

ENDORSED
First Judicial District Court

FIRST JUDICIAL DISTRICT COURT
COUNTY OF SANTA FE
STATE OF NEW MEXICO

AUG 24 2011

Santa Fe, Rio Arriba &
Los Alamos Counties
PO Box 2268
Santa Fe, NM 87504-2268

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,

D 101 CV 2011 0 2 6 3 0

vs.

Case No. _____

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

Respondent.

VERIFIED PETITION FOR WRIT OF MANDAMUS

Petitioners file this Verified Petition for Writ of Mandamus directed at Respondent Demesia Padilla (“Respondent Padilla”), the Secretary of the New Mexico Taxation and Revenue Department (“Department”), challenging the authority of the Department’s Motor Vehicle Division (“MVD”) to create, without legislative authority, a state program that requires a targeted class of residents of New Mexico to recertify that they are qualified to hold a New Mexico drivers’ license or identification card. Petitioners respectfully ask this Court to issue a writ of mandamus, prohibiting Respondent from continuing the *ultra vires* program, because its implementation and execution violates the separation of powers provision of Article III, section 1 of the Constitution of the State of New Mexico and the classification it creates violates the Equal Protection Clause of Article II, section 18, of the Constitution of the State of New Mexico. The

MVD's "Residency Certification Program" requires only "Foreign Nationals" to comply with the strictures created by the Department's MVD and essentially forces these individuals, whom the Legislature has determined to be eligible to apply for and obtain New Mexico drivers' licenses on the same footing as citizens, to reapply and recertify that they are eligible to hold the valid New Mexico drivers' licenses they already possess. Such a procedure, which on its face discriminates against individuals on the basis of alienage,¹ has not been authorized, ratified, or even considered by the New Mexico Legislature.

Petitioners, in further support of their request for a writ of mandamus, state the following:

A. Parties and Jurisdiction

1. Legislator Petitioners are the Honorable Gerald Ortiz Y Pino and the Honorable Howie Morales, members of the New Mexico Senate and citizens of New Mexico, and the Honorable Miguel Garcia and the Honorable Eliseo Alcon, members of the New Mexico House of Representatives and citizens of New Mexico. Since this case involves a matter of great public importance and is brought by citizens who are also members of the Legislature, standing of Petitioners is established here as it was in *State ex rel. Sego v. Kirkpatrick*, 86 N.M. 359, 363, 524 P.2d 975 (1974) (conferring standing on petitioners both because of the importance of the issue and because petitioner was "a citizen, an elector, a taxpayer, [and] a State Senator. . ."). Here one of the issues of importance, as it was in *Sego*, is the doctrine of separation of powers enshrined by our State's Constitution and a fundamental bedrock of our representative government. *See also State ex rel. Taylor v. Johnson*, 125 N.M. 343, 348, 961 P.2d 768, 773

¹ A "foreign national" is defined simply as "an individual who is a citizen of any country other than the United States." *See* U.S. Department of Homeland Security, <http://www.uscis.gov/files/article/8%20Glossary.pdf>.

(reaffirming that the “balance and maintenance of governmental power is of great public concern.”). This case also involves the equal protection clause, which mandates that similarly situated individuals be treated alike, a principle inherent in the democratic form of both our federal and state government. *See* N.M. CONST. Art. II, § 18.

2. Petitioner Marisela Morales is a legal permanent resident of the United States who has resided in New Mexico for over fourteen years. Under the New Mexico Motor Vehicle Code, Petitioner was eligible for and obtained a New Mexico drivers’ license. Petitioner Morales’ license was never deemed invalid and has never been suspended, cancelled or revoked. There is no reason or rational basis to suspect, much less conclude, that Petitioner Morales provided fraudulent documentation or moved out of state after obtaining her New Mexico drivers’ license. Petitioner, along with 10,000 other individuals, including other legal permanent residents and individuals who have since become naturalized citizens, has now been unlawfully targeted and classified by the MVD and commanded by that division of the Taxation and Revenue Department to travel to a designated location in Albuquerque, New Mexico to be “interviewed” by MVD personnel and to recertify and reapply for the New Mexico drivers’ license that she already holds. *See* 7-26-11 Letter from the Director of the MVD to Marisela Morales, attached as Ex. A. The MVD has notified Petitioner that her failure to obey its command to participate in this unauthorized recertification program will result in the cancellation of her drivers’ license. *See id.*

3. The Respondent is Demesia Padilla, the Secretary of the New Mexico Taxation and Revenue Department. The New Mexico Taxation and Revenue Department, and the divisions therein, including the MVD, are part of the executive branch of the state government. *See* NMSA 1978 § 9-11-4. Respondent Padilla is sued in her official capacity because, by state

statute, she is the chief executive and administrative office of the Department, whose duty is to manage all operations of the Department and to ensure that the Department, and the divisions therein, administers the law and performs the duties as charged by the Legislature. *See* NMSA 1978 §§ 9-11-5; 9-11-6.

