

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT	1
ARGUMENT	9
POINT I: A PRELIMINARY INJUNCTION IS APPROPRIATE BECAUSE PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS	9
A. Defendants’ Legal Presence Rule and One Year/Six Month Rule Are Not Authorized by Statute and Are Otherwise Improper	9
1. DMV Has Exceeded Its Statutory Authority by Implementing Regulations that Mandate Legal Presence.....	9
a. Identity Does Not Mean Legal Presence	10
b. The Commissioner’s Authority to Require Proof of Identity Does Not Empower the Commissioner to Exclude Undocumented Aliens	12
2. DMV Has Exceeded Its Statutory Authority by Implementing the One Year/Six Month Rule	15
3. The Legal Presence Rule and the One Year/Six Month Rule Are Invalid Because They Were Not Properly Implemented	17
a. The Legal Presence Rule is Invalid	17
b. The One Year/Six Month Rule Is Invalid	18
B. Defendants’ SSN Verification Project, Temporary Visitors Program, and Rule Requiring Legal Presence Are Unconstitutional	20
1. The DMV Rules Do Not Comport with Equal Protection	20
a. The One Year/Six Month Rule Violates Equal Protection	20
b. The Legal Presence Rule Violates Equal Protection	22
2. DMV’s SSN Verification Project Violates Due Process	23

POINT II: A PRELIMINARY INJUNCTION IS APPROPRIATE BECAUSE
PLAINTIFFS WILL OTHERWISE SUFFER IRREPARABLE INJURY
AND ARE FAVORED BY A BALANCE OF THE EQUITIES.....29

POINT III: THE COURT MUST DENY DEFENDANTS’ MOTION TO DISMISS32

CONCLUSION.....33

TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<i>10 Apartment Assocs., Inc. v. N.Y. State Div. of Housing and Community Renewal</i> , 240 A.D.2d 585, 658 N.Y.S.2d 674 (2d Dep't 1997).....	17
<i>Aliessa v. Novello</i> , 96 N.Y.2d 418, 754 N.E.2d 1085 (2001).....	20, 22, 24, 25
<i>Boreali v. Axelrod</i> , 71 N.Y.2d 1, 517 N.E.2d 1350 (1987).....	14, 15, 16
<i>Brad H. v. City of New York</i> , 185 Misc. 2d 420, 712 N.Y.S.2d 224 (Sup Ct. 2000).....	29
<i>Campbell Sales Co. v. New York State Tax Commission</i> , 68 N.Y.2d 617, 496 N.E.2d 213 (1986).....	13
<i>Chernoff Diamond & Co. v. Fitzmaurice, Inc.</i> , 234 A.D.2d 200, 651 N.Y.S.2d 504 (1st Dep't 1996).....	29
<i>Citizens to Preserve Overton Park, Inc. v. Volpe</i> , 401 U.S. 402 (1971).....	13
<i>Dixon v. Love</i> , 431 U.S. 105 (1977).....	26
<i>Dole v. Passidomo</i> , 118 A.D.2d 326, 504 N.Y.S.2d 809 (3d Dep't 1986).....	26
<i>Egan v. New York Care Plus Insurance Co.</i> , 266 A.D.2d 600, 697 N.Y.S.2d 776 (3d Dep't 1999).....	9
<i>Glassman v Catli</i> , 111 A.D.2d 744, 489 N.Y.S.2d 777 (2d Dep't 1985).....	32
<i>Graham v. Richardson</i> , 403 U.S. 365 (1971).....	21

<i>Grinberg v. Safir</i> , 181 Misc. 2d 444 (Sup. Ct. 1999).....	26, 30
<i>Jewish Community Action v. Commissioner of Public Safety</i> , 657 N.W.2d 604 (Minn. 2003).....	7
<i>John Doe v. Department of Public Safety</i> , 147 F. Supp. 2d 1369 (N.D. Ga. 2001).....	7
<i>Jones v. Berman</i> , 37 N.Y.2d 42, 332 N.E.2d 303 (1975).....	11, 12
<i>League of United Latin American Citizens v. Bredesen</i> , 2004 U.S. Dist. LEXIS 26507 (M.D. Tenn. Sep. 28, 2004).....	6, 21
<i>Leon v. Martinez</i> , 84 N.Y.2d 83, 638 N.E.2d 511 (1994).....	32
<i>Lily Pond Lane Corp. v. Technicolor, Inc.</i> , 98 Misc. 2d 853, 414 N.Y.S.2d 596 (Sup. Ct. 1979).....	30
<i>Lorillard Tobacco Co. v. Roth</i> , 99 N.Y.2d 316, 786 N.E.2d 7 (2003).....	10
<i>Majewski v Broadalbin-Perth Central School District</i> , 91 N.Y.2d 577, 696 N.E.2d 978, 673 N.Y.S.2d 966) (1998).....	10
<i>Nyquist v. Mauclet</i> , 432 U.S. 1 (1977).....	21
<i>People v. Cull</i> , 10 N.Y.2d 123, 176 N.E.2d 495 (1961).....	18, 19
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982).....	22
<i>Ritterband v. Axelrod</i> , 149 Misc. 2d 135, 562 N.Y.S.2d 605 (Sup. Ct. 1990).....	27
<i>Roman Catholic Diocese of Albany v. N.Y. State Department of Health</i> , 66 N.Y.2d 948, 489 N.E.2d 749 (1985).....	18

<i>Sanchez v. Iowa</i> , 2005 Iowa Sup. LEXIS 27 (Iowa Feb. 18, 2005)	6
<i>Saratoga County Chamber of Commerce, Inc. v. Pataki</i> , 275 A.D.2d 145, 712 N.Y.S.2d 687 (3d Dep't 2000).....	27, 28
<i>Securities & Exchange Commission v. Chenery Corp.</i> , 332 U.S. 194 (1947).....	14
<i>Seittelman v. Sabol</i> , 91 N.Y.2d 618, 697 N.E.2d 154 (1998).....	10
<i>Trump-Equitable Fifth Avenue Co. v. Gliedman</i> , 57 N.Y.2d 588, 443 N.E.2d 940 (1982).....	11, 12
<i>Trump-Equitable Fifth Avenue Co. v. Gliedman</i> , 62 N.Y.2d 539, 467 N.E.2d 510 (1984).....	12
<i>Uribe v. Merchants Bank</i> , 91 N.Y.2d 336, 693 N.E.2d 740 (1998).....	11

STATUTES

Calif. Vehicle Code § 12801.5 (2004)	6
Georgia Code Ann. § 40-5-1(15).....	7
Iowa Code § 321.182(1)	6
Minn. R. 7410 <i>et seq</i>	7
New Mexico Stat. Ann. § 66-5-9 (2004)	6
Tenn. Code Ann. § 55-50-331(h) (2004)	7

**REPLY BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION
AND IN OPPOSITION TO DEFENDANTS' CROSS-MOTION TO DISMISS**

PRELIMINARY STATEMENT

Plaintiffs submit this memorandum of law in support of their motion for preliminary relief and in opposition to Defendants' motion to dismiss.

