

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

MARIA MARQUEZ HERNANDEZ,)	CASE NO. CI 2124
OCTAVIO GERMAN,)	
ITZEL MARQUEZ HERNANDEZ, by and)	
through her next friend LUIS MARQUEZ,)	
and ADRIANA ROMERO, by and through)	
her next friend ALEJANDRA CASTILLO,)	
)	
Plaintiffs,)	
)	
vs.)	FIRST AMENDED
)	COMPLAINT AND
)	PETITION FOR
DAVE HEINEMAN, Governor of Nebraska,)	DECLARATORY
in his official capacity,)	JUDGMENT
NEBRASKA DEPARTMENT OF)	
MOTOR VEHICLES,)	
and RHONDA LAHM, Director of)	
the Nebraska Department of Motor)	
Vehicles, in her official capacity,)	
)	
Defendants.)	

Come now the Plaintiffs by and through counsel and pursuant to Nebraska Supreme Court Rule 6-115(a) bring this First Amended Complaint and for their causes of action against the Defendants state and allege as follows:

INTRODUCTION

1. Plaintiffs are four talented young immigrants residing in Nebraska who were brought to the United States as children. Based on individual applications demonstrating their equities, educational achievement, and contributions, the United States government has authorized each of the Plaintiffs to remain in the United States for a renewable two-year period under the Deferred Action for Childhood Arrivals (“DACA”) program, and granted them employment authorization.

2. Although the Plaintiffs have been granted deferred action status and

employment authorization, Defendants have taken the position—apparently based on a press statement issued by Defendant Governor Dave Heineman—that the Plaintiffs and other DACA recipients are categorically ineligible for a driver’s license, an important legal interest protected by constitution and other state law. Defendants’ denial of licenses places severe and often insurmountable burdens on the Plaintiffs’ ability to obtain employment as well as on their ability to fully contribute to their communities, assist their families, and accomplish everyday tasks.

3. Defendants’ rule denying driver’s licenses to DACA-recipients relies on an erroneous interpretation of the requirements of the federal “REAL ID” Act of 2005, which the state adopted in 2011. Defendants have attempted to justify their policy on the ground that because Nebraska has adopted the REAL ID provisions for issuing federally secure driver’s licenses, the state is prohibited from issuing driver’s licenses to DACA-recipients such as Plaintiffs. The REAL ID Act, however, clearly states that proof of “approved deferred action status,” such as DACA status, is “evidence of lawful status” for the purpose of issuing a federally secure driver’s license. *See* 49 U.S.C. § 30301 note, Sec. 202(c)(2). Contrary to Defendants’ misguided reading of the law, the REAL ID Act on its face explicitly includes Plaintiffs and others who have “approved deferred action status” as eligible for a driver’s license under the law.

4. All other states that have adopted the provisions of REAL ID issue driver’s licenses to DACA recipients. Nebraska is the only state that purports to comply with REAL ID, yet denies licenses to DACA recipients. Indeed, Arizona and Nebraska are the only two states in the country that deny driver’s licenses to DACA recipients.

5. Further, Defendants have implemented and are enforcing their rule without

complying with the Nebraska law requirements of notice and comment rulemaking, providing a reasoned explanation for agency action that is based in facts in the record, or procedural due process. Nebraska law requires that prior to implementing a rule that affects the private rights, interests, or procedures available to the public, state agencies and officials must follow certain procedures to notify the public and allow the public the opportunity to comment upon and influence the drafting of the rule. These procedures—which were not followed here—reflect an important and essential safeguard against abusive governmental power.

6. Defendants’ rule denying driver’s licenses to DACA recipients exceeds Defendants’ authority under state law implementing the REAL ID Act, and violates the Nebraska Administrative Procedures Act (the “APA”) and the guarantee of due process under the Nebraska Constitution.

7. Thus, Plaintiffs seek a declaration that the challenged rule is invalid, and an order immediately enjoining the Defendants from enforcing any policy that categorically denies Plaintiffs and those similarly situated to them from obtaining a driver’s license solely based on their immigration status.

PARTIES

8. Plaintiff Maria Marquez Hernandez is a 20-year-old resident of Omaha, Nebraska. She came to the United States at the age of 5. In October, 2012, she was granted deferred action under the DACA program, and shortly thereafter received an employment authorization document (“EAD”) and a Social Security Number. Maria is also in possession of “Form I-797” as issued from the U.S. Citizenship and Immigration Services (“USCIS”), which is the formal document notifying her that USCIS approved

her application for deferred action status. She was an honor student in high school and now is a senior at the University of Nebraska – Omaha, majoring in architectural engineering. She works at a major retail chain. She is concerned that she will be unable to obtain a professional career-track job in her field because she is ineligible for a driver's license because of Defendants' unlawful acts described herein. But for Defendants' unlawful acts, Plaintiff Maria Hernandez would meet the requirements to apply for a Nebraska driver's license.