4. This Court has original jurisdiction over petitions for writ of mandamus pursuant to Article VI, Section 13 of the New Mexico Constitution, and NMSA 1978 Section 44-2-1, *et seq.* The Supreme Court of New Mexico “on several occasions has recognized that mandamus is an appropriate means to prohibit unlawful or unconstitutional official action.” *State ex rel. Sandel v. New Mexico Public Utility Commission*, 1999-NMSC-019, ¶ 11, 127 N.M. 272, 980 P.2d 55 (quoting *State ex rel. v. Johnson*, 120 N.M. 562, 570, 904 P.2d 11, 19 (1995)).

5. In particular, New Mexico courts have exercised their original jurisdiction in mandamus “where a petitioner sought to restrain one branch of government from unduly encroaching or interfering with the authority of another branch in violation of Article III, Section 1 of the New Mexico Constitution. *Id.* (citing *State ex. Rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 17, 125 N.M. 343, 961 P.2d 768); *see also Kiddy v. Board of County Com’rs of Eddy County*, 57 N.M. 145, 152, 255 P.2d 678, 683 (1953) (“Public functionaries may be restrained by mandamus from doing what they know is an illegal act.”); *State ex rel. Bird v. Apodaca*, 91 N.M. 279, 282, 573 P.2d 213, 216 (1978) (“Mandamus is defined to include an order directing the restoration of the complainant to rights or privileges of which he has been illegally deprived.”).

6. New Mexico courts “ha[ve] not been reluctant to intervene when one branch of government unduly ‘interfere[s] with or encroache[s] on the authority of or within the province of a coordinate branch of government.” *State ex rel. Clark v. Johnson*, 120 N.M. 562, 573, 904 P.2d 11, 22 (1995) (quoting *Mowrer v. Rusk*, 95 N.M. 48, 54, 618 P.2d 886, 892 (1980)).

B. The Facts Related to the Statutory Authority of the MVD and the MVD's *Ultra Vires* Creation of the "Residency Certification Program"

The relevant authority granted to the MVD by the Legislature regarding drivers' licenses

7. By state statute, the Legislature has granted to the Department through the MVD the authority and obligation to "observ[e], administer [], and enforce[e] the Motor Vehicle Code ...as provided by law. . .that pertains to the licensing of drivers . . ." NMSA 1978, § 66-2-3.

8. The Motor Vehicle Code, as passed and amended by the Legislature, establishes the legal framework for the issuance of drivers' licenses and identification cards in New Mexico. The process for obtaining a New Mexico drivers' license is straightforward. First, an applicant for a drivers' license must submit an application and pay a fee to the MVD. *See* § 66-5-9(A). Applicants seeking a license must provide certain information to the MVD as part of the application process, including their full name, social security number or individual tax identification number, date of birth, sex, and their New Mexico address. *See* § 66-5-9(B). Applicants must also indicate on their application whether he or she has previously been licensed as a driver and, if so, when and by what state or country and whether any such license has ever been suspended or revoked or whether an application has ever been refused and, if so, the date of and reason for the suspension, revocation or refusal. *See id.*

9. As determined by the Legislature, the Motor Vehicle Code also provides a procedure by which foreign nationals can obtain a New Mexico drivers' license. Specifically, for foreign nationals applying for drivers' licenses, the Legislature directs that Respondent Padilla "shall accept the individual taxpayer identification number as a substitute for a social security number" regardless of the applicant's immigration status. *Id.* In the same statutory provision, the Legislature authorizes the Secretary of the Department to "establish by regulation

other documents that may be accepted as a substitute for a social security number or an individual tax identification number.” *Id.* In compliance with that express legislative authorization, the Secretary has promulgated a list of documents that applicants may use to satisfy the identification number, identity, and residency requirements for a drivers’ license or identification card. *See* NMAC 18.19.5.12.

10. The Legislature further determined that, once an applicant submits an application for a drivers’ license, the MVD is to review the application prior to the issuance of the drivers’ license or identification card to determine whether the applicant possesses the necessary qualifications for the drivers’ license. *See* § 66-2-8 (“The division shall examine and determine the genuineness, regularity and legality of every application for . . . a drivers’ license . . .”). The Legislature also instructed that, prior to the time a drivers’ license is granted to an applicant, the MVD has the authority to “make investigation as may be deemed necessary, may require additional information and shall reject any such application if not satisfied of the genuineness, regularity or legality thereof, or the truth of any statement contained therein, or for any other reason, when authorized by law.” *Id.*

11. If an applicant qualifies for a drivers’ license, then the MVD must issue the drivers’ license to the applicant. *See* § 66-5-15 (“The Department shall, upon payment of the required fee, issue to every qualified applicant a drivers’ license as applied for.”). Once issued, the drivers’ license is valid for four years, or, under certain circumstances, eight years. *See* § 66-5-21.

