Branded to Drive: Obstacle Preemption of North Carolina Driver’s Licenses for DACA Grantees

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BRANDED TO DRIVE: OBSTACLE PREEMPTION OF NORTH CAROLINA DRIVER’S LICENSES FOR DACA GRANTEES

Tung Sing Wong*

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* J.D., Brooklyn Law School, 2013; B.A., New York University, 2010. This article would not have been possible without the support of my family and friends. The author wishes to extend special thanks to Professor Mark Noferi, Lauren Kosseff, and the faculty at Brooklyn Law School for their encouragement and advice.
I. INTRODUCTION

On March 25, 2013, North Carolina began issuing special driver’s licenses (N.C. licenses) to qualified undocumented immigrants protected from removal under Deferred Action for Childhood Arrivals (DACA). The front of the license contains the words “NO LAWFUL STATUS” in bold red letters, conspicuously publicizing DACA grantees’ delicate immigration status. The key issue is whether states can publicize the immigration status of individuals who are protected from deportation by the federal government. DACA preempts the N.C. licenses because the N.C. licenses draw attention to DACA grantees’ immigration status in a way that frustrates the federal policy to integrate DACA grantees.

On June 15, 2012, the Obama administration announced it would defer any removal action for qualified undocumented immigrants under DACA. DACA preserves administrative resources by refocusing removal efforts on “high priority” persons. President Barack Obama stated that DACA protects individuals who “are Americans in their heart, in their minds, in every single way but . . . on paper,” by lifting “the shadow of deportation from these young people.” DACA does not grant any immigration status but offers lawful presence in the U.S. and clears a path for qualified immigrants to work legally and obtain driver’s licenses.

According to recent statistics, forty-eight states permit DACA grantees to apply for driver’s licenses. Though some states were initially

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2 Id.
4 Napolitano, supra note 3.
hesitant in issuing driver’s licenses to DACA grantees, only Arizona and Nebraska expressly prohibit DACA grantees from obtaining licenses.\(^8\)

North Carolina initially denied DACA grantees driver’s licenses, but eventually issued special driver’s licenses to DACA grantees.\(^9\) The original designs for the North Carolina licenses singled out DACA grantees with a bright pink stripe.\(^10\) After much controversy, North Carolina issued licenses to DACA grantees with “NO LAWFUL STATUS” in bold red letters on the face of the license without the pink stripe.\(^11\)

While DACA grantees are granted deferred action at the federal level, the attention drawn to an individual’s immigration status by the N.C. licenses is problematic at the local enforcement level. The N.C. licenses draw attention to the precarious immigration status of DACA grantees. This puts DACA grantees at risk of unnecessary detainment due to the interaction between state law enforcement and Immigration and Nationality Act (INA) § 287(g) and Secured Communities (S-COMM) programs.\(^12\)

The N.C. licenses affect a significant number of individuals. As of March 14, 2013, United States Citizenship and Immigration Services (USCIS) received 469,530 applications, 338,334 of which are Mexican applicants.\(^13\) USCIS has approved 453,589 applications.\(^14\) Of the applicants, 16,554 were North Carolina residents, the sixth most applicants from one


\(^9\) Copeland, supra note 7.

\(^10\) Id.

\(^11\) Id. (showing North Carolina also announced it will issue specially marked driver’s licenses for all noncitizens including lawful permanent residents in December 2013); See Bertrand M. Gutierrez, Planned N.C. Driver’s License Irks Some Noncitizens, WINSTON-SALEM J. (Feb. 22, 2013), www.journalonow.com/news/local/article_65c8a826-7d56-11e2-9d3b-001a4bcf6878.html.

\(^12\) U.S. Immigration and Customs Enforcement (ICE) has phased out large parts of the § 287(g) program. The “task force” model, in which state police are deputized to enforce immigration laws in the regular course of their activities on the street have been suspended. Michele Waslin, ICE Scaling Back 287(g) Program, IMMIGRATION IMPACT (Oct. 19, 2012), http://immigrationimpact.com/2012/10/19/ice-scaling-back-287g-program/; Alan Gomez, Immigration Enforcement Program to be Shut Down, USA TODAY (Feb. 17, 2012, 3:25 PM), http://usatoday30.usatoday.com/news/nation/story/2012-02-17/immigration-enforcement-program/53134284/1.

While comprehensive immigration reform seems on the horizon, the N.C. licenses will remain an issue unless any new law settles the immigration status of DACA grantees. Other scholars have focused on a potential equal protection challenge to driver’s licenses such as the N.C. license. Given the Supreme Court’s focus on federalism and preemption in the immigration law context, this article analyzes N.C. driver’s licenses in light of the Supreme Court’s use of obstacle preemption in Arizona v. United States. 

DACA preempts N.C. licenses because the licenses disrupt the federal government’s careful balance of policy goals to integrate qualified “low priority” undocumented immigrants and focus removal efforts on “high priority” criminals by drawing undue attention to DACA grantees’ lack of lawful status. Additionally, the N.C. licenses’ interaction with state “show me your papers” laws, § 287(g), and S-COMM exacerbates such disruption of federal policy goals because the “no lawful status” language on the N.C. licenses subjects DACA grantees to an increased risk of wrongful detention. Most troubling is how a N.C. license holder would fare in Arizona, where DACA grantees’ lawful presence is ignored. Therefore, N.C. licenses would offer no protection from Arizona law enforcement.

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15 Id.
17 See María Pabón López, More Than A License to Drive: State Restrictions on the Use of Driver’s Licenses by Noncitizens, 29 S. Ill. U. L.J. 91, 104 (2005) (examining several types of driver’s licenses that can be issued to noncitizens, including N.C. licenses, which Professor López describes as “branding”). Note that an equal protection challenge would offer substantive rights to affected immigrants and would not be vulnerable to changing political views, unlike the DACA program, which is vulnerable to shifting political views.
20 The ACLU, the ACLU of Arizona, the National Immigration Law Center (NILC), and the Mexican American Legal Defense and Education Fund (MALDEF), filed a suit challenging Governor Brewer’s executive order in the U.S. District Court in Phoenix on behalf of DACA grantees who were denied Arizona driver’s licenses. ACLU, American Dream Act Coalition, et al v. Brewer (Sept. 18, 2013), https://www.aclu.org/immigrants-rights/arizona-dream-act-coalition-et-al-v-brewer. The lawsuit asserts that Arizona’s executive order violates the Supremacy Clause of the U.S. Constitution by interfering with federal immigration law and also violates the Fourteenth Amendment’s Equal Protection Clause by discriminating against certain non-citizens. Id. The Court held that Arizona did not have
Part II provides a background of DACA and the N.C. licenses. Part III provides a brief overview of Arizona v. United States and modern obstacle preemption jurisprudence. Part IV begins by exploring the interaction between licenses and state law, § 287(g) and S-COMM, and how N.C. licenses are obstacle preempted. To illustrate the interaction between N.C. licenses with state and federal law, a hypothetical is set forth where a N.C. license holder is stopped by local law enforcement and is subsequently put through § 287(g) and S-COMM processes. Part IV then examines how Arizona law exacerbates the effect of the N.C. licenses. Finally, Part V concludes that the N.C. licenses are preempted, thus unconstitutional.

