

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

THE HONORABLE DAVID COSS, RAUL AARON LARA MARTÍNEZ, CHARLIE MALDONADO JR., ELIZABETH LARA, EULALIA ROBLES, DRUCILLA HAGER and REYNA CARMONA PÉREZ—all residents of New Mexico on behalf of themselves and individuals similarly situated, and THE NEW MEXICO COALITION TO END HOMELESSNESS and SOMOS UN PUEBLO UNIDO, New Mexico membership-based organizations representing low-income individuals,

Plaintiffs,

vs.

No. D-101-CV-2018-00302
District Judge David K. Thomson

JOHN MONFORTE, in his official capacity as the acting Secretary of the New Mexico Taxation and Revenue Department, ALICIA ORTIZ, in her official capacity as acting director of the Motor Vehicle Division of the Taxation and Revenue Department; and the NEW MEXICO TAXATION AND REVENUE DEPARTMENT, an executive agency,

Defendants.

PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION AND MEMORANDUM IN SUPPORT¹

Plaintiffs seek a temporary restraining order and preliminary injunctive relief from Defendants' unconstitutional actions, because, absent injunctive relief, Plaintiffs and putative class members will suffer irreparable harm every day they go without driver's licenses or identification cards. This case concerns the serious, life-altering consequences caused by the

¹Pursuant to Rule 1-007.1 NMRA, Plaintiffs requested but did not receive Defendants' concurrence on this motion. Contemporaneous with this motion, Plaintiffs move for an extension of pages, because the ten pages allowed by LR1-201(A) are insufficient to detail the irreparable harms that Plaintiffs will suffer absent injunctive relief. *See* Plaintiffs' Motion for an Extension of Pages. Under Rule 1-007.1, Plaintiffs also requested and received the Defendants' concurrence on Plaintiffs' Motion for an Extension of Pages.

Defendants' failure to issue driver's licenses and identification cards in accordance with New Mexico law. Without a driver's license, New Mexicans cannot purchase a car or car insurance, register their vehicles with the state, or lawfully drive to work, to school, to childcare, or to the hospital. Courts have long recognized the ability to work often depends on the ability to drive. *See, e.g., Bell v. Burson*, 402 U.S. 535, 539 (1971) (noting that "possession [of a driver's license] may become essential in the pursuit of a livelihood"). In our largely rural state, the ability to legally drive is imperative to earn an income.²

The consequences of not having any form of state-issued ID are grave, pervading almost every basic transaction in modern life. For example, without a state-issued ID card or driver's license, a person may find it impossible to rent a home or pay for a motel room. She cannot open a bank account, cash a paycheck, or obtain medical prescriptions. If she is looking for a job, she will need to present a government-issued ID to complete certain employment documents. In four New Mexico communities, local residents without a photo ID card cannot vote in municipal elections: Albuquerque, Clovis, Hobbs, and Rio Rancho.³

To prevent Defendants from causing these serious, irreparable harms, and upon the accompanying affidavits of all named Plaintiffs, Plaintiff Organizations, and other affected parties, Plaintiffs move this Court for a temporary restraining order ("TRO") and a preliminary injunction ("PI"). Pursuant to Rule 1-066 NMRA, this Court should enjoin Defendants from unlawfully denying driver's licenses and state-issued identification cards to New Mexicans in

²For example, 79.8 percent of New Mexican workers commute to work alone; an additional 10.1 percent carpool to work. By contrast, only 1.2 percent of New Mexicans use public transportation to commute to work. *See* U.S. Census Bureau, Selected Economic Characteristics, 2012-2016 American Community Survey 5-year Estimates, <https://tinyurl.com/j2348jk> (last visited April 26, 2018).

³*E.g.*, Albuquerque, N.M., Election Code art. XIII, § 14; Clovis, N.M., Ordinance 2073-2016; Hobbs, N.M., Charter, § 2-1(C)(2); Rio Rancho, N.M. Municipal Code art. XII, § 7.01(E).

violation of state statutory and constitutional law. Specifically, Plaintiffs seek an order requiring that Defendants, their employees, and their contractors, such as MVD Express, do the following:

1. Cease implementing and enforcing illegal regulations that require New Mexicans to present documents proving an “identification number” to obtain a DAC or a non-federally compliant ID card. NMAC 18.19.5.15.
2. Notify all New Mexicans denied a DAC or non-federally compliant ID card with information in writing giving the reason for their denial, the statutory requirements to obtain a DAC and non-federally compliant ID card, and notice of their right to appeal the denial pursuant to NMSA 1978, § 66-2-17(A).
3. Notify all New Mexicans denied a DAC or non-federally compliant ID card based on a fingerprint background check of specific documentation they can submit to show the basis of their ineligibility is resolved, pursuant to NMSA 1978, § 66-5-15.2(C).
4. Record and preserve the name and mailing address of every New Mexican who applies for, but does not receive, a DAC or a non-federally compliant ID card moving forward.

Defendants’ illegal denial of ID credentials—if not immediately enjoined by this Court—will cause irreparable harm to Plaintiffs and putative class members. Furthermore, Plaintiffs’ threatened injuries outweigh any harm that might be caused to Defendants from granting immediate injunctive relief; granting the requested relief is in the public interest; and Plaintiffs have a substantial likelihood of success on the merits of the underlying case. Accordingly, this Court should issue a TRO and grant Plaintiff’s motion for a PI until this case can be decided on its merit at trial.

BACKGROUND

Plaintiffs filed this action against Defendants on January 29, 2018, seeking to enjoin Defendants from unlawfully denying driver's licenses and non-federally compliant ID cards to New Mexicans in violation of state statutory and constitutional law.⁴ Defendants are the New Mexico Taxation and Revenue Department ("TRD"), TRD secretary John Monforte, and the acting Motor Vehicle Division ("MVD") director Alicia Ortiz. Under the Motor Vehicle Code, Defendants Monforte and Ortiz have statutory responsibilities for administering all state motor vehicle laws. *See* NMSA 1978, §§ 9-11-6, 66-2-3(A)–(B), 66-2-5–7, 66-2-12 & 66-2-14. Because Defendants are violating the law, Plaintiffs and putative class members have been unable to obtain driver's licenses and non-federally compliant ID cards from the MVD.