12. The Legislature determined that drivers’ license holders must, on an ongoing basis, notify the MVD of a change in address, but notably the drivers’ license holder may do so

by mail or other electronic means and need not personally appear at an MVD office. *See* § 66-5-22.

13. Although the Legislature granted the MVD the authority, under specific and limited circumstances, to cancel drivers' licenses upon information that a particular licensee was not entitled to the issuance of the license or upon information that a particular licensee failed to give the required or correct information in his application, *See* Section § 66-5-24, the Legislature did not contemplate, and the Motor Vehicle Code does not contain a provision requiring any license holders to "recertify" or "reapply" for the drivers' licenses they hold prior to the license's expiration date.

14. The process for obtaining an identification card is similar to that for drivers' licenses. The Legislature has provided that a "person who does not have a valid New Mexico drivers' license may be issued an identification card by the department certified by the applicant as to true name, correct age and other identifying data as the department may require." § 66-5-401(A). The identification card may only be revoked or denied for "good cause." *Id.* As with drivers' licenses, an identification card may be issued for four or eight years. *See* § 66-5-403. Significantly, an identification card may be renewed "by mail or telephonic or electronic means. . ." *Id.* An identification card holder need not make a personal appearance at an MVD office to renew a license. Also, nothing in the Motor Vehicle Code or promulgating regulations require that identification card holders provide updated identification or residency documents at the time that they reapply for the identification card.

The MVD's "Residency Certification Program"

15. 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 drivers' license." *See* Press Release of the Office of the Governor, attached as Ex. B. According to the Governor's Office, beginning on the same day of the press release, the MVD would send letters to a random sample of 10,000 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] drivers' licenses." *Id.*

16. On July 26, 2011, Petitioner Marisela Morales received a form letter from Keith Perry, the Director of the Taxation and Revenue Department's Motor Vehicle Division. *See* Ex. A. Through his letter, Mr. Perry ordered Ms. Morales to acquiesce to the Department and the MVD's "compliance effort" and "provide proof of [her] identity and residency to ensure that [the MVD] ha[s] correct and current information." *Id.* Mr. Perry 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 the Legislature to obtain a drivers' license when she initially applied for and was granted her license. *See id.* The letter threatened that if Ms. Morales failed to comply with the MVD's demand within thirty days, it would "take steps to cancel [her] license or identification card." *Id.*

17. The letter Ms. Morales received from Mr. Perry and the MVD did not provide any particularized reason for the Taxation and Revenue 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.* Tellingly, although the letter cited to a provision of the New Mexico state statutes which provides that the cancellation of drivers' licenses is without prejudice, nowhere in the letter did the Department or the MVD identify the statutory authority or basis by which it could command Ms. Morales to appear before the MVD to provide the information it requested. *See id.*

C. The Court Should Issue the Writ of Mandamus Because the Taxation and Revenue Department's "Residency Certification Program" Violates the Separation of Powers Provision of Article III, Section 1 of the New Mexico Constitution and the Equal Protection Clause of Article II, Section 18 of the New Mexico Constitution

The Department's MVD has exceeded its statutory authority and unlawfully intruded upon the province of the Legislature

18. "The Constitution of the State of New Mexico commands that "[t]he powers of the government of this state are divided into three distinct departments, the legislative, executive, and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others . . ." *Taylor*, 1998-NMSC-015 at ¶ 1 (quoting N.M. CONST. Art. III, § 1). "This provision [of the State Constitution] articulates one of the cornerstones of democratic government: that the accumulation of too much power within one branch poses a threat to liberty." *Id.* (citing *Gregory v. Ashcroft*, 501 U.S. 452, 458-59, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991)).

19. The New Mexico Supreme Court has long recognized that the State Legislature possesses the "sole power" of creating law, *State v. Armstrong*, 31 N.M. 220, 255, 243 P. 333,

347 (1924), and has recognized “the unique position of the Legislature in creating and developing public policy.” *Taylor*, 1998-NMSC-015 at ¶ 21.

20. “Elected executive officials and executive agencies also make policy, [but] to a lesser extent, [and only] *as authorized* by the constitution or legislature.” *Torres v. State*, 119 N.M. 609, 612, 894 P.2d 386, 389 (1995) (emphasis added).

21. Here, the Respondents have violated Article III, Section 1 of the New Mexico Constitution by creating and implementing, without legislative authority (or individualized suspicion of wrongdoing), a state program that singles out a class of individuals and commands them to come before government officials to once again prove their identity and their residency in New Mexico prior to the expiration of their drivers’ licenses and identification cards.

22. The Residency Certification Program, however, was not created, ratified, authorized, or even considered by the Legislature, 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. *Taylor*, 1998-NMSC-015 at ¶ 21.