II. BACKGROUND

A. The Creation of the DACA Program to Protect Qualified Individuals from Deportation

DACA was created to protect qualified undocumented immigrants from removal and was intended to protect undocumented immigrants who are “Americans in their heart, in their minds, in every single way but one: on paper.” On June 15, 2012, the Obama administration announced that the Department of Homeland Security (DHS) would exercise its prosecutorial discretion to defer action for qualified undocumented immigrants who arrived in the U.S. as children.

Janet Napolitano, the Secretary of Homeland Security, issued a memorandum instructing ICE and USCIS to defer removal action for qualified individuals for a renewable two-year period. To qualify for DACA protection, individuals must meet each of the following criteria: (i) entered the U.S. before they turned sixteen; (ii) are not older than thirty-one; (iii) have continuously resided in the United States since June 15, 2007, up to the present time; (iv) were physically present in the United States on
June 15, 2012, and at the time of making the DACA application; (v) graduated high school, attended college, or served in the military; and (vi) do not have a significant criminal background. 31 DACA grantees are eligible for employment authorization and a Social Security number. 32

DHS has reiterated that DACA grantees are lawfully present, despite lacking formal immigration status. 33 Lawful status is distinct from lawful presence. 34 An individual can lack lawful status but still be lawfully present. 35 Unlawful presence applies to an individual who is physically present in the U.S. without lawful status (i.e. a lawful permanent resident, an asylee or refugee, a visa holder, or a parolee). 36 However, DHS can stop the accrual of unlawful presence of an individual without lawful status as a matter of prosecutorial discretion. 37 In such a case, an individual can be lawfully present in the U.S. without lawful status. Accordingly, a DACA grante will not accrue any unlawful presence once granted DACA status, although any unlawful presence prior to obtaining DACA status is not forgiven. 38

Generally, individuals who are unlawfully present are ineligible for federal public benefits. 39 Such individuals may also be ineligible for state public benefits, but states have discretion to offer public benefits to unlawfully present individuals. 40

With lawful presence, DACA grantees can access state public benefits and various state licenses. 41 Providing access to state driver’s licenses is central to the Obama administration’s goal to integrate DACA

31 Id.
32 U.S. CITIZENSHIP & IMMIGRATION SERVS., CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS PROCESS—FREQUENTLY ASKED QUESTIONS (last visited Mar. 12, 2013) [hereinafter USCIS FAQ], http://www.uscis.gov/portal/site/uscis/menuitem.61d4c2a3e5b9ac89243c6af75436d1a/?vgnextoid=3a4dbec4b04499310VgnVCM10000082ca60aRCRD&vgnextchannel=3a4dbec4b04499310VgnVCM100000082ca60aRCRD.
33 Id.
35 Neufeld, supra note 34, at 9–10.
37 Neufeld, supra note 34, at 9–10.
38 USCIS FAQ, supra note 32; see also 8 U.S.C. § 1182(a)(9)(B) (2012) (noting “[n]o period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence”).
40 § 1621(a), (d).
41 See § 1621(c).
Indeed, state driver's licenses are essentially *de facto* national identification cards and are vital to daily activities. Driver's licenses are used to prove identity in many situations, including, but not limited to, opening bank accounts, cashing checks, and using credit cards.

DACA was announced in response to Congress’s inability to pass the Development, Relief, and Education for Alien Minors (DREAM) Act. In light of legislative inaction, law school professors outlined the legal authority for deferred action in a letter to President Obama and urged the President to take executive action. The letter explained that INA § 103(a) grants the Secretary of Homeland Security broad authority to exercise prosecutorial discretion, and deferred action is a form of prosecutorial discretion historically used by the executive branch.

DACA’s opponents question its legality. Kris Kobach, Kansas’s Secretary of State and the primary author of Ariz. Rev. Stat. Ann. § 11-1051 (2010), better known as Arizona S.B. 1070, filed a complaint against the Secretary of Homeland Security and the director of ICE on behalf of ICE officers claiming that DACA is unconstitutional and violates administrative law procedural requirements. The State of Mississippi joined the complaint two months later. Despite the backlash, many undocumented immigrants are applying for deferred action.

DACA grantees, as immigrants without lawful status, are vulnerable to detention during investigation of their immigration status. Under § 287(g) and S-COMM, ICE may access DACA grantees’ immigration information.
for removal purposes. Under INA § 287(g), states in current contracts with DHS only implement the Detention Model, where local jail officers are trained to screen inmates for potential immigration violations. If the local jail officers believe an individual is removable, they can then inform ICE, which may issue a detainer. Under S-COMM, the fingerprints of individuals arrested by local law enforcement are checked against the FBI criminal history database and the DHS biometric databases. If the federal database shows that the individual is removable, it will issue a “detainer” to local law enforcement requesting the arrested individual be detained until ICE agents interview and determine whether or not to transfer the individual to ICE custody. An arrest for any infraction, no matter how minor, is sufficient to trigger a § 287(g) detainer or S-COMM database check. No conviction is necessary for ICE to issue a detainer.

State and local law enforcement act as gatekeepers with the initial discretion to determine how to proceed with an arrested individual under both § 287(g) and S-COMM. As an illustration of the importance of local law enforcement’s discretion, police decisions to stop drivers for minor traffic violations have frequently led to detention of Latino immigrants under the § 287(g) program.


53 Id.; see also U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, FACT SHEET: DELEGATION OF IMMIGRATION AUTHORITY SECTION 287(G) IMMIGRATION AND NATIONALITY ACT, (Mar. 12, 2013), http://www.ice.gov/news/library/factsheets/287g.htm (showing five counties in North Carolina are currently enrolled in § 287(g)).


58 Motomura, supra note 56, at 1856.

59 Angela M. Banks, The Curious Relationship Between “Self-Deportation” Policies and Naturalization Rates, 16 LEWIS & CLARK L. REV. 1149, 1181–82 (2012). ICE statistics contain the following information:

Thirty percent of all ICE detainers issued nationwide in 2010 pursuant to 287(g) agreements were based on traffic offenses . . . . These numbers suggest that the police officers responsible for the most traffic-based arrests leading to ICE detainers were patrol officers with no specific authority or mandate to enforce immigration law. Patrol officers do not need 287(g) authority to support immigration enforcement; they just need
B. Background on Driver’s Licenses for Undocumented Immigrants

Generally, states have wide latitude in determining whether to issue driver’s licenses to undocumented immigrants.\(^{60}\) Even before September 11, 2001, several states prohibited undocumented immigrants from obtaining driver’s licenses to discourage immigration.\(^{61}\) After September 11, state efforts to deny undocumented immigrants driver’s licenses greatly increased.\(^{62}\)

The lack of a driver’s license directly threatens the livelihood of immigrants because driving is the most important mode of transportation in the U.S.\(^{63}\) To meet their daily needs, some undocumented immigrants continue to drive without licenses and are often unable to obtain automobile insurance because of their unlicensed status.\(^{64}\) Consequently, there are safety concerns regarding undocumented immigrants who are unable to legally drive.\(^{65}\)

Moreover, as noted previously, driver’s licenses issued by the states are essentially de facto national identification cards.\(^{66}\) The denial of driver’s licenses injures immigrants by exacerbating fears of arrest and deportation, limiting access to jobs, and generally increasing vulnerability to exploitation in the workplace and elsewhere.\(^{67}\) Indeed, the lack of a license more likely relegates a person to the secondary labor market, with low wages and poor conditions.\(^{68}\)

