

June 1, 2009



## Rebalance of Power

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The next issue of  
Capitol Journal will be  
available on June 8th.

### Top Story

*Under the Bush administration, the federal government took great pains to preempt state laws regulating everything from banks to car makers. Now, under President Obama, that is all changing.*

## SNCJ Spotlight

### Obama restores states' regulatory authority

Under the Bush administration, the federal government was king. One indication of that is the slew of rules the administration issued preempting state laws regulating everything from banking to the manufacture of pharmaceuticals and automobiles. The pro-preemption stance was a boon to the regulated industries, sparing them from having to deal with a patchwork of state laws as well as costly product-liability lawsuits.

But that all changed last month when President Obama issued a memo directing federal agencies and departments not only to avoid preempting state



law without “sufficient legal basis” when drafting new regulations but also to make sure every regulation passed in the last 10 years meets the same standard, using the amendment process if necessary.

“In recent years...executive departments and agencies have sometimes announced that their regulations preempt State law, including State common law, without explicit preemption by the Congress or an otherwise sufficient basis under applicable legal principles,” the May 20 memo stated.

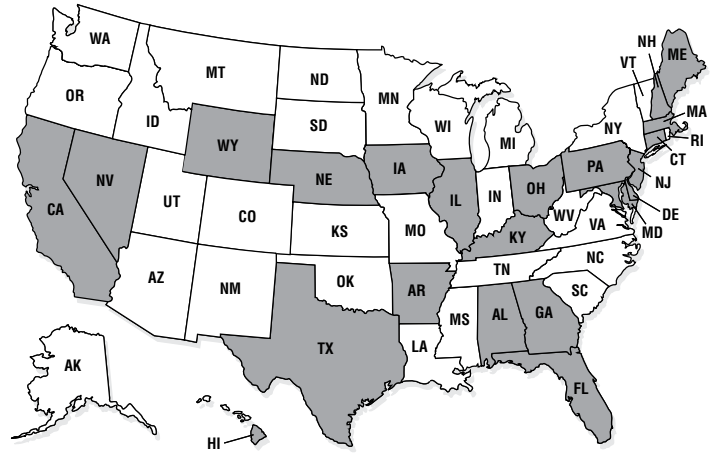
The memo also expressed a motive for Obama’s policy shift.

“Throughout our history, State and local governments have frequently protected health, safety and the environment more aggressively than has the national Government,” it said.

One group that welcomed the news was trial lawyers. The American Association for Justice, formerly the Association of Trial Lawyers of America, said the president’s order “overturned actions taken by Bush administration bureaucrats who were influenced by powerful, well-connected corporations,” and it will strengthen “laws designed to give Americans basic rights to hold wrongdoers accountable.”

The trial lawyers may have seen Obama’s action coming. They made their desire to reverse the Bush administration’s preemption regulations known to the Democratic presidential candidates during last year’s election, and they pressed the issue further in talks with Obama’s transition team before Christmas. Then in March the Bush preemption policy was called into question by the U.S. Supreme Court. In *Wyeth v. Levine*, the court ruled that preemption language inserted in a Food and Drug Administration regulation did not protect drug maker Wyeth from being sued under VERMONT state law by a woman who had to have her arm amputated after an injection of the company’s antinausea medication phenergan caused her to develop gangrene. In the 6-3 decision, Justice John Paul Stevens called the FDA’s preemption

## Bird’s eye view



Source: Stateline, National Conference of State Legislatures, American Gaming Association  States that have considered expanding gambling in 2009

### States eye gambling dollars

The recession may have sent state income and sales tax collections into freefall, but it hasn’t stopped Americans from gambling. According to the American Gaming Association, the nation’s commercial casinos took in \$32.5 billion in 2008, just 4.7 percent less than the year before. And state lotteries in KENTUCKY and NEW YORK saw record sales. The lure of all that tax-hike-free lucre spurred at least 22 states to consider expanding their gambling operations this year. Games of chance were even on the table in HAWAII, one of only two states (the other is UTAH) that has not legalized gambling.







government come in and shield the state from any of the negative consequences of an irresponsible budget?"

That seems to be the view of the Obama administration as well.