In 2016, the New Mexico Legislature enacted a new state law that establishes a two-tiered system of driver's licenses and identification cards. The first tier are licenses and identification cards that meet the requirements of the federal REAL ID Act. The second tier is comprised of state-issued Driver's Authorization Cards ("DACs") and the non-federally compliant ID cards, which have less burdensome requirements than their REAL ID counterparts and which might not be acceptable for federal purposes after October 1, 2020. New Mexico is currently compliant with the federal Act, and, according to the U.S. Department of Homeland Security's (DHS's) website, New Mexicans can use the DAC or non-federally compliant ID card

⁴On March 2, 2018, Defendants removed this action to federal court. *See* Notice of Removal of Action under 28 U.S.C. §§ 1331 and 1441 by Defendants, *Coss v. Monforte*, No. 1:18-cv-00209 (Mar. 2, 2018) (Doc. 1). Plaintiffs moved to remand on March 8, 2018. *See* Plaintiffs' Mot. for Remand and Attorneys' Fees and Costs under 28 U.S.C. § 1447(c), *Coss v. Monforte*, No. 1:18-cv-00209 (Mar. 8, 2018) (Doc. 7). Shortly thereafter, the parties stipulated to a remand, *see* Stipulation to Remand Removed Action, *Coss v. Monforte*, No. 1:18-cv-00209 (Mar. 27, 2018) (Doc. 13), and the federal court duly remanded this case to state court, *see* Order of Remand, *Coss v. Monforte*, No. 1:18-cv-00209 (Mar. 29, 2018) (Doc. 15).

for federal purposes until October 1, 2020—including to board commercial planes and to enter federal facilities and military bases.⁵ The new state law requires Defendants to issue DACs and the non-federally compliant ID cards to applicants who present (i) proof of identity and age and (ii) proof of New Mexico residency. *See* NMSA 1978, § 66-5-9(G) (DAC requirement for proof of identity and age); § 66-5-401(C) (non-federally compliant ID card proof of identity and age); § 66-5-9(B) (DAC requirement for proof of New Mexico residency); § 66-5-401(A) (non-federally compliant ID card requirement for proof of New Mexico residency). Applicants must also affirm they understand the DAC or non-federally compliant ID card may not be valid for federal purposes in the future. *See* NMSA 1978, § 66-5-9(E) (DAC); § 66-5-401(C). Additionally, if an applicant does not present a valid or un-expired New Mexico license or an identification card *and* does not present proof of lawful status, the law requires the MVD to take the applicant’s photograph and fingerprints. *See* NMSA 1978, § 66-5-15.2(A). The statute also requires Defendants to provide an opportunity for any person to dispute the denial of any license, permit placard, or registration provided for under the Motor Vehicle Code. *See* NMSA 1978, § 66-2-17(A).

In practice and under their regulations, however, Defendants are violating the law. This Motion seeks immediate relief from the Court to address two kinds of Defendants’ illegal conduct: (i) Defendants’ failure to issue DACs and non-federally compliant ID cards to New Mexicans eligible under the Motor Vehicle Code, by promulgating and enforcing NMAC 8.19.5.15, which requires New Mexicans to produce documentation of “identification number”—an *ultra vires* requirement absent in the statute; and (ii) Defendants’ failure to notify applicants

⁵“REAL ID Frequently Asked Questions for the Public, What do I need to do if I am visiting a federal facility or a military base?,” Department of Homeland Security, <https://www.dhs.gov/real-id-public-faqs> (last visited on April 10, 2018).

of their right to appeal a denial of any MVD-issued credential. Defendants' conduct is unlawful, and, for the reasons set forth in the Complaint and this Motion, should be enjoined to prevent the illegal denial of DACs and non-federally compliant ID cards.

ARGUMENT

To obtain a PI or a TRO, the plaintiff must show that: (1) the plaintiff will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damage the injunction might cause the defendant; (3) issuance of the injunction will not be adverse to the public's interest; and (4) there is a substantial likelihood plaintiff will prevail on the merits. *See LaBalbo v. Haymes*, 1993-NMCA-010, ¶ 11, 115 N.M. 314, 850 P.2d 101 (citing *Tri-State v. Shoshone River Power, Inc.*, 805 F.2d 351 (10th Cir. 1986)); *accord N.M. Right to Choose/NARAL v. Johnson*, 1999-NMSC-005, ¶ 60, 126 N.M. 788, 975 P.2d 841 (citation omitted); *see also Bank of N.Y. v. Mehner*, 375 F. Supp. 2d 1316, 1319 (D.N.M. 2005) ("The requirements for the issuance of a temporary restraining order are similar to those for the issuance of a preliminary injunction"). This Court should grant the requested TRO and PI because Plaintiffs satisfy all four factors for obtaining such relief.

I. THERE IS A SUBSTANTIAL LIKELIHOOD PLAINTIFFS WILL PREVAIL ON THE MERITS OF THEIR CLAIMS.

Plaintiffs carry their burden to show a "substantial likelihood of success on the merits." *LaBalbo*, 1993-NMCA-010, ¶ 11; *see also Crowther v. Seaborg*, 415 F.2d 437, 439 (10th Cir. 1969) ("In hearings upon motions for temporary or preliminary injunctive relief, the burden is upon the one requesting such relief to make a prima facie case showing a reasonable probability that he will ultimately be entitled to such relief sought."). Plaintiffs will succeed on the merits of their separation of powers claim, because Defendants implemented *ultra vires* regulations on the issuance of DACs and non-federally compliant ID cards that contravene state law. Plaintiffs will

also succeed on the merits of their due process claim, because Defendants fail to provide adequate notice and opportunity to challenge a denial, as required by the New Mexico Constitution and statute.

A. Plaintiffs are substantially likely to succeed on the merits of their separation-of-powers claim, because Defendants' *ultra vires* regulation contradicts statute.

