

# **Attorney General's Report**

Concerning the Recovery of Federal  
Reimbursement for Costs to the State of  
Colorado Associated with Illegal Immigration



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## I. INTRODUCTION

A special session of the Colorado General Assembly in July 2006 resulted in a number of legislative measures related to Colorado's efforts to address problems associated with illegal immigration. Among the new laws, the General Assembly approved House Bill 06S-1014, now codified as C.R.S. § 24-19.7-102, which states that "the Attorney General, on behalf of the State of Colorado, shall pursue all available remedies to recover any moneys owing from the federal government to the state for the reimbursement of costs incurred by the state in dealing with illegal immigration."<sup>1</sup>

The law also requires this Office to file at the end of 2006 and 2007 "a written report with the Governor, the President of the Senate, the Speaker of the House of Representatives, and the Chair of the Joint Budget Committee that details the progress and status of the Attorney General's pursuit of remedies." This report is hereby issued to the above officials, the Colorado congressional delegation, and the public.

## II. BACKGROUND

The illegal immigrant population in Colorado more than tripled between 1996 and 2003, and last year Colorado was estimated to have 263,000 illegal immigrants.<sup>2</sup> Lax federal immigration policy and enforcement have led to this increase in illegal immigration, but it is primarily state and local governments that face the economic and social consequences. Illegal immigrants impose a significant and increasing financial burden on Colorado because the state provides services to them such as emergency medical care, prisons, and public schools. One study concluded that Coloradans pay \$1 billion per year for illegal immigrant incarceration, Medicaid, and education, and that illegal immigrants in Colorado result in a loss for United States citizens of more than \$2 billion per year.<sup>3</sup>

House Bill 1014 seeks to recover federal funding to offset illegal immigration expenses. This report details the two potential sources of funding: first, legislatively created federal fund sources which exist to assist states with illegal immigration costs, and second, the possibility of litigation against the federal government for monetary damages.

Colorado should continue to work to maximize federal funding to assist with onerous and rising illegal immigration costs. As a legal matter, however,

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<sup>1</sup> Colo. Rev. Stat. § 24-19.7-102 (1) (2006).

<sup>2</sup> Federation for American Immigration Reform, *Extended Immigration Data for Colorado*, <[http://www.fairus.org/site/PageServer?pagename=research\\_research0072](http://www.fairus.org/site/PageServer?pagename=research_research0072)>.

<sup>3</sup> Donald Rice, *A Compendium of Illegal Immigration Data*, (March 28, 2006), <[www.defendcoloradonow.org](http://www.defendcoloradonow.org)>.

there simply are no “moneys owing from the federal government to the state for the reimbursement of costs incurred by the state in dealing with illegal immigration” that the state can recover. Our research shows that there are no outstanding debts or obligations for Colorado to collect, through litigation or otherwise.

Unfortunately, this means that most of the expenses associated with illegal immigration must be absorbed by the states under current law. The best solution to the problems caused by illegal immigration is for the federal government to enforce existing immigration laws, pass stronger immigration laws, and to reduce the number of illegal immigrants allowed to enter and stay in the United States. Colorado’s recent legislation requiring state agencies to verify citizenship of public benefit recipients may help to reduce costs by reducing the numbers of illegal immigrants receiving state services.<sup>4</sup>

### III. STATUTORY SOURCES OF FUNDING

Congress has, at various times, authorized and appropriated programs designed to provide federal funds to states and local governments for the purposes of reimbursing expenses related to illegal immigration. Appropriations to such programs are not large enough to permit full reimbursement of expenses, and funds are typically apportioned based on a cost-estimate formula. Colorado has no legally-enforceable claim to full reimbursement under these programs. Some statutes explicitly subject funding to appropriations,<sup>5</sup> but in any case, courts have determined that the decision to fund is one committed to the discretion of federal agencies.<sup>6</sup>

Though Colorado, like all other states, is not fully compensated under these programs, it does appear to be receiving an equitable amount when compared to other states.<sup>7</sup> The number of illegal immigrants served is the biggest variable in funding reimbursement levels, and identifying them is a challenge for all applicants. For example, in a study of medical care costs, the United States General Accounting Office notes that “[h]ospitals generally do not collect information on patients’ immigration status, thereby making it difficult to identify patients who are undocumented aliens and the costs

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<sup>4</sup> Colo. Rev. Stat. § 24-76.5-101 to 103 (2006) (House Bill 06S-1023).

