

TABLE OF CONTENTS

I. INTRODUCTION 1

II. BACKGROUND 2

 A. DEFERRED ACTION..... 2

 B. NEBRASKA POLICY ON DRIVER’S LICENSE ELIGIBILITY..... 4

III. ARGUMENT 6

 A. THE COURT SHOULD GRANT PRELIMINARY INJUNCTIVE RELIEF..... 6

 1. Plaintiff has Suffered and Will Continue to Suffer Irreparable Harm if the Court Does not Grant an Injunction.. 7

 2. The Balance of Equities Tips Sharply in Plaintiff’s Favor.. 9

 3. The Preliminary Injunction Will Serve the Public Interest..... 10

 4. Plaintiff is Likely to Succeed on the Merits..... 11

 a. Defendant's policy violates the Supremacy Clause..... 11

 b. Defendant's policy violates Equal Protection..... 15

 (i) DMV's policy denies driver's licenses to DACA recipients while granting driver's licenses to similarly situated noncitizens. 15

 (1) Discrimination against DACA recipients is subject to heightened scrutiny. 16

 (2) Defendant's driver's license policy does not pass rational basis review. 17

IV. CONCLUSION..... 18

TABLE OF AUTHORITIES

Cases

<i>Am. Express Fin. Advisors, Inc. v. Yantis</i> , 358 F. Supp. 2d 818, 825 (N.D. Iowa 2005)	6
<i>Arizona v. United States</i> , ___ U.S. ___, 132 S. Ct. 2492 (2012).....	11, 12, 13, 14, 15
<i>Bell v. Burson</i> , 402 U.S. 535 (1971).....	7, 12, 15
<i>Berman v. Parker</i> , 348 U.S. 26, 33, 75 S. Ct. 98, 102, 99 L. Ed. 27 (1954).....	10
<i>Buquer v. City of Indianapolis</i> , 797 F. Supp. 2d 905 (S.D. Ind. 2011).....	10
<i>Clark v. Jeter</i> , 486 U.S. 456 (1988).....	17
<i>DeCanas v. Bica</i> , 424 U.S. 351 (1976).....	11, 12, 13,14
<i>Dept. Agriculture v. Moreno</i> , 413 US 528 (1973).....	17
<i>Equal Access Educ. v. Merten</i> , 305 F. Supp. 2d 585 (E.D. Va. 2004)	13, 14
<i>Glenwood Bridge, Inc. v. City of Minneapolis</i> , 940 F.2d 367, 370 (8th Cir. 1991)	9
<i>Golinski v. U.S. Office of Personnel Management</i> , 824 F. Supp. 2d 968 (N.D. Cal. 2012).....	17
<i>Hispanic Interest Coal. of Ala. v. Bentley</i> , ___ F. Supp. 2d ___, No. 5:11–CV–2484–SLB, 2011 WL 5516953 (N.D. Ala. Sept. 28, 2011)	14
<i>League of United Latin American Citizens v. Wilson</i> , 908 F. Supp. 755 (C.D. Cal. 1995)	13, 14
<i>Ligon v. City of New York</i> , No: 12 CIV 2274 SAS, 2012 WL 3597066 (S.D.N.Y. Aug. 21, 2012)	8
<i>Matthews v. Diaz</i> , 426 U.S. 67, 80-81, 84-85 (1976).....	12

<i>Mathews v. Lucas</i> , 427 U.S. 495 (1976).....	16
<i>Miller v. Anckaitis</i> , 436 F.2d 115 (3d Cir. 1970)	7, 8, 12, 15
<i>Mills v. District of Columbia</i> , 571 F.3d 1304 (D.C. Cir. 2009).....	8
<i>Nyquist v. Mauclet</i> , 432 U.S. 1 (1977).....	13
<i>O’Brien v. Town of Caledonia</i> , 748 F.2d 403 (7th Cir. 1984)	10
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982).....	12, 13, 16
<i>Reed v. Reed</i> , 404 U.S. 71 (1971).....	17
<i>Romer v. Evans</i> , 517 U.S. 620 (1996).....	17
<i>Sixth Camden Corp. v. Evesham Twp., Burlington Cnty.</i> , 420 F. Supp. 709, 723 (D.N.J. 1976).....	10
<i>Toll v. Moreno</i> , 458 U.S. 1 (1982).....	13
<i>United States v. Virginia</i> , 518 U.S. 515 (1996).....	17
<i>Windsor v. United States</i> , 699 F.3d 169 (2d Cir. 2012)	16
<i>Wooley v. Maynard</i> , 430 U.S. 705 (1977).....	8
Statutes	
N.R.S. § 60-484.04	5, 10
N.R.S. § 60-484.04(2)	5, 10
N.R.S. § 60-484.05	5, 12, 14, 16
Rules	
8 C.F.R. § 274a.12(a)	13, 16

