

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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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).¹ The front of the license contains the words "NO LAWFUL STATUS" in bold red letters, conspicuously publicizing DACA grantees' delicate immigration status.² 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.³ DACA preserves administrative resources by refocusing removal efforts on "high priority" persons.⁴ 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."⁵ 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.⁶

According to recent statistics, forty-eight states permit DACA grantees to apply for driver's licenses.⁷ Though some states were initially

¹ Michael Hennessey, *Licenses for DACA Qualifiers Pink Stripe to be Removed*, WCTI 12 (Mar. 22, 2013, 7:40 PM), <http://www.wcti12.com/news/Licenses-for-DACA-qualifiers/-/13530444/19433972/-/dy8ys4/-/index.html>.

² *Id.*

³ See Lauren Gilbert, *Obama's Ruby Slippers: Enforcement Discretion in the Absence of Immigration Reform*, 116 W. VA. L. REV. (forthcoming 2013) [hereinafter *Obama's Ruby Slippers*], <http://ssrn.com/abstract=2238741>; U.S. Dep't of Homeland Sec., on Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children (June 15, 2012) [hereinafter Napolitano] (on file with the author).

⁴ Napolitano, *supra* note 3.

⁵ John Cushman Jr. & Julia Preston, *Obama to Permit Young Migrants to Remain in U.S.*, N.Y. TIMES (June 15, 2012), www.nytimes.com/2012/06/16/us/us-to-stop-deporting-some-illegal-immigrants.html?pagewanted=all&_r=0.

⁶ *Id.*; See 8 U.S.C. § 1621 (2012).

⁷ NAT'L IMMIGRATION LAW CTR., ARE INDIVIDUALS GRANTED DEFERRED ACTION UNDER THE DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) POLICY ELIGIBLE FOR STATE DRIVER'S LICENSES?, <http://www.nilc.org/dacadriverslicenses.html> (last updated June 19, 2013); Larry Copeland, *N.C.'s Immigrant Driver's License Plan Sparks Protests*, USA TODAY (Mar. 8, 2013), www.usatoday.com/story/news/nation/2013/03/07/ncs-immigrant-drivers-license-plan-sparks-protests/1972119/. See also Amanda P. Beadle, *States Move Forward to Allow Undocumented Immigrants to Drive Legally*, IMMIGRATION IMPACT (Apr. 29, 2013), <http://immigrationimpact.com/2013/04/29/states-move-forward-to-allow-undocumented-immigrants-to-drive-legally/> (noting states' increasing acceptance of providing undocumented immigrants without deferred action status driver's licenses).

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

⁸ Copeland, *supra* note 7; NAT'L IMMIGRATION LAW CTR., OVERVIEW OF STATE DRIVER'S LICENSE REQUIREMENTS FOR INDIVIDUALS GRANTED DEFERRED ACTION UNDER THE DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) POLICY, <http://www.nilc.org/dacadriverslicensetbl.html> (last updated Apr. 9, 2013); Ariz. Exec. Order No. 2012-06, 18 Ariz. Admin. Reg. 2237 (Sept. 7, 2012), available at <http://www.azsos.gov/aar/2012/36/governor.pdf> (noting the Arizona executive order expressly states that it does not recognize DACA's validity and, therefore, does not recognize DACA grantees' legal presence in the U.S.).

⁹ Copeland, *supra* note 7.

¹⁰ *Id.*

¹¹ Hennessey, *supra* note 1 (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.journalnow.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>.

¹³ U.S. CITIZENSHIP & IMMIGRATION SERVS., DEFERRED ACTION FOR CHILDHOOD ARRIVALS PROCESS (Mar. 14, 2013), <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca-13-3-15.pdf> (providing statistics from Aug. 15, 2012–Mar. 14, 2013).