Under New Mexico's two-tiered driver's license and identification statute, the New Mexico Legislature determined that New Mexicans are eligible for a DAC or a non-federally compliant ID card if they submit proof of New Mexico residency, proof of identity and age, and affirm that they understand that the DAC (or a second-tier ID card) might not be acceptable for federal purposes after October 1, 2020. *See* NMSA 1978, § 66-5-9(B), (E); § 66-5-401(C). Applicants who do not provide proof of lawful status and who do not possess a valid New Mexico license or ID card must also submit to the MVD taking their photograph and fingerprints. *See* NMSA 1978, § 66-5-15.2(A). The state law requires Defendants to issue a DAC (or a second-tier ID card) to any applicant who is otherwise eligible for a driver's license (or a first-tier ID card) but who does not provide proof of lawful status and who affirmatively acknowledges that the applicant understands that a DAC (or a second-tier ID card) might not be acceptable for federal purposes after October 1, 2020. *See* NMSA 1978, § 66-5-9(E); § 66-5-401(C). In sum, state law imposes *three* express requirements on all DAC and non-federally compliant ID card applicants (*viz.*, proof of identity and age, proof of New Mexico residency, and affirmation that the DAC or non-federally compliant ID cards might not be acceptable for federal purposes after October 1, 2020) and, for a delimited set of applicants, a *fourth* express requirement of a photograph and a fingerprint background check.

Instead of issuing DACs and non-federally compliant ID cards to New Mexicans who provide these documents, Defendants deny credentials to those who do not meet Defendants' *ultra vires* regulatory requirement to "establish proof of identification number." NMAC 18.19.15(A). Worse, Defendants' regulations prevent applicants from using the same document to prove their "identification number"—which is *not* a statutory requirement—and their identity and age. Applicants consequently must provide a completely separate document to show their identification number. *See* NMAC 18.19.5.15(D).

But the Legislature was unambiguous about the requirements that applicants need to satisfy to obtain a DAC or non-federally compliant ID and left no gaps for the MVD to fill with additional requirements. *See* NMSA 1978, § 66-5-9(B), (E); § 66-5-401(C). Defendants' requirement that applicants must produce documentation of their "identification number" to obtain a DAC or non-federally compliant ID card modifies, enlarges, and, hence, contravenes statutory requirements. *See Fancher v. Bd. of Comm'rs of Grant Cty.*, 1921-NMSC-039, ¶ 11, 28 N.M. 179, 210 P. 237 ("Where authority is given to do a particular thing, and the mode of doing it is prescribed, it is limited to be done in that mode, and all other modes are excluded."). If the *Legislature* had intended applicants to show documentation of an "identification number," it would have said so. Therefore, Defendants' rule—NMAC 18.19.5.15—conflicts with the Legislature's statutory scheme, because Defendants' rule creates a separate and additional requirement for the issuance of DACS and non-federally compliant ID cards.

Defendants have no power to issue this rule. The Legislature did not authorize the MVD to add requirements for the issuance of DACS or second-tier ID cards.⁶ Moreover, it is basic

⁶Neither § 66-5-9(B) nor § 66-5-9(G)(5) authorizes the TRD secretary to require that DAC applicants demonstrate proof of an "identification number." Those sections empower the TRD secretary to determine what materials applicants can use to satisfy certain requirements that

administrative law that an agency's rule-making power does not authorize the promulgation of rules that either conflict with or modify a legislatively enacted statute. *See, e.g., Rivas v. Board of Cosmetologists*, 1984-NMSC-076, ¶ 3, 101 N.M. 592, 686 P.2d 934 (“An administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority.”) (citations omitted); *State ex rel. Stapleton v. Skandera*, 2015-NMCA-044, ¶ 9, 346 P.3d 1191, 1195 (“When reviewing agency action . . . we will uphold [agency rules and regulations] if they are ‘reasonably consistent with the statutes that they implement’”) (emphasis added) (citation omitted); *Matter of Proposed Revocation of Food and Drink Purveyor’s Permit for House of Pancakes*, 1984-NMCA-109, ¶ 13, 102 N.M. 63, 691 P.2d 64 (“Nor may an agency, through the device of regulations, modify the statutory provision.”); *see also Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842 (1984) (“When a court reviews an agency’s construction of the statute which it administers, it is confronted with . . . the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress.”); *cf. Mechem v. City of Santa Fe*, 1981-NMSC-104, ¶ 20, 96 N.M. 668, 634 P.2d 690 (“If the City has authority to terminate a special exception upon a change in ownership, it must be found in the above statutes. The statutes do not expressly provide for regulation of land by making a special exception personal to a particular owner. Any power to do so must be by necessary implication and must reasonably relate to the objectives of zoning. Otherwise the

the Legislature established—namely, proof of New Mexico residency and proof of identity and age. *See* §§ 66-5-9(B), (E); 66-5-401(C). On the one hand, § 66-5-9(G)(5) delegates to the TRD secretary the authority to determine that a document, in addition to the documents the Legislature set forth in § 66-5-9(G)(1)–(4), establishes “proof of the applicant’s identity and age.” § 66-5-9(G). On the other hand, § 66-5-9(B) delegates to the TRD secretary the authority to determine what documents “may be accepted as evidence of the residency of the applicant.” § 66-5-9(B). Neither section delegates to the TRD secretary the power to create out of whole cloth a separate requirement for a DAC, in addition to the requirements that the Legislature established.

regulation is *ultra vires* and unenforceable.”) (citations omitted). Accordingly, Defendants’ “identification number” requirement is *ultra vires*, and their denial of DACs to Plaintiffs for failure to submit proof of an identification number was, therefore, illegal.⁷ Accordingly, Plaintiffs are substantially likely to succeed on the merits of their separation-of-powers claim.