23. The intent of the Legislature, and the spirit of the state statute that allows foreign nationals to obtain drivers’ license, is to treat every resident driver of New Mexico equally and not to discriminate on the basis of alienage against any individual who is otherwise qualified to obtain a state drivers’ license or identification card. *See, e.g.*, §66-5-9(B).

24. Although certain public officials of the executive branch of the state government, including Respondent Padilla, have made quite clear that they disagree with the policy decisions made by the Legislature with regard to the issuance of drivers’ 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).

25. Here, the creation and implementation of the statutorily unauthorized Residency Certification Program impermissibly distorts and perverts the Legislature's intent in enacting the current version of the Motor Vehicle Code, including Sections 66-5-9(B), 66-5-22, and other related provisions.

26. First, the Residency Certification Program imposes a non-statutory condition on a particular class of drivers and identification card holders to provide updated residency and identification documents during the term of the license or identification card. The program essentially requires the individuals in this class to reapply for drivers' licenses or identification cards that were lawfully issued to them previously and to recertify their eligibility to hold the drivers' license or identification cards.

27. The Legislature, however, has not authorized the Department or the MVD to require any drivers' license or identification card holders to submit a new application containing updated residency and identification documentation prior to the expiration of the previously issued license or identification card. In fact, through the provisions of the Motor Vehicle Code it enacted, the Legislature's intent regarding the procedure for obtaining a New Mexico drivers' license or identification card could not be clearer. The Legislature determined that, once an application for a drivers' license or identification card is submitted, the MVD was authorized to review or reject the application *before* the license is issued. *See id.* at §§ 66-2-8; 66-5-401(A). Once the application is approved, the drivers' license or identification card is valid for four or eight years. *See id.* at §§ 66-5-21; 66-5-403. Although the Legislature authorized the MVD to

cancel, suspend, or revoke drivers' license under certain delineated circumstances, or in the case of identification cards, to revoke if good cause exists, nowhere in the Motor Vehicle Code did the Legislature authorize the MVD to require any license or identification card holders to reapply for previously issued drivers' licenses or identification cards or recertify their eligibility to hold a drivers' license or identification card at its whim. This is particularly troublesome since the MVD does not require a drivers' license holder who wishes to renew that license to provide any documentation other than his or her previously issued drivers' license.² The Legislature certainly did not authorize the MVD to single out and discriminate against a particular class of drivers' license and identification card holders by requiring members of that class, and no other license holders, to continue to provide proof of their eligibility to obtain drivers' licenses and identification cards whenever the MVD believes it appropriate.

28. Second, the Residency Certification Program conflicts with and contradicts the statutory requirement that a drivers' license or identification card be valid for four years, or under certain circumstances, eight years. The MVD's letter to holders of a particular class of drivers' license makes clear that a licensee or identification card holder who fails to make an appointment and appear in person at the MVD with updated residency and identification documents will have his or her license cancelled. *See Ex. A.* The existing statutory scheme, however, only requires licensees and identification card holders to reapply for drivers' licenses every four or eight years depending on the term of the drivers' license or identification card. The Residency Certification program unlawfully subjects a random pool of licensees and

² *See* MVD Online, "Renew a Drivers' License," available at <http://www.mvd.newmexico.gov/Drivers/Licensing/pages/Renew-a-New-Mexico-Driver-License.aspx>.

identification holders to a shorter, and random, drivers' license and identification card term than what is provided for in the Motor Vehicle Code.³

29. Third, although the Department and the MVD have characterized the Residency Certification Program as an audit, the program in actuality is much more expansive. While the MVD could review previously submitted applications and supporting documentation to determine whether drivers' licenses and identification cards were issued appropriately, the Residency Certification Program actually commands foreign nationals to provide correct and *current* information, in effect requiring that this class of license and identification holders reapply for their previously issued drivers' licenses and identification cards on a continuing and random basis. *See* Ex. A. The Legislature has never authorized such a procedure, nor has the MVD promulgated any rules related to the program.⁴

30. Finally, the Residency Certification Program conflicts with and contradicts the provision of the Motor Vehicle Code which authorizes licensees and identification card holders to notify the MVD of a change of address through mail or electronic means and not by personal appearance. *See* § 66-5-22. Moreover, nothing in that section requires the licensee or

³ When the Legislature has wished to subject certain categories of licensees, such as teenagers and the elderly, to more frequent checks of their qualifications, it has expressly identified these categories in the statutes. *See e.g.*, §§ 66-5-19, 66-5-21, and 66-5-31. With regard to foreign nationals, however, the Legislature has expressly provided in Section 66-5-9(B) that licenses should be issued to them on the same terms and under the same rules that apply to all other drivers' license and identification holders in New Mexico. Had the Legislature intended for foreign national drivers' licenses and identification cards to be issued under a lesser term, then it would have explicitly stated so through legislative action, as it did for elderly and teenage drivers.