¹⁴ *Id.*

state.¹⁵ 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.¹⁶

Other scholars have focused on a potential equal protection challenge to driver's licenses such as the N.C. license.¹⁷ 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*.¹⁸

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.¹⁹ 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.²⁰ Therefore, N.C. licenses would offer no protection from Arizona law enforcement.²¹

¹⁵ *Id.*

¹⁶ Rosalind S. Helderman & Sean Sullivan, *Bipartisan Group of Senators to Unveil Framework for Immigration Overhaul*, WASH. POST (Jan. 27, 2013), www.washingtonpost.com/politics/bipartisan-group-of-senators-to-unveil-framework-for-immigration-overhaul/2013/01/27/bdb04360-68bf-11e2-ada3-d86a4806d5ee_story.html; Dan Nowicki, 'Amnesty' Losing Emotional Punch in Immigration Debate, USA TODAY (June 19, 2013), www.usatoday.com/story/news/nation/2013/07/19/amnesty-losing-emotional-punch-immigration-debate/2567509/. Under the current bill, undocumented immigrants must wait ten years and pay certain fines before becoming a permanent resident. Nowicki, *supra*. Even if the bill is passed, the status of undocumented immigrants would not be immediately resolved. *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.

¹⁸ See *Arizona v. United States*, 132 S. Ct. 2492 (2012).

¹⁹ See *Obama's Ruby Slippers*, *supra* note 3; Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869 (2008); Peter Marguiles, *Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers* (Roger Williams University Legal Studies Research Paper No. 133, 2013), available at <http://ssrn.com/abstract=2215255>.

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.²² Part III provides a brief overview of *Arizona v. United States* and modern obstacle preemption jurisprudence.²³ 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.²⁴ 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.²⁵ Part IV then examines how Arizona law exacerbates the effect of the N.C. licenses.²⁶ Finally, Part V concludes that the N.C. licenses are preempted, thus unconstitutional.²⁷

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.”²⁸ 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.²⁹

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.³⁰ 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

rational basis to deny DACA grantees driver’s licenses, but it also denied the plaintiffs’ request for a preliminary injunction against the Arizona policy. *Federal Court Says Arizona Violates Constitution by Denying Licenses to DREAMers*, COMMON DREAMS (May 17, 2013), <https://www.commondreams.org/newswire/2013/05/17> [hereinafter *Arizona Violates Constitution*].

²¹ See Complaint ¶¶ 44–49, *Ariz. Dream Act Coal. v. Brewer*, No. 2:12-cv-02546, 2013 WL 2128315 (D. Az. May 16, 2012), 2012 WL 5952174; *Ariz. Exec. Order 2012–06; Arizona Violates Constitution*, *supra* note 20.

²² See *infra* Part II.

²³ See *infra* Part III.

²⁴ See *infra* Part IV.

²⁵ See *infra* Part IV.

²⁶ See *infra* Part IV.

²⁷ See *infra* Part V.

²⁸ *Cushman & Preston*, *supra* note 5.

²⁹ *Obama’s Ruby Slippers*, *supra* note 3, at 15; *Napolitano*, *supra* note 3.

³⁰ *Napolitano*, *supra* note 3, at 1–3.

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 grantee 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.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=3a4dbc4b04499310VgnVCM10000082ca60aRCRD&vgnnextchannel=3a4dbc4b04499310VgnVCM10000082ca60aRCRD>.

³³ *Id.*

³⁴ 8 U.S.C. §§ 1621(a)(1), 1641 (2012); Memorandum from Donald Neufeld, Acting Associate Director of USCIS, on Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I)—Revision to and Redesignation of *Adjudicator's Field Manual (AFM)* Chapter 30.1(d) as Chapter 40.9 at 10 (*AFM* Update AD 08-03) (May 6, 2009), available at http://www.uscis.gov/USCIS/Laws/Memoranda/Static_Files_Memoranda/2009/revision_redesign_AFM.PDF [hereinafter Neufeld].

³⁵ Neufeld, *supra* note 34, at 9–10.

³⁶ *Id.* at 10; 8 U.S.C. §§ 1101(a)(15), 1182(d)(5), 1621(a)(1)(3), 1641 (2012).

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”).

³⁹ See 8 U.S.C. § 1611 (2012).

⁴⁰ § 1621(a), (d).

⁴¹ See § 1621(c).

grantees.⁴² Indeed, state driver's licenses are essentially *de facto* national identification cards and are vital to daily activities.⁴³ 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.⁴⁴

DACA was announced in response to Congress's inability to pass the Development, Relief, and Education for Alien Minors (DREAM) Act.⁴⁵ 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.⁴⁶ 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.⁴⁷

DACA's opponents question its legality.⁴⁸ 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.⁴⁹ The State of Mississippi joined the complaint two months later.⁵⁰ Despite the backlash, many undocumented immigrants are applying for deferred action.⁵¹

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

⁴² Kevin R. Johnson, *Driver's Licenses and Undocumented Immigrants: The Future of Civil Rights Law?*, 5 NEV. L.J. 213, 221 (2004).