C. Background of North Carolina Driver’s Licenses and Recent State Legislation

North Carolina wavered several times between issuing and not issuing licenses to DACA grantees.\(^{69}\) The North Carolina Division of Motor
Vehicles (N.C. DMV) ultimately decided to issue licenses to DACA grantees after the state Attorney General explained that “lawful presence” under DACA comports with federal law as well as the state’s driver’s license laws. 70 North Carolina’s Department of Transportation (N.C. DOT) announced that it would issue DACA grantees licenses with a pink stripe and the words “NO LAWFUL STATUS” and “LIMITED TERM” starting on March 25, 2013.71

Republican Governor of North Carolina Pat McCrory called the pink stripes “a pragmatic compromise.”72 The N.C. DOT maintained that the pink stripes were necessary to combat fraud, specifically voter fraud.73 Currently, the back of issued North Carolina licenses discreetly indicates that a license holder is not a U.S. citizen by stating the validity period of the noncitizen’s authorized presence.74

DACA applicants expressed concerns about being singled out on account of their immigration status.75 Religious groups in North Carolina also criticized the state’s decision to issue the pink licenses and have described the licenses as “punitive.”76

In light of such controversy, the N.C. DOT removed the pink stripe days before March 25, 2013.77 The redesigned licenses issued to DACA grantees still state “NO LAWFUL STATUS” in bold red letters on the front of the license.78 To obtain licenses, DACA grantees need to demonstrate


70 Copeland, supra note 7. The Office of North Carolina Attorney General Roy Cooper provided that under state statute, the N.C. DMV is required to issue driver’s licenses to applicants with legal presence in the U.S. Id. The Attorney General recognized that DACA granted lawful presence without providing any formal immigration status. Id. Thus, the Attorney General concluded that DACA grantees are lawfully present for the purposes of state law, therefore they meet the state statutory requirement of legal presence for driver’s licenses. Id.

71 Id.; Gutierrez, supra note 11.

72 Kim Severson, North Carolina to Give Some Immigrants Driver’s Licenses, with a Pink Stripe, N.Y. TIMES (March 5, 2013), www.nytimes.com/2013/03/06/us/north-carolina-to-give-some-immigrants-drivers-licenses-with-a-pink-stripe.html (noting it is not clear what points are “compromised” according to Governor McCrory). Given that DACA grantees are lawfully present for a limited duration, they are presumably entitled to state benefits, such as driver’s licenses for the same duration. Id.

73 Gutierrez, supra note 11.

74 Id.

75 Severson, supra note 12.

76 Id.


78 Hennessey, supra note 1; Pink Stripes Dropped From Driver’s Licenses for Illegal Immigrants, WRAL (Mar. 21, 2013), http://www.wral.com/pink-stripe-dropped-from-driver-s-licenses-for-illegal-immigrants/12252934/ (noting North Carolina plans to issue these licenses in December 2013); see also Colleen Jenkins, Immigrants Decry ‘Scarlet Letter’
DACA status.\textsuperscript{79} As of March 27, 2013, 693 DACA grantees in North Carolina received driver’s licenses, permits, or identification cards.\textsuperscript{80}

On April 10, 2013, North Carolina House Republicans took a further step and introduced H.B. 786. The bill proposed driver’s licenses for undocumented immigrants.\textsuperscript{81} The bill also proposed the addition of § 15A-506 to the North Carolina General Statutes, which would allow law enforcement officers to check the immigration status of anyone they stop and detain them for up to twenty-four hours.\textsuperscript{82} Recently, the bill’s sponsors offered an amendment to the bill requesting the Department of Public Safety study the ideas proposed in the bill.\textsuperscript{83} The state agency will submit its findings and recommendations to a legislative oversight committee by March 2014.\textsuperscript{84}

Driver’s Licenses in N.C., THOMAS REUTERS NEWS & INSIGHT (Mar. 14, 2013), http://www.reuters.com/article/2013/03/14/us-usa-immigration-licenses-idUSBRE92D0TL20130314. Alabama will also issue specially marked driver’s licenses to DACA grantees, but unlike the North Carolina licenses, driver’s licenses of all noncitizens, including lawful permanent residents will be identically marked with “FN.” Id. Thus, DACA grantees are not distinguished like they are in North Carolina. Id.

\textsuperscript{79} N.C. DEP’T OF TRANSP., DACA FREQUENTLY ASKED QUESTIONS, http://www.ncdot.gov/download/dmv/DACA/DACA_FAQs_English.pdf (last visited Mar. 31, 2013), (noting, per the N.C. DMV’s website, a DACA grantee must present proof of “lawful status,” which likely means any USCIS receipt notices of approval demonstrating DACA status). The N.C. DOT also announced plans to issue special driver’s licenses for all noncitizens, including lawful permanent residents Id.; see Gutierrez, supra note 11; see also Jenkins, supra note 78.

\textsuperscript{80} Kellen Moore, No Local DACA Participants Seek Licenses, WATAUGA DEMOCRAT (Mar. 29, 2013), www2.wataugademocrat.com/News/story/No-local-DACA-participants-seek-licenses-id-010952.

\textsuperscript{81} H.B. 786, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013); Rebecca Leber, North Carolina GOP Files Arizona Style “Show Me Your Papers” Bill (Apr. 12, 2013, 10:30 AM), http://thinkprogress.org/justice/2013/04/12/1855831/north-carolina-arizona-immigration-bill/ (showing undocumented immigrants who have lived in the state for at least one year may obtain driver’s licenses). The licenses given to undocumented immigrants, however, will be different from regular driver’s licenses and will be even more distinct than the N.C. licenses for DACA grantees. Leber, supra. The licenses will be vertical and contain the cardholder’s fingerprint. Id.

\textsuperscript{82} H.R. 786; AM. CIVIL LIBERTIES UNION, ACLU: N.C. BILL WOULD LEAD TO RACIAL PROFILING (Apr. 11, 2013), http://www.aclu.org/immigrants-rights-racial-justice/aclu-nc-bill-would-lead-racial-profiling (showing North Carolina republicans seek to adopt a “show me your papers” law akin to Arizona’s). The bill would also make it harder for undocumented immigrants to post bail, require anyone who is undocumented and arrested to pay the cost of their detention, and would allow law enforcement to impound and seize the vehicles of undocumented drivers. Id. Additionally, North Carolina driver’s license applicants must present proof of residency, which currently can be satisfied by “Immigration and Naturalization Services” documents or a Matricula Consular issued by the Mexican Consulate, but the bill prohibits the use of a Matricula Consular for such purposes. Id.

\textsuperscript{83} NC Immigration Bill Turned Mostly Into a Study, WSCO TV (July 17, 2013, 6:04 AM), http://www.wsocvtv.com/news/news/local/nc-immigration-bill-turned-mostly-study/n%5Js/b/ (explaining the bill has been transformed into an informational research and study bill rather than actual legislation).

\textsuperscript{84} Id.
III. OVERVIEW OF ARIZONA V. UNITED STATES AND THE PREEMPTION DOCTRINE

A. General Background on Preemption Analysis and Case Law

The Supreme Court has recognized that federal power over immigration is plenary and exclusive in some instances. The Supremacy Clause provides that federal law “shall be the supreme Law of the Land . . . .” Accordingly, the federal government may preempt otherwise valid state law.

Preemption can be express or implied. Express preemption occurs when federal law specifically states that it precludes a state or locality from regulating a particular field. Implied preemption includes field and conflict preemption. Field preemption exists when the federal government creates a comprehensive regulatory scheme that crowds out state legislation in a particular field. Courts generally adopt a presumption against preemption where Congress acts in a field that states traditionally occupy.

