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April 18, 2011

The Honorable Eric Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C.20530

Dear General Holder,

I write to ask you to bring a civil action in federal court to declare invalid and enjoin the implementation of Utah H.B. 116 as pre-empted by federal law and therefore in violation of the Supremacy Clause of the United States Constitution. Your silence regarding the Utah law stands in stark contrast to your early condemnation of the Arizona law that instituted a state immigration enforcement scheme. In fact, your criticism in that instance came before you had even read the Arizona law. If the Administration is serious about having a uniform immigration policy rather than the "patchwork" of state immigration laws you profess to oppose, then the Administration needs to take action against the Utah law.

On March 15, Utah Governor Gary Herbert signed into law H.B. 116. Section 9 of this legislation creates a "guestworker program". Section 13 provides that under the program, an "undocumented individual" who has worked or lived in Utah since before May 10, 2011, may obtain a guestworker permit in order to work in the State. Section 4 provides that an "undocumented individual" is a person who lives or works in Utah who is not in compliance with 8 U.S.C. sec. 1101 with regard to presence in the United States. Presumably, this refers to illegal immigrants, aliens who are not lawfully present in the U.S.

Further, section 14 of the statute provides that guestworkers can obtain "immediate family" permits for their "undocumented" spouses and unmarried children under 21 years of age. Section 12 provides that the Utah Department of Public Safety "shall provide a procedure under which a person may hire an undocumented individual who does not hold a [guestworker or immediate family] permit pending the undocumented individual obtaining a permit within 30 days" of being hired and "an undocumented individual may not provide services under a contract for hire to a person for more than 30 days during a two-year calendar period without obtaining a [guestworker or immediate family] permit . . . ." The section also provides that an undocumented individual cannot use a permit to "obtain work or provide services in a state other than Utah."

Section 21 explicitly provides that an employer may knowingly employ an unauthorized (to work in the U.S. under federal law) alien if the alien holds a guestworker or immediate family permit and section 23 explicitly provides that an employer may not be held civilly liable under Utah law for hiring an alien with a permit whose federal legal status does not allow the employer to hire the alien.

The employment of illegal immigrants is a direct threat to American workers, as an unanimous Supreme Court realized in 1976:

> Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens; and employment of illegal aliens under such conditions can diminish the effectiveness of labor unions.[1]

Even Alexander Aleinikoff – Clinton Administration INS official and now United Nations Deputy High Commissioner for Refugees, calls it a "myth" that "there is little or no competition between undocumented workers and American workers."[2]

Thus, the Immigration and Nationality Act makes it unlawful for any employer to hire for employment in the United States an alien knowing that the alien is an unauthorized alien, an unauthorized alien being an alien who is not lawfully admitted for permanent residence or authorized to be employed by the federal government.[3] The INA also makes it unlawful for any employer to hire for employment in the United States an individual without complying with the employment eligibility verification system set out to prevent the hiring of unauthorized aliens.[4] These provisions were enacted as part of the Immigration Reform and Control Act of 1986 ("IRCA").[5] The Utah legislation is in direct conflict with IRCA.

The Supreme Court has stated that:

> [I]RCA "forcefully" made combating the employment of illegal aliens central to "[t]he policy of immigration law." . . .
>
> . . . .

[1] De Canas v. Bica, 424 U.S. 351, 356-57 (1976).
[2] T. Alexander Aleinikoff, No Illusions: Paridigm Shifting on Mexican Migration to the United States in the Post-9/11 World, 2005 Woodrow Wilson International Center for Scholars Mexico Institute at 3.
[3] See sections 274A(a)(1)(A) and (h)(3) of the Immigration and Nationality Act.
[4] See INA sec. 274A(a)(1)(B).
[5] See Pub L. No. 99-603.