8 C.F.R. § 274a.12(c) 2, 16

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff respectfully moves this Court to enjoin Defendant, Rhonda Lahm, Director of the Nebraska Department of Motor Vehicles (hereinafter “DMV”) from enforcing the DMV’s current policy denying her a Nebraska driver’s license because of her status as a beneficiary under the Deferred Action for Childhood Arrivals (hereinafter “DACA”) program. Plaintiff is a young immigrant residing in Nebraska who arrived in the United States of America as a child, she has lived here for over twenty-two years, and has overcome innumerable obstacles to pursue an education, support her family, and succeed in her life. In light of the humanitarian factors and strong equities in her favor, Plaintiff has been granted deferred action under the DACA program, and has thus received federal authorization to live and work in the United States of America for a renewable two-year period. Yet despite federal action authorizing her presence, the DMV has deemed Plaintiff categorically ineligible to apply for a driver’s license. Consequently, the DMV’s policy impermissibly applies a state-law classification to DACA recipients and places the State of Nebraska in conflict with federal immigration law and policy. Moreover, the DMV’s policy unlawfully singles out Plaintiff and other DACA recipients for differential treatment when similarly situated lawfully present individuals – including individuals granted deferred action under other programs– remain eligible for licenses and continue to receive them.

Defendant’s policy causes Plaintiff irreparable harm and interferes with her ability to meet her daily needs, such as attending school or work, driving her siblings or other family members to school or medical appointments, or going to the grocery store.

Because Plaintiff is likely to succeed on the merits of her claims, and because she satisfies the remaining injunction factors, Plaintiff seeks a preliminary injunction barring Defendant from enforcing the DMV's unlawful driver's license policy while the merits of her claims are finally determined.

II. BACKGROUND

A. DEFERRED ACTION.

Deferred action is a longstanding form of prosecutorial discretion in which the federal government decides, often based on humanitarian reasons, to refrain from seeking a noncitizen's removal and to authorize her continued presence in the United States of America. Individuals granted deferred action are eligible to obtain employment authorization, 8 C.F.R. § 274a.12(c)(14), and a Social Security Number.

For over four decades, the federal government has used deferred action to authorize numerous groups of immigrants to live and work in the United States of America for a temporary and renewable period. Deferred action has been made available to victims of human trafficking and sexual exploitation; to relatives of victims of terrorism; to surviving family members of a lawful permanent resident member of the armed forces; to victims of domestic violence, or their children, who have been abused by a U.S. citizen or permanent resident spouse/parent/step-parent; to surviving spouses of U.S. citizens; to foreign students affected by Hurricane Katrina; and to applicants for certain types of visas. *See Ex. 1 Declaration of Karine Sokpoh in Support of Motion for a Preliminary Injunction & Ex. 2 Declaration of Rachel Yamamoto in Support of Motion for a Preliminary Injunction* In addition, the federal government may grant deferred

action on an individual basis: for example, where the person's continued presence is desired by law enforcement for an ongoing investigation. *See* Ex. 1 & Ex. 2.