<sup>5</sup> 8 U.S.C. § 1365 (2006), 8 U.S.C. § 1369 (2006).

<sup>6</sup> See *New Jersey v. United States*, 91 F.3d 463 at 471 (3<sup>rd</sup> Cir. 1996) (citing *Lincoln v. Vigil*, 508 US 182, 192 (1993)), *California v. United States*, 104 F.3d 1086 at 1093 (9<sup>th</sup> Cir. 1997) (citing *Lincoln*, 508 US at 192), and *California v. Department of Justice*, 114 F.3d 1222 (D.C. Cir. 1997).

<sup>7</sup> Colorado ranks 12<sup>th</sup> among states receiving a State Criminal Alien Assistance Program payment.

Colorado Department of Corrections, *SCAAP Statistical Bulletin No. OPA 06-5*, <<http://www.doc.state.co.us/Statistics/pdfs/OPABulletins/Obul0605.pdf>>.

associated with treating them.”<sup>8</sup> Likewise, the Colorado Department of Corrections often does not have federal information to determine the official immigration status of an offender, and in those cases rely on an inmate’s self-reported citizenship.

The three largest cost areas for states resulting from illegal immigration are incarceration, health care and education. The following paragraphs briefly describe the federal reimbursement programs available in each of these areas.

#### **A. State Criminal Alien Assistance Program**

The State Criminal Alien Assistance Program (SCAAP) provides federal funds to states for certain qualifying costs of incarcerating illegal aliens.<sup>9</sup> Inmates for whom funding is available are illegal immigrants with at least one felony or two misdemeanor convictions who are incarcerated for at least four consecutive days during the year. The award formula is based on annual costs for salaries of prison employees needed to handle eligible inmates, and then state or county applicants receive a proportionate amount of the annual federal appropriation. In 2005, SCAAP applicants received 33.52% of their eligible salary expenses, which resulted in a payment of \$2,358,707 to the Colorado Department of Corrections (CDOC).<sup>10</sup> CDOC estimates its total cost of incarceration for illegal immigrants for the same period to be \$35,757,952.

#### **B. Emergency Medical Care**

A state’s receipt of federal Medicaid funds is conditioned upon its agreement to provide emergency medical services to illegal immigrants.<sup>11</sup> States participate in Medicaid voluntarily.<sup>12</sup> Congress provides some reimbursement for emergency medical care given to illegal immigrants.<sup>13</sup> The federal Medicare Prescription Drug, Improvement, and Modernization Act of 2003 appropriated \$250 million for each of fiscal years 2005 through 2008 for payments to hospitals and other providers for emergency medical services furnished to illegal immigrants within their first five years of arrival

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<sup>8</sup> United States General Accounting Office, *Undocumented Aliens: Questions Persist about Their Impact on Hospitals’ Uncompensated Care Costs*, (May 2004), <<http://www.gao.gov/new.items/d04472.pdf>>.

<sup>9</sup> 8 U.S.C. § 1231(i) (2006).

<sup>10</sup> Colorado Department of Corrections, *SCAAP Statistical Bulletin No. OPA 06-5*, <<http://www.doc.state.co.us/Statistics/pdfs/OPABulletins/Obul0605.pdf>>. SCAAP percentage information available at <<http://www.ojp.usdoj.gov/BJA/grant/05SCAAP.html>>.

<sup>11</sup> 42 U.S.C. § 1396b(v) (2006) and see 42 C.F.R. 435.406.

<sup>12</sup> *Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498 (1990) cited by *California*, 104 F.3d at 1092 and *Padavan v. United States*, 82 F.3d 23 at 29 (2d Cir. 1996).