Significantly, Defendants no longer dispute or evade Plaintiffs' key assertion: the Department of Motor Vehicles ("DMV") has preconditioned the issuance of driver licenses and non-driver identification cards ("ID") on proof of legal presence in the United States. *Traschen Aff.* at ¶¶ 8-9; *Def. Response* at 3, 12, 27. Nor does DMV dispute that pursuant to the Temporary Visitors Program (*i.e.*, the one year/six month rule) it denies licenses to a class of applicants despite their ability to prove legal presence in the United States. Based on these two undisputed facts, Plaintiffs must prevail on the merits for the simple reason that the Legislature never empowered DMV to impose these requirements. The mere existence of these rules is dispositive; identity is distinct from immigration status, and while the Legislature has authorized DMV to mandate proof of the former, it has not empowered it to require the latter.

Defendants, of course, now admit that DMV "will not license or renew individuals who do not present documentation consistent with their 'legal presence' in the U.S." *Def. Response* at 27. They attempt to undermine the significance of this admission by asserting that the legal presence requirement is an unintended consequence of Defendants' lawful efforts to verify identity, as required by VTL §§ 490 and 502. DMV contends that it can only authenticate current immigration documentation, and therefore, only applicants with current documents can qualify for a license or ID. *Def. Response* at 27; *Traschen Aff.* ¶¶ 24-27.

This explanation, while perhaps promising at first glance, is wholly irrelevant for two reasons. First, this explanation is not the true motivation behind DMV's actions. According to bedrock principles of administrative law, a court must scrutinize agency action in light of the agency's actual decision making process, not according to a post hoc rationalization concocted for litigation. Second, even if DMV's explanation is true, as a matter of administrative and constitutional law, DMV is not authorized to deny a class of residents the benefits of licensure based solely on its own policy determination that it is more desirable or cost-effective to do so. The Legislature authorized DMV to verify identity; Defendants cannot, through an administrative backdoor, bring immigration status within this requirement.

Finally, even if Defendants possess the statutory authority to impose the legal presence and one year/six month rules, the rules are nonetheless invalid. Statutory authority cannot remedy the rules' constitutional deficiencies, nor does it relieve DMV of the required rule-making procedures enumerated in the State Administrative Procedure Act ("SAPA").

DMV Has Offered a Post Hoc Rationalization of the Legal Presence Rule

In a June 15, 2004 letter, Jill Dunn, Assistant Commissioner and Counsel to DMV, stated: "we do not have a legal presence requirement[.]" Maer Aff. Exh. C at 2. Assistant Commissioner Dunn further explained that any DMV personnel stating anything to the contrary would have been in error. *Id.* In the first affidavit submitted to this Court by Ida Traschen, there is no mention that documentation consistent with legal presence is required. Maer Aff. Exh. G (Traschen Aff. Nov. 23, 2004). Indeed, Ms. Traschen makes no mention of a need or effort by DMV to authenticate Department of Homeland Security ("DHS")

documentation. *Id.* Yet these “facts” are highlighted in Ms. Traschen’s most recent, March 9, 2005, affidavit and are essential to DMV’s defense of its rules. Traschen Aff. ¶¶ 8-9, 24-27.

Yet even the minimal amount of internal DMV documentation to which Plaintiffs have been privy conveys that the true motivation behind the legal presence rule does not stem from DMV’s efforts to verify identity or authenticate documentation. DMV line employees were given the following directive on April 19, 2002:

Requiring proof of date of birth documentation is the single most important tool for preventing applicants, who do not have legal presence, from obtaining NYS driving privileges or NYS photo documents. For example, an applicant who doesn’t have legal status may be able to meet our 6 points of proof of name requirements without using an INS document. It is this proof of date of birth documentation that will prevent applicants who do not have legal presence from obtaining NYS DMV photo documents or privileges.

Maer Aff. Exh. O at 2. Thus, as early as April of 2002, DMV was overtly manipulating its six-point system for the express purpose of implementing a legal presence requirement. As the April 19, 2002 Mailbag makes clear, were it not for DMV’s stratagems, applicants would be able to establish identity without proving legal presence. The Commissioner, however, acting on his conviction that it is bad policy to provide licenses to undocumented aliens, has finessed the proof of age requirement—a requirement distinct from identity—to require proof of legal presence.

But now, DMV purports to require legal presence only incidentally to its need to authenticate DHS documentation, which, allegedly, is only possible via the DHS “SAVE” database.¹ Traschen Aff. ¶¶ 24-27. Because the SAVE database supposedly only includes

¹ At least 13 states have worked out procedures through which they are able to verify at least some forms of foreign issued documentation: Idaho, Indiana, Michigan (accepted on a case-by-case basis),

information for current DHS documentation, DMV only has the ability to verify current documentation. *Id.* The flaw in the logic here, in addition to the dubious factual assertions, is that DMV did not get access to the SAVE database until October of 2003, approximately 18 months after the April 2002 Mailbag. *Id.* at ¶ 24. Even after gaining access to the SAVE database, DMV did not identify it as a component of its identification procedures; On August 19, 2004, Commissioner Martinez appeared before the New York Assembly Transportation Committee where he explained DMV’s state of the art efforts to ensure that people “are who they say they are.” Maer Aff. Exh. D at 2. At the hearing, Commissioner Martinez explained DMV’s use of the Social Security Administration (“SSA”) database, but conspicuously makes no mention of the SAVE database, to which DMV already had access for 10 months. Despite the hyperbolic tone assumed in their argument before this Court, DMV’s “need” to authenticate DHS documentation clearly could not—and did not—drive the imposition of the legal presence rule.²

Nebraska, North Carolina, New Mexico, Oregon, South Dakota, Tennessee, Texas, Utah, Washington and Wisconsin. Presumably, it would place no greater burden on DMV to verify a Mexican passport than it would to verify a birth certificate from the Mariana Islands, a transcript and ID card from the University of Alaska, a Con-Edison electricity bill, a Discover credit card, and a driver license from Manitoba that had expired six months earlier—yet this combination of documents would qualify an applicant for a license under current New York DMV rules. *See* Traschen Aff. Exh. I.