9. Plaintiff Octavio German is a 23-year-old resident of Omaha, Nebraska. He came to the United States at the age of 14. In October, 2012, he was granted deferred action under the DACA program and has received an EAD and a Social Security Number. Octavio is also in possession of "Form I-797" as issued from USCIS, which is the formal document notifying him that USCIS approved his application for deferred action status. Despite the fact he arrived in this country speaking no English, Octavio graduated from high school—the first person in his family to accomplish this achievement. He has received a Bachelor of Science in Biology from Bellevue College and wishes to pursue a Masters in Chemistry. In the last year, he has applied unsuccessfully for numerous jobs in his field, including positions for pharmacy technician, lab technician, and research assistant. Since most job applications inquire whether the applicant has a driver's license, he fears employers believe he will be unreliable and thus have not deemed him to be a strong candidate. But for Defendants' unlawful acts, Plaintiff German would meet the requirements to apply for a Nebraska driver's license.

10. Plaintiff Itzel Marquez Hernandez is a 17-year-old resident of Omaha,

Nebraska. She brings this suit through Luis Marquez, her parent and next friend. Itzel was brought to the United States when she was only 1 years old, and she is sister to Plaintiff Maria Marquez Hernandez. She has been granted deferred action under DACA and obtained an EAD and Social Security Number in October, 2012. Itzel is also in possession of “Form I-797” as issued from USCIS, which is the formal document notifying her that USCIS approved her application for deferred action status. She attends high school in Omaha and is active in extracurricular activities, including performing in theatre productions and show choir. She has never applied for a job because she does not reliably have transportation due to Defendants’ policy. She attempted to obtain a driver’s license in person at an office of the Department of Motor Vehicles (“DMV”), but was turned away based on Defendant Heineman’s press release. But for Defendants’ unlawful acts, Plaintiff Itzel Hernandez would meet the requirements to apply for a Nebraska driver’s license.

11. Plaintiff Adriana Romero is an 18 years old resident of Omaha, Nebraska. She brings this suit through her parent and next friend, Alejandra Castillo. She was brought to the United States at the age of 3. She has been granted deferred action under DACA and received her EAD in October, 2012 as well as a Social Security Number. Adrianna is also in possession of “Form I-797” as issued from USCIS, which is the formal document notifying her that USCIS approved her application for deferred action status. She just graduated high school where she was taking honor classes, including several courses in medicine at the University of Nebraska Medical Center. She has a strong interest in becoming a pediatrician and is enrolled in the University of Nebraska – Omaha for this fall. Defendants’ policy imposes a significant hardship on her ability to

get to college classes, extracurricular activities, or to help her parents with her little brother's activities. She attempted to obtain a driver's license in person at an office of the DMV, but was turned away based on Defendant Heineman's press release. But for Defendants' unlawful acts, Plaintiff Romero would meet the requirements to apply for a Nebraska driver's license.

12. Defendant Dave Heineman is Governor of the State of Nebraska. He is sued in his official capacity.

13. Defendant Department of Motor Vehicles is the Nebraska state agency that, inter alia, is charged with the responsibility for educating, regulating, and enforcing motor vehicle operator and vehicle requirements. The Nebraska DMV is also responsible for ensuring that individuals meet Nebraska's licensing standards and requirements for issuance of driver permits, licenses and State ID Cards.

14. Defendant Rhonda Lahm is the director of the Nebraska Department of Motor Vehicles. She is sued in her official capacity.

JURISDICTION AND VENUE

15. This Court has jurisdiction over Plaintiffs' claims pursuant to *Neb. Rev. Stat.* 84-911. The Court has authority to grant injunctive and declaratory relief under *Neb. Rev. Stat.* 84-911, and 25-21,149 through 25-21,164. Venue is also proper pursuant to *Neb. Rev. Stat.* 84-911. Defendants are sued in their official capacity and their official place of business is in this District.