"Obviously, the state has to make some very tough fiscal decisions," said White House Press Secretary Robert Gibbs. "They understand the laws which they operate under and the budgetary constraints that they have. They're going to have to make a lot of difficult choices, and we're going to monitor that situation." (LOS ANGELES TIMES)

**ONLINE GAMBLERS PUSH FOR LEGALIZATION:** An effort in Congress two years ago to legalize Internet gambling came up snake eyes, failing to even make it out of committee. But advocates believe the weakening of the Republican Party and grass-roots support may improve the chances for a new proposal this year.

"The poker players and other online gamblers have gotten organized," said U.S. Rep. Barney Frank (D-MASSACHUSETTS), who is leading the charge in the House.

I. Nelson Rose, a professor at Whittier Law School in Costa Mesa and one of the world's leading authorities on gambling law, believes Frank will manage to get internet gambling legislation through the House this time around.

"It will pass, although there will be changes," Rose said. "Very few people in Congress really care at all about Internet gambling."

The measure's odds in the Senate, however, are less clear. Majority Leader Harry Reid (D-NEVADA) has opposed legalizing Internet gambling in the past; many of the casinos in his home state oppose the idea, and he is skeptical that online gaming can be regulated.

Some socially conservative organizations don't like the idea either.

"There's something to be said for people having to get in their car and actually go to a casino," said Chad Hills, an analyst for gambling research and policy at Focus on the Family. "If you have this available in your living room and it's accessible 24/7... this is like the perfect storm for addiction." (LOS ANGELES TIMES)

**BUDGETS IN BRIEF: NEW YORK** Attorney General Andrew Cuomo announced that he will form a task force to look into so-called placement agents,

## Upcoming elections

5/29/2009 - 6/18/2009

06/02/2009

### **Alabama Special General or Runoff**

Senate District 22

### **New Hampshire Special Election**

House Grafton County District 11  
(Lebanon Wards 1-3)

### **New Jersey Primary Election**

Senate Districts 6 and 23rd  
Constitutional Officers:  
Governor, Lieutenant Governor

### **New York Special Election**

Assembly Districts 77th (Greene) and  
85th (Diaz, Jr.)

06/09/2009

### **Alabama Special General Runoff if Needed**

Senate District 07

### **Virginia Primary Election**

Constitutional Officers:  
Governor, Lieutenant Governor, Attorney  
General

06/16/2009

### **Massachusetts Special Election**

House 3rd Suffolk





Wright also dismissed the notion that Burris' promise of a donation was part of a pay-to-play scheme.

"Fifteen hundred dollars? Come on," Wright said. "Burris had been a fundraiser in years past. This had nothing to do with pay-to-play."

But Rep. Jim Durkin (R) said Burris' pledge to give Blagojevich money is something he "absolutely" should have told the impeachment panel. And Rep. Jack Franks (D) added, "It underscores what we found at our committee: He wasn't truthful." (CHICAGO SUN-TIMES)

## Upcoming stories

Here are some of the topics you will see covered in upcoming issues of the State Net Capitol Journal:

- **Balance Billing**
- **Data Mining**
- **Free Choice/Card Check**

**CALIFORNIA VOTERS REJECT BUDGET BALLOT MEASURES:** The hopes of CALIFORNIA Gov. Arnold Schwarzenegger (R) and legislative leaders to get voters to help them patch the state's gaping budget hole were dashed last month. Five of the six budget measures on the May 19 ballot were rejected by margins exceeding 30 percent. Only Proposition 1F, barring elected state officials from receiving pay raises in years when there is a budget deficit, won approval — and handily, 74 percent to 26 percent.

Not even the threat of the state's budget gap growing from \$15.4 billion to \$21.3 billion and deeper cuts to education, healthcare, social services and other programs were enough to save Props. 1A-1E. Nor were the governor's pleas.

"To fix the system, I need the people's help," he said before the election. "I know people are sick and tired of hearing about Sacramento's dysfunction...but (the election) isn't about me, it isn't about the Legislature, it's about CALIFORNIA's legacy."