Conflict preemption occurs when there is a direct conflict between federal and state law making it impossible to comply with both federal and state law. Obstacle preemption is a subset of conflict preemption existing when state law creates an obstacle to a federal law’s policy goals and objectives. The Supreme Court’s decision in Arizona offers guidance as to how the N.C. licenses are obstacle preempted under obstacle preemption jurisprudence prior to Chamber of Commerce of U.S. v. Whiting.

B. Obstacle Preemption Jurisprudence Pre-Whiting

In Hines v. Davidowitz, the Court relied on legislative history to hold that Pennsylvania’s Alien Registration Act was an obstacle to the federal

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85 See Toll v. Moreno, 458 U.S. 1, 26 (1982).
86 U.S. CONST. art. VI, cl. 2.
87 Arizona, 132 S. Ct. at 2500.
88 See Gade v. Nat’l Solid Wastes Mgmt. Ass’n, 505 U.S. 88, 98 (1992) (“Preemption may be either expressed or implied and is compelled whether Congress’ command is explicitly stated in the statute’s language or implicitly contained in its structure and purpose.”) (internal quotations and citation omitted).
92 Id.
95 See Arizona, 132 S. Ct. at 2492; See also David A. Martin, Reading Arizona, 98 Va. L. Rev. 41 (2012).
government’s “plainly manifested” purpose. The state law required adult noncitizens to register annually, pay a fee, carry their alien identification card at all times, and show it upon request. Noncitizens who failed to register or carry their card were subject to fines. A year after Pennsylvania passed the law, Congress enacted the federal Alien Registration Act. The Act did not require noncitizens to carry a registration card, but criminalized willful failure to register.

In striking down the state law, the Court stated that rules and regulations touching on “the rights, privileges, obligations or burdens of aliens” implicate the federal foreign affairs power. Moreover, “states cannot, inconsistently with the purposes of Congress, conflict or interfere with, curtail or complement the federal law, or enforce additional or auxiliary regulations.” The Court balanced the federal government’s policy goals against the effects of the state law and emphasized that the federal government sought to “protect the personal liberties of law-abiding aliens through one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance that might not only affect our international relations but might also generate the very disloyalty which the law has intended guarding against.”

Similarly, in Crosby v. National Foreign Trade Council, the Court held that a Presidential executive order obstacle preempted a Massachusetts statute. The Court focused on the executive intent and broad foreign policy concerns underlying the executive order to determine that the state law interfered with the President’s authority to speak on foreign policy matters which impeded the development and execution of a national policy concerning Burma (Myanmar).

The Supreme Court has held that a state law may be an obstacle to achieving the purposes of a federal law when it balances policy goals

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96 Hines, 312 U.S. at 74; See also Immigrant Laws, supra note 90, at 202 (“Hines v. Davidowitz frequently has been categorized in the literature as a field preemption case, even though the Court used the language of obstacle preemption in striking down Pennsylvania’s registration requirements.”).

97 Hines, 312 U.S. at 5960.

98 Id.

99 Id. at 60–61

100 Id at 62–63.

101 Id. at 66–67.

102 Id. at 74 (emphasis added).


104 Id. at 376–84 (“The state Act undermines the President’s capacity, in this instance for effective diplomacy. It is not merely that the differences between the state and federal Acts in scope and type of sanctions threaten to complicate discussions; they compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments.”) (emphasis added). The Court examined congressional intent in delegating power to the executive to handle relations and economic sanctions with Burma. Id.
differently than federal law. In *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, the Court found that the state law at issue was preempted because it struck the balance between “the encouragement of invention and free competition in unpatented ideas” differently than federal law. Similarly, in *Buckman Co. v. Plaintiffs’ Legal Comm.*, the Court held that tort claims under state law for misrepresenting products to the FDA were obstacle preempted because the “balance sought by the Administration can be skewed by allowing fraud-on-the-FDA claims under state tort law.”

In *Lozano v. Hazelton*, the Third Circuit adopted a similar balancing approach in examining obstacle preemption in the immigration context. The court then found that the local ordinance regulating employment of undocumented immigrants and prohibiting rentals to undocumented immigrants was obstacle preempted. The court examined Congress’ efforts to carefully balance multiple policy objectives by extensively searching the legislative history and the overall structure of the Immigration and Reform Control Act of 1986 (IRCA). Ultimately, the court found that the Hazleton ordinance chose to prioritize only one of the various policies considered by Congress and disregarded Congress’ other objectives.

**C. The Supreme Court’s Decisions in Whiting and Arizona**

However, in *Chamber of Commerce of U.S. v. Whiting*, the Court deviated from the fact-intensive balancing. The Court examined the Legal Arizona Workers Act (LAWA), which provides that the licenses of “state employers who knowingly or intentionally employ unauthorized aliens” may be revoked under certain circumstances. LAWA also requires every employer “[to] verify the employment eligibility of the employee by using E-Verify.”

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106 *Bonito Boats*, 489 U.S. at 157–58 (showing the Court examined the state statute which prohibited the use of a particular process to duplicate unpatented boat hulls conflicted with federal law that promoted free competition in unpatented areas).

107 Buckman Co. v. Plaintiffs’ Legal Comm., 531 U.S. 341, 348 (2001) (determining that it would undermine federal policy to allow state law tort claimants to negate the FDA’s finding that the manufacturer made a valid application for FDA approval).

108 *Immigrant Laws, supra* note 90, at 176.


110 *Lozano*, 620 F.3d at 210 (noting “it is indisputable that Congress went to considerable lengths in enacting IRCA to achieve a careful balance among its competing policy objectives of effectively deterring employment of unauthorized aliens . . . ”).

111 Id. at 219.

112 See infra Part III.


114 Id. at 1976–77.
The Court found the state law at issue was not preempted. The Court held that the provision revoking business licenses was not expressly preempted. The Court broadly interpreted “licensure” in the business context and held that LAWA fell within the scope of IRCA’s savings clause. The Court found it significant that Arizona relied solely on the federal government’s determination of who is an unauthorized individual, which in turn was not in contention with federal law. Finally, the Court held that the LAWA licensure provision was not obstacle preempted and refused to engage in a “freewheeling . . . inquiry into whether a state statute is in tension with federal objectives” to determine whether federal law preempted LAWA.

In stark contrast to the Whiting Court’s reluctance to utilize a searching obstacle preemption analysis, the Court in Arizona relied on legislative history to find congressional intent obstacle preempted two of the four challenged provisions of S.B. 1070. Indeed, the Court in Arizona seemed to revisit the broad pre-Whiting obstacle preemption analysis.

First, the Court held that the portion of the law criminalizing failure to carry immigration documents was field preempted. Second, the Court stated that “even complementary state regulation is impermissible” where Congress has adopted a comprehensive regulatory scheme.

The Court then relied on obstacle preemption to uphold a preliminary injunction against the provision of the law that imposed criminal penalties on immigrants who work without employment authorization. The Court examined the text, structure, and legislative history of IRCA to determine that the state law criminalizing immigrant workers was an obstacle to the regulatory scheme enacted by Congress. The Court held that the provision interfered with “the careful balance struck by Congress with respect to unauthorized employment of aliens. Although § 5(C) attempts to achieve one of the same goals as federal law . . . it involves a conflict in the method of enforcement.”