<sup>13</sup> Medicaid also makes disproportionate share hospital (DSH) adjustments to rates for qualified hospitals serving large numbers of low-income patients, including illegal aliens. Section 1001(d) of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003.

in the United States.<sup>14</sup> Funds are distributed based on estimates of the number of undocumented immigrants residing in the state. In fiscal year 2006 Colorado received \$3,433,957.<sup>15</sup>

The Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 authorized federal reimbursement for specific emergency medical care outside of Medicaid and certain ambulance service provided to illegal immigrants.<sup>16</sup> Congress has not funded either program.

### C. Public Education

The United States Supreme Court ruled that it would be unconstitutional for any state or school district to deny K-12 education to a child residing in that state or school district on the basis of the child's being an illegal immigrant.<sup>17</sup> The costs of educating illegal immigrants and the children of illegal immigrants are substantial, but because the federal government does not attempt to estimate the number of illegal immigrants in public schools, it is difficult to accurately estimate the costs.<sup>18</sup> Currently no federal program is authorized to reimburse states for costs associated with public education for illegal immigrants, although there have been recent legislative proposals in Congress to do so.

## IV. LITIGATION

In the mid 1990s, six states separately sued the federal government to require enforcement of the federal immigration laws and monetary reimbursement for state expenses incurred by providing services to illegal aliens.<sup>19</sup> The lawsuits shared a common premise: the federal government's deficient enforcement of immigration laws permitted illegal immigrants to enter and remain in the United States, and therefore the federal government

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<sup>14</sup> Pub. L. 108-173, §1011 (2003).

<sup>15</sup> State allocation statistics available at <[http://www.cms.hhs.gov/UndocAliens/downloads/fy06\\_state\\_alloc.pdf](http://www.cms.hhs.gov/UndocAliens/downloads/fy06_state_alloc.pdf)>.

<sup>16</sup> 8 U.S.C. § 1369 (2006).

<sup>17</sup> *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>18</sup> See United States General Accounting Office Report, *Illegal Alien Schoolchildren, Issues in Estimating State-by-State Costs*, (June 2004) <<http://www.gao.gov/new.items/d04733.pdf>>.

<sup>19</sup> *Chiles v. United States*, 874 F. Supp. 1334 (S.D. Fla. 1994) (dismissing Florida's claims), aff'd, 69 F.3d 1094 (11th Cir. 1995), Cert. denied, 517 U.S.1188 (1996); *Padavan v. United States*, No. 94-CV-1341 (N.D.N.Y., Apr. 18, 1995) (dismissing New York's claims), aff'd, 82 F.3d 23 (2d Cir. 1996); *New Jersey v. United States*, No. 94-cv-03471 (D.N.J. Aug. 3, 1995) (dismissing New Jersey's claims), aff'd, 91 F.3d 463 (3d Cir. 1996); *California v. United States*, No. 94-0674-K (S.D. Cal. Mar. 3, 1995) (dismissing California's claims), aff'd, 104 F.3d 1086 (9th Cir. 1997), Cert. denied, 522 U.S. 806 (1997); *Arizona v. United States*, No. 94-0866 (D. Ariz. Apr. 18, 1995) (dismissing Arizona's claims), aff'd, 104 F.3d 1095 (9th Cir. 1997), Cert. denied, 522 U.S. 806 (1997); *Texas v. United States*, No. B-94-228 (S.D. Tex. Aug. 7, 1995) (dismissing Texas' claims), aff'd, 106 F.3d 661 (5th Cir. 1997); *California v. Department of Justice*, No. 96-CV-00411 (dismissing California's claims), aff'd 114 F.3d 1222 (D.C. Cir. 1997).

should reimburse the states for the costs of providing necessary public services to those illegal immigrants. The states utilized various legal arguments, which are detailed herein.