"Clearly the voters have spoken," said Bill Hauck, president of the California Business Roundtable, which supported the measures. "The voters are angry, they're frustrated, and they've concluded the politicians in Sacramento are not getting the job done." (SACRAMENTO BEE)

**CONGRESS SEEKS TO CURB UNFUNDED MANDATES:** U.S. Reps. Virginia Foxx (R-NORTH CAROLINA) and Henry Cuellar (D-TEXAS) introduced legislation last month that would amend the federal Unfunded Mandates Reform Act of 1995 (UMRA) to require more complete and accurate cost estimates on intergovernmental and private sector mandates. The Unfunded Mandates Information and Transparency Act of 2009 (HR 2255) was applauded by the National Conference of State Legislatures. "Congress and the administration will finally be aware of the total cost to states, when voting on legislation or issuing regulations," said NCSL Vice President and MASSACHUSETTS Sen. Richard T. Moore (D). "The bill promotes greater transparency and fiscally responsible lawmaking." NCSL said Congress shifted over \$125 billion in costs onto states between 2004 and 2008. (NATIONAL CONFERENCE OF STATE LEGISLATURES)

— *Compiled by KOREY CLARK*

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# Governors

**H**UNTSMAN LATEST GOV TO HEAD EAST: President Barack Obama has chosen UTAH Gov. Jon Huntsman Jr. (R) to serve as U.S. Ambassador to China. Lt. Gov. Gary Herbert (R) will assume the governor's office once Huntsman is confirmed by the U.S. Senate.

Although Herbert is a self-described "traditional Republican," he downplayed philosophical differences between him and the more moderate Huntsman.

"On the core issues we are in lock step," Herbert said. "Our priorities remain the same. I've asked all the Cabinet members to stay on. There's not going to be any big shake-up or big changes. We're not going to veer to the left or right."

**"On the core issues we are in lock step. There's not going to be any big shake-up or big changes. We're not going to veer to the left of right."**

Herbert noted he would also continue to support Huntsman's environmental policies in spite of their longstanding disagreement on global warming.

Huntsman has been a vocal supporter of policies intended to combat greenhouse gas emissions that advocates say contribute to global climate change;

Herbert, in contrast, does not believe that climate change is caused by humans. He made a point of saying, however, that he had no intention of pulling UTAH out of the multi-state Western Climate Initiative, as some GOP lawmakers have proposed. Herbert did strike one note of caution, specifically his concern that some greenhouse gas control efforts could lead to higher consumer energy prices and drive some jobs overseas, saying "we need to be thoughtful as we move forward."

The two men have a greater disparity in their views on same-sex unions. Huntsman earlier this year endorsed legislation that would have allowed the Beehive State's same-sex couples to enter into civil unions, something Herbert adamantly opposes. Herbert also said he has not been involved in any discussion on the Common Ground Initiative, a failed legislative effort earlier this year that would have granted basic rights such as hospital visits and inheritance to the lesbian, gay, bisexual and transgender community.

The incoming governor also confirmed he will seek the office on his own merits in 2010.

"I'm going to concentrate very laser-like on being the best governor in 2009 to turn the economy around, to have the ability to withstand the growth of our education [system], our infrastructure, our roads and all those things that go into governing," he said. "And if I do that, I'm confident that the political ramifications in 2010 will take care of themselves."



Huntsman becomes the third sitting governor — but the first Republican — to join the Obama administration this year. Former ARIZONA Gov. Janet Napolitano (D) is now the head of the Dept. of Homeland Security while former KANSAS Gov. Kathleen Sebelius (D) recently took over the top job at the Dept. of Health and Human Services. NEW MEXICO Gov. Bill Richardson (D) was also tabbed to be commerce secretary, but had to step aside after a federal investigation was opened into how some of his political donors landed a lucrative transportation contract. Former WASHINGTON Gov. Gary Locke (D) eventually became Commerce Secretary, while former IOWA Gov. Tom Vilsack (D) now runs the U.S. Department of Agriculture. (WASHINGTON POST, BLOOMBERG, SALT LAKE TRIBUNE)

**GREGOIRE ORDERS EMISSIONS CUTS:**

Frustrated with state lawmakers’ inability to pass cap-and-trade legislation to curb greenhouse gas emissions, WASHINGTON Gov. Christine Gregoire (D) issued an executive order (EO 09-05) intended to achieve those reductions by ratcheting back coal-fired electricity and automobile emissions.