² Defendants also gloss over critical factual shortcomings in their argument. First, SAVE is one of several databases maintained by DHS. Defendants do not explain why or how they obtained access to this one, as opposed to others. Second, the SAVE database was originally created to enable employers in the United States to determine whether a non-citizen had work authorization. Defendants make no effort to explain how such a database is relevant to their efforts. Third, Defendants do not even explain how or when access to the SAVE database has been integrated and utilized in the identification process, nor have they alleged that every license application or renewal is, in fact, authenticated or matched against the SSA and/or SAVE databases. Fourth, DMV does not explain whether the SAVE database includes biometric information, such as a photo, and if not, how reference to the database proves anything other than the fact that someone with a given name has been issued DHS documents. Fifth, by all accounts, DHS databases are neither comprehensive in scope nor complete in listings. *See, e.g.*, U.S. Gov’t Accountability Office,

Major Policy Decisions Cannot Be Made Via Administrative Fiat

As even the Commissioner has recognized, “in New York State . . . the Legislature has not spoken to the issue specifically of legal status to get a license, pro or con.” Raymond Martinez, appearing on the Lou Dobbs Show on CNN (March 1, 2005). The Commissioner is correct. What he neglects to recognize, however, is that in the absence of the Legislature’s direction on this issue, the Commissioner cannot legally interpose his own solution to the so-called problem. Yet that is exactly what he has done.

The Commissioner has concluded that it is wise policy, especially after the terrorist attacks of September 11, 2001, to deny licenses to undocumented aliens. *Maer Aff. Exh. D*; *Def. Response at 11-12*. Whether this is wise policy, however, is a matter of debate.³

“Alien Registration: Usefulness of a Non-Immigrant Alien Annual Address Reporting Requirement Is Questionable,” GAO-05-204 (January 2005) (“ICE agents said that they consider the data found in existing public source database systems such as department of motor vehicle records, credit bureaus, court filings, and Internet search engines that compile address and other information to be more current and reliable [than the DHS address database.]”).

³ Commissioner Martinez’s reasoning on this issue is misguided. First, he laments that 18 of the 19 terrorists on September 11 had state driver licenses. What he fails to appreciate is that all but one of these licenses were obtained legally and all of the terrorists were legally present in the United States. All of the terrorists used their real names. 9/11 Commission’s Final Report at 237. There was no issue of fraud in the majority of cases. Presumably, many of the terrorists would be eligible under the Temporary Visitor’s Program, even as it now operates. In any event, even had the terrorists been denied driver licenses, they would have been able to board the airplanes with their passports, as one in fact did. The failures of September 11 were intelligence failures, not DMV licensing failures.

Most significantly, the Commissioner fails to recognize that the single most useful tool in reconstructing the actions of the terrorists came from tracking them through various DMV databases. As the American Association of Motor Vehicle Administrators, of which Commissioner Martinez is a member, has recognized: “Digital images from driver records have significantly aided law enforcement agencies charged with homeland security. The events of September 11, 2001 clearly demonstrate the value of the driver record photograph. The 19 terrorists obtained driver licenses from several states and federal authorities relied heavily on those images for the identification of the individuals responsible for the horrific criminal acts on that fateful day.” American Ass’n of Motor Vehicle Administrators, “Access to Drivers License & Identification Card Data by Law Enforcement,” October 2003, available at <http://www.aamva.org/Documents/idsIDSecurityFrameworkAppendices278303.pdf>.

And this debate should properly occur in the Legislature. As Defendants point out, numerous state legislatures have already addressed the issue.

For example, some state legislatures have chosen to deny undocumented aliens the privilege of a license under all circumstances. *See, e.g.*, Calif. Vehicle Code § 12801.5 (2004). Others have explicitly permitted undocumented aliens to obtain licenses. *See, e.g.*, New Mexico Stat. Ann. § 66-5-9 (2004). Still other state legislatures have chosen a middle ground, denying undocumented aliens full licensing rights, but providing some type of provisional driving authorization. *See, e.g.*, Tenn. Code Ann. § 55-50-331(h) (2004). Each state, through its legislative process, reaches a solution it deems best. This is federalism in action. In New York, however, the Commissioner has cut the Legislature—and the People—out of the loop. No court has allowed, through the implementation of unpromulgated administrative rules, the imposition of a legal presence requirement. Notably, in every licensing case cited by Defendants, the court was asked to consider the legality of a *statute*, not a surreptitiously implemented rule or regulation.⁴

Indeed, the 9/11 Commission noted that had officials been vigilant, they could have tracked a number of the terrorists right up until September 11 by using information in DMV databases. 9/11 Commission's Final Report at 539. In fact, numerous law enforcement agencies rely on DMV databases daily, including the US Department of State; the US Department of Justice; the US Department of Homeland Security; the Postal Inspection Service; the Department of Defense; the US Secret Service; the Department of the Army; the US Coast Guard; the National Center for Missing and Exploited Children; the Department of the Interior; the Veterans Administration; the National Insurance Crime Bureau; the Federal Protective Service; and many others. If Commissioner Martinez has his way, the 20 million estimated undocumented aliens that live in the United States will be left out of DMV databases, and will truly become untraceable, thereby undermining safety, rather than bolstering it.