The Court in Arizona deviated from Whiting and examined a wide range of legislative background materials, including

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115 Id. at 1985–87.
116 Id. at 1981.
117 Id. at 1980.
118 Id. at 1981.
119 Whiting, 131 S. Ct. at 1985.
120 Martin, supra note 95, at 43 (noting that the Arizona Court’s reliance on obstacle preemption was a surprise, particularly because the Arizona law in Whiting, which was far more specific and closer to federal law, managed to withstand an obstacle preemption challenge).
121 See infra Part III.
122 Arizona, 132 S. Ct. at 2503.
123 Id. at 2502.
124 Id. at 2505.
125 Id.
126 Id.
Congressional studies, recommendations, and hearings to ascertain the federal objectives underlying IRCA.127

The section allowing state law enforcement to arrest noncitizens who commit “removable offenses” without a warrant was similarly struck down as the Court held that Arizona law enforcement would have greater authority to enforce immigration laws than federal immigration officers.128 The Court examined a guidance memorandum issued by DHS to determine what factors the federal government perceived to be crucial in determining whether to prosecute a removable individual and found that the state law was an obstacle to federal objectives.129 In striking down the provision, the Court expressed concerns that the law “could result in unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) whom federal officials determine should not be removed,” presenting an obstacle to the federal enforcement scheme.130

The Court found no facial flaw in the “show me your papers” law, but stated that it could be challenged as applied, particularly in situations involving racial profiling and violations of the Fourth Amendment.131 The Court left the door open for future challenges to “show me your papers” laws.132

IV. NORTH CAROLINA LICENSES ARE OBSTACLE PREEMPTED BY DACA BECAUSE THEY HINDER FEDERAL POLICY OBJECTIVES

The central issue regarding the N.C. licenses is whether states can publicize the immigration status of individuals protected from removal by the federal government, drawing attention to the individuals’ immigration statuses. As a general matter, states have the authority to issue driver’s

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127 Id. at 2504–05. The opinion held that:

In the end, IRCA’s framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives . . . . Under § 5(C) of S.B. 1070, Arizona law would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens. Although § 5(C) attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it involves a conflict in the method of enforcement.

Id. (citations omitted).
128 Id. at 2506.
129 Id. at 2505.
130 Id. at 2505 (emphasis added).
131 Id. at 2506 (emphasis added).
132 Id. at 2510.
licenses. However, federal legislation may preempt state legislation regarding driver’s licenses.

The Supreme Court has recognized that it is within the absolute discretion of the executive branch to not pursue immigration enforcement action. As such, any exercise of prosecutorial discretion by the executive branch may preempt otherwise valid state legislation regarding driver’s licenses. In the immigration context, DHS frequently exercises its prosecutorial discretion to “defer action.” DHS has used “deferred action” in various contexts to ensure efficient resource allocation with an eye toward humanitarian concerns. Examples of individuals receiving deferred action include survivors of domestic violence with approved VAWA self-petitions who are not immediately eligible to adjust and certain widows of U.S. citizens who are ineligible for immigration status. DACA is merely an extension of DHS’s policy to not remove “low priority” aliens. Indeed, Napolitano’s memo adopted measures to ensure federal resources are not wasted on removing “low priority” DACA grantees.

As a threshold matter, before examining N.C. licenses under the preemption framework, it should be noted that DACA is not legislation created by Congress, nor is it a federal regulation created from formal

133 See López, supra note 17.
134 U.S. CONST. art. VI, cl. 2.
135 See Heckler v. Chaney, 470 U.S. 821, 831 (1985). “This Court has recognized on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.” Id.
136 Napolitano, supra note 3, at 2–3.
137 Obama’s Ruby Slippers, supra note 3, at 7, 37. See also Lennon v. Immigration & Naturalization Serv., 527 F.2d 187 (2d Cir. 1975); 8 U.S.C. § 1103(a)(3) (2012). Arguably, one of the more prominent examples of “deferred action,” then termed “nonpriority status.” Id. (noting John Lennon was found to be eligible for deferred action despite a prior drug conviction).
139 See Napolitano, supra note 3, at 1; Memorandum from John Morton, Dir. of ICE, on Exercising Prosecutorial Discretion Consistent with Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) (on file with the author) (setting forth the different priority levels of removable individuals and stating that that only higher priority level individuals should be pursued and removed); Memorandum from John Morton, Dir. of ICE, on Civil Immigration Enforcement: Priorities for the Apprehension, Detention, and Removal of Aliens (Mar. 2, 2011) (explaining the focus of enforcement resources on high priority individuals); Memorandum from John Morton, Dir. of ICE, on Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions (Aug. 2, 2010) [hereinafter Morton Memo] (terminating removal proceedings of persons with pending applications for status in certain instances and essentially directing ICE not to use enforcement resources on “low priority” persons).
140 Napolitano, supra note 3, at 1.
rulemaking processes per the Administrative Procedure Act (APA). A potential issue in determining the viability of the DACA program is whether the Obama administration overstepped constitutional bounds by announcing the policy.

Indeed, recent litigation brought forth by Kris Kobach, ICE officials, and the State of Mississippi seeks to dismantle the DACA program by arguing that it is unconstitutional. Scholars have also expressed concerns regarding the constitutionality of preemption by federal agencies and the executive branch.

However, Professor Lauren Gilbert argued DACA falls within the policy exception to rule making under the APA. Furthermore, she argued that DACA is the result of the Secretary of Homeland Security’s broad authority under 8 U.S.C. § 1103(a) to establish rules and regulations to further the goals of the INA. Professor David A. Martin also argued that the plain language of the INA does not prevent DHS from exercising its prosecutorial discretion through DACA.

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141 Obama’s Ruby Slippers, supra note 3, at 28.
142 See Jill E. Family, Administrative Law Through the Lens of Immigration Law, 64 ADMIN. L. REV. 565, 572 (2012) (noting “Nonlegislative rules” are nonbinding and do not have the force of law, while legislative rules are binding and have the force of law). Generally, legislative rules create a “new law” that results in a substantive change. Id. There are various criteria for determining whether an agency document (i.e. policy memoranda) is indeed binding. Id. (noting the various procedural concerns that nonlegislative rules raises, particularly in the immigration law context). William Funk, A Primer on Nonlegislative Rules, 53 ADMIN. L. REV. 1321, 1322 (2001) (providing a broad overview of the rulemaking process in administrative law); United States v. Mead Corp., 533 U.S. 218, 231 (2001); see Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
143 See Obama’s Ruby Slippers, supra note 3, at 28; Amended Complaint, supra note 50 (arguing that DACA was enacted without proper notice and comment per the APA, does not have the force of law, and improperly impedes DHS officers from enforcing INA § 235); see also Amended Complaint, supra note 50, ¶ 50 (showing Plaintiff Doebler faced a three-day suspension for arresting and processing an alien for a hearing rather than exercising the “prosecutorial discretion” commanded by his supervisors).
144 Young, supra note 19, at 878 (“When executive actors add preemptive mandates not clearly set forth in the underlying statute, the notice and deliberation facilitated by clear textual statement is lacking.”).
145 Obama’s Ruby Slippers, supra note 3, at 27–28 (explaining the DACA program is a “general statement of policy” rooted in the “foreign affairs” exception to the formal rulemaking process per the APA). Thus, even if DACA is indeed a binding rule, the executive branch did not violate rulemaking procedures by foregoing the notice and comment process. Id.; 5 U.S.C. § 553 (2012).
146 Obama’s Ruby Slippers, supra note 3, at 28; see 8 U.S.C. § 1103(a)(3). “[The Secretary] shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter.” § 1103(a)(3).
147 See David A. Martin, A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach’s Latest Crusade, 122 YALE L.J. ONLINE 167 (2012) (arguing that not only does DHS have broad prosecutorial discretion under 8 U.S.C. § 1103(a), but the agency has broad discretion to not remove otherwise removable individuals under INA § 235). Professor Martin addresses the arguments Kris Kobach set forth in Crane
For the purposes of examining N.C. licenses under the preemption framework, it is assumed that DACA does not violate any provisions of the APA.\textsuperscript{148} It is further assumed that DACA is not the product of an improper delegation of power and is otherwise constitutional.\textsuperscript{149} This article adopts the argument that DACA was created pursuant to the executive branch’s broad discretion under 8 U.S.C. § 1103(a)(3).\textsuperscript{150}