Gregoire’s order directs state agencies to develop an array of emission reduction strategies and industry emissions benchmarks in order to meet previously adopted 2020 reduction targets. Those strategies include working with local governments to expand public transit, having the Department of Ecology make emission-reductions plans for all of the state’s top industrial greenhouse gas polluters by next year, and ordering the Departments of Commerce and Transportation to develop standards on the amount of carbon emitted during production, distribution and use of certain vehicle fuels. The order also directs government officials to work with the state’s only coal-fired power plant to reduce its emissions by at least 50 percent by 2025.

“I wanted cap-and-trade. I didn’t get it,” said Gregoire, who noted that her order is designed to realize similar carbon reductions and prepare the state to adopt such a plan in the future. “This readies WASHINGTON state to implement a federal cap-and-trade program immediately,” she said. (SEATTLE TIMES, LOS ANGELES TIMES)

**PERDUE PURSUES GREEN AGENDA:** Calling it “one of the cornerstones” of her agenda, NORTH CAROLINA Gov. Beverly Perdue (D) laid out a proposal she says will make the Tar Heel State more energy efficient and create more “green economy” jobs. Two key elements in her plan rely on federal stimulus money: the creation of a revolving loan fund to provide low- or no-interest loans to finance

**In the hopper**

At any given time, State Net tracks tens of thousands of bills in all 50 states, the US Congress and the District of Columbia. Here’s a snapshot of what’s in the legislative works:

**Number of Prefiles last week: 88**

**Number of Intros last week: 1,408**

**Number of Enacted/Adopted last week: 1,887**

**Number of Prefiles to date: 31,876**

**Number of Intros to date: 139,961**

**Number of 2009 Session Enacted/Adopted overall to date: 26,384**

— Compiled By JAMES ROSS  
(measures current as of 5/28/2009)  
Source: State Net database



energy-saving projects at businesses, local governments and schools and growing an existing fund to award competitive grants to businesses and organizations with innovative projects that are environmentally friendly. “By leveraging these federal recovery dollars,” Perdue said, “I believe we can serve as a jump-start to NORTH CAROLINA’s green economy.” (NEWS & OBSERVER [RALEIGH]).

**GOVERNORS IN BRIEF:** A federal judge ruled that **KENTUCKY** Gov. Steve Beshear (D) must testify in person at the bid-rigging trial of former state Transportation Secretary Bill Nighbert. The trial is set to begin June 23<sup>rd</sup>. Citing the governor’s duties at the Capitol during an expected June special session, Beshear’s attorney had sought to have the governor testify via a videotaped deposition (UPI). • **CALIFORNIA** Gov. Arnold Schwarzenegger (R) and state Attorney General Jerry Brown (D) have asked the U.S. Supreme Court to examine a lower court ruling that tossed the state’s law banning the sale of violent video games to kids. A U.S. District court invalidated the measure (2005 AB 1179) in 2007, saying it violates First Amendment guarantees of free speech (SACRAMENTO BEE). • **MARYLAND** Gov. Martin O’Malley (D) issued an executive order that, among other things, bars state employees from using a hand-held cell phone while driving a state-owned car (BALTIMORE SUN). • **KANSAS** Gov. Mark Parkinson (D) vetoed a line-item in the budget bill (KS HB 2373) that would have prevented Planned Parenthood of **KANSAS** and Mid-**MISSOURI** from receiving approximately \$250,000 in federal funds for family planning services. Parkinson called the funding “critical if we are to continue reducing the number of abortions that occur in this state” (LAWRENCE JOURNAL-WORLD).

— *Compiled by RICH EHISEN*

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## Hot issues

**B** **USINESS:** The **LOUISIANA** House rejects HB 705, which would have barred Pelican State employers from paying a woman less than a man for doing the same or similar work. Opponents said state law already bars such discrimination (TIMES-PICAYUNE [NEW ORLEANS]). • **MICHIGAN** Gov. Jennifer Granholm (D) signs HBs 4453, 4454 and 4455, which collectively allow Wolverine State homeowners facing foreclosure to delay those proceedings for 90 days if they meet with a housing counselor and the lender. Lenders that refuse to rework loans for qualified homeowners would have to go to court to finish the foreclosure (DETROIT FREE PRESS). • The **OHIO** House approves HB 3, which would enact a six-month moratorium on foreclosures in the Buckeye State. The

bill, which would also impose a \$750 foreclosure filing fee, is now in the Senate (COLUMBUS DISPATCH). • **OKLAHOMA** Gov. Brad Henry (D) signs HB 1603, legislation that would, among other things, cap noneconomic damages in most civil suits at \$400,000. The new law goes into effect in November (INSURANCE JOURNAL [SAN DIEGO]).