B. Plaintiffs are substantially likely to succeed on the merits of their due process claim.

“A driver’s license is an ‘important, protect[able] right,’ subject to due process protections.” *Barraza v. State Taxation & Revenue Dep’t, Motor Vehicle Div.*, 2017-NMCA-043, ¶ 15, 395 P.3d 527, 531 (quoting *Stevens v. N.M. Transp. Dep’t*, 1987-NMCA-095, ¶ 12, 106 N.M. 198, 740 P.2d 1182) (citing *Maso v. N.M. Taxation & Revenue Dep’t*, 2004-NMSC-028, ¶ 10, 136 N.M. 161, 96 P.3d 286 (“Due process requires notice and an opportunity for a hearing before the State can suspend or revoke a person’s driver’s license.”)); *see also State v. Herrera*, 1991-NMCA-005, ¶ 4, 111 N.M. 560, 807 P.2d 744 (citing *Bell*, 402 U.S. at 539). Similarly, an identification card is a protectable right, necessary for the exercise of other rights⁸,

⁷Defendants illegally denied DACs to named Plaintiffs because they could not meet the *ultra vires* requirement to submit proof or their “identification number.” First, during his second trip to the Santa Fe MVD, Plaintiff the Honorable David Coss presented the MVD clerk with proof of identity and age and New Mexico residency as required by the statute. *See Ex. 1, Coss Aff.* ¶ 6. Defendants illegally denied his application for a DAC because, in addition to the aforementioned proof, he could not produce a social security card or an old paystub showing his full social security number. *See Ex. 1, Coss Aff.* ¶¶ 7-9. Second, Defendants illegally denied Plaintiff Drucilla Hager a DAC after she presented proof of identity, age and New Mexico residency, because she could not produce both a social security card and a birth certificate with the same name. *See Ex. 2, Hager Aff.* ¶ 7. Third, Defendants denied Plaintiff Charlie Maldonado Jr. a DAC and non-federally compliant ID card after he presented proof of identity and age and New Mexico residency, because he also could not also produce a social security card with the exact name that appeared on his birth certificate. *See Ex. 3, Maldonado Aff.* ¶ 13.

⁸For example, New Mexicans who are denied a non-federally compliant ID card cannot prove their identity, meaning they might not gain lawful employment, and, in four New Mexico jurisdictions, they might not be able to vote. *E.g.*, Albuquerque, N.M., Election Code art. XIII, §

and, therefore, is also subject to due process protections. *See, e.g., Worley v. Waddell*, 819 F. Supp. 2d 826, 830 (S.D. Ind. 2011) (“Defendant’s refusal to issue identification to Plaintiff [is a] predicate state action [that] impairs his rights to vote, marry, and/or adopt his children. . . . The loss of the rights to vote, marry, and adopt children are, indeed, deeply rooted in this nation’s history and tradition. Because Plaintiff has alleged a deprivation of these fundamental rights due to the DMV’s refusal to issue him photo identification, he has adequately alleged a substantive due process claim.”) (internal quotations and citations omitted).

Defendants cannot deny access to a driver’s license or non-federally compliant ID card without due process, as required by Article II, Section 18 of the New Mexico Constitution. To safeguard due process, the Legislature created a statutory right in an applicant to challenge the denial of any license, permit, placard, or registration provided for under the Motor Vehicle Code. *See* NMSA 1978, § 66-2-17(A). A person must file a protest within 30 days of the “date of the mailing or verbal notification of the action proposed to be taken by the Department.” *Id.*

Constitutional due process requires notice and the opportunity to be heard before a deprivation by the state can occur. *See Maso*, 2004-NMCA-025, ¶ 19. Adequate notice must be “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Id.* Specifically, “due process mandates ‘notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’” *Id.* (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Due process also requires the state to provide reasons for governmental action affecting important individual rights. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972) (termination

14; Clovis, N.M., Ordinance 2073-2016; Hobbs, N.M., Charter, § 2–1(C)(2); Rio Rancho, N.M. Municipal Code art. XII, § 7.01(E)

from state employment); *Goldberg v. Kelly*, 397 U.S. 254 (1970) (termination of welfare benefits); *Raper v. Lucey*, 488 F.2d 748 (1st Cir. 1973) (denial of driver's license); *Misurelli v. City of Racine*, 346 F. Supp. 43 (E.D. Wis. 1972), *overruled on other grounds by City of Kenosha v. Bruno*, 412 U.S. 507 (1973). The Defendants deny Plaintiffs due process by failing to notify applicants denied DACs and non-federally compliant ID cards of the right to appeal and the process for appealing a denial.

1. Failure to Notify Applicants of the Right to Appeal

Defendants do not notify New Mexicans of their right to challenge the denial of a DAC or non-federally compliant ID card. Here, Plaintiffs were denied DACs and non-federally compliant ID cards multiple times at multiple MVD offices. Defendants did not notify any Plaintiffs they had a right to appeal a denial.⁹ Standard form documents used by Defendants to deny a DAC or non-federally compliant ID card lack any information detailing a right to a

⁹For example, Defendants denied Plaintiff Elizabeth Lara a DAC and issued a letter to her stating additional verification was required. The letter did not include any information about a right to a hearing. *See* Ex. 4, Lara Aff., ¶¶ 9–10. Plaintiff Raul Aaron Lara Martinez received a standard denial form letter stating he was denied a DAC on the basis of a fingerprint background check. The letter did not contain information about the right to appeal. Instead, the letter lists a number that applicants can call for more information. *See* Ex. 5, Lara Martinez Aff., ¶¶ 9–10. Plaintiffs Reyna Carmona Perez, Eulalia Robles, and Raul Aaron Lara Martinez each called the MVD multiple times concerning the denial of their DAC applications. *See* Ex. 6, Carmona Perez Aff. ¶20; Ex. 7, Robles Aff. ¶ 19; Ex. 5, Lara Martinez Aff., ¶ 17. Likewise, MVD clerks never told witnesses Ross Nieto and Manual Reyes Escarcega nor was any information included within their denial letters about their right to appeal when their applications for DACs were denied. *See* Ex. 8, Nieto Aff., ¶¶ 16–17 & 25; Ex. 9, Reyes Escarcega Aff., ¶¶ 9 & 11. Mr. Nieto only became aware of his right to appeal the MVD's denial of his DAC after engaging the pro-bono assistance of an attorney at the Senior Citizen Law Office of New Mexico in October 2017. *See* Ex. 8, Nieto Aff., ¶¶ 18 & 24. In fact, public records requests show Defendants have no record of *any* request for an appeal. *See* Compl. ¶ 187; Compl., Ex. 5, Defendants' Responses to NMCEH Records Requests (Nov. 3, 2017) ("MVD Responses"). The manual Defendants use to train MVD clerks on the process and requirements for issuing DACs and non-federally compliant ID cards does not contain any information on the right to appeal, how to notify applicants of their right, or how to process an appeal request. *See* Compl., Ex. 6, Defendants' Manual for MVD Employees (Nov. 1, 2016) ("MVD Manual").

challenge the denial or the process of doing so.