Most recently, on June 15, 2012, the Secretary of the U.S. Department of Homeland Security (“DHS”) announced that certain youth present in the United States of America without immigration status would be eligible to obtain deferred action if they meet specific criteria. *See* Janet Napolitano, *Memo. on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, June 15, 2012, at 2-3.¹ Individuals granted deferred action under DACA are permitted to remain in the United States of America for a renewable period of two years; are shielded from removal proceedings during that time; may apply for federal employment authorization; and may apply for a Social Security Number. *Id.* DACA recipients, like all other recipients of deferred action, are authorized to be present in the United States of America during the deferred action period. *See USCIS DACA Clarification Frequently Asked Questions, Jan. 18th, 2013; Q.6.*²

To apply for deferred action under DACA, young immigrants who entered the United States of America as children must meet several educational and residency requirements, submit an application to the federal government, undergo extensive criminal background checks, and establish that their individual circumstances justify a

¹ Accessed at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>

² Accessed at <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD>

grant. See Ex. 1 at 1; USCIS, *Consideration of Deferred Action for Childhood Arrivals Process* (Sept. 12th, 2012), at 1-5.³

B. NEBRASKA POLICY ON DRIVER'S LICENSE ELIGIBILITY.

On August 17, 2012 – two days after the federal government began accepting DACA applications – Governor Heineman issued a press release, stating that “President Obama’s deferred action program to issue employment authorization documents to illegal immigrants does not make them legal citizens. The State of Nebraska will continue its practice of not issuing driver’s licenses, welfare benefits or other public benefits to illegal immigrants unless specifically authorized by Nebraska statute.” *Gov. Heineman Issues a Statement on President Obama’s Deferred Action Program.*⁴ The DMV considered Governor Heineman’s August 2012 statements to be a directive to deny driver’s licenses to DACA beneficiaries. Consequently, the department implemented a policy denying driver’s licenses to any individual whose Employment Authorization Document (hereinafter “EAD”) returned with the code “(c)(33),” the code for DACA beneficiaries, after the applicant’s information was run through the SAVE verification program. Although to this day the policy has not been put in writing, internal DMV e-mails establish the policy went into effect on or about September 6, 2012.

Nebraska has for many years required that an applicant for a driver’s license or state ID “present valid documentary evidence that he or she has *lawful status* in the

³ Accessed at

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=f2ef2f19470f7310VgnVCM100000082ca60aRCRD&vgnnextchannel=f2ef2f19470f7310VgnVCM100000082ca60aRCRD>

⁴ Accessed at http://www.governor.nebraska.gov/news/2012/08/17_deferred_action.html

United States.” Neb.Rev.Stat. § 60-484.04(2). Until recently, the DMV had a long-standing policy that allowed applicants to apply for and obtain a regular driver’s license as long as they were able to prove *lawful presence*. The policy required individuals applying for a Nebraska permit, license or State ID Card to present documentation of: (1) Identity (containing name and date of birth); (2) Principal Address in Nebraska (at least two documents are required); and (3) disclosure of valid social security number or proof of exemption. *See* Nebraska Driver’s Manual 1C-1.⁵ Proof of identity could be established with one document, and among the documents the DMV accepted for this purpose was “[a] valid, unexpired Employment Authorization Card (I-766).” *Id.* at 1C-1(1)(8). Under this policy, recipients of deferred action, such as VAWA, TPS or U-visa holders, were able to apply for and obtain a driver’s license.

In January 2013, the DMV amended its policy and now only issues *temporary* driver’s licenses to individuals who can only prove lawful presence as opposed to lawful status. The policy mirrors Nebraska state law, which mandates that the DMV “shall only issue an operator’s license or a state identification card that is temporary to any applicant who presents documentation under section 60-484 and subsection (2) of section 60-484.04 that shows his or her *lawful presence* in the United States is temporary.” Neb.Rev.Stat. § 60-484.05 (emphasis added). The law also provides that “[a]n operator’s license or a state identification card that is temporary shall be valid only during the period of time of the applicant’s authorized stay in the United States or, if there is no definite end to the period of authorized stay, a period of one year.” *Id.* Despite this new policy

⁵ Accessed at <http://www.dmv.ne.gov/examining/pdf/engdrivermanual.pdf>

allowing individuals who are lawfully present in the country to apply for a temporary driver's licenses, the DMV has continued its policy of denying permits, licenses or state IDs to DACA beneficiaries.⁶

To this date, several DACA beneficiaries have been denied driver's licenses under the DMV's policy. Plaintiff, Mayra Saldana, has unsuccessfully attempted three times to obtain a driver's license. Plaintiff wrote to Governor Heineman pleading for a change in the DMV policy, and the Governor simply responded that he "support[s] legal immigration as opposed to policies that reward illegal behavior." Ex. 3 *Heineman Reply Letter to Plaintiff Mayra Saldana*. Because she is not able to drive, Plaintiff has lost at least one job opportunity since she received deferred status under DACA. See Ex. 4 *Response to Employment Opportunity E-mail from Jenn Walker to Plaintiff Mayra Saldana*.