• The **CONNECTICUT** House and Senate approve HB 6572, legislation that would phase in a ban on the sale, manufacture and distribution of products containing bisphenol-A, or BPA, a chemical used to harden plastic, as of October 1, 2011. BPA has been linked in some studies to cancer and other serious diseases. It moves to Gov. M. Jodi Rell (R) for review (HARTFORD COURANT).

**CRIME & PUNISHMENT:** The **PENNSYLVANIA** Supreme Court rules that just watching child pornography on the Internet is a crime and that Keystone State prosecutors do not need to prove a defendant intentionally downloaded the material. The decision came in the case of a man convicted on child pornography charges after viewing Internet images that were automatically downloaded to his computer's hard drive (PHILADELPHIA INQUIRER). • **OHIO** corrections officials announce that prison wardens will now pinch and shove prisoners undergoing lethal injection to ensure they are unconscious before expiring. Officials say the new policy combats charges that the state's execution practices are cruel and unusual (CLEVELAND PLAIN DEALER). • **COLORADO** Gov. Bill Ritter (D) signs SB 241, which makes the Centennial State the 22<sup>nd</sup> to require certain felony suspects to submit DNA samples (DENVER POST). • The **OKLAHOMA** Senate approves SB 1064, which would bar Sooner State prisoners from possessing cell phones. The bill is now with Gov. Brad Henry (D), who is expected to sign it (TULSA TODAY).

**EDUCATION:** The **OREGON** Senate endorses HB 2599, a bill that would require Beaver State school districts to establish clear, uniform policies to combat bullying and to appoint specific individuals to investigate such incidents. The measure moves to Gov. Ted Kulongoski (D) for review (OREGONIAN [PORTLAND]). • **ALASKA** Gov. Sarah Palin (R) signs HB 215, which repeals for two years a state salary limit for hiring out-of-state teachers. The bill allows Last Frontier State schools

## The week in session

**States in Regular Session:** AZ, CA, CT, DC, DE, IL, KS, LA, MA, ME, MI, MN, MO, NC, NE, NH, NJ, NV, NY, OH, OK, OR, PA, RI, SC, TN, TX, US, VT, WI

**States in Recess:** WI

**States in Special Session:** CA "c"

**States in Veto Session:** MO

**States in Extended Session:** WV

**States Currently Prefiling or Drafting for 2009:** AL, KY

**States Projected to Adjourn:** AZ, CT, KS, MS, NE, NV, TN, TX,

**States Adjourned in 2009:** AK, AL, AR, CO, FL, GA, HI, IA, ID, IN, KY, MD, MN, MO, MT, ND, NM, OK, SC, SD, UT, VA, VT, WA, WY

**State Special Sessions Adjourned in 2009:** AZ "a", AZ "b", CA "a", CA "b", CT "a", FL "a", MS "a", UT "a"

Letters indicate special/extraordinary sessions

— Compiled By JAMES ROSS  
(session information current as of 5/29/2009)  
Source: State Net database



to use greater financial incentives to attract experienced personnel for hard-to-fill positions (DAILY NEWS MINER [FAIRBANKS]). • **FLORIDA** Gov. Charlie Crist (R) signs SB 1540, legislation that eases some of the Sunshine State’s strict zero-tolerance school rules. Under the statute, students will no longer be arrested for violations like petty theft, bringing plastic butter knives to school, drawing pictures of guns, throwing erasers or vandalizing property (SUN-SENTINEL [ORLANDO]).

## In case you missed it

In February, Gov. Arnold Schwarzenegger (R) and legislative leaders thought a slew of hard fought ballot measures would keep the state from falling into insolvency. But with voters to rejecting those measures, the nation’s most populous state may be heading for disaster.