⁴³ *Id.*

⁴⁴ Paul L. Frantz, *Undocumented Workers: State Issuance of Driver Licenses Would Create A Constitutional Conundrum*, 18 GEO. IMMIGR. L.J. 505, 532 (2004).

⁴⁵ Cushman & Preston, *supra* note 5.

⁴⁶ See *Obama's Ruby Slippers*, *supra* note 3, at 15.

⁴⁷ Letter from Immigration Law Professors, Executive Authority to Grant Administrative Relief to Dream Act Beneficiaries, to President Obama (May 28, 2012) (on file with author).

⁴⁸ Cushman & Preston, *supra* note 5; Andres Gonzalez & Alicia Caldwell, *Deferred Action for Childhood Arrivals, Obama Immigration Program, Begins Taking Applications*, HUFFINGTON POST (Aug. 15, 2012), www.huffingtonpost.com/2012/08/15/deferred-action-for-childhood-arrivals_n_1778834.html.

⁴⁹ Complaint, *Crane v. Napolitano*, No. 3:12-CV-03247, 2013 WL 1744422 (N.D. Tex. Apr. 23, 2013), 2012 WL 3629252 (arguing DACA was enacted without proper notice and comment per the Administrative Procedure Act and in turn does not have the force of law and impedes DHS officers from enforcing INA § 235).

⁵⁰ Amended Complaint, *Crane v. Napolitano*, No. 3:12-CV-03247, 2013 WL 1744422 (N.D. Tex. Apr. 23, 2013), 2012 WL 5199509.

⁵¹ As of Aug. 31, 2013, USCIS has received 588,725 applications, 433,318 of which are Mexican applicants. U.S. CITIZENSHIP & IMMIGRATION SERVS., DACA MONTHLY REPORT 1–2 (Sep. 11, 2013), <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca-13-9-11.pdf>. USCIS has approved 455,455 applications. *Id.* There were 19,876 applicants residing in North Carolina, the seventh most applicants from one state. *Id.*

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.⁵² If the local jail officers believe an individual is removable, they can then inform ICE, which may issue a detainer.⁵³ 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.⁵⁴ 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.⁵⁵ An arrest for any infraction, no matter how minor, is sufficient to trigger a § 287(g) detainer or S-COMM database check.⁵⁶ No conviction is necessary for ICE to issue a detainer.⁵⁷

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.⁵⁸ 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.⁵⁹

⁵² Press Release, U.S. Immigration and Customs Enforcement, FY 2012: ICE Announces Year-End Removal Numbers, Highlights Focus on Key Priorities and Issues New National Detainer Guidance to Further Focus Resources (Dec. 21, 2012), available at <http://www.ice.gov/news/releases/1212/121221washingtondc2.htm#statement>.

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)).

⁵⁴ U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, SECURE COMMUNITIES, http://www.ice.gov/secure_communities/ (last visited Mar. 17, 2013).

⁵⁵ Edgar Aguilasocho, *Misplaced Priorities: The Failure of Secure Communities in Los Angeles County* (University of California Irvine Legal Studies Research Paper No. 118, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012283.

⁵⁶ Hiroshi Motomura, *The Discretion That Matters: Federal Immigration Enforcement, State and Local Arrests, and the Civil—Criminal Line*, 58 UCLA L. REV. 1819, 1851 (2011).

⁵⁷ Aguilasocho, *supra* note 55; See U.S. IMMIGRATION & CUSTOMS ENFORCEMENT, ACTIVATED JURISDICTIONS, <http://www.ice.gov/doclib/secure-communities/pdf/sc-activated2.pdf> (last updated July 31, 2012) (noting that, as of July 2012, 97% of U.S. jurisdictions have activated S-COMM, including every North Carolina county resulting in the removal of 4,085 undocumented immigrants).