⁴ Even if the Secretary promulgated rules to govern the implementation of the Residency Certification Program, the entire program would still be unlawful for the reasons set forth in this Petition.

identification card holder to again provide proof of residency; they need only provide their new address. *See id.*

31. In sum, 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 individuals who obtain drivers' license or identification cards using an identification number other than a social security number.

The Residency Certification Program violates the Equal Protection Clause of the New Mexico Constitution

32. The Supreme Court of New Mexico "on several occasions has recognized that mandamus is an appropriate means to prohibit unlawful or unconstitutional official action." *State ex rel. Clark*, 120 N.M. at 573, 904 P.2d at 19.

33. In addition to constituting an unlawful encroachment by an executive agency into the purview of the Legislature, the MVD's Residency Certification Program is unlawful and unconstitutional because it violates the Equal Protection Clause of the Constitution of the State of New Mexico.

34. The Equal Protection Clause of the New Mexico Constitution provides that "[n]o person shall be ... denied equal protection of the laws." N.M. CONST., art. II, §12. Similarly, the Fourteenth Amendment to the United States Constitution declares that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

35. The Equal Protection Clauses contained in the United States and the New Mexico Constitutions are substantially identical, but the latter is interpreted to afford more protection than the federal constitution. *See Breen v. Carlsbad Mun. Schools*, 2005-NMSC-028, ¶¶ 14, 18, 138 N.M. 331, 336, 120 P.3d 413, 418. While New Mexico courts “take guidance from the Equal Protection Clause of the United States Constitution and the federal courts’ interpretation of it, [New Mexico courts] will nonetheless interpret the New Mexico Constitution’s Equal Protection Clause independently when appropriate.” *Id.* at ¶14.

36. The Equal Protection Clause directs that “all persons similarly circumstanced shall be treated alike.” *Plyler v. Doe*, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). The Equal Protection Clause protects not only citizens, but also “any person” within a state’s jurisdiction, from unequal treatment at the hands of the state. *See Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886); *Truax v. Raich*, 239 U.S. 33, 36 S.Ct. 7, 60 L.Ed. 131 (1915); *Takahashi v. Fish & Gam Comm’n*, 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478 (1948); *see also Tayyari v. New Mexico State University*, 495 F.Supp. 1365, 1372 (D.N.M. 1980) (“Aliens residing in our land have long enjoyed protection of [the Equal Protection Clause].”)

37. The Equal Protection clause prohibits a branch of government from creating classifications that “are unreasonable, unrelated to a legitimate statutory purpose, or are not based on real differences.” *Madrid v. St. Joseph Hosp.*, 1996-NMSC-064, ¶ 34, 122 N.M. 524, 928 P.2d 250.

38. The courts “have treated as presumptively invidious those classifications that disadvantage a ‘suspect class.’” *Plyler*, 457 U.S. at 216-217, 102 S.Ct. at 2394. Where a suspect class is affected, courts analyze the constitutionality of the classification under strict

scrutiny analysis. *See Trujillo v. City of Albuquerque*, 125 N.M. 721, 726, 965 P.2d 305, 310 (1998).

39. “[S]trict scrutiny requires the most exacting review by a court.” *Breen*, 2005-NMSC-028 at ¶ 12. In order to survive constitutional scrutiny under a strict scrutiny analysis, the burden is on the state to demonstrate that the classification has been “precisely tailored to serve a compelling governmental interest,” *Plyler*, 457 U.S. at 217, 102 S.Ct. at 2395, “by the least restrictive means practically available.” *Bernal v. Fainter*, 467 U.S. 216, 227, 104 S.Ct. 2310, 2320, 81 L.Ed.2d 175 (1984).

40. There is no question that alienage classifications constitute a suspect classification. *See Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848, 1852 29 L.Ed.2d 534 (1971); *Tayyari*, 495 F.Supp. at 1372 (“Alienage has been treated under modern equal protection analysis as a suspect classification.”).

41. In this case, the MVD’s Residency Certification Program implicates the Equal Protection Clause *on its face* because it singles out and classifies individuals strictly by alienage and treats them differently from other similarly situated individuals who hold drivers’ licenses and identification cards. The implementation of the Residency Certification Program is thus subject to strict scrutiny analysis.⁵

42. Through public statements made to the media, Respondent Padilla and the Governor’s Office have made clear that the purpose of the Residency Certification Program is to address their concern that “New Mexico drivers’ licenses are going to people who do not remain

⁵ The Legislature certainly did not create this impermissible classification. To the contrary, the Legislature, through its enactment of Section 66-5-9(B), intended that all qualified license holders would be similarly situated regardless of immigration status or alienage and that no drivers’ license or identification card holders would be classified by such status.

or even intend to remain residents of our state.” Ex. B. According to Respondent Padilla, the MVD has “evidence to indicate that illegal immigrants from other states and countries are coming to New Mexico just to obtain drivers’ licenses and then leave.” *Id.* The program the MVD invented, insists Respondent, “will allow [the MVD] to determine how deep this problem runs and also make necessary regulatory changes to prevent fraud and misrepresentation.” *Id.*

43. The Residency Certification Program created by Respondent Padilla and the MVD cannot pass strict scrutiny analysis for a number of reasons. First, the concerns of Respondent Padilla and the Governor do not constitute a “compelling state interest” where the Legislature has not found it to be so. Under New Mexico law, it is the Legislature that is responsible for directing state policy and thus addressing the interests of the state. *See Taylor*, 1998-NMSC-015 at ¶ 21.