FACTUAL BACKGROUND

16. On June 15, 2012, the Secretary of the United States Department of Homeland Security ("DHS") announced a new program of administrative immigration

relief for young immigrants who came to the United States as children and are subject to removal from the United States. The DACA program was established to allow these young immigrants to remain in the United States without fear of deportation for a specified, renewable period, and thus continue to contribute to American society.

17. Under DACA, certain young immigrants are eligible to obtain “deferred action” from the federal government upon meeting specific criteria such as the attainment of a high school diploma and passing a rigorous background check including the absence of a criminal record. Deferred action is a mechanism used by the federal government to prevent the removal of a noncitizen who would otherwise be subject to deportation, and to allow the noncitizen to remain in the United States for a specified period of time. Persons granted deferred action under DACA may stay in the United States for a renewable period of two years, are shielded from removal proceedings during that time, and may be granted federal employment authorization and a Social Security Number. DACA recipients granted work authorization are issued federal employment authorization documents (“EADs”).

18. As the President of the United States has recognized, these young immigrants “are Americans in their heart, in their minds, in every single way but one: on paper.” President Barack Obama, Remarks on Immigration Reform, 2012 Daily Comp. Pres. Doc. 1 (June 15, 2012). The President explained, “it makes no sense” to deport “[t]hese [] young people who study in our schools, they play in our neighborhoods, they’re friends with our kids, they pledge allegiance to our flag.” The DACA program is intended “to lift the shadow of deportation from these young people” and “to mend our Nation’s immigration policy to make it more fair, more efficient, and more just.”

19. In response to the DACA program, on August 17, 2012, Defendant Heineman issued a press release announcing the implementation of a rule barring DACA recipients from obtaining a driver's license. The press release, in its entirety, stated: "President Obama's deferred action program to issue employment authorization documents to illegal immigrants does not make them legal citizens. The State of Nebraska will continue its practice of not issuing driver's licenses, welfare benefits, or other public benefits to illegal immigrants unless specifically authorized by Nebraska statute."

20. The DMV has complied with Defendant Heineman's mandate as set forth in his press release. The DMV has described this as an "executive order" and has been denying, and will continue to deny, driver's licenses to DACA recipients absent relief from this Court or another court of competent jurisdiction.

21. Pursuant to Defendant Heineman's press release, the Department of Motor Vehicles began denying driver's licenses to DACA recipients on October 15, 2012. From that time through February, 2013, the DMV reports it has denied driver's licenses to 285 individuals because of their DACA status.

22. Defendants' policy is contrary to the statutory authority provided by *Neb. Rev. Stat.* § 60-484.04. The Nebraska Legislature passed the provisions set forth in *Neb. Rev. Stat.* § 60-484.04 in order to bring the state in compliance with the REAL ID Act provisions. Defendant Heineman signed the law on March 20, 2011.

23. The Real ID Act was passed by Congress and signed by President Bush in May 2005. It establishes federal guidelines for the security of state driver's licenses and identity cards by imposing regulations on how they are designed, issued, and verified.

24. As part of the REAL ID Act, Congress also explicitly outlined classes of

immigrants deemed to have “lawful status” and therefore eligible for a federally secure license. The law states in relevant part:

Sec. 202 Minimum Document Requirements and Issuance Standards for Federal Recognition . . .

(2) Special Requirements

(A) In General - To meet the requirements of this section, ***a State shall comply with the minimum standards of this paragraph.***

(B) ***Evidence of Lawful Status-*** A State shall require, before issuing a driver's license or identification card to a person, valid documentary evidence that the person--

(i) is a citizen or national of the United States;

(ii) is an alien lawfully admitted for permanent or temporary residence in the United States;

(iii) has conditional permanent resident status in the United States;

(iv) has an approved application for asylum in the United States or has entered into the United States in refugee status;

(v) has a valid, unexpired nonimmigrant visa or nonimmigrant visa status for entry into the United States;

(vi) has a pending application for asylum in the United States;

(vii) has a pending or approved application for temporary protected status in the United States;

(viii) ***has approved deferred action status;*** or

(ix) has a pending application for adjustment of status to that of an alien lawfully admitted for permanent residence in the United States or conditional permanent resident status in the United States.

See 49 U.S.C. § 30301 note, Sec. 202(c)(2) (emphases added).

25. In its clear delineation of categories of aliens eligible for licenses under REAL ID, Congress explicitly included individuals with “approved deferred action status” in the list of immigration classifications that have “lawful status” for the purposes of receiving a federally secure driver’s license. Congress also included other immigrants, such as those who have applied for asylum or temporary protected status (a temporary status that DHS provides when circumstances in a country make it dangerous for its nationals to return) who, like deferred action recipients, typically do not have any formal immigration status conferred by Congress.