2. *Denials on the basis of fingerprinting background checks*

Following the results of a fingerprint background check, Defendants denied Plaintiffs DACs and non-federally compliant ID cards, but did not give them the reasons for the denial. Under state law, applicants for a DAC or a non-federally compliant ID card must allow MVD to take their photograph and fingerprints when they do not provide documentation of lawful status and do not have a current valid driver's license or state ID. *See* NMSA 1978, § 66-5-15.2(A). There are many different reasons why applicants cannot provide or choose not to provide proof of lawful status to the MVD. For example, some U.S. citizens cannot provide such proof because they have lost their birth certificate or never had such proof because they were born at home.¹⁰ Moreover, immigrants in a wide range of statuses do not want to provide MVD with immigration status documents.

The MVD can deny a DAC or non-federally compliant ID card following the results of a fingerprint background check where (i) the applicant has an outstanding valid criminal arrest warrant; or (ii) the applicant's fingerprints are associated with any name, date of birth, or social security number other than those provided by the applicant in the application for a DAC or a non-federally compliant ID card. *See* § 66-5-15.2(B). Under state law, individuals denied a DAC or a non-federally compliant ID on the basis of a background check "shall become eligible" for a DAC or non-federally compliant ID card "upon submission of satisfactory evidence that the basis for ineligibility is resolved." *See* § 66-5-15.2(C). Despite these statutory requirements, Defendants deny DACs and non-federally compliant ID cards on the basis of fingerprinting background checks and do not inform applicants of the basis for their ineligibility

¹⁰*See* Ex. 8, Nieto Aff., ¶ 10.

or of their right to appeal.¹¹ Further, Defendants do not inform denied applicants what documentation the applicant can present to demonstrate they have resolved their ineligibility pursuant to § 66-5-15.2(C). Consequently, Plaintiffs and their members are without recourse when Defendants deny them a DAC or a non-federally compliant ID card.

As early as July 2017, emails between Defendants' employees show that they knew they were legally required to give denied applicants the information in fingerprint background checks, if that was the basis of a denial, and information about how to resolve the problem. *See* Compl., Ex. 7, Email communications between Diana Martwick and Lynnette Borrego (2016–17). For example, MVD employee Diana Martwick notes that “under the law we are not supposed to deny, but we have to allow time to fix.” *Id.* She suggests including information in the denial letter “about how to fix an alias problem” in order to “avoid lawsuits.” *Id.* But the Defendants never made the change Martwick recommended. Currently, Defendants continue to send notices denying DACs and non-federally compliant ID cards which only advise applicants to call the

¹¹Following the results of their fingerprint background checks, Defendants denied Plaintiffs Reyna Carmona Perez, Eulalia Robles and Raul Aaron Lara Martinez DACs. *See* Ex. 6, Carmona Perez Aff., ¶ 15; Ex. 7, Robles Aff., ¶ 12; Ex. 5, Lara Martinez Aff., ¶ 9. Defendants notified Mr. Lara Martinez by mail that the results of his background check made him ineligible for a DAC; however, the letter did not explain why he was denied or what documents he could submit to resolve the basis of his ineligibility. *See* Ex. 10, Ltr. to Lara Martinez. Additionally, Defendants did not send a letter or otherwise notify Ms. Carmona Perez or Ms. Robles that they were denied DACs. After waiting for the MVD to send them their DACs, both Plaintiffs called the MVD. The MVD informed Ms. Carmona Perez that her name was recorded incorrectly as “Reyna Perez Carmona” in a database alongside an incorrect date of birth. *See* Ex. 6, Carmona Perez Aff., ¶¶ 16–17. The MVD clerk told Ms. Carmona Perez that she would have to contact another government agency to correct the information in the database. *See id.* at ¶¶ 17–19. The MVD clerk did not inform Ms. Carmona Perez about the documentation she would need to submit to the MVD to prove that the basis of her ineligibility had been resolved. Likewise, when Ms. Robles called MVD, the clerk told her that her fingerprints were associated with an arrest in Texas. *See* Ex. 7, Robles Aff., ¶¶ 12–13. The MVD clerk did not inform Ms. Robles about documentation she could submit to demonstrate the basis of her ineligibility had been resolved. Instead, the clerk told Ms. Robles that she would need to correct the database record in Texas. *See id.* at 13.

MVD.¹²

Giving denied applicants the MVD's phone number only does not reasonably apprise them of the status of their driver's license or non-federally compliant ID card application. Defendants have not trained MVD employees to inform applicants about the reasons for the denial or the opportunity to appeal. Indeed, public records requests show Defendants do not even have a policy on how to communicate the outcome of a background check to driver's license and non-federally compliant ID card applicants. Nor does Defendants' employee training contain information about a right to appeal. *See* Compl., Ex. 6, MVD Manual. Moreover, calling the MVD is also difficult because the MVD phone system regularly experiences shutdowns. For example, on February 6, 2018, across New Mexico, MVD clerks were not accepting any phone calls because of technical difficulties. *See* Ex. 11, Screenshot of MVD New Mexico Website (Feb. 5, 2018).

