

AUG 24 2011

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Los Alamos Counties
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**FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO**

STATE OF NEW MEXICO ex rel., the HON. MIGUEL GARCIA, HON. HOWIE MORALES, HON. ELISEO ALCON, and HON. GERALD ORTIZ Y PINO, citizens of New Mexico and members of the New Mexico Legislature, and **MARISELA MORALES**, a legal permanent resident of New Mexico,

Petitioners,

vs.

DEMESIA PADILLA, in her capacity as the Secretary of the New Mexico Taxation and Revenue Department,

Respondent.

**APPLICATION FOR TEMPORARY RESTRAINING ORDER
IN AID OF WRIT OF MANDAMUS**

COME NOW Petitioners, the Honorable Miguel Garcia, Honorable Howie Morales, Honorable Eliseo Alcon, Honorable Gerald Ortiz Y Pino, and Marisela Morales, pursuant to the provisions of Rule 1-066 of the New Mexico Rules of Civil Procedure, and respectfully moves this Court to enter an order temporarily restraining Respondent Demesia Padilla (“Respondent Padilla”), the Secretary of the New Mexico Taxation and Revenue Department (“Department”), from further implementing and executing the Department’s “Residency Certification Program,” and from cancelling or taking any adverse action to the drivers’ licenses of individuals who fail to abide by the commands of the unlawful program. In further support of their Application,

Petitioners state the following:

Introduction

1. Petitioners have filed a Verified Petition for Writ of Mandamus directed at Respondent Padilla (“Verified Petition”).
2. Through their Mandamus action, brought under this Court’s original jurisdiction as provided by the New Mexico Constitution, Article VI, Section 13, and NMSA 1978, Section 44-2-1, *et seq.*, Petitioners request that this Court issue an order of mandamus prohibiting Respondent from continuing the implementation and execution of the newly-created “Residency Certification Program” of the Department’s Motor Vehicle Division (“MVD”).
3. This program, as further explained in the Petition for Writ of Mandamus, constitutes an unconstitutional encroachment upon the authority of the New Mexico Legislature and targets and commands only a particular class of drivers’ license holders in New Mexico—those who were born outside of the United States – to appear in person before MVD officials to reapply and recertify for the drivers’ licenses they already hold. The MVD has made clear that those targeted individuals who do not comply with its demands will have their drivers’ licenses immediately cancelled. *See Ex. A to Verified Petition.* Because this program constitutes an unconstitutional infringement upon the authority of the Legislature, and, if allowed to continue, will violate the equal protection rights of thousands of New Mexico drivers’ license holders who have been targeted based on a suspect classification, including Petitioner Marisela Morales, this Court should temporarily restrain Respondent from executing the program and from cancelling the drivers’ licenses of individuals who fail to comply with the MVD’s commands until the Court addresses the requested writ of mandamus.

Standard for Granting Temporary Restraining Order

4. Rule 1-066 of the New Mexico Rules of Civil Procedure provides that a Temporary Restraining Order may be granted if it appears from specific facts shown by verified pleading that immediate and irreparable injury will result to the applicants before the adverse party or his attorney can be heard in opposition. *See* NMRA 1-066(B)(1).

5. When violations of constitutional rights are alleged, irreparable injury is presumed, especially if what is at stake is not monetary damages. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976). Thus, when a plaintiff demonstrates a constitutional deprivation, the plaintiff satisfies the requirement of irreparable harm for injunctive relief. *See, e.g., LaBalbo v. Hymes*, 115 N.M. 314, 318, 850 P.2d 1017, 1021 (N.M. Ct. App. 1993) (holding that trial court erred in not considering irreparable injury when there was allegation of constitutional deprivation); *Henry v. Greenville Airport Comm'n*, 284 F.2d 631 (4th Cir.1960) (violation of constitutional right deprives trial court of discretion to deny request for injunction); *Back v. Carter*, 933 F. Supp. 738, 754 (N.D. Ind. 1996) (holding that “equal protection rights are so fundamental to our society that any violation of those rights causes irreparable harm.”); 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, *Federal Practice and Procedure* § 2948 n. 39 (1973) (where deprivation of constitutional right is shown, no further showing of irreparable harm need be demonstrated).

Verified Facts

6. Here, the facts verified in the Petition are straightforward. On July 19, 2011, the Office of the Governor of New Mexico announced the creation and implementation of what it called a “residency certification program for those who have obtained a foreign national driver’s license.” *See* Ex. B to Verified Petition. (Press Release of the Office of the Governor).