III. ARGUMENT

A. THE COURT SHOULD GRANT PRELIMINARY INJUNCTIVE RELIEF.

Plaintiff is entitled to a preliminary injunction to suspend enforcement of the DMV's policy regarding driver's licenses for DACA recipients. A preliminary injunction should ordinarily be granted when the moving party establishes: (1) the likelihood of success on the merits; (2) the threat of irreparable harm to the moving party; (3) the balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (4) whether the grant of a preliminary injunction is in the public interest. *Am. Express Fin. Advisors, Inc. v. Yantis*, 358 F. Supp. 2d 818, 825 (N.D. Iowa

⁶ Despite the fact the Obama Administration clarified in mid-January that DACA beneficiaries are authorized to be in the United States and are to be considered "lawfully present" under federal immigration laws.

2005). Thus, in order for a preliminary injunction to be granted the moving party must be able to convince the court that the aforementioned steps will be met. Plaintiff will establish that all of these steps shall be met. As a result, a preliminary injunction suspending enforcement of the DMV's driver's license policy towards DACA recipients should be granted.

1. Plaintiff has Suffered and Will Continue to Suffer Irreparable Harm if the Court Does not Grant an Injunction.

As a result of Defendant's denial of driver's licenses to DACA recipients, Plaintiff has suffered irreparable harms, and will continue to suffer them if the DMV policy is not enjoined.

First of all, the denial of a driver's license causes irreparable injury by hindering Plaintiff's efforts to find and maintain stable employment, develop her resume, and begin her career. Courts have recognized that the ability to work is often dependent on the ability to drive. *See, e.g., Bell v. Burson*, 402 U.S. 535, 539 (1971) (noting that "possession [of a driver's license] may become essential in the pursuit of a livelihood"); *Miller v. Anckaitis*, 436 F.2d 115, 120 (3d Cir. 1970) ("use of an automobile [is] an actual necessity for virtually everyone who must work for a living"). Driving is a necessity of modern life and is essential to the ability to work, particularly in Nebraska. U.S. Census Bureau statistics estimate that over 90 percent of Nebraskans commute to work by car.⁷ In contrast, only 0.7 percent of all Nebraskan workers commute to work by public

⁷ U.S. Census Bureau, Means of Transportation to Work by Selected Characteristics for Workplace Geography, 2011 American Community Survey 1 Year Estimates Available at http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_1YR_S0804&prodType=table

transportation.⁸ Denying driver's licenses to DACA recipients in Nebraska severely frustrates their ability to obtain employment and achieve economic self-sufficiency.

Here, denying a driver's license to Plaintiff severely frustrates her ability to work, advance her career, and achieve economic self-sufficiency. For example, Plaintiff was denied a job opportunity because the placement required at least one worker capable of driving and without a driver's license she was deemed ineligible. *See* Ex. 4. Plaintiff is afraid she will not be able to get a job to further her career, both while trying to complete school and after she graduates, without the ability to drive between school and work.