In every case the district courts dismissed the claims under Federal Rule of Civil Procedure 12(b)(6), which permits dismissal of a motion for failure to state a claim on which relief can be granted.<sup>20</sup> Under this rule, allegations in the plaintiff's complaint are presumed true<sup>21</sup> and the complaint is dismissed only if the law does not provide a remedy for the plaintiff even if the allegations are true.<sup>22</sup> In every case the courts of appeals affirmed the dismissals on appeal. The United States Supreme Court denied every request to review these decisions.

The initial legal hurdle when seeking monetary damages from the federal government is that the doctrine of sovereign immunity bars states from suing the federal government for monetary damages, restitution or reimbursement, absent Congress' explicit waiver of immunity.<sup>23</sup> Congress has not explicitly waived its immunity, and this would be a significant legal problem if a court were to hear Colorado's claims.

The states made claims against the federal government on the constitutional and statutory grounds listed below.

## **A. Potential Constitutional Claims**

The following Constitutional claims were dismissed as nonjusticiable political questions, and the dismissals upheld by the appellate courts:

1. The federal government has exclusive power over immigration pursuant to Article I, Section 8 of the U.S. Constitution (the Naturalization Clause). Claim: The federal government has an affirmative duty to protect states from harm caused by illegal immigrants, and should reimburse states for costs incurred as a consequence of the federal government's failed immigration policy. Dismissal upheld by 11<sup>th</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Circuit Courts.<sup>24</sup>
2. Article IV, Section 4 of the U.S. Constitution requires the federal government to protect the states against invasion. Claim: By allowing the

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<sup>20</sup> Fed.R.Civ.P. 12(b)(6), 28 U.S.C.A.

<sup>21</sup> *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), *Curtis Ambulance of Fla., Inc. v. Board of County Comm'rs*, 811 F.2d 1371, 1374 (10th Cir.1987).

<sup>22</sup> *Conley v. Gibson*, 355 U.S. 41 (1957).

<sup>23</sup> *California*, 104 F.3d at 1095, citing *Block v. North Dakota*, 461 U.S. 273 (1983).

<sup>24</sup> Dismissed by *Padavan*, 82 F.3d at 27; *New Jersey*, 91 F.3d at 469; *California*, 104 F.3d at 1091; and *Texas*, 106 F.3d at 665. Even assuming justiciability, *arguendo*, case would be dismissed on merits by *New Jersey*, 91 F.3d at 467; *California*, 104 F.3d at 1091; and *Texas*, 106 F.3d at 665.

influx of illegal immigrants into the state, the federal government failed to protect the state against invasion. Dismissal upheld by the 11<sup>th</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and 9<sup>th</sup> Circuit Courts.<sup>25</sup>

3. Article IV, Section 4 of the U.S. Constitution guarantees a republican form of government. Claim: Federal immigration policy forces states to spend money on services to illegal immigrants, and therefore infringes on the right of the state and its voters to determine the spending priorities of state government and violates the guarantee of a republican government. Dismissal upheld by the 11<sup>th</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 9<sup>th</sup>, and 5<sup>th</sup> Circuit Courts.<sup>26</sup>

4. The Fifth Amendment of the U.S. Constitution prohibits the taking of state property without just compensation. Claim: Forcing the state to spend state tax funds and revenues to provide services to illegal immigrants amounts to the taking property without just compensation. Dismissal upheld by the 3<sup>rd</sup> Circuit Court.<sup>27</sup>

5. The Tenth Amendment of the U.S. Constitution limits the federal government's powers to those enumerated in the Constitution. Claim: The federal government is coercing the state into providing social, educational, health, and correctional services to illegal immigrants, which usurps the right of the state to determine how its funds will be spent and therefore violates the Tenth Amendment. Dismissal upheld by the 3<sup>rd</sup> and 9<sup>th</sup> Circuit Courts.<sup>28</sup> The 2<sup>nd</sup> and 5<sup>th</sup> Circuits did not find a political question, but upheld dismissal on merit.<sup>29</sup>