44. Second, even assuming that the concerns of Respondent Padilla and the Governor could constitute a “compelling state interest,” their Residency Certification Program cannot survive strict scrutiny because it is not narrowly and precisely tailored to address these issues by the least restrictive means practically available. *See Bernal*, 467 U.S. at 227; *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.”). Respondent Padilla and the MVD cannot make a credible argument that randomly selecting 10,000 individuals from the overall group of individuals who are on their list of “foreign nationals” license holders, without any evidence whatsoever of wrongdoing by these individuals, could possibly constitute a “precisely tailored” method of generally rooting out fraud by the least restrictive means possible. Literally

thousands of qualified license holders – like Petitioner Morales – are being summoned by Respondent Padilla and the MVD under the threat of having their drivers’ licenses and identification cards cancelled, and yet neither the Respondent nor the MVD has articulated *any* basis to believe that any of these particular individuals committed any fraud when they originally applied for their drivers’ licenses or identification cards or that they have done anything since that would warrant having their drivers’ licenses or identification cards cancelled or revoked.

45. Moreover, even assuming that it did not matter whether the Taxation and Revenue Department had any basis to actually suspect fraud by any of the individuals it has targeted, the Residency Certification Program is certainly not the least restrictive and intrusive manner by which to accomplish its objectives. For instance, the Department could, among other things:

- improve the administrative process for reviewing and approving residency documents or rejecting applications *before* licenses are issued, in order to prevent any purported fraud;
- perform audits of previously approved applications (and the associated documentation) to determine whether any of the applications appear to have been submitted fraudulently⁶;
- seek to cancel the licenses of particular individuals for whom the MVD has actual information that a drivers’ license or identification card was obtained improperly; or
- seek to persuade the Legislature to amend the Motor Vehicle Code to allow the MVD to engage in residency certification procedures, which would be applicable *to all license holders* in New Mexico, prior to the time drivers’ licenses expire.

⁶ In fact, the Legislature has directed the MVD to maintain on file copies of previously submitted applications, probably for this reason. *See* Section 66-5-23 (“The division shall file every application for a drivers’ license. . .received by it . . .”).

46. Each of these less restrictive means would be just as effective, if not more so, in addressing any concerns about fraud during the drivers' license application process.

47. Finally, the fact that legal permanent residents like Petitioner Morales (and likely U.S. citizens) are being subjected to the MVD's demands, where the stated purpose of its residency certification program is to address a perceived problem with undocumented immigrants from other states receiving drivers' licenses, demonstrates the absurd over-inclusiveness of the MVD's efforts.⁷ *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 389-90, 98 S.Ct. 673, 682-83 54 L.Ed.2d 618 (1978) (considering the over and under-inclusiveness of a classification in analyzing whether the classification violates the Equal Protection Clause). That the Residency Certification Program has targeted individuals born outside the United States but who are not undocumented immigrants – like Petitioner Morales - demonstrates that it is not narrowly tailored to address the stated concerns of the Taxation and Revenue Department's MVD, particularly where the Legislature has endeavored to ensure that applicant's for licenses are not discriminated based upon whether they were born in the United States. *See* NMSA 1978, § 66-5-9(B).

PRAYER FOR RELIEF

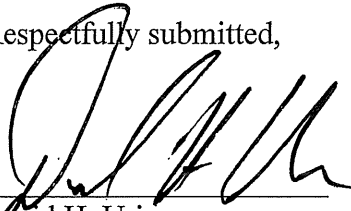
WHEREFORE, Petitioners pray that this Court:

Enter an order granting this Petition and issue a Writ of Mandamus, directed to the Respondent, and requiring Respondent to immediately cease and desist from implementing and executing its Residency Certification Program and from taking any action to cancel the drivers'

⁷ The MVD does not have the authorization or the means by which to determine whether and when individual license holders become naturalized citizens. Therefore, its database of "foreign national" license holders undoubtedly includes individuals who have become naturalized citizens since obtaining their licenses as well as other legal permanent residents.

licenses or identification cards of any individuals under the unlawful program; and any further relief that this Court deems necessary and proper.