A. North Carolina Licenses Are Not Expressly Preempted by Any Federal Statute

Express preemption occurs when Congress plainly declares a federal law’s preemptive effect, usually through an express preemption provision.\textsuperscript{151} In such cases, the Court focuses “on the plain wording of the [express preemption] clause,” as it is considered the “best evidence of Congress’ preemptive intent.”\textsuperscript{152}

Based on Whiting, the N.C. licenses are not expressly preempted. The Whiting Court only interpreted “licenses” in the context of 8 U.S.C. § 1324a, which governs employment of undocumented immigrants.\textsuperscript{153} The IRCA provision at issue in Whiting contained an express savings clause for and ultimately concludes DHS properly exercised its broad discretion as an enforcement agency. \textit{Id.} Professor Martin dismisses the argument that individual ICE officers are necessarily bound to removing individuals under INA § 235, even though DHS has already exercised its prosecutorial discretion. \textit{Id.}

\textsuperscript{148} See Obama’s Ruby Slippers, supra note 3; Marguiles, supra note 19; Young, supra note 19; Paul E. Mcgreal, \textit{Some Rice with Your Chevron?: Presumption and Deference in Regulatory Preemption}, 45 CASE W. RES. L. REV. 823, 845 (1995) (providing further analysis of the federalism and administrative law issues pertaining to DACA and federal agencies in general).

\textsuperscript{149} See Marguiles, supra note 19 (arguing the validity of DACA cannot be fully explained by the executive exercise of prosecutorial discretion, instead DACA is justified by the President’s power to protect “intending citizens” from violations of law by the States). This Presidential “stewardship” arises from the Supreme Court’s ruling in \textit{Youngstown Sheet & Tube Co. v. Sawyer}, 343 U.S. 579 (1952). \textit{Id.}; Obama’s Ruby Slippers, supra note 3, at 22 (noting it is arguable that the language of INA § 103(a) pushes the limits of the non-delegation doctrine as it may not provide an “intelligible principle” for executive action per \textit{Whitman v. American Trucking Associations, Inc.}, 531 U.S. 457 (2001)).

\textsuperscript{150} See Obama’s Ruby Slippers, supra note 3. This paper will adopt Professor Gilbert’s argument.

\textsuperscript{151} Immigrant Laws, supra note 90, at 159.

\textsuperscript{152} Sprietsma v. Mercury Marine, 537 U.S. 51, 62 (2002) (holding the express preemption clause of the Federal Boat Safety Act did not expressly preempt common law tort claims); \textit{see also} Geier, 529 U.S. 861 (holding the express preemption clause of the National Traffic and Motor Vehicle Safety Act did not expressly preempt common law tort claims).

\textsuperscript{153} \textit{Whiting}, 131 S. Ct. at 1973.
business licenses. The Court broadly interpreted “licenses” in the federal statute savings clause to find that LAWA was not preempted. 

The language of 8 U.S.C. § 1324a is inapplicable to driver’s licenses. No provision in the INA expressly prohibits the N.C. licenses. The Napolitano memorandum does not expressly require states to issue driver’s licenses with uniformity. The only federal statute that defines driver’s licenses is 49 U.S.C. § 30301, which states that a “motor vehicle operator’s license” is “a license issued by a State authorizing an individual to operate a motor vehicle on public streets, roads, or highways.” Unlike 8 U.S.C. § 1324a, the plain language of 49 U.S.C. § 30301 does not expressly address the type of immigration information on the face of the N.C. licenses. Thus, it would seem that federal law does not expressly preempt the N.C. licenses, as the language of the federal law does not directly address the publication of immigration status.

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154 8 U.S.C. § 1324a(h)(2) (2012) (preempting “any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens”).

155 Whiting, 131 S. Ct. at 1980.

156 Napolitano, supra note 3, at 1–3.


158 Id.

159 REAL ID Act of 2005 § 202, H.R. 1268, Pub. L. 109-13 (providing a proposed note to 49 U.S.C. § 30301 detailing how state driver’s licenses and identification documents should be issued). Section 202(c)(2)(B)(viii) contemplates a situation where states issue driver’s licenses to people with deferred action status. Id. Section 202(c)(2)(C) provides that people with temporary status (i.e. deferred action status) may receive a temporary driver’s license valid for the individual’s period of authorized stay or one year if the an individual is authorized to stay in the U.S. indefinitely. Id. Interestingly, section 202(c)(2)(C)(iii) provides that “[a] temporary driver’s license or temporary identification card issued pursuant to this subparagraph shall clearly indicate that it is temporary and shall state the date on which it expires.” Id. But, it is unclear how this note would impact the preemption analysis. The language of § 202(c) does not seem to expressly preempt the N.C. licenses, because it does not address the type of immigration information that is permitted on driver’s licenses. But see League of United Latin Am. Citizens v. Bredesen, No. 3:04-0613, 2005 WL 2034935 (M.D. Tenn. Aug. 23, 2005) (finding that the REAL ID Act impliedly preempted a state statute which provided that the “[D]epartment of Safety] shall not accept matricula consular cards as proof of identification for driver license application and issuance purposes” as the REAL ID Act set forth guidance for documents that are acceptable for “federal purposes”). See also Nat’l Conference of State Legislatures, Countdown to Real ID (Apr. 18, 2013), http://www.ncsl.org/issues-research/transport/count-down-to-real-id.aspx; 6 C.F.R. § 37 (providing applicable rules for states that issue driver’s licenses for use by federal government).
B. North Carolina Licenses Are Obstacle Preempted Because the Licenses Disrupt the Federal Government’s Policy Objectives and Interfere with the Federal Government’s Allocation of Resources

Even though federal law doesn’t expressly preempt the N.C. licenses, implied preemption may still apply. As discussed above, the Supreme Court’s obstacle preemption jurisprudence focuses on the federal government’s balancing of policy goals. In Arizona, the Supreme Court utilized a broad analysis of legislative history to determine the federal government’s balance of policy goals.


The Court in Arizona recognized that “a principal feature of the removal system is the broad discretion exercised by immigration officials,” which in turn “embraces immediate human concerns.” DACA reflects the federal government’s use of broad discretion to “embrace immediate human concerns” by using federal policy to prevent the marginalization of qualified young undocumented immigrants. Moreover, the Court in Hines emphasized that the federal immigration system seeks to “protect the personal liberties of law-abiding aliens . . . and to leave them free from the possibility of inquisitorial practices and police surveillance that might not only affect our international relations but might also generate the very disloyalty which the law has intended guarding against.” The Court in Arizona echoed the concerns raised in Hines and struck down the provision of S.B. 1070 allowing arrest without a warrant.