6. The Tenth Amendment and Guarantee Clause require that states be treated equally. Claim: Federal restrictions against providing Medicaid and Aid to Families with Dependent Children benefits to illegal immigrants result in the state bearing an unfair burden due to a disproportionately large number of illegal immigrants. (At the time of the lawsuits filed in the 1990s,

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<sup>25</sup> *Chiles*, 69 F.3d at 1097; *Padavan*, 82 F.3d at 28; *New Jersey*, 91 F.3d at 469; and *California*, 104 F.3d at 1090. Even assuming justiciability, *arguendo*, case would be dismissed on merits by *Chiles*, 69 F.3d at 1097; *Padavan*, 82 F.3d at 28; *New Jersey*, 91 F.3d at 468; and *California*, 104 F.3d at 1091 (“Invasion” requires armed hostility from another political entity intending to overthrow our government).

<sup>26</sup> *Chiles*, 69 F.3d at 1097; *Padavan*, 82 F.3d at 28; *New Jersey*, 91 F.3d at 469; *California*, 104 F.3d at 1091; and *Texas*, 106 F.3d at 667. Even assuming justiciability, *arguendo*, case would be dismissed on merits by *Padavan*, 82 F.3d at 28; *New Jersey*, 91 F.3d at 468; *California*, 104 F.3d at 1091; and *Texas*, 106 F.3d at 667.

<sup>27</sup> *New Jersey*, 91 F.3d at 469. Even assuming justiciability, *arguendo*, case would be dismissed on merits by *New Jersey*, 91 F.3d at 468.

<sup>28</sup> *New Jersey*, 91 F.3d at 469; *California*, 104 F.3d at 1093. Even assuming justiciability, *arguendo*, case would be dismissed on merits *New Jersey*, 91 F.3d at 467; *California*, 104 F.3d at 1093. (The courts found no federal coercion; states participate voluntarily in Medicare, the education requirement derives from the Constitution, and the obligation to incarcerate illegal immigrants stems from state law.)

<sup>29</sup> *Texas*, 106 F.3d at 666; and *Padavan*, 82 F.3d at 29.

the states that sued were six of the seven states with the largest illegal immigrant populations.<sup>30)</sup> Dismissal upheld by the 11<sup>th</sup> Circuit Court.<sup>31</sup>

7. The Constitution provides that the federal government “may not intrude on the fundamental sovereignty of a State.”<sup>32</sup> Claim: The federal government violates this principle by failing to adequately enforce illegal immigration laws and refusing to reimburse states. Dismissal upheld by the 3<sup>rd</sup> Circuit Court.<sup>33</sup>

8. The Constitution requires a judicial remedy where a there is no political remedy.<sup>34</sup> Claim: Judicial relief is required because there is an absence of remedy through the political process and political and practical remedies have been exhausted and further efforts would be futile. Dismissal upheld by the 3<sup>rd</sup> Circuit Court.<sup>35</sup>

Almost all of these constitutional claims brought against the federal government were dismissed as “nonjusticiable political questions.” A decision dismissing a case as a political question is not a decision on the merits; rather, it is an abstention from judicial review.<sup>36</sup> Three factors that each independently identify a political question were present throughout these cases: 1) “a textually demonstrable constitutional commitment of the issue to a coordinate political department,” 2) “a lack of judicially discoverable and manageable standards for resolving it,” and 3) “the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government.”<sup>37</sup> The courts agreed generally that there is a lack of judicially discoverable standards for determining whether federal immigration control efforts are constitutionally adequate, and found the preceding constitutional claims to be nonjusticiable political questions. Essentially, the claims against the federal government are questions of foreign policy, and the courts determined that judicial intervention would be inappropriate. In several cases, the courts went on to say that even if the claims were justifiable, they would be dismissed for lack of merit.

In one case, the only court to hear the claim ruled that the claim was justiciable. The federal government has exclusive power over immigration

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<sup>30</sup> California, Florida, Texas, New York, Illinois, Arizona and New Jersey. *Chiles*, 874 F.Supp. at 1335, citing The Urban Institute, *Fiscal Impacts of Undocumented Aliens: Selected Estimates for Seven States*, (September 1994).

