the legitimate government purpose of ensuring the reliability of identification of individuals within the state and preventing fraud against law enforcement, merchants and consumers. In fact, it is only by utilizing an absurd interpretation of the Act that an argument can be made that it is irrational, arbitrary or violates due process. Further, the Plaintiffs properly concede that the proper standard of review is the rational basis test, and that the "scrutiny under the rational basis is not particularly rigorous[.]" Docket No. 123 at 31.

"Rational-basis review is 'highly deferential.'" *Brown v. City of Michigan City, Indiana,* 462 F. 3d 720 (7th Cir. 2006) (citing *Turner v. Glickman*, 207 F.3d 419, 426 (7th Cir. 2000). To find that a government action violates the requirements of substantive due process in this context, it must be 'utterly lacking in rational justification.'" *Id*. (internal quotation marks omitted). Governmental action only fails rational basis scrutiny if no sound reason for the action can be hypothesized. *Lamers Dairy Inc., v. U.S. Dept. of Agr.*, 379 F.3d 466, 473 (7th Cir. 2004); *Northside Sanitary Landfill Inc. v. City of Indianapolis*, 902 F.2d 521, 522-23 (7th Cir. 1990). In fact, the Plaintiffs cite only to a few extreme cases to support their irrational interpretation of the Act, despite the substantial number of cases upholding similar legislative action.[9] This irrational interpretation and description of the Act's provisions is carried over to

[9] *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993) (Court upheld Cable Communications Policy Act, which made a distinction in franchising arrangements for the purposes of F.C.C. regulations); *Heller v. Doe by Doe*, 509 U.S. 312 (1993) (Court upheld Kentucky involuntary commitment procedures statute under the rational basis standard); *Williamson v. Lee Optical of Okla.*, Inc., 348 U.S. 483 (1955) (Court upheld licensing law favoring optometrists over opticians against equal protection claim); *Lamers Dairy Inc. v. U.S. Dept. of Agr.*, 379 F.3d 466, 473 (7th Cir. 2004) (upheld USDA regulation distinguishing between different classes of milk handlers for purpose of marketing rules); *Johnson v. Daley*, 339 F.3d 582 (7th Cir. 2003) (upheld Prison Litigation Reform Act's limits on attorneys' fees for prisoners' civil suits); *Turner v. Glickman*, 207 F.3d 419, 426 (7th Cir. 2000) (court upheld welfare law that restricted availability of food stamps to convicted felons); *City of Chicago v. Chicago v. Shalala*, 189 F.3d 598 (7th Cir. 1999) (court found that the Welfare Reform Act, which restricted the eligibility of

the Plaintiffs' unsupported arguments. Rational basis review does not authorize "the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in the areas that neither affect fundamental rights nor proceed along suspect lines." *New Orleans v. Dukes,* 427 U.S. 297, 303 (1976)(*per curium*). A decision by the legislature "is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data." *FCC v. Beach Communications, Inc.,* 508 U.S. 307, ----, 113 S.Ct. 2096, 2102 (1993). *See also, e.g.*, *Nordlinger v. Hahn,* 505 U.S. 1, ----, 112 S.Ct. 2326, 2334, (1992); *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 463 -65 (1981); *Vance v. Bradley,* 440 U.S. 93, 111 (1979). "The doctrine that ... due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely ... has long since been discarded." *Ferguson v. Skrupa,* 372 U.S. 726, 730 (1963).

Indiana Code § 34 -28-8.2-1 clearly is rationally related to the legitimate government purpose of ensuring the reliability of identification of individuals within the state and preventing fraud against law enforcement, merchants and consumers. The legitimate government purpose is underscored by the concern about the reliability of consular identification. Indeed the reliability of the cards for purposes of identification has been the topic of concern for many years. They have been heralded as unreliable and subject to fraud. *See* Steve McCraw, Testimony at the House Judicial Subcommittee on Immigration, Border Security, and Claims Of the Committee on the Judiciary, House of Representatives, One Hundred Eighth Congress, First Session, June 19 and June 26, 2003. (transcript available at http://judiciary.house.gov/Legacy/mccraw 062603.htm); *See also* Hearing on Consular Identification Cards (transcript available http://judiciary.house.gov/Legacy/87813.PDF).

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some non-citizens for certain benefits, met the rational basis standard); *Graff v. City of Chicago*, 9 F.3d 1309, 1309-27 (7th Cir. 1993) (upheld City's permit requirements for sidewalk newsstands against an equal protection claim).

While imposing a penalty *via* an infraction, the Plaintiffs' suggestion that the Act criminalizes the use and receipt of a consular identification card is incorrect. *See A.S. v. State*, 929 N.E.2d 881, 891 (Ind. Ct. App. 2010) (noting that since 1981, an infraction is a civil sanction). Moreover, the State has an interest in the consistency and reliability of identification used by individuals with its borders. Indiana Code § 34-28-8.2-1 satisfies the rational basis test.