That the logic underlying the Commissioner's policy decision is flawed further highlights the importance of reaching policy through the traditional democratic, legislative process, where ideas are publicly tested and reformulated until consensus among a majority of elected representatives is achieved.

⁴ *See Sanchez v. Iowa*, 2005 Iowa Sup. LEXIS 27 (Iowa Feb. 18, 2005) (considering Iowa Code §§ 321.182(1)(a) and 321.196(1)); *League of United Latin American Citizens v. Bredesen*, 2004 U.S. Dist.

Defendants should have gone to the Legislature with their concerns about the licensing requirements in New York. Instead, they opted to usurp the Legislature's role and implement a legal presence requirement without any of the usual and mandated constitutional processes. They now ask the Court to endorse these undemocratic actions. Under the laws of New York, the Court cannot abide Defendants' misdeeds.

Administrative Efficiency Does Not Trump New York Law

DMV asserts that the legal presence rule is "a valid and reasonable requirement of verifiable documentation of identity." Def. Response at 2. But Defendants never address the fact that identity is distinct from legal presence. Plaintiffs do not contend that DMV should neglect its crucial duty of verifying identity. Rather, Plaintiffs contend that DMV cannot, based on its authority to specify and require documentation, categorically eliminate a class of people from licensing eligibility. The statutory grant of power to verify proof of identity, age, fitness and Social Security Number ("SSN") ineligibility in VTL § 502 does not permit the Commissioner to smuggle whatever additional prerequisites into licensing that he deems appropriate.

That DMV is using "improved" technical measures—*i.e.*, the SSA and SAVE databases—to verify documentation is to be lauded, and Plaintiffs do not quarrel with Defendants' efforts to employ better verification techniques. But requiring documentation that demands legal presence is not just a matter of verification; it is the imposition of an entirely new

LEXIS 26507 (M.D. Tenn. Sep. 28, 2004) (considering Tenn. Code Ann. §§ 55-5-321(c)(1)(C) and 55-50-331(g)); *Jewish Cmty. Action v. Comm'r of Pub. Safety*, 657 N.W.2d 604 (Minn. 2003) (considering Minn. R. 7410 *et seq.*); *John Doe v. Dep't of Pub. Safety*, 147 F.Supp.2d 1369 (N.D. Ga. 2001) (considering Georgia Code Ann. §§ 40-5-1(15) and 40-5-20(a)).

eligibility requirement that DMV does not have the authority to enact unilaterally. In a broader context, the modification of a “technical” verification procedure cannot be utilized to deprive hundreds of thousands of otherwise eligible drivers of their licenses, which Defendants acknowledge is a property right.

In short, the process of proving age or identity cannot be transformed into categorical legal presence requirement. After all, DMV's primary purpose is to regulate who can drive on the State's highways. To achieve this statutorily mandated goal, DMV must, as the New York Legislature has required, accommodate Plaintiffs—who are eligible under VTL §§ 502 and 490—in its licensing procedures.

ARGUMENT

POINT I

A PRELIMINARY INJUNCTION IS APPROPRIATE BECAUSE PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS

Defendants' have posed no valid response to Plaintiffs' legal arguments.

Accordingly, the Court should stand by its initial assessment that Plaintiffs are likely to prevail on the merits. Defendants' attempts to muddy the waters with complex factual allegations do not undermine Plaintiffs' case. "[T]he mere fact that there indeed may be questions of fact for trial does not preclude a court from exercising its discretion in granting an injunction." *Egan v. New York Care Plus Ins. Co.*, 266 A.D.2d 600, 601, 697 N.Y.S.2d 776 (3d Dep't 1999).

A. DEFENDANTS' LEGAL PRESENCE RULE AND ONE YEAR/SIX MONTH RULE ARE NOT AUTHORIZED BY STATUTE AND ARE OTHERWISE IMPROPER

1. DMV Has Exceeded Its Statutory Authority by Implementing Regulations that Mandate Legal Presence

Resolution of this case in favor of Plaintiffs is mandated by established principles of administrative law, as Defendants have conceded the dispositive issue: indisputably, DMV has imposed a legal presence requirement on applicants for driver licenses and non-driver IDs that is not included in the statutory grant of authority. As the Commissioner remarks in his response, "DMV does not dispute that, at present, it will not license or renew individuals who do not present documentation consistent with their 'legal presence' in the U.S." Def. Response at 27. *See also id.* at 3, 12; *Traschen Aff.* at ¶¶ 8-9. Because the statutory regime that empowers DMV is clear and limited, the legal inquiry is correspondingly straightforward. By law, DMV is authorized to require proof of (1) identity, (2) age, (3) fitness, and (4) SSN or SSN ineligibility.

VTL §§ 490, 502. Nothing in these four factors justifies the imposition of a fifth requirement of legal presence.

In defending its actions, DMV attempts to bring legal presence within the ambit of its authority to verify identity, but its effort misses the mark. DMV offers extensive factual allegations that implicate its exercise of expertise in verifying the identity of applicants. But as the Court of Appeals has explained, where “the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency.” *Seittelman v. Sabol*, 91 N.Y.2d 618, 625, 697 N.E.2d 154, (1998) (internal citations omitted). *See also Lorillard Tobacco Co. v. Roth*, 99 N.Y.2d 316, 326, 786 N.E.2d 7, 10 (2003). Thus, the Court need only look to the statute to determine whether the Legislature’s “identity” requirement encompasses “legal presence.” Clearly, it does not.

a. Identity Does Not Mean Legal Presence

First, as a simple matter of statutory interpretation, the plain meaning of “identity” cannot reasonably be construed to include legal presence. *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 583, 696 N.E.2d 978, 673 N.Y.S.2d 966 (1998) (“As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof.”). As the Commissioner has recognized, the sum and substance of the “identity” requirement is to ensure that applicants “are who they say they are.” Maer Aff. Exh. D at 2.. The veracity of an applicant’s identity is independent of whether the United States government has authorized the applicant to be in the United States.

Second, the identity requirement cannot reasonably be interpreted to imply the additional requirement of legal presence. The Legislature’s enumeration of four specific criteria suggests that this list should be exhaustive; had the Legislature wanted to preclude the licensing of undocumented aliens, it could easily have done so. *Cf. Uribe v. Merchants Bank*, 91 N.Y.2d 336, 340, 693 N.E.2d 740, 743 (1998) (“*inclusio unius est exclusio alterius* (the inclusion of one is the exclusion of another)”).