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 detainees 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 detainees 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

to operate within a jurisdiction in which the immigration status of all arrested individuals is checked.

Id. See also AM. CIVIL LIBERTIES UNION OF TENN., CONSEQUENCES AND COSTS: LESSONS LEARNED FROM DAVIDSON COUNTY, TENNESSEE'S JAIL MODEL 287(G) PROGRAM, (2012), [http://www.aclu-tn.org/pdfs/287g\(F\).pdf](http://www.aclu-tn.org/pdfs/287g(F).pdf) (reporting Tennessee law enforcement making pretextual arrests and jailing individuals for § 287(g) jail program purposes).

⁶⁰ See Johnson, *supra* note 42, at 219.

⁶¹ López, *supra* note 17, at 95.

⁶² *Id.* at 96.

⁶³ *Id.* at 96–97.

⁶⁴ *Id.* at 97–98.

⁶⁵ *Id.*

⁶⁶ Johnson, *supra* note 42, at 221.

⁶⁷ *Id.* at 221–22.

⁶⁸ *Id.*

⁶⁹ Franco Ordoñez, *N.C. Switches Stance on Driver's Licenses for Illegal Immigrants*, CHARLOTTE OBSERVER (Jan. 11, 2013), www.charlotteobserver.com/2013/01/11/3778691/nc-switches-stance-on-licenses.html; Copeland, *supra* note 7; *North Carolina Suspends Issuing Driver's Licenses to DREAMers*, FOX NEWS (Jan. 9, 2013),

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

<http://latino.foxnews.com/latino/news/2013/01/09/n-carolina-suspends-issuing-driver-licenses-to-dreamers/>.

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 72.

⁷⁶ *Id.*

⁷⁷ *North Carolina: Pink Licenses Dropped*, N.Y. TIMES (Mar. 21, 2013), www.nytimes.com/2013/03/22/us/north-carolina-pink-licenses-dropped.html; Hennessey, *supra* note 1 (explaining that the N.C. DOT removed the pink stripe to ensure that it would meet the Mar. 25, 2013 deadline).

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.⁷⁹ As of March 27, 2013, 693 DACA grantees in North Carolina received driver's licenses, permits, or identification cards.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.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.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.⁸³ The state agency will submit its findings and recommendations to a legislative oversight committee by March 2014.⁸⁴

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.*

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.

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.

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.*

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.*

⁸³ *NC Immigration Bill Turned Mostly Into a Study*, WSCO TV (July 17, 2013, 6:04 AM), <http://www.wsocv.com/news/news/local/nc-immigration-bill-turned-mostly-study/nYsj6/> (explaining the bill has been transformed into an informational research and study bill rather than actual legislation).

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.⁸⁵ The Supremacy Clause provides that federal law “shall be the supreme Law of the Land”⁸⁶ Accordingly, the federal government may preempt otherwise valid state law.⁸⁷

Preemption can be express or implied.⁸⁸ Express preemption occurs when federal law specifically states that it precludes a state or locality from regulating a particular field.⁸⁹ Implied preemption includes field and conflict preemption.⁹⁰ Field preemption exists when the federal government creates a comprehensive regulatory scheme that crowds out state legislation in a particular field.⁹¹ Courts generally adopt a presumption against preemption where Congress acts in a field that states traditionally occupy.⁹²

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.⁹³ Obstacle preemption is a subset of conflict preemption existing when state law creates an obstacle to a federal law’s policy goals and objectives.⁹⁴ 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*.⁹⁵

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

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).

⁸⁹ See *Gibbons v. Ogden*, 22 U.S. 1, 9–10 (1824); *Savage v. Jones*, 225 U.S. 501 (1912); *California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989).

⁹⁰ Lauren Gilbert, *Immigrant Laws, Obstacle Preemption and the Lost Legacy of McCulloch*, 33 BERKELEY J. EMP. & LAB. L. 153, 159 (2012) [hereinafter *Immigrant Laws*].

⁹¹ *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (citation omitted).

⁹² *Id.*

⁹³ *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963).

⁹⁴ *Hines v. Davidowitz*, 312 U.S. 52, 65 (1941).