<sup>31</sup> *Chiles*, 69 F.3d at 1097.

<sup>32</sup> New Jersey made this claim without a citing any particular provision of the U.S. Constitution.

<sup>33</sup> *New Jersey*, 91 F.3d at 469.

<sup>34</sup> New Jersey made this claim without a citing any particular provision of the U.S. Constitution.

<sup>35</sup> *New Jersey*, 91 F.3d at 469.

<sup>36</sup> *Texas*, 106 F.3d at 665, citing *United States Dep’t of Commerce v. Montana*, 503 U.S. 442 (1992).

<sup>37</sup> *New Jersey*, 91 F.3d at 469 citing *Baker v. Carr*, 369 U.S. 186, 217 (1962).

pursuant to Article I, Section 8 of the U.S. Constitution (the Naturalization Clause). A claim that this clause alone obligates the federal government to reimburse states for expenditures made for legal and illegal immigrants was dismissed for lack of merit, and the dismissal upheld by the 2<sup>nd</sup> Circuit.<sup>38</sup>

## **B. Potential Statutory Claims**

The states' statutory claims were very similar to each other conceptually; the states alleged that the federal government violated immigration statutes by failing to take action to reimburse states or manage or deport illegal immigrants. All ripe claims were dismissed under the Administrative Procedure Act ("APA").<sup>39</sup> "[A]n agency's decision not to take enforcement actions is unreviewable under the Administrative Procedure Act because a court has no workable standard against which to judge the agency's exercise of discretion."<sup>40</sup>

The following statutory claims were dismissed, and the dismissals upheld by the appellate courts:

1. The United States Attorney General has the power and the duty to deport illegal immigrants under 8 USC § 1103. Claim: the Attorney General is abusing his discretion by failing to enforce immigration laws and deport illegal immigrants, and should be required to deport illegal immigrants or provide equitable restitution to the state. Dismissal upheld by the 11<sup>th</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Circuit Courts.<sup>41</sup>
2. Subject to appropriations, the Attorney General shall reimburse states for cost of illegal immigrant incarceration for felons pursuant to 8 U.S.C. § 1365(a). Claim: Although money is not specifically appropriated for this purpose, the Attorney General should use available funds from department sources to reimburse states under this statute. Dismissal upheld by the 3<sup>rd</sup> and 9<sup>th</sup> Circuit Courts.<sup>42</sup>
3. SCAAP requires the federal government to either compensate the state for incarceration of illegal immigrants or take custody of the prisoner.<sup>43</sup>

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<sup>38</sup> *Padavan*, 82 F.3d at 26.

<sup>39</sup> 5 U.S.C. § 701-706.

<sup>40</sup> *Texas*, 106 F.3d at 667 citing *Heckler v. Chaney*, 470 U.S. 821 (1985).

<sup>41</sup> *Chiles*, 69 F.3d at 1096; *Padavan*, 82 F.3d at 29; and *Texas*, 106 F.3d at 668 (Policy choice not reviewable under APA, no abdication of duty).

<sup>42</sup> *New Jersey*, 91 F.3d at 471; and *California*, 104 F.3d at 1093 (The decision to appropriate or not appropriate funds for the purposes of reimbursing states is one "committed to agency discretion" and is not reviewable under the APA).

<sup>43</sup> 8 U.S.C. § 1252(j)(1996) (subsequently this section was redesignated by Pub. L. 104-208, § 306(a)(1) as 8 U.S.C. § 1231(i)).