In *Jones v. Berman*, 37 N.Y.2d 42, 332 N.E.2d 303 (1975), the Court of Appeals considered whether the State Commissioner of Social Services could impose an additional sixth requirement where the Legislature had already identified five requirements to qualify for emergency assistance under section 350-j of the Social Services Law. Ultimately, the Court concluded “that by adding a requirement not found in the existing State statute, the regulation as presently written is invalid.” *Jones*, 332 N.E.2d at 308. Similarly, as the Legislature has identified four requirements for licensing, the Commissioner cannot of his own volition impose a fifth.

The Court of Appeals has repeatedly emphasized that an agency’s interpretation of a statute is only reasonable where it is in fact an interpretation, not an augmentation of the statutory text. In the *Trump-Equitable* cases, the Court twice rejected the Department of Housing Preservation and Development’s (“HPD”) interpretation of a statute that provided a tax break for developers of “under-utilized” land. In the first round of litigation, the Court rejected HPD’s understanding of “under-utilized” as equivalent to “functional obsolescence.” *Trump-Equitable Fifth Ave. Co. v. Gliedman*, 57 N.Y.2d 588, 592, 443 N.E.2d 940, 941 (1982) (“*Trump-Equitable I*”). HPD offered legislative history suggesting that its interpretation was in

line with intent of the Legislature, to which the Court responded: “even if the legislative history of the statute were as respondent contends our conclusion would in no way be affected . . . This court should not ignore the words of a statute, clear on its face, to reach a contrary result through judicial interpretation.” *Trump-Equitable I*, 443 N.E.2d at 944.

Later, the Court of Appeals again rejected HPD’s interpretation, which imposed a “substantially under-utilized” standard where the statute merely required that land be “under-utilized.” *Trump-Equitable Fifth Ave. Co. v. Gliedman*, 62 N.Y.2d 539, 545, 467 N.E.2d 510, 513 (1984) (“*Trump-Equitable II*”). The unanimous Court, disallowing the relatively minor imposition of the word “substantial,” explained, “Respondent’s interpretation, by imposing a requirement of substantial under-utilization, thus is inconsistent with the governing statute.” *Trump-Equitable II*, 467 N.E.2d at 514. *See id.*, 467 N.E.2d at 514 (“HPD’s regulations suffer from the same infirmity: they improperly add a requirement not found in the statute.”). Here, Defendants ask this Court to overlook much more—the wholesale incorporation of legal presence as an additional licensing requirement. This is beyond the statutory authority of DMV. *Jones*, 332 N.E.2d at 308 (“by adding a requirement not found in the existing State statute, the regulation as presently written is invalid”).

b. The Commissioner’s Authority to Require Proof of Identity Does Not Empower the Commissioner to Exclude Undocumented Aliens

Throughout its argument, DMV does not deny that identity and legal presence are distinct concepts. Rather, DMV cites administrative inconvenience as justification for excluding undocumented aliens from the privilege of licensing. DMV refuses to authenticate foreign documents because to do so would, by its own estimation, be overly burdensome. *Traschen Aff.*

¶ 27. While the veracity of this claim is dubitable, it is also besides the point for two reasons. First, this is a rationalization that cannot be considered by the Court. Second, DMV refuses to allocate the resources necessary to verify foreign documents because it claims to do so is impractical; but this is relevant, as the will of the Legislature cannot lawfully be subjugated to the Commissioner's desire for administrative convenience.

i. DMV Has Deliberately Imposed a Legal Presence Requirement Separate and Apart from Its Utility in the Identification Process

DMV attempts to undermine the existence of the legal presence rule by suggesting that it is an accidental effect of its legitimate statutory duty to verify identity. Def. Response at 37. The evidence, however, suggests otherwise. Internal DMV documents show that the agency has constructed its policy with the objective of denying licenses to undocumented aliens. Because DMV's proffered justification for the legal presence rule is not the actual rationale that drove its decision, the Court must disregard it; an agency may only rely on its actual decision making process to justify its actions. *See, e.g., Campbell Sales Co. v. New York State Tax Comm'n*, 68 N.Y.2d 617, 621, 496 N.E.2d 213, 215 (1986) ("The agency did not reach its decision on this basis and our review is confined to the agency's basis for its determination."). *See also Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971) (recognizing that litigation "affidavits were merely 'post hoc' rationalizations, which have traditionally been found to be an inadequate basis for review.") (citing *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962)).

If there is any doubt that Defendants have indeed chosen to effect their view of sound policy through administrative fiat, the Court need only look to DMV's internal documents:

Requiring proof of date of birth documentation is the single most important tool for preventing applicants, who do not have legal presence, from obtaining NYS driving privileges or NYS photo documents. For example, an applicant who doesn't have legal status may be able to meet our 6 points of proof of name requirements without using an INS document. It is this proof of date of birth documentation that will prevent applicants who do not have legal presence from obtaining NYS DMV photo documents or privileges.

Maer Aff. Exh. O at 2. In other words, DMV consciously manufactured its “verification procedures” with the objective of precluding undocumented aliens from obtaining licenses. It is on this ground that the imposition of the legal presence rule must be evaluated. *See, e.g., Securities & Exchange Comm’n v. Chenery Corp.*, 332 U.S. 194, 196 (1947). As explained above, the statutory language of VTL §§ 502 and 490 does not authorize the Commissioner to require legal presence. Because the Commissioner has nonetheless intentionally imposed this requirement, the legal presence rule is invalid.

ii. Administrative Inconvenience Cannot Legitimize the Legal Presence Rule

Where an applicant for a driver license or ID can prove identity, age, fitness, and SSN ineligibility, the Commissioner “*shall*” issue appropriate documentation. VTL § 501 (emphasis added). *See also* VTL §§ 490, 502. DMV cannot, as it has done here, abdicate its licensing responsibilities based on its own assessment that its statutorily prescribed duties are ill-advised or unduly burdensome.