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.⁹⁶ 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.⁹⁷ Noncitizens who failed to register or carry their card were subject to fines.⁹⁸ 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.⁹⁹

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.¹⁰⁰ 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."¹⁰¹ 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.*"¹⁰²

Similarly, in *Crosby v. National Foreign Trade Council*, the Court held that a Presidential executive order obstacle preempted a Massachusetts statute.¹⁰³ 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).¹⁰⁴

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

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).

¹⁰³ *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

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.¹⁰⁵ 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.¹⁰⁶ 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.”¹⁰⁷

In *Lozano v. Hazleton*, the Third Circuit adopted a similar balancing approach in examining obstacle preemption in the immigration context.¹⁰⁸ The court then found that the local ordinance regulating employment of undocumented immigrants and prohibiting rentals to undocumented immigrants was obstacle preempted.¹⁰⁹ 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).¹¹⁰ 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.¹¹¹

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.¹¹² 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.¹¹³ LAWA also requires every employer “[to] verify the employment eligibility of the employee by using E-Verify”¹¹⁴

¹⁰⁵ See, e.g., *Arizona*, 489 U.S. at 157–58; *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861 (2000) (noting the Court held that such a tort action would frustrate the DOT’s goal of permitting automobile manufacturers wide discretion in choosing safety devices); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989).

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.

¹⁰⁹ *Lozano v. City of Hazleton*, 620 F.3d 170, 210 (3d Cir. 2010), *vacated*, 131 S. Ct. 2958 (2011), *remanded to* 724 F.3d 297 (3d Cir. 2013).

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.

¹¹³ *Chamber of Commerce of U.S. v. Whiting*, 131 S. Ct. 1968, 1973 (2011).

¹¹⁴ *Id.* at 1976–77.

The Court found the state law at issue was not preempted.¹¹⁵ The Court held that the provision revoking business licenses was not expressly preempted.¹¹⁶ The Court broadly interpreted “licensure” in the business context and held that LAWA fell within the scope of IRCA’s savings clause.¹¹⁷ 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.¹¹⁸ 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.¹¹⁹

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. 1070.¹²⁰ Indeed, the Court in *Arizona* seemed to revisit the broad pre-*Whiting* obstacle preemption analysis.¹²¹

First, the Court held that the portion of the law criminalizing failure to carry immigration documents was field preempted.¹²² Second, the Court stated that “even complementary state regulation is impermissible” where Congress has adopted a comprehensive regulatory scheme.¹²³

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.¹²⁴ 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.¹²⁵ 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.”¹²⁶ The Court in *Arizona* deviated from *Whiting* and examined a wide range of legislative background materials, including

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

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 2506 (emphasis added).

¹³¹ *Id.* at 2510.

¹³² *Id.*

licenses.¹³³ However, federal legislation may preempt state legislation regarding driver's licenses.¹³⁴

The Supreme Court has recognized that it is within the absolute discretion of the executive branch to not pursue immigration enforcement action.¹³⁵ 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."¹³⁶ DHS has used "deferred action" in various contexts to ensure efficient resource allocation with an eye toward humanitarian concerns.¹³⁷ 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.¹³⁸ DACA is merely an extension of DHS's policy to not remove "low priority" aliens.¹³⁹ Indeed, Napolitano's memo adopted measures to ensure federal resources are not wasted on removing "low priority" DACA grantees.¹⁴⁰

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).

¹³⁸ DEP'T OF HOMELAND SEC., DHS ESTABLISHES INTERIM RELIEF FOR WIDOWS OF U.S. CITIZENS (June 9, 2009), <http://www.dhs.gov/news/2009/06/09/dhs-establishes-interim-relief-widows-us-citizens>.

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).¹⁴¹ A potential issue in determining the viability of the DACA program is whether the Obama administration overstepped constitutional bounds by announcing the policy.¹⁴²

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.¹⁴³ Scholars have also expressed concerns regarding the constitutionality of preemption by federal agencies and the executive branch.¹⁴⁴

However, Professor Lauren Gilbert argued DACA falls within the policy exception to rule making under the APA.¹⁴⁵ 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.¹⁴⁶ Professor David A. Martin also argued that the plain language of the INA does not prevent DHS from exercising its prosecutorial discretion through DACA.¹⁴⁷

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.¹⁴⁸ It is further assumed that DACA is not the product of an improper delegation of power and is otherwise constitutional.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).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.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."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.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. *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. *Id.*

¹⁴⁸ See *Obama's Ruby Slippers*, *supra* note 3; Marguiles, *supra* note 19; Young, *supra* note 19; Paul E. McGreal, *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).

