

PRELIMINARY ANALYSIS OF

HB 497 “Utah Illegal Immigration Enforcement Act”



Summary of major provisions: This bill purports to give local police officers authority to investigate and arrest people for perceived immigration violations without adequate training, exacerbating the problem of racial profiling, and raising concerns about the prolonged detention of citizens and legal residents. Fundamentally, this bill unconstitutionally allows the state of Utah to regulate immigration by establishing separate state offenses for violations of federal immigration law and unique procedures for investigating and arresting individuals for such offenses. Under this law, individuals in Utah will need to carry proof of lawful presence at all times or risk being subjected to a lengthy detention and investigation, which would result in an un-American, “show-me-your-papers” approach to law enforcement.

The following is not a comprehensive analysis of all the unconstitutional aspects of HB 497. The provisions discussed below represent some of the most troubling provisions of this legislation.

Section 76-9-1004¹: Grounds for Presumption of Lawful Presence in the United States

(1) Provides a list of identification documents that would create a presumption that a person is lawfully present in the United States.

Even though in America we are not required to carry government identification everywhere we go, this law will effectively require that rule in Utah. The reality is that many citizens and lawfully present individuals will not be able to provide one of the specified forms of identification to prevent an intrusive investigation as to their immigration status. To take just one example, individuals from states such as New Mexico and Washington—which do not require proof of lawful status for the issuance of a driver’s license—would likely not be able to satisfy this

1 The proposed provisions refer to sections of the Utah Code.

requirement no matter what their status is and would be subject to further investigation into their immigration status.

Additionally, not all categories of foreign nationals who are lawfully present will be able to provide documentation to demonstrate their status. For example, many authorized temporary visitors from other countries, individuals who have applied for asylum or temporary protected status, or abused women petitioning for immigration relief under the Violence Against Women Act likely would not have a document that meets this provision's requirements. And if a person does not have the identification necessary to create a presumption of lawful presence, the verification of status is not a simple and quick process. Many U.S. citizens do not appear in Department of Homeland Security ("DHS") immigration databases, and an indeterminate answer could require DHS to search multiple databases and even paper files to resolve the inquiry. Officers will likely feel pressure to hold people for prolonged periods of time to verify their status.

- (2) Provides that a person is presumed to be a citizen or national of the United States if the person makes a statement to the law enforcement officer that he or she is a United States citizen or national, unless the officer has reasonable suspicion that the statement is false.**

While this section seemingly provides a method by which citizens can avoid further investigation under Section 1003 (described below), a person's own statement of citizenship in fact does not create a presumption of lawful status that would prevent further investigation of immigration status by a police officer. Under Section 1003 only the specified identification documents will create that presumption. Furthermore, this law provides no guidelines for how an officer is to develop reasonable suspicion that the statement is false, leaving open the likelihood that an officer will not accept such statements from those who "appear" to be immigrants or foreigners based on impermissible factors such as race, ethnicity, or English-speaking ability.

Section 76-9-1003: Detention or Arrest—Determination of Immigration Status

- (1) This bill allows police officers to investigate a person's status when a person is stopped for a class B or C misdemeanors (which includes minor offenses such as littering, jaywalking, and any traffic law violation), if the person is unable to provide certain forms of government ID that show lawful presence and the officer is otherwise unable to determine the identity of the person. An officer is mandated to verify the status of a person if they are arrested for any crime (felony or misdemeanor).**

This provision attaches an immigration enforcement mandate to the traditional mission of local police. Yet, because most police officers have not been trained to enforce immigration law, this provision is an invitation for abuse and many U.S. citizens and lawful permanent residents will face additional investigations and be wrongfully detained for a prolonged period

of time. The clear danger is that police will rely on unconstitutional factors, such as race, ethnicity, national origin, and English-speaking ability, for immigration enforcement. The purported limitation on the use of race and ethnicity is a fig leaf, designed to cover the plain fact that apart from appearance it's hard to imagine any legitimate reason a police officer would have to investigate someone's citizenship or immigration status.

This law will significantly burden lawfully present individuals by making every encounter with the police an occasion on which they may need to demonstrate their federal status. The Supreme Court has ruled that the Constitution and federal laws are designed "to protect the personal liberties of law-abiding aliens . . . and to leave them free from the possibility of inquisitorial practices and police surveillance." As the district court ruled in Arizona with respect to a similar provision, this would "impose[] an impermissible burden on lawfully-present aliens." This law will create that same intolerable result.

Furthermore, the law does not specify how a person can "otherwise" prove identity. This lack of clarity opens the door to selective enforcement of the law against people presumed to look or sound "foreign."

- (2) Requires that when an officer has reasonable suspicion that the driver or passengers of a vehicle are violating state laws concerning the smuggling and transporting of undocumented individuals, the officer must detain and inquire as to the immigration status of every occupant in the vehicle.**

This law is unnecessary as Utah peace officers are already allowed to stop a vehicle based on reasonable suspicion of a crime. To the extent that this law allows for the unlawful detention of occupants who may not be suspected of the underlying criminal activity, it would be unconstitutional.

- (3) Requires a law enforcement agency that has custody of a person it believes to be undocumented to request that DHS issue a detainer (or a hold) on the person requesting that they be transferred to federal custody.**

This law is both unnecessary and creates a strong likelihood that individuals will be held unlawfully by local law enforcement agencies. As this law does not define what is meant by "custody," it encourages officers to detain individuals unlawfully while awaiting a request from DHS. Federal law already provides for a process by which federal authorities, such as DHS, may request that an individual be held for a short period of time so that federal officers may obtain custody of that individual. Finally, police can only detain individuals based on probable cause. This provision does not acknowledge that fundamental principle.