According to the Governor, beginning on the same day of the press release, the MVD would send letters to 10,000 randomly selected foreign nationals, each of whom would be instructed to schedule, within 30 days, an in-person appointment in Albuquerque with state officials to [re-]verify their residency in New Mexico. *See id.* Respondent Padilla warned of the consequences for those individuals who could not or did not obey the command of the Department's MVD, stating that "steps will be taken to cancel [their] driver's licenses." *Id.*

7. Thereafter, the MVD, as threatened, began to send letters to a randomly selected "foreign national"¹ drivers' license holders in New Mexico threatening to cancel their licenses if they did not appear before the MVD as commanded.

8. On July 26, 2011, Petitioner Marisela Morales received the form letter from the MVD. *See Ex. A to Verified Petition.* Through its letter, the MVD demanded that Ms. Morales acquiesce to its "compliance effort" and "provide proof of [her] identity and residency to ensure that [the MVD] ha[s] correct and current information." *Id.* The MVD warned Ms. Morales that "[t]his process is not optional and you must comply with the detailed instructions. . ." *Id.* The letter further informed Ms. Morales that she was to appear before an office of the MVD, in Albuquerque, New Mexico, and that she was to provide proof of identification and identity, including two different documents showing that she lives at a valid New Mexico address – even though Ms. Morales had provided all the documentation required by state statute to obtain a drivers' license when she initially applied for and was granted her New Mexico drivers' license. The letter threatened that if Ms. Morales failed to comply with the MVD's demand and set up an

¹ Of course, the Department does not have the ability to determine when and if the immigration status of any particular individual in New Mexico is adjusted. Therefore, the MVD's "foreign national" list includes legal permanent residents like Petitioner Morales and, upon information and belief, individuals who have become naturalized citizens since obtaining their drivers' license.

appointment within thirty days, it would “take steps to cancel [her] license or identification card.” *Id.*

9. The letter Ms. Morales received from the MVD did not provide any particularized reason for the Department or the MVD to suspect that Ms. Morales, individually, had provided fraudulent documentation when she applied for her drivers’ license; nor did the Department or the MVD claim to have any information that Ms. Morales was no longer a resident of New Mexico. *See id.*

10. It is undisputable that nowhere in the New Mexico Motor Vehicle Code is there a provision that indicates the Legislature has authorized the MVD to create or implement a program like the “Residency Certification Program.”

11. In fact, requiring a particular class of individuals to recertify that they are eligible to obtain a drivers’ license prior to the time their drivers’ license expires, distorts the intent and purpose of the provisions of the Motor Vehicle Code, as enacted and amended by the Legislature, in a myriad of ways. *See Verified Petition at ¶¶18-31.*

Irreparable Injury to Ms. Morales and Other Non-citizen License Holders.

12. Petitioner Morales (and literally thousands of other residents of New Mexico) will suffer irreparable injury if Respondent Padilla is not immediately restrained from continuing the statutorily unauthorized Residency Certification Program. Ms. Morales has not been scheduled for an appointment in order to comply with the Residency Certification Program. If the Secretary is not immediately enjoined from continuing the Residency Certification Program, the MVD will begin the process of cancelling Ms. Morales’ drivers’ license as soon as August 26, 2011.

13. By targeting individuals based on alienage, the MVD's Residency Certification Program violates the Equal Protection rights guaranteed to Ms. Morales and other non-citizens who reside in New Mexico. *See* Verified Petition at ¶¶ 32-47. Classifications based on alienage or national origin are suspect and subject to strict scrutiny analysis. *See Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852 29 L.Ed.2d 534 (1971); *Tayyari v. New Mexico State University*, 495 F.Supp. 1365, 1372 (D.N.M. 1980) ("Alienage has been treated under modern equal protection analysis as a suspect classification."). For the reasons set forth in the Verified Petition, Respondent cannot show that the Residency Certification Program addresses a compelling state interest in a manner that is narrowly and precisely tailored. *See* Verified Petition at ¶¶ 43-47; *see also Marrujo v. New Mexico State Highway Transp. Dept.*, 118 N.M. 753, 757, 887 P.2d 747, 751 (1994) ("[T]he burden is placed upon the state to show that the restriction of a fundamental right or the delineation of suspect classes supports a compelling state interest, and that the legislation accomplishes its purposes by the least restrictive means."). Therefore the application of the Residency Certification Program to individuals like Ms. Morales violates the rights protected by the Equal Protection Clause of the New Mexico Constitution and constitutes irreparable injury. *See Elrod*, 427 U.S. at 373 (the loss of constitutionally protected freedoms "for even minimal periods of time, constitutes irreparable injury").