In an effort to justify the request for injunctive relief the Plaintiffs repeatedly mischaracterize the wording and potential effects of the Act. To this end, Plaintiffs weave strained hypotheticals to justify their claim that there is a lack of rational basis for the legislation. The Plaintiffs' cursory analysis of Indiana Code § 34-28-8.2 is inaccurate and the provisions of the legislation do not make it a crime to "produce" or "show" a consular identification to law enforcement as Plaintiffs have alleged. First, this statute clearly does not provide for strict liability upon the production of a consular identification and specifically requires that an individual "*knowingly or intentionally offers, accepts, or records a consular identification as a valid form of identification*." Indiana Code § 34 -28-8.2-1(2)(b). Plaintiffs' hypothetical of "producing" a consular identification upon request by law enforcement does not violate that Act on its own. The individual is required to knowingly and intentionally offer the consular identification as a valid form of identification. Further, Plaintiffs repeatedly misstate that a violation of the Act will be deemed a "crime", which is patently false as discussed above. The plain language of the Act states that a violation of the statue is merely an "infraction" not a crime as defined by statute, similar to a parking or speeding ticket.

Along the same line of flawed reasoning Plaintiffs allege that the Act would criminalize the "showing" of Mexican consular identifications at the Mexican Consulate without citation or support for the claim. Nothing in the Act makes it illegal to obtain, possess, or utilize consular

identification at their respective consulates. The Act specifically permits the use of a passport issued by the government of a foreign state for identification purposes. Contrary to prior evidence and the practical considerations of how this could even be enforced by state law enforcement in a foreign consulate this hypothetical fails to recognize that there is lack of jurisdiction to enforce this Act on the foreign soil of any foreign consulate. The Mexican consulate is "foreign state," so that Foreign Sovereign Immunities Act governs exercise of jurisdiction over any consulate. *Gerritsen v. de la Madrid Hurtado*, 819 F.2d 1511, 1517 (9th Cir. 1987). The Mexican Consulate also falls within the definition of a foreign state because it is "a separate legal person" that is "an organ of a foreign state or political subdivision thereof" and that is "neither a citizen of a state of the United States ... nor created under the laws of a third country." 28 U.S.C. § 1603(b); *cf. Gray v. Permanent Mission of the People's Republic of the Congo to the United Nations,* 443 F.Supp. 816, 819 (S.D.N.Y.1978) (Congo Mission is a foreign state under 28 U.S.C. § 1603), *aff'd,* 580 F.2d 1044 (2d Cir.1978). Thus, the Foreign Sovereign Immunities Act governs the exercise of jurisdiction over the Mexican Consulate. *Gerritsen*, 819 F.2d at 1517. Therefore, the Plaintiffs' speculative concern about the potential "crime" committed when providing a consular identification at the Mexican Consulate is flawed and unsupported by the law.

Finally, in the form of an open-ended question, in lieu of argument, Plaintiffs merely ask what rational purpose can be served by allegedly criminalizing the showing of a consular identification as identification for commercial transactions. As stated above, the Act is rationally related to the legitimate government purpose of ensuring the reliability of identification of individuals within the state and preventing fraud against law enforcement, merchants and consumers.

In addition, individual states on a daily basis require merchants to request proof of identification to purchase such items as alcohol, tobacco, firearms, and certain forms of medication for similar rational interests. The Plaintiffs have failed to show any undue burden to legally identify themselves and the Act does not preclude the use of a passport, issued by the government of a foreign state for identification purposes. Further, it is admitted by Plaintiffs that the federal government has taken a decidedly neutral role on the commercial use of consular identification. As explained above, there is nothing in the United States Department of Treasury final regulations that allows customers to offer consular identification as proof of identification. In fact the federal government does not always accept them as proof of identification. Since the federal government has remained neutral in this area individual states may adopt reasonable regulations in this area without preemption. Therefore, Indiana Code § 34-28-8.2-1 is clearly rational, serves many legitimate state interests, and does not violate the Fourteenth Amendment.

To the extent the Plaintiffs are now attempting to bring a claim under the Equal Protection Clause of the Fourteenth Amendment (by comparing the security measures employed for CIDs to those for other forms of identification), that claim was not alleged in the Plaintiffs' Complaint.

CONCLUSION

Based upon the foregoing reasons, Plaintiffs' motion for summary judgment should be denied and judgment should be entered in State Defendants' favor as a matter of law.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that a cop y of the foregoing was filed electronically on this 9th day of April, 2012. Notice of this filing will be sent to the parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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