For example, in *Boreali v. Axelrod*, 71 N.Y.2d 1, 12, 517 N.E.2d 1350, 1355 (1987), the Court of Appeals invalidated the Public Health Council’s (“PHC”) anti-smoking regulations. The Court recognized, that even where there is a broad statutory grant of authority, agencies are empowered to fill in the gaps of a statute, not to impose wholly new law. *Id.*, 517

N.E.2d at 1356 (“the agency’s actions were a far cry from the ‘interstitial’ rule making that typifies administrative regulatory activity”). PHC’s anti-smoking initiative, like DMV’s legal presence requirement, grew out of a cost-benefit analysis conducted by the agency. The Court soundly rejected this justification:

While it is true that many regulatory decisions involve weighing economic and social concerns against the specific values that the regulatory agency is mandated to promote, the agency in this case has not been authorized to structure its decision making in a “cost-benefit” model, and, in fact, has not been given any legislative guidelines at all for determining how the competing concerns of public health and economic cost are to be weighed. Thus, to the extent that the agency has built a regulatory scheme on its own conclusions about the appropriate balance of trade-offs between health and cost to particular industries in the private sector, it was “acting solely on [its] own ideas of sound public policy” and was therefore operating outside of its proper sphere of authority.

Id., 517 N.E.2d at 1355 (citation omitted). Similarly, where the Legislature has instructed DMV to verify identity of applicants, DMV cannot construct a regulatory regime based on its own policy assessments in order to exclude a class of applicants, even if the decision is based on a cost-benefit analysis. It is the prerogative of the Legislature to determine what is a reasonable burden for an agency to bear.

2. DMV Has Exceeded Its Statutory Authority by Implementing the One Year/Six Month Rule

In defense of the one year/six month rule, Defendants assert that “DMV has plenary power to set reasonable administrative procedures.” Def. Response at 30. Yet the only administrative discretion granted to the Commissioner is sharply limited in scope, and provides in relevant part:

[T]he Commissioner shall appoint agents to act in his behalf with respect to the acceptance of applications and the issuance of licenses and permits prescribed in this article, and he may prescribe the *internal procedures* to be followed by such agents with respect to such matters.

VTL § 508 (emphasis added). The Commissioner’s authority to set procedures is clearly limited to “internal procedures.” *Id.* But the imposition of a the one year/six month rule has effect primarily externally—it precludes licensing for a number of legally present applicants.

The one year/six month rule does not deal with the internal operation of DMV or the processing of applications. Rather, the rule merely relieves an administrative burden on DMV by eliminating a part of its statutorily prescribed duties. In other words, Defendants concede that applicants falling within the rule have no problem establishing identity, age, fitness and SSN ineligibility. Instead, DMV chooses not to provide services to this group based on administrative convenience. By this logic, DMV could, pursuant to VTL § 508, cease licensing duties altogether, because to do so would ease the internal administrative workload.

As explained above, DMV’s administrative convenience argument will not suffice. The Legislature has stated that DMV “shall” license those individuals who meet the four statutory requirements. VTL § 501. DMV cannot abdicate its duty based on a cost-benefit analysis that the Legislature never empowered it to conduct. *Boreali*, 517 N.E.2d at 1355. Currently, under the guise of the one year/six month rule, DMV has unilaterally eliminated a class of residents that it concedes, absent the rule, are otherwise qualified to obtain licenses. Such action is out of harmony with the statute, and is thus invalid.

In addition, the decision to implement the one year/six month rule is a policy decision, and Defendants admit as much. *See* Def. Response at 31 (“DMV believes it is bad

public policy to have valid identification documents such as licenses and permits in circulation whose legitimate owners have no use for them.”). DMV’s policy assessments, however, are irrelevant. The Legislature has spoken on this issue and has commanded licensing pursuant to VTL § 502. The Commissioner’s imposition of the one year/six month rule and refusal to license those who are otherwise eligible is not countenanced by his authority to set internal operating procedures under VTL § 508.

3. The Legal Presence Rule and the One Year/Six Month Rule Are Invalid Because They Were Not Properly Implemented

Even were the Court to determine that DMV possesses the authority to implement the legal presence and one year/six month rules, it must still hold the current rules invalid because DMV has failed to follow the required procedures under the State Administrative Procedure Act (“SAPA”) and the New York Constitution. *See, e.g., 10 Apartment Assocs., Inc. v. N.Y. State Div. of Housing and Community Renewal*, 240 A.D.2d 585, 586, 658 N.Y.S.2d 674, 675 (2d Dep’t 1997) (“Since there is no evidence that the provisions of the State Administrative Procedure Act were followed in promulgating this new rule, the requirement . . . is invalid.”).

a. The Legal Presence Rule is Invalid

On the one hand, DMV admits that it will not license or renew individuals who are not legally present. Def. Response at 27. On the other hand, DMV contends that “[w]ith regard to the identification . . . verification procedures, DMV has been fully authorized by statute to perform [it] and no additional rule-making is required simply to enforce existing statutory and regulatory requirements.” *Id.* at 32. In other words, DMV would like to have its cake and eat it too. Defendants admit to imposing a rule, but argue that by smuggling it into their

“identification verification procedures” they have thereby obviated any need to abide by the rule-making laws of SAPA and the New York Constitution.

Under New York law, “a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers constitutes a rule or regulation”. *Roman Catholic Diocese of Albany v. N.Y. State Dep’t of Health*, 66 N.Y.2d 948, 951, 489 N.E.2d 749, 750 (1985). Here, as Defendants admit, “DMV . . . will not license or renew individuals who do not present documentation consistent with their ‘legal presence’ in the U.S.” Def. Response at 27. This categorical requirement—this “fixed, general principle”—is a rule.

That the Commissioner has been granted authority to verify identity does not negate the fact that the legal presence requirement is a rule within the meaning of the law. Nor does it eliminate the requirement that the rule be promulgated and published as required by law. For example, in *People v. Cull*, 10 N.Y.2d 123, 176 N.E.2d 495 (1961) the Court of Appeals invalidated DMV’s orders that set speed limits—a power clearly given to the agency—because the agency exercised this power without following rule-making procedure. *Cull*, 176 N.E.2d at 498. Similarly, the Commissioner’s explicit authority to verify identity pursuant to VTL § 502 does not eliminate the applicability of SAPA § 202(1) or Article 4 section 8 of the New York Constitution. The legal presence rule must be promulgated if it is to have effect.

b. The One Year/Six Month Rule Is Invalid

DMV argues the one year/six month rule is in fact not a rule, but is merely a “technical guideline” or “interpretive statement.” Def. Response at 38. DMV asserts that the requirement is “illustrative, rather than all inclusive” and is subject to discretionary exception.