Defendants' failure to provide constitutionally adequate notice denying a DAC and non-

¹²For example, Mr. Lara Martinez called an MVD phone number, and an MVD employee advised there was a "problem with his name" and he should clarify the name issue with the New Mexico State Police. *See* Ex. 5, Lara Martinez Aff., ¶¶ 10–11. When Mr. Lara Martinez went to the state police office in Santa Fe, he was informed only the arresting agency could correct the record of his name in the appropriate database. *See id.* at ¶ 11. When he contacted the MVD again, Monica Miller informed him a 2009 arrest in Santa Fe where his name was recorded as "Aaron Lara" instead of his full name or "Raul Aaron Lara Martinez" was the cause of his denial. *Id.* at ¶ 13. Ms. Miller instructed Mr. Lara Martinez to continue his efforts to correct the database. *Id.* at ¶ 14. Mr. Lara Martinez contacted the Santa Fe Magistrate Court, municipal court, and Santa Fe Police in attempts to fix the database, but to no avail. *See id.* at ¶¶ 12 & 15. To date, Mr. Lara Martinez has not been able to correct the necessary database in order to be issued a DAC.

Likewise, Mr. Reyes Escarcega inquired at various offices at the Albuquerque Police Department, the Second Judicial District Court, and the Bernalillo County Metropolitan Court, all in attempts to correct his background check. *See* Ex. 9, Reyes Escarcega Aff., ¶¶ 13-17. Mr. Reyes Escarcega was never informed either in a letter or verbally what specifically needed to be corrected within his background check. *See id.* at 13. To date, Mr. Reyes Escarcega is still without a DAC. *Id.* at 18.

federally compliant ID card leaves Plaintiffs and putative class members with no way to obtain a DAC or a non-federally compliant ID. Accordingly, Plaintiffs are substantially likely to prevail on the merits of their due process claim.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM UNLESS INJUNCTIVE RELIEF IS ENTERED.

Without an injunction, Plaintiffs and putative class members will suffer irreparable harm every day they go without licenses or identification cards. First, Plaintiffs and putative class members will not be able to obtain an important protected right to a driver's license and other protected interests that require identification. Defendants' *ultra vires* regulations create an illegal barrier to obtaining a DAC or non-federally compliant ID card for Plaintiffs. Second, Defendants' failure to provide constitutionally adequate due process entails that many Plaintiffs and putative class members have not and will not be notified of the reason for a denial of a DAC or a non-federally compliant ID card or of the right to appeal a denial—leaving New Mexicans stymied without identification or authorization to drive. Without a state-issued ID card or driver's license, Plaintiffs cannot lawfully drive, be employed, open a bank account, cash a paycheck, find housing, and, in many cases, vote. Without access to these basic and constitutionally protected functions, Plaintiffs cannot support their families or participate in our democracy on equal terms with other New Mexicans.

Defendants' illegal denial of DACs and non-federally compliant ID cards prevents Plaintiffs from finding and maintaining stable employment.¹³ *See Arizona Dream Act Coalition*

¹³For example, Defendants illegally denied Plaintiff Charlie Maldonado Jr. a non-federally compliant ID card because he could not produce both a birth certificate and social security card, pursuant to Defendants' illegal identification number requirement. As a result, an employer revoked a job offer to Mr. Maldonado to lay tile—much-needed income that would help him exit homelessness. *See Ex. 3, Maldonado Aff.*, ¶ 15. Second, Plaintiff Eulalia Robles was denied two caregiving jobs because she could not present a valid driver's license. *See Ex. 7,*

v. Brewer, 757 F.3d 1053, 1068 (9th Cir. 2014) (“Plaintiffs’ inability to obtain driver’s license likely causes them irreparable harm by limiting their professional opportunities. Plaintiffs’ ability to drive is integral to their ability to work—after all, eighty-seven percent of Arizona workers commute to work by car.”); *see also Enyart v. Nat’l Conference of Bar Exam’rs, Inc.*, 630 F. 3d 1153, 1166 (9th Cir. 2011) (denial of bar admission caused irreparable harm to individual prevented from beginning her legal career); *Kinney v. Int’l Union of Operating Eng’rs, Loc. 150, AFL-CIO*, 994 F. 2d. 1271, 1279 (7th Cir.) (personal costs of being unnecessarily unemployed is irreparable harm). The inability to legally drive also imposes onerous burdens on the daily lives of the individual plaintiffs, organizational plaintiffs, and their members by restricting their ability to assist their families with child care, health needs and other daily necessities of life.¹⁴ Accordingly, courts have long recognized that “possession of a driver’s license may become essential in the pursuit of a livelihood.” *Bell*, 402 U.S. at 539.

A. Harm to Plaintiffs and Members who are Homeless

Robles Aff., ¶ 15. Without income, Ms. Robles had to forfeit her car because she could not afford payments and could not drive. She has no car and continues to owe \$12,000 in payments on the forfeited car. *See id.* at ¶ 16. Each day, she travels a three-hour round-trip on two public buses to get to work, which is only 20 minutes away from her home by car, because she cannot lawfully drive. *See id.* at ¶ 18. Third, Plaintiff Raul Aaron Lara Martinez cannot lawfully drive to work and take care of his family, including his wife who is expecting a baby in March 2018. *See Ex. 5, Lara Martinez Aff.*, ¶ 16.

¹⁴For instance, Plaintiff the Honorable David Coss was illegally denied because he could not produce a Social Security card or SSA-1099 showing his full social security number. *Ex. 1, Coss Aff.*, ¶ 6. The MVD never notified Mr. Coss of his right to appeal the denial or how to file an appeal. *See id.* at ¶ 9. Because of the Defendants’ actions, he cannot lawfully drive his grandchildren, disabled father and other family members for whom he regularly cares. *See id.* at ¶¶ 10–12. Second, Plaintiff Elizabeth Lara was denied a DAC and cannot take her children to school or medical appointments. *See Ex. 4, Lara Aff.*, ¶¶ 19–20. Third, Plaintiff Reyna Carmona Perez was denied a DAC and therefore cannot lawfully drive to work or take her five children to school or medical appointments. *See Ex. 6, Carmona Perez Aff.*, ¶ 21.