Respectfully submitted,



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Vincent Ward
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MEXICAN AMERICAN LEGAL DEFENSE AND
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Los Angeles, CA 90014
(213) 629-2512

Attorneys for Petitioners

* Pro hac vice application pending

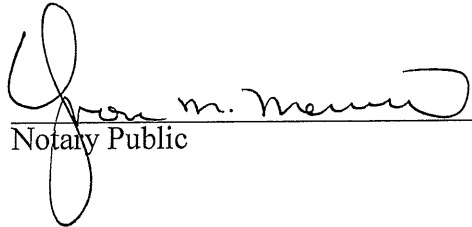
VERIFICATION

STATE OF NEW MEXICO)
COUNTY OF BERNALILLO) SS

Miguel Garcia, a member of the New Mexico House of Representatives and citizen of New Mexico, being sworn under oath, states that he is a named Petitioner herein, that he has read the foregoing Petition for Writ of Mandamus and that the factual allegations of this petition are true and correct to the best of his knowledge and belief.


Miguel Garcia
Petitioner

SUBSCRIBED AND SWORN TO before me this 23rd day of August, 2011 by Miguel Garcia.


Notary Public

My commission expires:

7-14-2014

VERIFICATION

STATE OF NEW MEXICO
COUNTY OF SANTA FE } SS

Marisela Morales, a resident of the State of New Mexico, being sworn under oath, states that she is a named Petitioner herein, that she has read the foregoing Petition for Writ of Mandamus and that the factual allegations of this petition are true and correct to the best of her knowledge and belief.

Marisela Morales
Marisela Morales
Petitioner

SUBSCRIBED AND SWORN TO before me this 23 day of August, 2011 by Marisela Morales.

Lucia D. Maynes
Notary Public

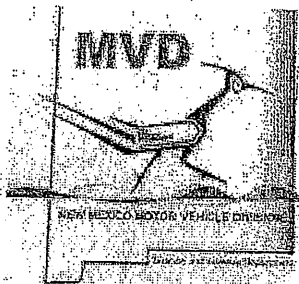
My commission expires:

8-01-2012



OFFICIAL SEAL
LUCIA D. MAYNES
NOTARY PUBLIC—STATE OF NEW MEXICO

My commission expires: 8-01-2012



New Mexico Taxation and Revenue Department

Motor Vehicle Division

1100 South St. Francis Drive

PO Box 1028

Santa Fe, NM 87504-1028

26-Jul-11

MORALES MARISELA

SILVER CITY, NM 88061

RE: NEW MEXICO DRIVER'S LICENSE OR IDENTIFICATION CARD#

You must act within thirty (30) days from the date of this letter to avoid cancellation of your New Mexico driver's license or identification card.

Dear Mr./Ms. MARISELA

The public safety of New Mexico requires that State authorities identify and cancel the driver's licenses (licenses) and identification cards of Foreign Nationals who presented fraudulent documents or have moved out of state since obtaining a New Mexico license or identification card. This compliance effort requires that you provide proof of your identity and residency to ensure that we have correct and current information. This process is not optional and you must comply with the detailed instructions below. This is notice that the Motor Vehicle Department (MVD) will take steps to cancel your license or identification card if you fail to comply with the appointment process within thirty (30) days of the date listed on this notification. The law states that "the cancellation of a license is without prejudice and application for a new license may be made at any time after cancellation." NMSA 1978, §66-1-4.3.

As part of this compliance process, you must provide sufficient proof of your identity and residency. You must provide the following documentation: one (1) proof of identification number, one (1) proof of identity, and two (2) proofs of residency showing a valid New Mexico address. Enclosed you will find a list of acceptable identification and residency documents. Any documentation not listed will not be accepted.

We have established a new office at the Bank of the West Building at the corner of Central Avenue and San Mateo in Albuquerque. The new office will handle the compliance review of all Foreign National driver licenses and identification card holders. By using a single, centrally located facility for this purpose, with MVD employees who are specially trained in the Foreign National compliance process, we will be able to efficiently confirm your identity and residency status. Our intention is to make your visit as quick and easy as possible.

You can schedule your appointment by going on-line at <http://www.mvd.newmexico.gov> or by calling our Foreign National Call Center at 1-855-784-8407. Please note that only one appointment will be allowed per individual. Your appointment time is for you alone and cannot be used by anyone else. Please appear for your appointment 10-15 minutes early so that we can serve you promptly at the scheduled time. Should you need to cancel your appointment, you must call the Foreign National Call Center, give them your existing appointment date and time, and ask to be rescheduled. Please note that an appointment is required and the new office will not service walk-ins without a scheduled appointment.

If you have additional questions or need more information, please contact us at 1-855-784-8407.