Id. But Defendants’ evidence belies these claims. In support of its argument, DMV refers to two documents. The first, is an internal Mailbag directive that articulates the proper procedure where “there is a legitimate reason to process a transaction for a client who has an INS **document** w/less than 6 months of time remaining.” Traschen Aff. Exh. E at 3 (emphasis added). Initially, this sounds promising, though, upon closer examination, it becomes obvious that the exception is not what DMV suggests.⁵

The Mailbag at Exhibit E refers the reader to the “Supervisors Guidelines for INS Exceptions.” *Id.* The Guidelines, in turn, identify “the legitimate reason[s] to process” an application absent documentation showing six months of legal presence. Traschen Aff. Exh. G. The Guidelines make clear that the so-called exceptions, are exceptions only to the list of accepted documentation, not to the substantive requirement that an applicant have at least six months remaining of legal presence that was initially authorized for at least a year. In other words, DMV recognizes that there are immigrants who may be authorized to remain in the U.S. for longer than their documentation represents. DMV also recognizes that its list of INS documentation is not complete. The documents at Exhibits E and G are the “technical guidelines” for administering the one year/six month rule.

In essence, these “technical guidelines” allow for the effective administration of the one year/six month requirement. The guidelines reflect DMV’s efforts to ensure that those who are authorized to enter the United States for a year, and who have six months of legal

⁵ It is also worth noting that DMV does not so much as allege that exceptions are made to the one year requirement. Even taking DMV’s explanation at face value, there is no justification for the one year requirement. If the administrative process requires 6 months, any applicant with 6 months of legal presence remaining should be eligible; the one year component of the rule is unrelated to the explanation.

presence remaining, are able to obtain a license despite any quirks or nuances of federal immigration documentation. Nowhere in the Guidelines does it allow for the issuance of a license to an applicant who does not meet the substantive requirements of the one year/six months rule. The rule is fixed. It is universally applied. As such, it should have been promulgated according to SAPA § 202(1) and Article 4 section 8 of the New York Constitution.

B. DEFENDANTS' SSN VERIFICATION PROJECT, TEMPORARY VISITORS PROGRAM, AND RULE REQUIRING LEGAL PRESENCE ARE UNCONSTITUTIONAL

In addition to running afoul of the statutory and administrative law of the State of New York, Defendants' actions violate the New York and United States Constitutions.

1. The DMV Rules Do Not Comport with Equal Protection

Defendants have misapprehended applicable case law in arguing that the one year/six month and legal presence rules do not run afoul of the Equal Protection provisions of the New York and United States Constitutions.

a. The One Year/Six Month Rule Violates Equal Protection

Defendants rely on numerous cases that are factually inapposite and legally irrelevant their argument that the one year/six month rule does not violate Equal Protection. The controlling case—which Defendants' mention only in passing in a footnote—is *Aliessa v. Novello*, 96 N.Y.2d 418, 754 N.E.2d 1085 (2001). In *Aliessa*, the Court of Appeals extensively discussed and unambiguously determined that discrimination against lawful aliens is subject to strict scrutiny. *Aliessa*, 754 N.E.2d at 1094-97.

Indisputably, DMV has singled out a class of aliens for special treatment. That some lawfully present aliens may obtain licenses does not sanitize the discrimination against the

subgroup. *See Nyquist v. Mauclet*, 432 U.S. 1, 9 (1977) (“The fact that the statute is not an absolute bar does not mean that it does not discriminate against the class.”). Defendants’ attempts to distinguish the holding of *Nyquist* are misguided and ignore considerable United States Supreme Court precedent. Def. Response at 47 n.18. The relevant fact here, is that DMV imposes no restrictions on citizens who will reside in New York for less than a year, or who plan to move in less than six months, yet it does impose such restrictions on aliens. *See, e.g., Graham v. Richardson*, 403 U.S. 365, 372 (1971) (striking down Arizona statute that imposed a durational residency requirement for welfare benefits on aliens, but not on citizens).

Also, Defendants misconstrue *League of United Latin American Citizens v. Bredesen*, 2004 U.S. Dist. LEXIS 26507 (M.D. Tenn. Sep. 28, 2004) (“*LULAC*”) to suggest a contrary rule. In *LULAC*, the Court recognized that under the challenged statute, all legal aliens were able to obtain licenses. *Id.* at *9. In other words, in *LULAC* there was no equivalent to the one year/six month rule. Tennessee merely restricted the duration of the license’s validity based on the duration of authorized lawful presence. *Id.* Thus, the Court determined that there was no burden placed on any group of aliens.⁶ *Id.* Indeed, the District Court explicitly distinguished its case from *Nyquist* on precisely these grounds. *Id.* at *11 n.3 (“In *Nyquist*, some, but not all, aliens were prohibited from obtaining state financial assistance for higher education. Here, all aliens can obtain driving privileges from the state and, thus, ‘aliens’ as a group are not harmed.”).

⁶ Plaintiffs do not endorse the *LULAC* Court’s conclusion that restricting the duration of the licenses does not in and of itself constitute a burden. Rather, the point here is that *LULAC* clearly does not stand for the proposition for which Defendants have cited it.