Secondly, the inability to drive legally imposes onerous restrictions on the daily life of the Plaintiff by restricting her ability to assist her family with child care, health needs, and other necessities of daily life. *See Wooley v. Maynard*, 430 U.S. 705, 712 (1977) (holding that plaintiffs had demonstrated harms sufficient to justify injunctive relief where threat of prosecution impeded ability to perform the ordinary tasks of daily life requiring an automobile); *Mills v. Dist. of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) (finding irreparable injury where citizens' right to drive was unconstitutionally limited); *Ligon v. City of New York*, No: 12 CIV 2274 SAS, 2012 WL 3597066 (S.D.N.Y. Aug. 21, 2012) (holding preliminary injunction was warranted where plaintiffs' daily lives are being disrupted by police harassment); and *Anckaitis*, 436 F.2d at 120 (holding that Pennsylvania motor vehicle safety responsibility provisions were unconstitutional since "a combination of public and private policies have made use of an automobile an actual necessity for virtually everyone who must work for a living.") The

⁸ *Id.*

DMV's policy and its enforcement are causing substantial irreparable harm to Plaintiff. In order to manage the basic activities of daily life, Plaintiff is forced to rely on rides from others, or risk criminal penalties and fines by driving without a license.

2. The Balance of Equities Tips Sharply in Plaintiff's Favor.

The harm to Plaintiff from denying a preliminary injunction strongly outweighs the harm to Defendant from granting the motion. As described above, barring access to a driver's license severely hinders Plaintiff's ability to work and to function as a fully participating member of society. *See* § III(A)(1), *supra*. In comparison, any hardship to Defendant from a preliminary injunction would be minimal. Under its previous policy, Nebraska issued driver's licenses to anyone who could prove lawful presence in this country without distinction, including beneficiaries of deferred action under other federal programs. Moreover, under its new policy, the DMV continues to issue temporary driver's licenses to individuals who are able to establish they are lawfully present in the United States. *See* § II(B), *supra*. It is not a substantial hardship for Defendant and the DMV to apply its current policy and grant temporary driver's licenses to DACA holders, who are also considered lawfully present under federal immigration laws and policies. *See* Exs. 1 & 2. Indeed, courts frequently find that the equities favor an injunction to preserve the status quo – here, the Nebraska DMV allowing *all* individuals who can establish they are lawfully present to apply and obtain a driver's license, including DACA holders. *See, e.g., Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 370 (8th Cir. 1991) (“[The basic function of a preliminary injunction is to determine] whether the balance of equities so favors the movant that justice requires the court to

intervene to preserve the status quo until the merits are determined.”) Thus, the equities tip sharply in favor of the grant of a preliminary injunction.

3. The Preliminary Injunction Will Serve the Public Interest.

The public interest encompasses general welfare and the “concept of the public welfare is broad and inclusive.” *Berman v. Parker*, 348 U.S. 26, 33, 75 S. Ct. 98, 102, 99 L. Ed. 27 (1954); *see also Sixth Camden Corp. v. Evesham Twp., Burlington Cnty.*, 420 F. Supp. 709, 723 (D.N.J. 1976) (“the range of public interests comprehended by the public welfare is exceedingly broad.”) A preliminary injunction supports the public interest by permitting DACA recipients to participate meaningfully in the state’s communities and to contribute to Nebraska as a whole. Driver’s licenses allow DACA recipients access to work and educational opportunities, and help them contribute to the economy and provide for their families – as the federal government has intended the DACA program to do pursuant to the exercise of statutorily conferred discretion. *See* Remarks by the President on Immigration (noting that permitting economic participation by DACA eligible youth is the “right thing to do for our economy”).⁹

Furthermore, “the public has a strong interest in the vindication of an individual’s constitutional rights” *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905, 925 (S.D. Ind. 2011) (quoting *O’Brien v. Town of Caledonia*, 748 F.2d 403, 408 (7th Cir. 1984)). As described in detail below, the DMV’s driver’s license policy is preempted by

⁹ Remarks by President Obama on immigration – accessed at <http://www.whitehouse.gov/the-press-office/2012/06/15/remarks-president-immigration>

federal law and violates equal protection. For these reasons, the public interest weighs in favor of a preliminary injunction.

Ensuring that all drivers can obtain validly issued driver's licenses promotes public safety for numerous reasons. For example, it ensures that drivers in a state are trained and tested on the state's traffic laws. As a further example, it facilitates access to insurance that can protect all drivers in case of an accident. In addition, it helps ensure that police can accurately identify individuals that they stop and that all drivers in Nebraska are accountable for their driving records.

4. Plaintiff is Likely to Succeed on the Merits.

a. Defendant's policy violates the Supremacy Clause.