26. As DACA recipients, Plaintiffs have evidence of “approved deferred action status” and thus are eligible on the face of the REAL ID Act for federally secure driver’s licenses.

27. Nebraska law adopts the federal REAL ID Act’s classifications regarding eligibility for driver’s licenses. Defendants’ policy of denying driver’s licenses to DACA recipients thus exceeds their statutory authority as provided by state law.

28. Defendants’ policy is invalid for the independent reason that Defendants did not comply with the state’s APA notice and hearing requirements. Prior to implementing any rule or regulation barring DACA recipients from obtaining driver’s licenses, Defendants were required to follow the procedures set forth in *Neb. Rev. Stat.* 84-901 et seq., also known as the Administrative Procedures Act (“the APA”), which would include giving published notice and holding a public hearing. The Department of Motor Vehicles is an entity covered by the APA and is not exempted by any of the Act’s exemptions.

29. The APA requires: “No rule or regulation shall be adopted, amended, or repealed by any agency except after public hearing on the question adopting, amending, or repealing such rule or regulation. Notice of such hearing shall be given at least thirty days prior thereto to the Secretary of State and by publication in a newspaper having general circulation in the state. All such hearings shall be open to the public.” *Neb. Rev. Stat.* 84-907. No hearing or notice was given by Defendants.

30. The APA requires that an agency shall maintain an official rulemaking or regulation-making record for each rule or regulation it adopts or proposes by publication of a notice. The record and materials incorporated by reference shall be available for

public inspection, and the Act specifies what documents shall be included in the rulemaking record for public review. *Neb. Rev. Stat.* 84-906.01(1). No record has been created or provided by Defendants. Both the express language of the statute and the legislative history reflect that the Act was intended to provide the public with a meaningful opportunity to review applicable documents and time to comment on same at a public hearing.

31. Had Defendants conducted a public hearing as required by the Administrative Procedures Act, the public—including the Plaintiffs—would have had the opportunity to provide testimony at the hearing and participated in the rule making process— participation that could have influenced whether the DMV would issue driver’s licenses to DACA recipients. Instead, Defendants have blatantly ignored their statutory duties under the APA and unlawfully implemented a rule that imposes enormous financial and personal burdens on Plaintiffs and other DACA recipients. Plaintiffs’ legal rights have been impaired by the Defendants’ unlawful actions described herein.

FIRST CAUSE OF ACTION

32. Plaintiffs incorporate by reference all preceding paragraphs.

33. This cause of action is brought pursuant to the Uniform Declaratory Judgments Act, *Neb. Rev. Stat.* 25-21,149 through 25-21,164 and *Neb. Rev. Stat.* 84-901 through 84-920.

34. Each of the Plaintiffs has applied and been approved by the USCIS for deferred action status under the DACA program.

35. Each of the Plaintiffs possesses documentary evidence of their approved deferred action status, including a Form I-797, a EAD, and a Social Security Number.

36. Each of the Plaintiffs desires a driver's license, and is irreparably harmed by the inability to obtain one.

37. But for Defendants' invalid rule, each of the Plaintiffs would meet the qualifications to apply for a driver's license under Nebraska law.

38. It would be futile for Plaintiffs to apply for a driver's license, or exhaust any administrative remedies, in light of Defendants' clear and unmistakable rule categorically denying driver's licenses to DACA recipients as well as its past acts denying licenses to persons similarly situated to Plaintiffs.

39. Nebraska law reflects a clear, unambiguous adoption of the federal REAL ID Act's immigration classification scheme for driver's license eligibility.

40. Each of the Plaintiffs can demonstrate proof of "lawful status" as that term is used in the REAL ID Act, and thus are eligible to obtain a driver's license that satisfies the provisions of that statute.

41. Defendants' rule denying driver's licenses to DACA recipients is invalid because the rule exceeds their authority under state law.

42. Each of the Plaintiffs has suffered, and are suffering ongoing harm because of Defendants' unlawful rule described herein.

43. Unless enjoined by this Court, Defendants will continue to deny driver's licenses to DACA recipients who otherwise meet the licensing requirements.

SECOND CAUSE OF ACTION

44. Plaintiffs incorporate by reference all preceding paragraphs.

45. This cause of action is brought pursuant to the Uniform Declaratory Judgments Act, *Neb. Rev. Stat.* 25-21,149 through 25-21,164 and the Nebraska

Administrative Procedures Act, *Neb. Rev. Stat.* 84-901 through 84-920.