Section 77-7-2: Arrest by Peace Officers

Gives police officers authority to conduct warrantless arrests of persons for whom the officer has reasonable cause to believe 1) are subject to a civil removal order of an immigration judge, 2) have a civil detainer warrant issued against them by DHS, or 3) have been charged or convicted in another state of a any public offense that makes those persons deportable.

To the extent that this provision attempts to create state arrest authority for administrative violations of federal immigration law, it is likely to be deemed invalid by the courts because states cannot create such arrest authority where it does not exist under federal law. Officers not trained in federal immigration law who attempt to exercise this arrest authority would be subject to legal liability for violations of the Fourth Amendment. In addition, a warrantless arrest in these situations is unlawful as even federal immigration agents do not have the power to conduct warrantless arrests away from the border or international points of entry unless the agent can articulate specific reasons to believe the person was likely to flee before a warrant could be obtained. 8 U.S.C. § 1357(a)(2).

This law also allows for the arrest of an individual based solely on “reasonable cause.” We are unaware of this legal standard in the criminal justice context. In order to lawfully effectuate an arrest, a police officer must have probable cause to believe that the person committed a criminal act. Reasonable suspicion of a crime only allows for a very brief stop by a police officer to investigate the criminal activity, but an arrest must meet the higher standard of probable cause. As written, the law purports to allow an arrest based on a standard that is below probable cause and is thus unconstitutional.

Furthermore, the categories of individuals who are subject to arrest under this law are excessively broad and will likely result in many unlawful arrests. For example, a person may be subject to a civil removal order but have been released on bond by an immigration judge pending the completion of their case. An arrest of such persons would contravene federal-level decisions to not detain, and would not be based on any lawful authority. Also, as discussed above, a civil detainer does not authorize local agencies to initiate custody based solely on the detainer. In order for a detainer to be properly effected, the person must already be in custody for a state criminal offense. If the person is not already in custody, officers—even federal agents—must have an arrest warrant save for a few limited exceptions. Lastly, the ambiguity present in allowing arrests for those who have been “charged or convicted” of a deportable offense will allow for the arrest of individuals who may have been charged at some point in the past but ultimately cleared of the underlying offense.

Section 76-9-1005: Transportation to a Federal Facility

Provides authority for state and local law enforcement to transport noncitizens in their custody suspected of being unlawfully present to federal authorities, even outside the jurisdiction of the local agency.

This law is unnecessary as to any person who the federal government has reason to believe is in the country illegally because federal law already provides for a process by which those persons can be transported to federal custody. Local agencies can also contract with federal authorities to be reimbursed for the cost of detaining and transporting such persons.

Section 76-9-1006: Enforcement of Federal Immigration Laws

(1) Prohibits any policy limiting state and local agencies from assisting the federal government in the enforcement of federal immigration law.

This law is unnecessary as law enforcement agencies are already allowed under federal law to cooperate directly with investigations or enforcement actions by federal agencies, such as ICE. However, this law takes away the ability of law enforcement agencies to exercise judgment as to how best to allocate police resources to ensure public safety and deal with the most pressing criminal issues.

(2) Prohibits limitations on the authority of a law enforcement agency to investigate or enforce federal immigration violations, such as failure to register or to possess an alien registration document.

This appears to prohibit localities from having policies aimed at increasing trust within immigrant communities, such as not questioning victims and witnesses of crime about their immigration status. It ties the hands of local governments by not permitting them to exercise their own judgment about the allocation of law enforcement resources because it requires police agencies to treat administrative violations of the immigration law on the same level as serious felonies. Law enforcement agencies should be able to determine how best to allocate resources in order to deal with the most problematic issues in the community.

Section 76-9-1007: Transfer or Maintenance of Information

Establishes that, except as provided in federal law, state and local government officials cannot be prohibited from maintaining information about the immigration status of individuals or communicating that information to any other governmental entity, including the federal government, in the course of 1) verifying eligibility for public benefits, 2)

verifying claims of residence or domicile, 3) determining if the person is compliance with federal alien registration laws, or 4) determining citizenship or immigration status.

This provision is unnecessary with respect to any legitimate attempt to communicate with federal authorities for the purpose of enforcing the federal immigration laws. Federal law, 8 U.S.C. § 1373(a) and (b), already provides that such communications and the maintenance of information about immigration status cannot be restricted.

Section 76-9-1009: Federal Law and Civil Rights

Declares that the above provisions shall be implemented in a manner consistent with federal immigration laws and civil rights protections.

It is unclear what this provision could mean in practice, since several of the provisions of the bill are facially inconsistent with federal statutes, regulations, and the U.S. Constitution.

Section 76-9-2901: Transporting or Harboring Illegal Aliens

Would modify an existing law by making it a state crime to encourage or induce any immigrant to come, enter, or reside in the state illegally. A person who violates this law would be subject to a third degree felony.

This provision is unnecessary because the exact same actions (encouraging or inducing) are already prohibited under federal law. 8 U.S.C. § 1324(a)(1)(a)(iv). Furthermore, Utah peace officers have explicit authority to arrest anyone who violates the federal harboring law. 8 U.S.C. § 1324(c). States, however, lack the authority to create their own immigration crimes that supplement federal immigration law.