Plaintiff is likely to succeed on the merits of her preemption claim. In the immigration context, state action is "per se pre-empted" if it amounts to a regulation of immigration because the Constitution grants that power exclusively to the federal government. *DeCanas v. Bica*, 424 U.S. 351, 355 (1976). In addition, state action may be expressly or impliedly preempted by federal law. *See, e.g., Arizona v. United States*, ___ U.S. ___, 132 S. Ct. 2492, 2500-01 (2012). Here, the Nebraska DMV's policy is per se preempted as a regulation of immigration and impliedly preempted because it conflicts with federal law.

Current Nebraska DMV policy regarding the issuance of driver's licenses or state identification cards to persons who are only able to prove lawful presence, as opposed to lawful status, essentially mirrors Nebraska state law. Nebraska law mandates that the DMV "shall only issue an operator's license or a state identification card that is temporary to any applicant who presents documentation under section 60-484 and

subsection (2) of section 60-484.04 that shows his or her lawful presence in the United States is temporary.” Neb.Rev.Stat. § 60-484.05. USCIS has made it clear that DACA recipients are legally present in the United States during the deferred action period. *See Ex. 2 & USCIS DACA Clarification; supra*. Nevertheless, when Plaintiff appealed the DMV’s denial of a driver’s license, Defendant stated the department did so “because the Nebraska DMV cannot issue an operator’s license to a person using a [DACA] deferment to prove they are lawfully present for purposes of Nebraska statute.” *See Ex. 5 Order Affirming Refusal to Issue a Nebraska Operator’s License*. The Nebraska DMV believes that it “has the authority to interpret and apply the term lawful presence appearing in its own statutes.” *See Ex. 5 at 4*.

By its own admission, the DMV has created its own immigration classification that determines who may and may not be deemed lawfully present in the country and has decided to exclude DACA beneficiaries from that definition. Such classification impermissibly intrudes upon the federal government’s exclusive power to regulate immigration and conflicts with federal law and policy.

The power to classify aliens is a core component of the federal government’s exclusive power. As the Supreme Court explained in *Plyler v. Doe*, 457 U.S. 202 (1982)

This [classification] power “is committed to the political branches of the Federal Government.” Although it is “a routine and normally legitimate part” of the business of the Federal Government to classify on the basis of alien status, and to “take into account the character of the relationship between the alien and this country,” only rarely are such matters relevant to legislation by a State.

Id. at 225 (internal citations omitted) (quoting *Mathews v. Diaz*, 426 U.S. 67, 80-81, 84-85 (1976)). Accordingly, “[t]he States enjoy no power with respect to the classification

of aliens.” *Id.*; *see also id.* at 219 n.19; *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (noting “the substantial limitations upon the authority of the States in making classifications based upon alienage”); *Nyquist v. Mauclet*, 432 U.S. 1, 7 n.8 (1977) (“Congress, as an aspect of its broad power over immigration and naturalization, enjoys rights to distinguish among aliens that are not shared by the States”). At most, states may, in some circumstances, “borrow the federal classification.” *Plyler*, 457 U.S. at 226; *accord Equal Access Educ. v. Merten*, 305 F. Supp. 2d 585, 602-03 (E.D. Va. 2004).

Here, the DMV has created its own classification of noncitizens that are “authorized” to be in the country under federal law and has deemed that DACA beneficiaries do not fall into that category. The DMV’s policy, and the Governor’s approval of it, establishes a state classification of authorized presence that contradicts the federal treatment of DACA beneficiaries. Thus, the DMV’s classification is preempted because it usurps the exclusive federal power to classify noncitizens and therefore amounts to a regulation of immigration. *See, e.g., Equal Access Educ.*, 305 F. Supp. 2d at 603 (explaining that restrictions on postsecondary admission “would amount to a regulation of immigration” if state officials “failed to adopt federal immigration standards . . . and instead . . . either implicitly or explicitly developed their own, different standards”).