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 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). *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 *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457 (2001)).

¹⁵⁰ See *Obama's Ruby Slippers*, *supra* note 3. This paper will adopt Professor Gilbert's argument.

¹⁵¹ *Immigrant Laws*, *supra* note 90, at 159.

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); 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).

¹⁵³ *Whiting*, 131 S. Ct. at 1973.

business licenses.¹⁵⁴ The Court broadly interpreted “licenses” in the federal statute savings clause to find that LAWA was not preempted.¹⁵⁵

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.¹⁵⁶ 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.”¹⁵⁷ 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.¹⁵⁸ 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.¹⁵⁹

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.

¹⁵⁷ 49 U.S.C. § 30301(5) (2012).

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.¹⁶⁰ In *Arizona*, the Supreme Court utilized a broad analysis of legislative history to determine the federal government’s balance of policy goals.¹⁶¹

1. North Carolina Licenses Disrupt the Federal Government’s Balancing of Policies

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.”¹⁶² 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.”¹⁶³ The Court in *Arizona* echoed the concerns raised in *Hines* and struck down the provision of S.B. 1070 allowing arrest without a warrant.¹⁶⁴

The executive branch is permitted to use its decision-making power to balance a number of factors within the executive branch’s expertise.¹⁶⁵ 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.

language.”¹⁶⁶ 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.¹⁶⁷ 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.¹⁶⁸ 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.¹⁶⁹ 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.¹⁷⁰ 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.¹⁷¹ The dynamic nature of relations with other countries requires the executive branch to ensure immigration enforcement policies are consistent with U.S. foreign policy.¹⁷² 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.*

¹⁶⁹ *See* Hiroshi Motomura, *Immigration Outside the Law*, 108 COLUM. L. REV. 2037, 2079 (2008).

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.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."¹⁷⁴ As such, the federal government is ensuring that a class of individuals who will have difficulty in reintegrating 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.

Id. An example of the interaction between immigration and U.S. foreign policy is illustrated by the relationship between the U.S. and China. In 1990, Congress debated whether to permit Chinese students to remain in the U.S. because of persecution in China. China, in response, accused the U.S. of interfering with its affairs, creating tension between the two nations and within the political parties in the U.S. See Kenneth J. Franzblau, *Immigration's Impact on U.S. National Security and Foreign Policy*, U.S. COMM'N ON IMMIGRATION REFORM 2 (Oct. 1997), www.utexas.edu/lbj/uscir/respapers/ii-oct97.pdf; Jim Mann, *House Votes to Override Bush on Chinese Students*, L.A. TIMES (Jan. 25, 1990), articles.latimes.com/1990-01-25/news/mn-966_1_chinese-students. More recently, the U.S., through both its immigration policies and foreign policies, is competing directly with China for talented, highly educated individuals. Peter Ford, *Reverse Brain Drain: China Engineers Incentives for "Brain Gain"*, CHRISTIAN SCI. MONITOR (Oct. 21, 2012), www.esmonitor.com/World/Global-Issues/2012/1021/Reverse-brain-drain-China-engineers-incentives-for-brain-gain/%28page%29/2. In both instances, the federal government is making decisions about immigration policy and foreign policy to best deal with diplomatic relations with China.

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.”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.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.¹⁷⁷ Information may be shared with ICE for national security purposes, such as for the investigation or prosecution of a criminal offense.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 *Arizona* because the federal government’s immigration enforcement policy to avoid police surveillance and “unnecessary harassment” would be undermined.¹⁷⁹ Post-arrest federal prosecutorial discretion does not remedy an individual’s initial interaction with local law enforcement.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.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.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

¹⁷⁵ See, e.g., S.B. 1070 § 2(B); H.B. 786 § 15A-506.

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.

¹⁷⁷ USCIS FAQ, *supra* note 32.

¹⁷⁸ *Id.*

¹⁷⁹ *Arizona*, 132 S. Ct. at 2506.

¹⁸⁰ Motomura, *supra* note 56, at 1856.