In case you missed it, the article can be found on our Web site at

[http://www.statenet.com/capitol\\_journal/05-18-2009/html](http://www.statenet.com/capitol_journal/05-18-2009/html)

**ENVIRONMENT:** Citing an almost complete recovery in the number of nesting bald eagle pairs in the Pine Tree State, **MAINE** Gov. John Baldacci (D) signs SB 25, a measure that removes the bird from protection under the state’s endangered species law (BANGOR DAILY NEWS). • **IOWA** environmental officials remove the peregrine falcon from the Hawkeye State’s endangered species list. Officials say the bird will still be listed as a “species of concern” (RADIO IOWA [DES MOINES]). • **KANSAS** Gov. Mark Parkinson (D) signs HB 2369, which requires Sunflower State utilities to provide 20 percent of their power through renewable sources such as wind or solar by 2020. The new law also allows consumers to use their own generation and sell back the extra electricity they produce to their utility provider (LAWRENCE JOURNAL-WORLD). • **VERMONT** Gov. Jim Douglas (R) allows HB 466, which sets favorable rates for small-scale solar, wind, hydro and methane energy production, to become law without his signature. The measure also allows state utilities officials to review and adjust those rates as they see fit (BURLINGTON FREE PRESS).

**HEALTH & SCIENCE:** The **OREGON** Senate approves HB 3236, which would allow pharmacists to administer vaccines and immunizations to children who are at least 11 years of age. It moves to Gov. Ted Kulongoski (D) for review (STATESMAN-JOURNAL [SALEM]). • **WISCONSIN** Gov. Jim Doyle (D) signs SB 27, legislation that requires health insurers to cover the cost of hearing aids and cochlear implants for hearing-impaired children under 18 (MILWAUKEE JOURNAL-SENTINEL). • The **NEW JERSEY** Senate approves AB 2030, which would require Garden State pharmacists to inform consumers when generic drugs are substituted for brand name prescriptions. It moves to Gov. Jon Corzine (D) for consideration (STAR-LEDGER [NEWARK]). • The **MICHIGAN** House approves HB 4377, which would ban smoking in most Wolverine State workplaces, including bars and restaurants. It moves to the Senate (DETROIT NEWS). • The **ILLINOIS** Senate approves SB 1381, which would legalize the use of marijuana for medicinal purposes. It is now in the House (DAILY HERALD [ARLINGTON HEIGHTS]).



**SOCIAL POLICY:** The **CALIFORNIA** Supreme Court upholds Proposition 8, a voter-approved measure that defines marriage as being only between one man and one woman. However, the high court ruling also upheld the legality of approximately 18,000 same-sex marriage ceremonies conducted during a five-month window in 2008 when such unions were legal in the Golden State (**SACRAMENTO BEE**). • **COLORADO** Gov. Bill Ritter (D) signs SB 88, a bill that allows gay and lesbian state employees to share benefits with their partners in the same way as married couples. The measure takes effect in August (**DENVER POST**).

**POTPOURRI:** The **LOUISIANA** Senate approves SB 168, which would require all vehicle occupants to use a seat belt. The measure moves to the House (**TIMES-PICAYUNE [NEW ORLEANS]**). • Still in **LOUISIANA**, The House approves HB 146, which would require drivers to use a hands-free device when talking on a cell phone while behind the wheel. It moves to the Senate (**ADVOCATE [BATON ROUGE]**). • **NEVADA** Gov. Jim Gibbons (R) vetoes SB 394, which would have required the licensing of all-terrain and other off-road vehicles (**LAS VEGAS REVIEW-JOURNAL**). • The **TENNESSEE** House gives final approval to HB 716, which would allow people with handgun permits to carry their weapons in all state and local parks. It moves to Gov. Phil Bredesen (D) for consideration (**TENNESSEAN [NASHVILLE]**).

— Compiled by **RICH EHISEN**

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## Once around the statehouse lightly

**A**ND DON'T SAY 'CHEESE' EITHER: As hard as it may be to imagine, some states are making it even drearier to tend to your driver's license matters. As the *USA Today* reports, four states — **ARKANSAS**, **INDIANA**, **NEVADA** and **VIRGINIA** — now require license applicants to maintain “neutral facial expressions” when having their picture taken. In other words, no smiling allowed. DMV officials blame the mandate on new high-tech software that compares photos with those already on file, all in an effort to catch folks trying to do a little identity theft. Other states may soon follow. To date, **VIRGINIA** seems to be the most rigid on enforcing the sourpuss rule, while **ARKANSAS**, **INDIANA** and **NEVADA** allow folks to display a slight grin. **ARKANSAS** driver services chief Tonie Shields says, “You just can't grin really large.” Somehow we doubt that is a major problem at most DMV offices.



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