> Under the IRCA regime, it is impossible for an undocumented alien to obtain employment in the United States without some party directly contravening explicit congressional policies. Either the undocumented alien tenders fraudulent identification, which subverts the cornerstone of IRCA's enforcement mechanism, or the employer knowingly hires the undocumented alien in direct contradiction of its IRCA obligations.[6]

Additionally, the INA contains a comprehensive scheme regarding which aliens may legally work in the United States, with a prime goal of protecting American workers. In addition to permanent residents, the INA provides a large number of nonimmigrant categories in which qualifying aliens may legally work in the U.S.[7] It also provides instances in which otherwise unlawfully present aliens are permitted to work.[8] The INA requires that:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined . . . that . . . there are not sufficient workers who are able, willing, qualified . . . and available at the time of application . . . at the place where the alien is to perform such skilled or unskilled labor, and . . . the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.[9]

All these laws are exclusively within Congress' constitutional powers. Article I, section 8, clause 4 of the Constitution gives Congress the power to "establish an uniform Rule of Naturalization", and the Supreme Court has long found that this provision of the Constitution grants Congress plenary power over immigration policy. As the Court found in Galvan v. Press, "that the formulation of policies [pertaining to the entry of aliens and their right to remain here] is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government."[10] And, as the Court found in Kleindienst v. Mandel, "[t]he Court without exception has sustained Congress' 'plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.'"[11]

Congress has clearly exercised its constitutionally authority through the INA, as your Justice Department argued in its complaint filed against the Arizona law:

> Congress has exercised its authority to make laws governing immigration and the status of aliens within the United States by enacting the various provisions of the INA and other laws regulating immigration. Through the INA, Congress set forth the framework by which the federal government determines which aliens may be eligible to enter and reside in the United States . . . conditions of residence, and employment of aliens . . . .
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> . . . .

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[6] Hoffman Plastics v. National Labor Relations Board, 535 U.S. 137, 147-48 (2002).
[7] See, e.g., INA secs. 101(a)(15)(H)(i)(b), (H)(ii)(b), (L).
[8] See, e.g., INA sec. 244(a)(1)(B).
[9] INA sec. 212(a)(5)(A)(i).
[10] 347 U.S. 522, 531 (1954).
[11] 408 U.S. 753, 766 (1972) (quoting Boutilier v. INS, 387 U.S. 118, 123 (1967)).

> Congress has further exercised its authority over immigration and the status of aliens by prohibiting the hiring of aliens not authorized to work in the United States.[12]

Additionally, your complaint stated that there is a "comprehensive federal scheme of sanctions related to the employment of unauthorized aliens . . . ."[13]

As your complaint against Arizona argues, when a state so intrudes on Congress' powers, the state action is preempted by federal law and in violation of the Constitution's Supremacy clause:

> Because [the Arizona law] attempts to set state-specific immigration policy, it legislates in an area constitutionally reserved to the federal government, conflicts with the federal immigration laws and federal immigration policy . . . and impedes the accomplishment and execution of the full purposes and objectives of Congress, and is therefore preempted.[14]

The United States thus sought a motion for preliminary injunction against the Arizona law, stating that:

> In our constitutional system, the power to regulate immigration is exclusively vested in the federal government. . . . The Constitution and federal law do not permit the development of a patchwork of state and local immigration policies throughout the country. Although a state may adopt regulations that have an indirect or incidental effect on aliens, a state may *not* establish its own immigration policy or enforce state laws in a manner that interferes with federal immigration law.
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> . . . .
>
> Dissatisfied with the federal government's response to illegal immigration, Arizona has sought . . . to override the considered judgment of Congress regarding the formulation of immigration policy . . . . [The Arizona law is] preempted, because . . . it is an unlawful attempt to set immigration policy at the state level [and] the policy it advances conflicts with federal objectives animating federal administration and enforcement of the INA . . . . Standing alone, Arizona's state-level immigration policy is intolerable under the Constitution and federal law. But the court should also consider the consequences that would follow were Arizona's approach to be allowed. The Supremacy Clause protects the federal system against the chaos that would result were states and localities across the country allowed to fashion their own immigration schemes according to their own (potentially conflicting) policy choices and subject the federal government to the demands of multiple enforcement priorities.
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> . . . .

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[12] U.S. v. Arizona, cv-10-1413-PHX-SRB (D. Ariz.), complaint filed by the United States at 5 (count 17), 11 (count 29)(July 6, 2010)(emphasis added).
[13] Id. at 21 (count 54).
[14] Id. at 14-15 (count 36).