Claim: The federal government fails to fully compensate the state, and therefore should increase compensation or take custody of illegal immigrant prisoners. Dismissal upheld by the DC Circuit Court.<sup>44</sup>

4. Pursuant to 8 U.S.C. §1326, previously deported illegal immigrants commit a crime if they reenter the United States. Claim: The Attorney General is only prosecuting deported illegal immigrants who are serious repeat offenders and should be required to prosecute all previously deported illegal immigrants. Dismissal upheld by 9<sup>th</sup> Circuit Court.<sup>45</sup>

5. 8 U.S.C. § 1252(i) provided that the Attorney General shall begin any deportation proceeding as expeditiously as possible after the date of conviction for illegal immigrants subject to deportation because of their offense. Federal policy, however, was not to commence deportation proceedings until shortly before convicted illegal aliens were to be released from confinement. Claim: The federal government is not in compliance with the statute because deportation proceedings are not initiated quickly enough. Dismissal upheld by the 9<sup>th</sup> Circuit Court.<sup>46</sup>

6. 8 U.S.C. § 1252(a)(2)(A) provided that the United States Attorney General shall take custody of any illegal immigrant with a felony conviction pending determination of deportment. Claim: The federal government has failed to take custody of all such prisoners. Dismissal upheld by 9<sup>th</sup> Circuit Court.<sup>47</sup>

7. The United States Attorney General had six months following a final deportation order to effect the departure of an illegal immigrant from the county under 8 U.S.C. § 1252(c). Claim: The federal government failed to effectively execute final orders of deportation pursuant to this section by choosing to drop illegal immigrants at the border rather than escorting them across. Dismissal upheld by 9<sup>th</sup> Circuit Court.<sup>48</sup>

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<sup>44</sup> *California*, 114 F.3d 1222 (The agency has no obligation to provide funds from other sources, and the federal government is not obligated to take responsibility for incarcerating immigrants if it fails to reimburse for costs).

<sup>45</sup> *California*, 104 F.3d at 1094.

<sup>46</sup> *California*, 104 F.3d at 1094. This provision was deleted when Congress restructured the deportation statute. Pub. L. 104-208, § 306(a)(2).

<sup>47</sup> *California*, 104 F.3d at 1094. This provision was deleted when Congress restructured the deportation statute. Pub.L. 104-208, § 306(a)(2).

<sup>48</sup> *California*, 104 F.3d. at 1095, citing *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). This provision was deleted when Congress restructured the deportation statute. Pub.L. 104-208, § 306(a)(2).

## C. Referendum K

During last summer's special session, the General Assembly also passed House Bill 06S-1022, which referred to the voters a measure known as Referendum K, requiring the Attorney General to "initiate or join other states in a lawsuit against the United States Attorney General to demand the enforcement of all existing federal immigration laws by the federal government."<sup>49</sup> Colorado voters approved Referendum K on November 7, 2006.

Because a Referendum K suit would seek an injunction requiring enforcement of immigration laws by the federal government rather than the reimbursement for costs, it is beyond the scope of this Report. Nevertheless, the decisions in the prior state cases are relevant to any similar lawsuit against the federal government, including one filed pursuant to Referendum K. Some of the states requested both monetary reimbursement and injunctive relief requiring the federal government to enforce immigration laws or otherwise take action that would lessen the fiscal burden of illegal immigrants on the state.<sup>50</sup>

As the discussion above shows, any lawsuit brought by Colorado pursuant to Referendum K faces serious legal challenges. Every prior case filed by a state seeking enforcement of immigration laws or additional reimbursement of the costs of illegal immigration has been rejected.<sup>51</sup>

In considering remedies, the 11<sup>th</sup> Circuit Court observed that the United States Supreme Court has held that "there is a presumption of unreviewability of a [federal] agency's decision not to undertake enforcement action."<sup>52</sup> In *Chiles*, the state of Florida admitted that a "broad-scale injunction against the United States to enforce immigration laws may well be beyond the competence of the court as it would involve the Court in matters relating to the conduct of foreign relations and the deployment of the military forces of the United States."<sup>53</sup>

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<sup>49</sup> Colo. Rev. Stat. § 24-19.8-101 (2006).

<sup>50</sup> *Chiles*, 69 F.3d 1094; *California*, 104 F.3d 1086; and *California*, 114 F.3d 1222.

<sup>51</sup> The specific language of Referendum K may make a successful suit by Colorado even more difficult. Though the law requires the suit to be filed against the United States Attorney General, the United States Attorney General no longer is responsible for enforcing the federal immigration laws. That responsibility was shifted to the Department of Homeland Security. Pub. L. 107-296 § 441 (2002).