The executive branch is permitted to use its decision-making power to balance a number of factors within the executive branch’s expertise. The Napolitano memorandum states the DACA program is an exercise of prosecutorial discretion designed to prevent the removal of “productive young people to countries where they may not have lived or even speak the

160 See infra Part III.
161 Arizona, 132 S. Ct. at 2505.
162 Id. at 2499 (emphasis added) (noting this prosecutorial discretion is rooted in 8 U.S.C. § 1103(a)); see Immigrant Laws, supra note 90.
163 Hines, 312 U.S. at 74 (emphasis added).
164 Arizona, 132 S. Ct. at 2506 (noting federal immigration law seeks to prevent the “unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) whom federal officials determine should not be removed”).
165 Heckler, 470 U.S. at 831.
The federal government acknowledged that DACA grantees entered the U.S. without authorization, but did so “[without intent] to violate” immigration law, by providing DACA grantees only lawful presence, not lawful status. As such, the DACA program carefully balances the government’s need to remove “high priority” criminals, while also integrating “low priority” undocumented individuals who entered the U.S. without fault and have developed ties to the U.S.

The N.C. licenses undercut the Obama administration’s balancing of policy goals to integrate DACA grantees and removing high priority criminals. The N.C. licenses prominently display DACA grantees’ lack of permanent immigration status. The N.C. licenses overemphasize DACA grantee’s lack of immigration status while ignoring the federal government’s plan to integrate such individuals. Despite being technically accurate, “NO LAWFUL STATUS” in bold red letters on the license intentionally differentiates DACA grantees. Such an action reinforces the outsider status of DACA grantees. In highlighting the DACA grantee’s precarious immigration status, North Carolina limits the number and size of the communities to which immigrants without lawful status can belong. In turn, this creates a risk that DACA grantees will not apply for driver’s licenses for fear of exposing their immigration status, which would frustrate the government’s goal of bringing DACA grantees, productive young immigrants, out of the shadows. Thus, the N.C. licenses disproportionately focus on a DACA grantee’s lack of formal immigration status, which compromises the government’s goal of discreet integration.

The Court in Arizona acknowledged the complex interaction between a removable individual’s ties to the community and the impact of removal orders on broader U.S. foreign policy. Indeed, removal decisions, including the selection of a removed alien’s destination, may implicate the U.S. relations with foreign powers and require consideration of changing political and economic circumstances. The dynamic nature of relations with other countries requires the executive branch to ensure immigration enforcement policies are consistent with U.S. foreign policy. Similarly, the

166 Napolitano, supra note 3, at 2; see also Martin, supra note 95 (addressing the broad discretion that DHS and ICE enjoy in enforcing immigration law against removable individuals and noting that such discretion is common across all enforcement agencies).
167 Napolitano, supra note 3, at 3.
168 López, supra note 17, at 104 (suggesting licenses like the N.C. license single out the license holders, thus violating Equal Protection rights). Though Professor López uses Equal Protection analysis, given the Court’s language in Arizona, the protection of a group of undocumented immigrants can be a broad goal of federal action. Id.
170 Arizona, 132 S. Ct. at 2499.
171 Id. (citations omitted).
172 Id.
Court in *Crosby* noted that the executive branch had broad discretion in the development of foreign policy.\(^\text{173}\)

Given the Court’s broad deference to the federal government’s control over foreign policy in *Arizona*, the N.C. licenses would disrupt the government’s foreign policy goals. The DACA program reflects the federal government’s exercise of prosecutorial discretion in favor of young individuals who should not be removed to “countries where they may not have lived or even speak the language.”\(^\text{174}\) As such, the federal government is ensuring that a class of individuals who will have difficulty in reintegration in their country of origin will not be removed. Conversely, the federal government seeks to facilitate individuals’ integration into the U.S., the country to which many of the affected individuals feel most connected. The N.C. licenses undermine the integration of such individuals, which in turn, compromises the Obama administration’s overall foreign policy goals.

Additionally, the N.C. licenses place undue attention on a DACA grantee’s unlawful status, thereby putting them at risk of removal or unnecessary detention. The impact of N.C. licenses on federal objectives can be illustrated by examination of a hypothetical N.C. license holder who encounters local law enforcement. Theoretically, a N.C. license holder can be stopped pursuant to a “show me your papers” law or can otherwise be stopped for any reason. If a N.C. license holder is stopped by local law enforcement, he or she also faces the risk of encountering the § 287(g) or S-COMM detainer programs.

First, assuming the hypothetical DACA grantee is stopped pursuant to a “show me your papers” law, the N.C. licenses ostensibly would be

\(^{173}\) *Crosby*, 530 U.S. at 381. The opinion states:

> [T]he state Act undermines the President’s capacity, in this instance for effective diplomacy. It is not merely that the differences between the state and federal Acts in scope and type of sanctions threaten to complicate discussions; they compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments.

\(^{174}\) Napolitano, *supra* note 3, at 2; *see also* Martin, *supra* note 147, at 181–83.
sufficient documentation that a DACA grantee is “lawfully present.”\textsuperscript{175} But, the N.C. license would subject a DACA grantee to heightened police scrutiny, as the licenses would alert local law enforcement of the DACA grantees’ lack of formal immigration status. In which case, the local police may choose to spend time checking with DHS to confirm the N.C. license holder’s legal presence. Such a process would be an inefficient use of federal resources because the federal government has already deemed these people legally present. This inefficiency frustrates the federal policy to focus resources on the prosecution and removal of “high priority” criminals, not wasting law enforcement resources on “low priority” undocumented immigrants.\textsuperscript{176}

In the § 287(g) and S-COMM context, N.C. licenses may increase the risk of wrongful detention of DACA grantees. Generally, USCIS has stated that any information obtained to determine whether an applicant qualifies for DACA may be shared with national security and law enforcement agencies, including ICE, for purposes other than removal.\textsuperscript{177} Information may be shared with ICE for national security purposes, such as for the investigation or prosecution of a criminal offense.\textsuperscript{178} Essentially, a DACA applicant’s information is not relayed to ICE unless USCIS deems it necessary because the applicant represents a threat to national security.

The N.C. licenses raise the concerns addressed by the Court in \textit{Arizona} because the federal government’s immigration enforcement policy to avoid police surveillance and “unnecessary harassment” would be undermined\textsuperscript{179} Post-arrest federal prosecutorial discretion does not remedy an individual’s initial interaction with local law enforcement.\textsuperscript{180} By exposing DACA grantees’ immigration status on N.C. licenses, local law enforcement in North Carolina and in other states risk wrongfully detaining DACA grantees for § 287(g) and S-COMM purposes. While most states have phased out the § 287(g) program, S-COMM has filled the void.\textsuperscript{181}

There are numerous reports of errors in the § 287(g) and S-COMM databases, which have led to the improper detainment of individuals with legal status.\textsuperscript{182} While the N.C. licenses provide proof of identity, they exacerbate DHS database errors by alerting local law enforcement to an individual’s “unlawful status” which places a DACA grantee through

\textsuperscript{175} \textit{See}, e.g., S.B. 1070 § 2(B); H.B. 786 § 15A-506.
\textsuperscript{176} DACA grantees are especially “low priority” individuals because a grantee must demonstrate that he or she does not have any significant criminal history to qualify for DACA protection.
\textsuperscript{177} USCIS FAQ, \textit{supra} note 32.
\textsuperscript{178} \textit{Id}.
\textsuperscript{179} \textit{Arizona}, 132 S. Ct. at 2506.
\textsuperscript{180} Motomura, \textit{supra} note 56, at 1856.
\textsuperscript{181} \textit{See supra} text accompanying notes 53, 57; \textit{see supra} Part II.A.
needless § 287(g) and S-COMM checks despite his or her legal presence. This in turn frustrates the facilitation of legally justifiable detention of individuals who, in contrast, do present a risk to the community.