46. Defendants have not properly adopted and promulgated rules and regulations to determine eligibility of DACA recipients for driver's licenses in Nebraska.

47. As a direct and proximate result of Defendants' failure to fulfill their statutory duty to adopt and promulgate rules and regulations, the Nebraska Department of Motor Vehicles is acting and will continue to act without established standards created in conformance with the Administrative Procedures Act.

48. Unless enjoined by this Court, Defendants will continue to deny driver's licenses to DACA recipients without public notice and hearing on the merits of the issue.

THIRD CAUSE OF ACTION

49. Plaintiffs incorporate by reference all preceding paragraphs.

50. This cause of action is brought pursuant to the Uniform Declaratory Judgments Act, *Neb. Rev. Stat.* 25-21,149 through 25-21,164, and *Neb. Rev. Stat.* 84-901 through 84-920.

51. Defendant Heineman's press release directing that DACA recipients are ineligible for driver's licenses under the circumstances described herein violates the fundamental principle of administrative law that an agency's action must be based on a factual foundation in the record of the proceedings. The record contains no evidence to justify Defendants' actions, rendering said actions unreasonable and arbitrary.

52. Defendants' decision to deny driver's licenses to DACA recipients under the circumstances described herein violates the Due Process Clause of Article I, section 3 of the Nebraska State Constitution. Defendants' actions described above violate the fundamental principle of administrative law that an agency must hold public hearings,

provide a complete rulemaking record to the public during the proceedings, and consider public input. Absolutely no aspect of the APA was met herein, rendering the Defendants' decision regarding DACA recipients' eligibility for a license illegal, void and without weight. All proceedings in connection with that action should be nullified and set aside, and all further actions resulting from that action should be enjoined.

53. The State, through its statutes, has created legitimate expectations regarding eligibility for driver's licenses. A driver's license is an important interest entitled to the protection of procedural due process. Pursuant to the requirements of due process, the State cannot summarily deny licenses from applicants who otherwise qualify under rules duly promulgated by the Department of Motor Vehicles. The Department has no rules or regulations describing why recipients of deferred action are ineligible for driver's licenses and has summarily denied Plaintiffs' application for driver's licenses. Nor has the Department promulgated any rules or regulations explaining their rejection of applications from DACA recipients.

54. Unless enjoined by this Court, Defendants will proceed to deny driver's licenses to DACA recipients who otherwise meet the licensing requirements.

WHEREFORE, the Plaintiffs request the following relief:

A declaration of this Court that any rule, regulation, directive, policy, or practice by the Defendants making DACA recipients ineligible to receive driver's licenses is invalid;

A declaration of this Court that the APA imposes upon Defendants a mandatory obligation to adopt rules and regulations that comport with the Administrative Procedures Act;

A declaration of this Court that any rule, regulation, directive, policy, or practice by

the Defendants making DACA recipients ineligible to receive driver's licenses is null and void absent compliance with the APA;

A declaration of this Court that Defendants' actions as described herein violate the Due Process Clause of Article I, section 3 of the Nebraska State Constitution;

Issuance of a preliminary and permanent injunction enjoining Defendants in their official capacity, their successors in interest, and anyone acting on their behalf, from enforcing any rule, regulation, or standard that categorically makes a DACA recipient ineligible for a driver's license;

For costs and attorney's fees and expenses pursuant to *Neb. Rev. Stat.* 25-1803; and

For such further relief as the Court may deem just and proper.

Dated this 26th day of August, 2013.

/s/ Amy A. Miller
Amy A. Miller NSBA #21050
ACLU Nebraska Foundation
941 O Street #706
Lincoln NE 68508
402-476-8091

Christine P. Sun (admitted *pro hac vice*)
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
IMMIGRANTS' RIGHTS PROJECT
39 Drumm Street
San Francisco, CA 94111
Telephone: 415.343.0783
Facsimile: 415.395.0950
csun@aclu.org

Attorneys for Plaintiffs

Certificate of Service

I hereby certify that on Monday, August 26, 2013 I provided a true and correct copy of the Amended Complaint to the following:

Marquez,Luis, service method: Personal Service

Department of Motor Vehicles service method: Personal Service

Lahm,Rhonda, service method: Personal Service

Castillo,Alejandra, service method: Personal Service

Heineman,Dave, service method: Personal Service

Signature: /s/ Amy Miller (Bar Number: 21050)