Sincerely,

Keith Perry, Director

Motor Vehicles Division

Enclosure: Required Documents



[Click to view this email in a browser](#)



FOR IMMEDIATE RELEASE
July 19, 2011

Contact: Scott Darnell
(505) 819-1398
scott.darnell@state.nm.us

**GOVERNOR SUSANA MARTINEZ ANNOUNCES RESIDENCY
CERTIFICATION EFFORT FOR FOREIGN NATIONAL DRIVER'S
LICENSES**

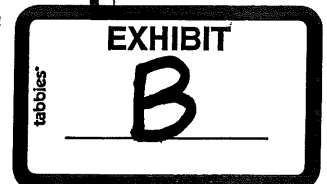
***Effort Intended to Enhance the Security of New Mexico's Driver's
License***

SANTA FE – Today, Governor Susana Martinez announced that the State will begin efforts to increase the security of New Mexico's driver's license by initiating a residency certification program for those who have obtained a foreign national driver's license. The program is the result of a recommendation from the Taxation and Revenue Department (TRD) and the Motor Vehicle Division (MVD), in response to the Governor's directive on June 22nd to identify and implement administrative changes that can enhance the security of New Mexico's driver's license.

"New Mexico's driver's license is not secure. We are one of only two states that offer driver's licenses to illegal immigrants, and our state has become a destination spot for people from other states and around the world who wish to receive an official government-issued ID card," said Governor Martinez. "There is a real and legitimate concern, given the interest that is coming from out of state and the numerous license rings that have recently been uncovered, that New Mexico driver's licenses are going to people who do not remain or even intend to remain residents of our state."

Beginning today, MVD will be sending letters to a random sample of 10,000 foreign nationals who have obtained New Mexico driver's licenses. Each individual who receives the letter will have 30 days in which to contact MVD to schedule an in-person appointment to verify their residency in New Mexico. They can call 855-784-8407 or go online to www.mvd.newmexico.gov to make appointments. The letter includes a description of the process for verifying residency, and an MVD center at the Bank of the West building in Albuquerque has been established to handle the required in-person appointments. The address of the office is 5301 Central Avenue in Albuquerque, on the building's first floor.

"We have strong evidence to indicate that illegal immigrants from other states and countries are coming to New Mexico just to obtain our driver's licenses and then leave," TRD Secretary Demesia Padilla said. "This review process will allow us to determine how deep this problem runs and also make necessary regulatory changes to prevent fraud and misrepresentation."



Over 85,000 foreign nationals without a Social Security Number have obtained New Mexico driver's licenses since a law was passed allowing illegal immigrants to obtain driver's licenses in 2003. The residency certification program should provide valuable data regarding the percentage of foreign national driver's licenses that have been issued to people who are not, in fact, residents of New Mexico. If the results of the effort point to a serious problem of issuing licenses to non-residents, TRD and MVD will then proceed with verifying the residency of the additional foreign nationals who were not part of the random sample.

"Let me be very clear - the fraud and abuse related to New Mexico's driver's license will not go away until the irresponsible law that grants driver's licenses to illegal immigrants is repealed," Governor Martinez concluded. "But in the meantime, we owe it to New Mexicans to identify driver's licenses that are being used improperly and cancel them."

The residency requirements for foreign nationals are the same as for anyone else who wants to obtain a New Mexico driver's license. Some of the documents that can be shown to verify full-time residency in New Mexico include: bank statements with activity in New Mexico; utility bills; lease agreements; and pay stubs. A complete list can be found on the MVD website at www.mvd.newmexico.gov.

MVD regulations require anyone who has moved since the date of obtaining a driver's license to notify the agency of the change of address. "We understand that some of these individuals might have moved since obtaining their driver's licenses and have failed to properly notify MVD. To accommodate these individuals, we will resend the letters if any of the returned letters have a new forwarding address within New Mexico. If the forwarding address is from out-of-state, we will cancel those individuals' driver's licenses," said Secretary Padilla. For other licenses that are determined to be held by non-residents or by those who fail to comply with the certification process, steps will be taken to begin the process of cancelling their driver's license.

In the past year, law enforcement officials have busted numerous criminal rings that have used false residency documents to obtain New Mexico driver's licenses for illegal immigrants living outside the State. These criminal schemes involved Chinese, Brazilian, Costa Rican, Polish, East Indian and Mexican nationals. MVD also cancelled dozens of licenses already issued to individuals involved with these schemes.

In 2003, when New Mexico law was implemented to issue driver's licenses to illegal immigrants, 17 other states in the country also issued them. All but two states – New Mexico and Washington – have stopped issuing driver's license to illegal immigrants. Since 2010, more and more illegal immigrants from across the country are coming to New Mexico for the sole purpose of obtaining our driver's license and then leaving the State.

New Mexico has become a magnet for driver's licenses for illegal immigrants from all over the country. Investigators have found that people are willing to pay anywhere between \$500 and \$6,000 per person to obtain a New Mexico driver's license. Since July 2010, MVD has required all illegal immigrants who want to obtain a driver's license to make an appointment. A staggering 35 percent of those calling to make these appointments have used out-of-state phone numbers – yet another indicator of the outside interest from those in other states and countries for a New Mexico license.

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