Federal courts have found similar state classifications were constitutionally preempted. For example, in *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995), the Court held that California’s Proposition 187 was an impermissible regulation of immigration because it created a classification system for public benefits purposes that was not “tied to federal standards,” *id.* at 772, but rather “an

entirely *independent* set of criteria by which to classify individuals based on immigration status.” *League of United Latin Am. Citizens* at 769-70. Similarly, in *Hispanic Interest Coal. of Ala. v. Bentley*, ___ F. Supp. 2d ___, No. 5:11–CV–2484–SLB, 2011 WL 5516953 (N.D. Ala. Sept. 28, 2011), *vacated as moot*, 691 F.3d 1236 (11th Cir. 2012), the court concluded that section 8 of Alabama’s H.B. 56 was preempted because it impermissibly created a state definition of “lawful presence” for purposes of admission to public higher education that excluded numerous categories of noncitizens who were in fact lawfully present under federal law — including deferred action recipients. *Id* at *23 n.11.

The DMV policy is also conflict preempted because it excludes DACA beneficiaries from its definitions of “lawful presence” in a manner that is inconsistent with federal immigration law and undermines federal discretion and control over immigration matters. A state law conflicts with federal law if it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *DeCanas*, 424 U.S. at 363 (internal punctuation and citations omitted). *See also, e.g., Arizona*, 132 S.Ct. at 2501.

The State of Nebraska and the DMV chose to condition eligibility for temporary driver’s licenses on “lawful presence.” *See* Neb.Rev.Stat. § 60-484.05. Consequently, the DMV cannot define lawful presence in a manner inconsistent with federal law. *See Equal Access Educ.*, 305 F. Supp. 2d at 608 (holding that state-created standards “to determine an applicant’s immigration status” constitute “a classification system in conflict with federal immigration laws”). The DMV has excluded DACA beneficiaries from its definitions of lawful presence, when federal law and policy dictate otherwise.

The DMV's policy also frustrates Congress' intent that the Department of Homeland Security (DHS) exercise discretion in the enforcement of the Immigration and Naturalization Act (INA). *See Arizona*, 132 S.Ct. at 2499 (stating that "[d]iscretion in the enforcement of immigration law embraces immediate human concerns," and "[s]ome discretionary decisions involve policy choices that bear on this Nation's international relations"). Denial of driver's licenses to DACA beneficiaries impermissibly undermines the federal goal of permitting these individuals to remain and work in the United States, and to be full, contributing members of society. For instance, the Plaintiff in this case was already denied a job because she is not able to drive. As mentioned earlier, courts have recognized that the ability to work is often dependent on the ability to drive. *See, e.g., Bell*, 402 U.S. at 539; *Anckaitis*, 436 F.2d at 120.

b. Defendant's policy violates Equal Protection.

Plaintiff is also likely to prevail on the merits of her Equal Protection claim. The DMV currently allows any individual who is able to prove lawful presence in the country to apply for and obtain a temporary driver's license, including deferred action recipients other than those granted deferred action under the DACA program. As discussed below, the DMV's policy is a classification that discriminates against a group of similarly situated individuals without any permissible justification.

(i) DMV's policy denies driver's licenses to DACA recipients while granting driver's licenses to similarly situated noncitizens.

In denying driver's licenses to DACA grantees, the DMV is singling out and discriminating against these individuals despite Nebraska's longstanding policy of allowing other similarly situated individuals, some of them also deferred action

recipients, to apply for and obtain driver's licenses simply by proving they are lawfully present in the United States. These similarly situated individuals have included survivors of domestic violence who have filed a VAWA self-petition, and victims of serious crimes who have applied for U nonimmigrant status. Indeed, Nebraska law and the DMV's current policy makes temporary driver's licenses available to individuals who demonstrate authorized presence in the country, including those who lack a formal immigration status. *See* N.S.R. 60-484.05.¹⁰ The number of such individuals is not insubstantial. Those individuals only need to present their valid and unexpired EAD as proof of authorized presence and are, therefore, eligible for a driver's license. There simply is no valid justification – under any standard of review – for treating DACA recipients differently from such similarly situated noncitizens.

(1) Discrimination against DACA recipients is subject to heightened scrutiny.