Defendants' illegal denial of DACs and non-federally compliant ID cards causes irreparable harm to organizational plaintiff the NM Coalition to End Homelessness ("NMCEH") and its members, which include organizations serving New Mexico's homeless population and individuals experiencing homelessness. According to the Coalition's *2017 Point-in-Time Count Results*, 1,186 New Mexicans were homeless on the night of the count. *See Ex. 12, Hughes Aff.*, ¶ 6. This includes adults and children living in emergency shelters or unsheltered locations, such as a park or in their car, but not those who are living in motels or in households with other families.¹⁵ Data from the New Mexico Homeless Management Information System, a joint project that NMCEH administers with the NM Mortgage Finance Authority and the City of Albuquerque, show that throughout the year, over 10,000 New Mexicans experience homelessness. *Id.* at ¶ 21.

For many reasons related to homelessness, people experiencing homelessness often have few, if any, vital documents that can verify identity under the MVD's current regulations. Many people lose identity documents in the course of an eviction, when fleeing domestic violence, or when sleeping outside. Without a permanent place to live and keep their belongings, people experiencing homelessness are frequent victims of theft. *See id.* at ¶¶ 19–23; *Ex. 13, McClelland Aff.*, ¶ 10; *Ex. 3, Maldonado Aff.*, ¶ 5. It is difficult for people experiencing homelessness to replace lost or stolen identity documents, particularly birth certificates and social security cards. *See Ex. 12, Hughes Aff.*, ¶ 20; *Ex. 14, Morales Aff.* ¶ 9. Defendants' illegal requirement that applicants for DACs and non-federally compliant ID cards supply proof of an identification number in addition to the verification required by statute means that New Mexicans experiencing

¹⁵*2017 Point-in-Time Count Results*, N.M. COALITION TO END HOMELESSNESS, <http://www.nmceh.org/pages/reports/2017%20BoS/Balance%20of%20State%202017%20Point%20in%20Time%20Count%20Report.pdf> (last visited Feb. 28, 2018).

homelessness are often denied DACs and non-federally compliant ID cards. Without identification, the lives of people experiencing homelessness become even more precarious. Without a state-issued identification card, New Mexicans experiencing homelessness cannot exit homelessness because they cannot cash checks, rent motels or apartments, or accept job offers. Ex. 12, Hughes Aff., ¶ 24; Ex. 3, Maldonado Aff. ¶¶ 6, 18–19. This places further strain on the resources of NMCEH and its members to provide community-based services to people without homes in New Mexico. Ex. 12, Hughes Aff., ¶ 25. *See Arizona Dream Act Coalition*, 757 F.3d at 1068 (“The irreparable nature of Plaintiffs’ injury” stemming from the illegal denial of a driver’s license “is heightened by . . . [their] fragile socioeconomic status”). For example, Alfonso Morales, the lone case manager at Santa Fe’s Interfaith Community Shelter—known as Pete’s Place—has seen his caseload shift to 75 percent ID-related issues. *See* Ex. 14, Morales Aff., ¶ 6. Abby McClelland, an employee at Albuquerque Healthcare for the Homeless, who works in a weekly ID-assistance clinic reports that the agency has fewer resources to assist people experiencing homelessness because of the amount of money and time staff spend assisting people in obtaining identification that meets Defendant’s illegal identification number requirements. *See* Ex. 13, McClelland Aff., ¶ 12. Unless Defendants are enjoined from administering the illegal “identification number” requirement, New Mexicans experiencing homelessness will continue to be irreparably harmed.

B. Harm to Plaintiffs and Members Who are Immigrants

Defendants’ illegal denial of DACs also causes irreparable harm to organizational Plaintiff SOMOS UN PUEBLO UNIDO (“Somos”) and its members. Somos is a membership-based organization consisting of immigrants and their supporters in eight counties or Santa Fe, San Juan, Rio Arriba, Chaves, Curry, Roosevelt, Lea, and McKinley counties. Ex. 15, Díaz Aff.,

¶ 4. There are an estimated 201,300 foreign-born New Mexico residents, about 9.6 percent of the state's total population.¹⁶ Somos members and allies work to improve public policy around workers' and immigrants' rights. *Id.* In 2003, Somos successfully led a legislative campaign to change New Mexico's Motor Vehicle Code to allow all New Mexico residents, regardless of immigration status, to apply for driver's licenses and identification cards. *Id.* at ¶ 5.

From 2011 to 2016, Somos led the effort to thwart repeated attempts in the New Mexico Legislature to take away licenses from the state's immigrant community. *Id.* at ¶ 7. In 2016, Republicans and Democrats—by a wide margin—in the state capitol approved the state's new two-tier licensing system to keep all New Mexicans licensed, regardless of immigration status.¹⁷ Somos continues to lead efforts to prevent the administration from using the inefficient and illegal implementation of the new law to violate the rights of all New Mexicans.

Defendants' unlawful actions harm mixed-status immigrant families. Between the years of 2010 and 2014, more than 115,000 New Mexicans lived in mixed status families.¹⁸ Many of the residents who lived in these mixed families were children: one of every eleven children in

¹⁶See U.S. Census Bureau, State of New Mexico, Selected Characteristics of the Native and Foreign-Born populations, 2012-2016 American Community Survey 5-year Estimates.

¹⁷See Uriel J. García, Martínez signs bill to create Real ID-compliant driver's licenses, SANTA FE NEW MEXICAN (March 8, 2016), <http://bit.ly/2F7Krqj> (last viewed on April 9, 2018).

¹⁸Silva Mathema, *State-by-State Estimates of the Family Members of Unauthorized Immigrants*, UNIVERSITY OF SOUTHERN CALIFORNIA'S CENTER FOR THE STUDY OF IMMIGRANT INTEGRATION AND THE CENTER FOR AMERICAN PROGRESS (March 16, 2017), <https://www.americanprogress.org/issues/immigration/news/2017/03/16/427868/state-state-estimates-family-members-unauthorizaedimmigrants> (last viewed on April 15, 2018).

New Mexico was a U.S. citizen living with an immigrant family member.¹⁹ When adults in mixed-status families do not have access to identification cards or licenses, the entire family suffers collateral consequences. By imposing *ultra vires* requirements for second-tier IDs and failing to provide due process, Defendants are unlawfully preventing many immigrants from obtaining *any* state-issued ID. Defendants' practice wholly undermines the purpose of having a two-tiered identification system—namely, to preserve, not to restrict, access to identification.