¹⁸¹ See *supra* text accompanying notes 53, 57; see *supra* Part II.A.

¹⁸² Michele Waslin, *The Secure Communities Program: Unanswered Questions and Continuing Concerns*, IMMIGRATION POLICY CENTER (Nov. 2010), http://elpasotimes.typepad.com/files/secure_communities_updated_110410-1.pdf.

needless § 287(g) and S-COMM checks despite his or her legal presence.¹⁸³ 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,¹⁸⁴ or a state where DACA driver's licenses are not as conspicuously marked as the N.C. licenses.¹⁸⁵ Furthermore, such action risks "generat[ing] the very disloyalty" DACA seeks to avoid.¹⁸⁶ Therefore, the N.C. licenses would disrupt the federal government's policy goals.

2. North Carolina License Holders Face Danger in Arizona Because of Arizona's Policy Not to Recognize DACA Grantees' Lawful Presence

Most troubling is how a N.C. license holder would fare in Arizona.¹⁸⁷ Governor Brewer has steadfastly maintained DACA grantees are not lawfully present.¹⁸⁸ Governor Brewer chose to ignore recent DHS guidance reiterating that DACA grantees are lawfully present in the U.S.¹⁸⁹

¹⁸³ *Id.*

¹⁸⁴ *See infra* Part IV.B.2.

¹⁸⁵ The differing policies of states regarding DACA grantees' drivers licenses can cause reciprocity and consistency problems between states and result in difficulties for law enforcement imposing out-of-state laws and also for states following state-specific reciprocity agreements. *See* AM. ASS'N OF MOTOR VEHICLE ADM'RS, DRIVER LICENSING FOR UNDOCUMENTED IMMIGRANTS IN 2013: HOW STATES ARE REACTING AND THE EFFECTS ON THE MOTOR VEHICLE COMMUNITY 4-8 (Nov. 20, 2013).

¹⁸⁶ Individuals who qualify for DACA must have entered the U.S. before they turned sixteen and may not be older than thirty-one. *See supra* text accompanying note 31. Consequently, many DACA grantees are in the U.S. during a vital time during the brain and emotional development process. Researchers are hoping to study the effect that undocumented status has on young individuals. Erika L. Sanchez, *Studies Hope to Show the Emotional Toll on Children of Undocumented Immigrants*, NBC (Mar. 25, 2013), nbclatino.com/2013/03/25/studies-hope-to-show-the-emotional-toll-on-children-of-undocumented-immigrants/. This paper extrapolates and assumes that living "in the shadows" as second class citizens can cause the type of effects that the researchers are studying. In which case, resentment and a refusal to make meaningful contributions to the U.S. caused by psychological and emotional stress of "living in the shadows" is the type of "disloyalty" that this paper envisions.

¹⁸⁷ *See* NAT'L IMMIGRATION LAW CTR., *supra* note 8 (noting, in addition to Arizona, Nebraska has expressly stated that it would not issue DACA grantees driver's licenses).

¹⁸⁸ *Arizona Governor Brewer: Decision Denying Licenses Stands*, KTAR NEWS (Feb. 11 2013), ktar.com/22/1609469/Brewer-Decision-denying-licenses-stands; *see supra* note 20.

¹⁸⁹ USCIS FAQ, *supra* note 32.

Arizona is unique in that, unlike other states, it does not recognize the legal presence of DACA grantees.¹⁹⁰ Thus, 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.¹⁹¹ 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.¹⁹² Generally, in the immigration law context, individuals with a pending application for status are protected from removal.¹⁹³ 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.¹⁹⁴ He was finally released after being transferred to ICE custody.¹⁹⁵

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.¹⁹⁶ 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

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.

¹⁹¹ Ariz. Exec. Order No. 2012-06.

¹⁹² Carmen Cornejo, *DACA Field Report: When DACA and SB 1070 Collide*, ILW.COM BLOGS (Nov. 20, 2012, 5:40 AM), <http://blogs.ilw.com/dacafieldreport/2012/11/when-daca-and-sb1070-collide.html>.

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.*

¹⁹⁶ Ariz. Exec. Order No. 2012-06.

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.¹⁹⁷ 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."¹⁹⁸ 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.¹⁹⁹

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

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.