> By violating the Constitution's structural reservation of authority to the federal government to set immigration policy, [the Arizona law] effects ongoing irreparable harm to the constitutional order. Indeed, the Supreme Court has suggested that irreparable harm inherently results from the enforcement of a preempted state law. [15]

Your Justice Department made these arguments in the context of an Arizona law designed merely to complement and assist in the enforcement of federal immigration law. Therefore, you must agree that the Utah law – which directly and intentionally subverts the letter and spirit of federal immigration law – is itself pre-empted by federal law and is unconstitutional. Therefore I would hope that your Justice Department will act accordingly and bring a civil action in federal court to declare invalid and enjoin the implementation of Utah H.B. 116 as pre-empted by federal immigration law.

Under normal circumstances, the Justice Department should take legal action against the Utah law for usurping Congress' constitutional authority to determine national immigration policy. But it is even more important to do so during these tough economic times. Again, as the Supreme Court has stated, "[e]mployment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs . . . ."[16] Jobs are scarce and families are worried. The most vulnerable American workers have been especially hard hit by the ongoing jobs recession. The unemployment rate for native-born Americans without a high school degree is 20.8%, and 32.4% of such Americans are either unemployed, too discouraged to seek work, or forced to work part time.[17]

I am, however, apprehensive about whether you will seek federal court action against the Utah law based on this Administration's track record. A number of states and localities are, and have been for years, in violation of federal immigration law and yet the Justice Department has not sought action against any of them:

- The Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA") bars state and local entities or officials from prohibiting, or in any way restricting, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service (now the Department of Homeland Security) information regarding the citizenship or immigration status, lawful or unlawful, of any individual.[18] Despite this provision, many sanctuary cities in fact prohibit their law enforcement agencies from providing the names of illegal immigrants to DHS. The Department of Justice has never taken any legal action against a sanctuary city for violating IIRIRA.

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[15] U.S. v. Arizona, cv-10-1413-PHX-SRB (D. Ariz.), motion by the United States for preliminary injunction and memorandum of law in support thereof at 1, 13, 47 (July 6, 2010)(emphasis in original, footnote and citation omitted).

[16] De Canas v. Bica at 356.

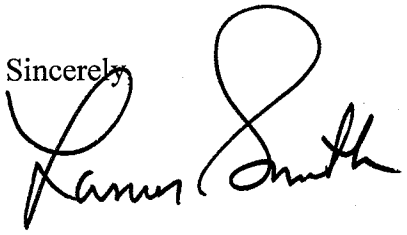
[17] See Steve Camarota, From Bad to Worse: Unemployment and Underemployment Among Less-Educated U.S.-Born Workers, 2007-2010, 2010 Center for Immigration Studies at 6, 7 (figures for second quarter of fiscal year 2010).

[18] See section 642 of division C of Pub. L. 104-208.

- IIRIRA provides that "an alien who is not lawfully present in the United States shall not be eligible on the basis of residence within a State (or a political subdivision) for any postsecondary education benefit unless a citizen or national of the United States is eligible for such a benefit (in no less an amount, duration, and scope) without regard to whether the citizen or national is a such a resident."[19] Despite this provision, a number of states have enacted laws offering in-state tuition to illegal immigrants.[20] Just last week, the State of Maryland took this step.[21] The Department of Justice has refused to go to federal court to enjoin the actions of these states.

If you choose not to seek action against the Utah law, it will be perceived that you are basing your decisions on your own policy preferences rather than on constitutional principle. We would be able to gather that the Administration's definition for "patchwork of immigration enforcement" is limited to those who seek to enforce federal immigration law and does not include those who seek to undermine it. For the sake of consistency, it is time to end the double standard. Because of this concern and because of Justice Department inaction in the past in defending the supremacy of federal immigration law, I ask that you assure me by May 1 that the Department will bring a civil action against the Utah law. I appreciate your attention to this very important matter.

Sincerely,



Lamar Smith
Chairman

cc: The Honorable John Conyers, Jr.

[19] Section 505 of division C of Pub. L. 104-208.
[20] See Kris Kobach, The Senate Immigration Bill Rewards Lawbreaking: Why the DREAM Act is a Nightmare 2006 Heritage Foundation at 3.
[21] See Julie Bykowicz and Annie Linskey, Lawmakers Approve Tuition Break for Illegal Immigrants, New Sales Tax on Alcohol, Baltimore Sun, April 12, 2011.