Furthermore, when the state unlawfully closes off access to IDs and licenses, New Mexicans cannot obtain or keep employment. Immigrants, including many Somos members, are employed in key industries throughout the state that require employees to drive. Foreign-born residents make up almost half of the workers employed in crop production and animal production, which includes the state's dairy and livestock industries.²⁰ New Mexico is the sixth-largest net supplier of energy to the nation—the industry accounts for nearly one-third of all state funding—and immigrants are 2.6 times more likely to be employed in the agriculture and extraction industries.²¹ These largely rural jobs require employees to drive to and from work and on the job. Being able to lawfully drive is critical to providing stable income for Somos' members and their families. Ex. 15, Díaz Aff., ¶ 6.

Somos' members and other Plaintiffs include individuals with Spanish surnames or hyphenated last names that are often misspelled or missing from their identity documents,

¹⁹American Immigration Council, *Immigrants in New Mexico* (2017), https://www.americanimmigrationcouncil.org/sites/default/files/research/immigrants_in_new_mexico.pdf (last viewed on April 15, 2018).

²⁰Immigrants and the economy in New Mexico, Report (August 2016) p. 1 *available at* <https://www.newamericaneconomy.org/locations/new-mexico/>, (last viewed on April 9, 2018).

²¹Pew Charitable Trust, *Employment by State: Immigrants vs. U.S. Born* (2015) *available at* <http://www.pewtrusts.org/en/multimedia/data-visualizations/2015/immigrant-employment-by-state-and-industry> (last viewed on April 15, 2018).

causing the MVD to deny their applications. *See id.* at ¶17. This is especially common following the results of a fingerprint background check because the applicant's name has been misspelled in other government databases and the MVD erroneously denies the application on the mistaken belief that the applicant uses a different name than the one they provided on their application for a DAC or non-federally compliant ID card. *See* NMSA 66-5-15.2(B); *see also* Ex. 15, Díaz Aff., ¶ 17.

Plaintiffs and their members are also harmed by Defendant's failure to notify applicants of the reason for a denial of a DAC or non-federally compliant ID card following the result of a fingerprint background check and Defendant's failure to provide information to applicants about what satisfactory evidence denied applicants can provide to resolve the basis of their ineligibility, as required by § 66-5.15.2. Defendant's failure to provide constitutionally adequate due process, including a right to challenge a denial, entail that Plaintiffs and their members have no way to correct an erroneous denial and lawfully drive or obtain identification.

Finally, Defendants' failure to provide due process to Plaintiffs and their members causes irreparable harm because the deprivation of a fundamental constitutional right such as due process, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

III. THE HARM TO PLAINTIFFS OUTWEIGH ANY HARM TO DEFENDANTS.

The harm to Plaintiffs from denying a PI strongly outweighs the harm to Defendants from issuing injunctive relief. As described above, illegally denying DACs and non-federally compliant ID cards severely hinders Plaintiffs' ability to work, financially support their families, and obtain housing. In comparison, the relief sought by Plaintiffs would not impose any hardship on Defendants beyond requiring that they comply with the New Mexico Constitution

and statutes in issuing DACs and non-federally compliant ID cards. The organizational Plaintiffs in this case made repeated requests that Defendants stop requiring proof of identity number a condition of eligibility for a DAC and a non-federally compliant ID card and provide basic due process. In March 2017, Defendants provided to the organizational Plaintiffs draft regulations eliminating the identification number requirement as a condition of eligibility for a DAC or a non-federally compliant ID card. *See* Ex. 16, Draft of NMAC 18.19.5.12 (providing proposed regulations). The Department said it intended to implement the regulations so long as the Governor approved them. Plaintiffs waited for months; however, Defendants never issued the new regulations. Defendants' prior proposal and willingness to implement regulatory changes consistent with the injunctive relief requested here show that there is no harm to Defendants in complying with state law concerning the issuance of DACs and non-federally compliant ID cards. Accordingly, the harm to Plaintiffs of not issuing injunctive relief strongly outweighs any harm a PI would cause Defendants.

IV. THE REQUESTED INJUNCTIVE RELIEF WILL SERVE THE PUBLIC INTEREST.

A PI supports the public interest by forcing Defendants to follow the statute and cease violating Plaintiffs' constitutional and statutory rights. *See Protect Democracy Project, Inc. v. U.S. Department of Defense*, 263 F. Supp. 3d 293, 301 (D.D.C. 2017) (“[A]n agency’s compliance with a mandatory statutory regime is presumable always in the public interest”) (citing *Jacksonville Port Authority v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977) (“[T]here is an overriding public interest . . . in the general importance of an agency’s faithful adherence to its statutory mandate.”)); *see also Verlo v. Martinez*, 820 F.3d 1113, 1127 (10th Cir. 2016) (“[I]t is always in the public interest to prevent the violation of a party’s constitutional rights.”); *Awad v. Ziriach*, 670 F.3d 1111, 1132 (10th Cir. 2012) (same).

CONCLUSION

For the above-mentioned reasons Plaintiffs respectfully move this Court to issue a TRO and a PI requiring that Defendants:

1. Cease implementing and enforcing illegal regulations that require New Mexicans to present documents proving an “identification number” in order to obtain a DAC or a non-federally compliant ID card. NMAC 18.19.5.15.
2. Notify all New Mexicans denied a DAC or non-federally compliant ID card with information in writing giving the reason for their denial and the statutory requirements to obtain a DAC and non-federally compliant ID card and of their right to appeal the denial pursuant to NMSA 1978, § 66-2-17(A).
3. Notify all New Mexicans denied a DAC or non-federally compliant ID card on the basis of a fingerprint background check of specific documentation they can submit to document that the basis of their ineligibility is resolved pursuant to NMSA 1978, § 66-5-15.2 (C).
4. Record and preserve the name and mailing address of everyone who applies for, but does not receive, a DAC or non-federally compliant ID card.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2018, I filed the foregoing electronically through the Tyler host system, which caused the following counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

Respectfully submitted,

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