Irreparable Injury to the Public and Citizens of New Mexico, Including the Legislator Petitioners.

14. As explained and verified in the Verified Petition, the Department's creation and implementation of the Residency Certification Program was not ratified, authorized, or even considered by the Legislature. *See* Verified Petition at ¶¶ 7-14; 22-31. The Legislature, however, is the governmental body that has the exclusive power under the Constitution of the

State of New Mexico to make laws and is entrusted by the people of New Mexico to make policy. *State ex. Rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 17, 125 N.M. 343, 961 P.2d 768).

15. The Residency Certification Program interferes with and contravenes the intent of the Legislature, and the spirit of the state statute that allows individuals to obtain drivers' licenses regardless of where they were born. While the Residency Certification Program singles out "foreign nationals," the Legislature intended that the law would treat every resident driver of New Mexico equally and would not discriminate against individuals who are otherwise qualified to obtain a state driver's license or identification card on the basis of alienage. *See, e.g.*, NMSA 1978 §66-5-9(B).

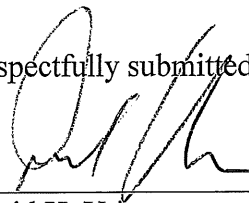
16. Although certain public officials of the executive branch of the state government, including Respondent Padilla, have made clear that they disagree with the policy decisions made by the Legislature with regard to the issuance of driver's licenses, they do not have the power, even through the executive agencies they control, to override the rule of law and *sua sponte* develop programs or policies that contradict or conflict with the intent and goals of the Legislature. *See State ex rel. Sandel*, 1999-NMSC-019, 127 N.M. 272, 980 P.2d 55 (holding that an executive agency's order exceeded its statutory authority and unlawfully intruded upon the province of the Legislature because it contradicted the policy of the law-making body).

17. Nothing in Section 66-5-22 (or anywhere else in the Motor Vehicle Code for that matter) demonstrates that the Legislature intended to require drivers' license or identification card holders to provide on an ongoing basis identity and residency documents upon demand by the MVD. Nor did the Legislature impose any special restrictions or conditions on foreign nationals who obtain drivers' license or identification cards using an identification number other than a social security number.

18. For the reasons stated above, and in the Verified Petition, the creation, execution and implementation of the Residency Certification Program thus violates the separation of powers principle in Article III, Section 1 of the New Mexico Constitution. The harm to Petitioners will be irreparable if the Residency Certification Program is allowed to continue.

WHEREFORE Petitioners move this Court for the issuance of a Temporary Restraining Order prohibiting Respondent Padilla from implementing and executing the Residency Certification Program and from taking any action to cancel the drivers' licenses or identification cards of any individuals under the unlawful program until the Court addresses Petitioners' Verified Petition for Writ of Mandamus. Because the Petition for Writ of Mandamus raises issues of great public importance, Petitioners request that the Court waive the furnishing of security as allowed in NMRA 1-066(C) because good cause is shown. *See State ex rel. Segó v. Kirkpatrick*, 86 N.M. 359, 363, 524 P.2d 975 (1974) (recognizing the great importance of the doctrine of separation of powers enshrined by our State's Constitution, a fundamental bedrock of our representative government); *State ex rel. Taylor v. Johnson*, 125 N.M. 343, 348, 961 P.2d 768, 773 (reaffirming that the "balance and maintenance of governmental power is of great public concern").

Respectfully submitted,



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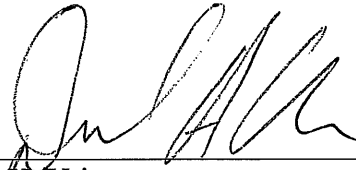
* Pro hac vice application pending

Certificate of Service

In accordance with Rule 1-066, undersigned counsel certifies that, on August 24, 2011, Petitioners emailed and mailed notice of Petitioners' intent to make this application, and the proposed Temporary Restraining Order, to Mr. Nelson Goodin, general counsel for Respondent and the New Mexico Taxation and Revenue Department, to:

Nelson Goodin
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New Mexico Taxation and Revenue Department
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Counsel for Petitioners and Applicants also left voice mail messages by phone for Mr. Goodin and notified him of the intent to present this Application for Temporary Restraining Order to the Court today, August 24, 2011.



David H. Urias