Assuming a hypothetical N.C. license holder is stopped for a minor traffic offense, local law enforcement may read the language of the N.C. licenses and feel compelled to check the immigration status of the license holder, even though DACA grantees are protected from removal. As such, ICE would waste resources on DACA grantees put into § 287(g) and S-COMM checks when DHS has already declared its exercise of prosecutorial discretion. The possibility of such waste increases in a situation where a N.C. license holder travels to a state where DACA grantees are either not issued licenses, such as Arizona, or a state where DACA driver’s licenses are not as conspicuously marked as the N.C. licenses. Furthermore, such action risks “generat[ing] the very disloyalty” DACA seeks to avoid. Therefore, the N.C. licenses would disrupt the federal government’s policy goals.


Most troubling is how a N.C. license holder would fare in Arizona. Governor Brewer has steadfastly maintained DACA grantees are not lawfully present. Governor Brewer chose to ignore recent DHS guidance reiterating that DACA grantees are lawfully present in the U.S.
Arizona is unique in that, unlike other states, it does not recognize the legal presence of DACA grantees. Arizona’s “show me your papers” law would have an even bigger impact on N.C. license holders than other states’ “show me your papers” laws.

Arizona residents who are DACA grantees cannot receive driver’s licenses. As such, Arizona DACA grantees who are stopped by local law enforcement pursuant to S.B. 1070 must present notices from DHS or USCIS to verify their immigration status. This in turn results in significant pressure on DACA grantees who are protected from removal under federal law, but are powerless when stopped pursuant to Arizona’s “show me your papers” law. There are reports that Arizona law enforcement has arrested DACA applicants for not presenting a driver’s license. Generally, in the immigration law context, individuals with a pending application for status are protected from removal. Thus, while DACA applicants are not afforded the full protections provided to DACA grantees, they are temporarily non-removable while their application is pending.

Cesar Valdes’ arrest is an anecdotal example of the impact of Arizona’s policy. Cesar Valdes was arrested and detained by Arizona police for violating Arizona’s “show your papers” law when he failed to produce a driver’s license during a traffic-related stop despite his status as a DACA applicant. He was finally released after being transferred to ICE custody.

The N.C. license demonstrates that an individual is a qualified DACA grantee. In Arizona, where the lawful status of DACA grantees is not recognized, the N.C. license will not offer any protection from local law enforcement. Unlike Cesar Valdes, a N.C. license holder possesses a driver’s license and is an actual DACA grantee. Given that Arizona does not recognize the lawful presence of DACA grantees, it is not certain that owning a license proclaiming “NO LAWFUL STATUS” would be any better than not owning a license. After all, the N.C. licenses clearly state that the license holder does not have “lawful status” in the U.S., and Arizona does not recognize a DACA grantee’s “legal presence.” It is highly likely that if a

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190 As previously noted, Nebraska is the only other state besides Arizona that does not recognize DACA grantees as having legal presence in the U.S. See supra note 8.
193 Morton Memo, supra note 139; Memorandum from John Morton, Dir. of ICE, on Guidance Regarding the Handling of Removal Proceedings of Aliens with Pending or Approved Applications or Petitions (Aug. 2, 2010) (terminating removal proceedings of persons with pending applications for status in certain instances); see also DREAM Relief: FAQs Other Immigration Cases Robert Menendez, http://www.menendez senate.gov/ issues/dream-relief-faqs-other-immigration-cases (last visited Feb. 4, 2013).
194 See supra note 190.
195 Id.
N.C. license holder were stopped or arrested by Arizona law enforcement, the N.C. license would not prevent the Arizona officers from detaining the license holder for § 287(g) and S-COMM purposes. Indeed, local police did not respect Cesar Valdes’s right to protection from unnecessary detention as a DACA applicant with a pending application. Instead, he was needlessly kept in police custody before being released by ICE. The Arizona policy to not recognize DACA status is at odds with federal policy to focus immigration enforcement efforts on high priority individuals. Cesar Valdes’s experience highlights how the N.C. licenses expose DACA grantees to the risk of prolonged detention when Arizona law enforcement chooses to utilize § 287(g) and S-COMM.

By exposing DACA grantees and putting them at such a risk, the N.C. licenses directly conflict with the federal goal of integrating DACA grantees into American society. The licenses wrongly emphasize DACA grantees’ lack of legal status, making them a target for unnecessary law enforcement attention rather than facilitating their social integration. Moreover, the N.C. licenses impede the federal government’s policy of resource allocation, as the licenses enhance the risk of DACA grantees going through § 287(g) and S-COMM background checks even when the DACA grantees have not been convicted of a crime and are legally present in the U.S., therefore are not removable. The N.C. licenses, particularly in confluence with Governor Brewer’s executive order and S.B. 1070, are an obstacle to the federal policy of protecting DACA grantees from removal.

V. CONCLUSION

The N.C. licenses undermine the DACA program’s objective to integrate individuals who are “Americans in every single way but one: on paper.” In Arizona, the Supreme Court emphasized the federal government’s “broad discretion” to “embrace immediate human concerns” in immigration enforcement, grounded in the executive branch’s constitutional powers. The language used on the licenses, despite accurately stating DACA grantees’ immigration status, frustrates the federal government’s attempts to “embrace immediate human concerns” by publicizing the DACA grantees’ status. Indeed, the Obama administration sought to fully integrate DACA grantees into the U.S. by making public benefits available to them, like driver’s licenses. The N.C. licenses impede integration by highlighting the precarious immigration status of DACA grantees and exposing them to heightened scrutiny by law enforcement. Moreover, N.C. licenses place DACA grantees at risk for being detained for § 287(g) and S-COMM

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197 See supra note 187.
198 Cushman & Preston, supra note 5.
199 Martin, supra note 147, at 186.
purposes, particularly in states like Arizona, despite the government’s exercise of prosecutorial discretion. As a result, the N.C. licenses conflict with federal policy and disrupt the federal government’s resource allocation. Thus, the N.C. licenses are obstacle preempted and should be rescinded.

Currently, North Carolina driver’s licenses issued to people with non-immigrant visas already discreetly state the temporary validity period of the licenses on the back of the licenses without conspicuously highlighting the cardholder’s specific immigration status. 200 Discreetly placing such information on DACA grantees’ driver’s licenses would not draw attention to their “unlawful status.” In doing so, DACA grantees’ driver’s licenses will contain the same information as other noncitizens. This would lower the risk that DACA grantees will be wrongfully subjected to § 287(g) or S-COMM programs and would conform with the federal government’s goal to integrate DACA grantees. Therefore, North Carolina should include DACA grantees in its current licensing scheme for noncitizens in lieu of the N.C. licenses emphasizing their lack of lawful status.

200 Gutierrez, supra note 11.