<sup>52</sup> *Chiles*, 69 F.3d at 1340 citing *Heckler*, 470 U.S. 821 (presumption may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers).

<sup>53</sup> *Chiles* 874 F. Supp. at 1339. The *Chiles* court therefore restricted its discussion to equitable restitution.

## V. RECOMMENDATIONS

### 1. Statutory Sources of Funding

The best prospect for Colorado to obtain increased federal funding of the costs of illegal immigration is Congressional action to fully fund programs to offset the high costs of illegal immigration imposed on state and local governments.

There are a number of bills in development or introduced in Congress regarding programs to provide funding to states for the costs of providing services to illegal immigrants. Executive department and legislative leaders in Colorado should lobby Congress in support of such measures. They should specifically seek to engage members of Colorado's congressional delegation in this effort. The Colorado Attorney General is a member of the U.S. Attorney Generals' Executive Working Group and has raised the issue of inadequate reimbursement to the state for the costs of illegal immigration in that forum. He will continue to press the issue with appropriate federal authorities, including the Colorado congressional delegation.

Meanwhile, the relevant Colorado departments should continue to review the existing sources of federal funding in SCAAP and the Emergency Medical Care program to ensure that every measure is taken to maximize state and hospital funding under the allocation formulas, and review state agency practices and applications related to statutory funds. The Colorado Attorney General's Office will request departments to provide a report on the efforts they have taken in this regard.

### 2. Litigation for Reimbursement of Costs of Illegal Immigrant Services

The notion behind the other states' claims against the federal government is the same one that led Colorado's legislature to request this report. The federal government has the primary authority to enforce federal immigration laws, and the inadequate enforcement of these laws allows illegal immigrants to continue to populate Colorado, forcing a burden on the state to provide services to these illegal immigrants. While this premise continues to motivate our state government to find ways to reduce the outflow of state funds for services to illegal immigrants, the fact is that the viability of legal claims to recover state expenses related to illegal immigrants is not promising.

The Attorney General's Office has contacted every Attorney General in the United States on this matter; we are aware of no other states currently

pursuing a lawsuit, and none has expressed an interest in joining a Colorado lawsuit.

Unless directed otherwise by the Colorado legislature by the repeal of C.R.S. § 24-19.8-101, the Attorney General's Office will continue to pursue a lawsuit pursuant to the direction of Referendum K, but successful recovery of costs or injunctive relief against the federal government is unlikely.

### **3. Further State Action to Reduce Immigration Costs**

House Bill 1014 only directs the Attorney General to investigate federal reimbursement for state immigration costs, and this office has determined that the state's options for seeking increased federal funding under current law are limited. The Attorney General's Office notes that our state government has other means of easing the burden on the state budget caused by providing services to illegal immigrants, and encourages the Colorado legislature to continue to explore ways to limit those expenditures and discourage illegal immigration in Colorado. Colorado's Attorney General is committed to working to reduce illegal immigration in Colorado.

## **VI. CONCLUSION**

The federal government is responsible for controlling the Nation's borders. Its failure to effectively do so has, as the General Assembly recognized in House Bill 1014, led to increasing numbers of illegal immigrants coming to Colorado, imposing many costs on the taxpayers of this state.

The legal remedies available to the State, however, are very limited. Unless Congress has specifically appropriated funds for reimbursement, courts have held that states may not extract payment from the federal government. Moreover, our review shows that where Congress has created and funded programs to reimburse states, as it has with SCAAP and Medicaid, Colorado's agencies have pursued those funds that are available to the state. Therefore, no moneys appear to be legally owing from the federal government to the state.

The Office of the Attorney General will continue to monitor this situation to ensure that the state receives all it is legally entitled to. In the meantime, we would suggest that the only available remedy for increasing federal reimbursement of the costs associated with illegal immigration is action by the United States Congress. The State of Colorado should also continue to focus on ways to reduce such costs.