The discriminatory treatment of DACA beneficiaries is properly reviewed under a heightened scrutiny standard. Courts have found heightened scrutiny is warranted for certain state classifications that are not inherently suspect. *See Plyler*, 457 U.S. at 223-24 (applying heightened scrutiny to Texas's denial of access to public education to undocumented children); *Mathews v. Lucas*, 427 U.S. 495, 505 (1976) (same, to state discrimination against children with unmarried parents); *Windsor v. United States*, 699

¹⁰ These include noncitizens paroled into the country without a formal immigration status, 8 C.F.R. § 274a.12(c)(11); noncitizens who lack a formal immigration status, but are applying for temporary protected status, *id.* § 274a.12(c)(19); noncitizens who lack a formal immigration status but have a pending application for asylum, withholding of removal, *id.* § 274a.12(c)(8), or adjustment of status, *id.* § 274a.12(c)(9); noncitizens granted deferred enforced departure, *id.* § 274a.12(a)(11); noncitizens granted temporary protected status, *id.* § 274a.12(a)(12); noncitizens with a pending application for suspension of deportation or cancellation of removal, *id.* § 274a.12(c)(10); noncitizens ordered removed, but granted withholding of removal or relief under the Convention Against Torture, *id.* § 274a.12(a)(10); and noncitizens who have been ordered removed, but permitted to remain in the country under an order of supervision, *id.* § 274a.12(c)(18).

F.3d 169, 185 (2d Cir. 2012), *cert. granted*, 12-307, 2012 WL 4009654 (U.S. Dec. 7, 2012) (same, to discrimination against same-sex couples); *Golinski v. U.S. Office of Personnel Management*, 824 F. Supp. 2d 968, 985-990 (N.D. Cal. 2012) (same). Under heightened scrutiny, the DMV must show that its policy is “substantially related to an important government objective.” *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Importantly, in making this showing the DMV may only refer to the “actual [governmental] purpose, not rationalizations for actions in fact differently grounded.” *United States v. Virginia*, 518 U.S. 515, 535-36 (1996). The policy of the DMV towards DACA beneficiaries cannot meet the heightened scrutiny standard since the Department has not bothered to state what is the important government objective to be achieved by denying DACA beneficiaries the opportunity to apply for a driver’s license when it has given such opportunity to other similarly situated individuals who are also lawfully present in this country in the past.

(2) Defendant’ driver’s license policy does not pass rational basis review.

The DMV’s policy does not even meet the more deferential rational basis standard. Rational basis requires that a classification “be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.” *Reed v. Reed*, 404 U.S. 71, 75-76 (1971) (citations omitted).

The denial of driver’s licenses to DACA beneficiaries while treating similarly situated individuals differently lacks any legitimate basis. Under the DMV’s policy, all individuals who can establish lawful presence are eligible for temporary driver’s licenses

except DACA beneficiaries. This discriminatory treatment is unreasonable and arbitrary and has no basis on either law or fact. Indeed, statements made by Governor Heineman indicate that the policy is motivated solely by an illegitimate intent to defy federal immigration policy and to discriminate against a disfavored group. *See Exs. 3 & Gov. Heineman Issues a Statement on President Obama's Deferred Action Program.*¹¹ For instance, in response to Plaintiff's plea to change the policy, Governor Heineman wrote he "support[s] legal immigration as opposed to policies that reward illegal behavior." Ex. 3. The Supreme Court has held that "[a] bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Romer v. Evans*, 517 U.S. 620, 634-35 (1996) (quoting *Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)).

IV. CONCLUSION

For all of the foregoing reasons, Defendant's policy of denying driver's licenses to individuals allowed to lawfully remain in the country under the DACA program should be preliminarily enjoined.

Respectfully submitted

Dated this 24th day of July, 2013.

/s/ Aaron Siebert-Llera
MEXICAN AMERICAN LEGAL
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MEXICAN AMERICAN LEGAL
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¹¹ Accessed at http://www.governor.nebraska.gov/news/2012/08/17_deferred_action.html

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July 2013, I electronically transmitted the foregoing document to the U.S. District Court Clerk's Office by using the ECF System for filing and transmittal.

By: Aaron Siebert-Llera
AARON SIEBERT-LLERA