Defendants offer no explanation of how the one year/six month rule can survive strict scrutiny. In any event, there is none. The only justification offered by DMV for discriminating against these legally present aliens, is administrative convenience. This cannot survive strict scrutiny. Accordingly, this Court must find the one year/six month rule unconstitutional under the New York and United States Constitutions.

b. The Legal Presence Rule Violates Equal Protection

Defendants do not cite any case from New York or from the United States Supreme Court that has held that discrimination against undocumented aliens is subject to rational basis review. The statement primarily relied upon by Defendants is dicta from *Plyler v. Doe*. See Def. Response at 42 (quoting *Plyler v. Doe*, 457 U.S. 202, 219 (1982)). Of course, despite the dicta cited by Defendants, the Court in *Plyler* ultimately applied intermediate scrutiny to the undocumented aliens who were the plaintiffs. *Plyler*, 457 U.S. at 224. The Court of Appeals has recognized as much. See *Aliessa*, 754 N.E.2d at 1094 n.13. And Defendants have not even attempted to meet their burden of showing that the legal presence rule “is reasonably adapted to further a substantial goal of the State.” *Id.* (citation and quotation marks omitted).

Even were the Court to determine that rational basis review applies, the legal presence rule cannot survive. Admittedly, rational basis places a heavy burden on Plaintiffs. But the arbitrary and capricious nature of DMV’s actions condemn the legal presence rule even under the most permissive review.

The legal presence rule must be viewed in context. The legal presence rule is not an act of the legislature. Rather, it is the act of an agency that has been empowered to act within narrow confines, in this instance, to ensure safety on the roads. While DMV has identified

numerous other concerns—such as fighting terrorism and crime—the legal presence rule must be deemed irrational where the primary aim of the agency is limited to the pursuit of safety in administering drivers and motor vehicles in the State of New York. DMV may be right—perhaps DMV issued identification has taken on increased significance in our world. But this does not change the scope of the authority vested in the Commissioner under the Vehicle and Traffic Laws of New York. Whether and how changes in the post 9/11 world should impact the issuance of licenses is a matter for the Legislature. Currently, the Legislature has commanded DMV to issue licenses to applicants who qualify under VTL § 502. Any denial based on a criterion other than identity, age, fitness or SSN ineligibility is, by definition, irrational and arbitrary, and therefore, cannot survive even rational basis review.

2. DMV’s SSN Verification Project Violates Due Process

Plaintiffs seek to enjoin DMV from sending out license suspension notices pursuant to the SSN Verification Project unless DMV: 1) provides adequate notice of the specific grounds for the proposed suspension, and includes notice that a SSN ineligibility letter from SSA is an acceptable alternative to having a SSN, and 2) affords a constitutionally appropriate opportunity to challenge the suspension before the suspension goes into effect.

As part of the SSN Verification Project, DMV has already sent 600,000 Verification notices to residents whose SSN did not match SSA’s database. There is no dispute that these notices did not inform recipients of the alternative documentation option. The notice simply told recipients to correct the information regarding their SSN:

Please contact us . . . and provide us with the information we need to correct your record. You will have to provide your social security number[.]

Traschen Aff. Ex R. The notice then continues:

Please be advised that if you do not contact us within 15 days from the date of this letter, we will have to take additional action, including the possible suspension of you learner permit, diver license or identification document.

Id. (Emphasis in original).

Any resident receiving this notice is left with the impression that they have no means to avoid the suspension of their licenses unless they can provide a valid SSN. An immigrant resident lacking a valid SSN would have no reason to contact DMV in response to this notice as they will not perceive the utility of doing so. Defendants respond to Plaintiffs' petition by claiming that they already give the notice that Plaintiffs seek. But as the foregoing discussion demonstrates, they have not yet given any such notice, nor does the SSN Verification Project's procedures call for them to do so. Given this factual background and the fact that DMV stands ready to initiate the mailing of 300,000 suspension notices, Plaintiffs properly seek relief at this juncture.

Plaintiffs also seek an opportunity to challenge suspensions in a meaningful manner before deprivation of a constitutionally protected property right. While Defendants concede that a license is in fact a property right, they nonetheless assert that no process need be afforded to effect suspensions under the SSN Verification Project. Defendants cite to cases that reiterate the well establish proposition, with which Plaintiffs are in full agreement, that Due Process obliges Defendants to provide a license holder with a meaningful opportunity to be heard. *See* Def. Response at 53.

Defendants misconstrue the factual underpinnings of this case in an effort to evade the conceded requirements of Due Process. DMV asserts:

Here, the issue to be addressed is . . . simple – either the party has a valid SSN or does not, and either he or she can provide a current, valid letter of ineligibility with the required valid, supporting documentation, or he or she cannot.

Id. at 55. But, if the quantity and complexity of the dozens of relevant governing rules, forms, and procedures submitted in this case are any indication, this is not a simple procedure out of which only simple problems or disputes will arise.

Even the seemingly simple scenario describe above—whether a person has a valid SSN that matches the data in the SSA database—may raise questions of fact, as is often the case when dealing with two, or even more, large governmental bureaucracies (in this case, DMV and SSA). As for the SSN Letter of Ineligibility, DMV has already found verification of this letter to be of paramount importance, yet so difficult to do, that it has necessitated the creation of the entire, highly complex bureaucratic process now under review by this Court. These facts negate DMV’s assertion that a hearing is not warranted.

In addition, where immigration documentation comes into play, the complexity of DMV’s assessments are amplified. Again, DMV has required numerous internal directives and allows for discretion of supervisors in determining what documentation is acceptable. *Traschen Aff.* Exh. G. It is absurd to claim that a decision to reject immigration documentation as fraudulent will always, if ever, be a simple matter. Nor is the decision to disqualify someone because, after wading through numerous documents relating to their legal presence, it cannot be determined whether their legal presence is of adequate duration under the one year/six month

rule. One plaintiff, Eris Lumi, was erroneously denied for this very reason. *See* Maer Aff. Exh. J (Amended Complaint ¶¶ 142-47). Defendants dismiss the treatment of Mr. Lumi as “administrative error,” seemingly without taking stock that it has taken heated litigation before the “administrative error” was acknowledged. *Traschen Aff.* ¶ 52. This is precisely Plaintiffs point; given the complexity of the decisions being made, administrative errors will occur, and so, an opportunity must be given to challenge them before an erroneous deprivation of a constitutionally protected property right occurs.

Defendants reference two cases in support of their position. Neither is persuasive. In *Dole v. Passidomo*, 118 A.D.2d 326, 504 N.Y.S.2d 809 (3d Dep’t 1986), the Appellate Division determined that Due Process did not mandate a pre-suspension evidentiary, adversarial hearing for those whose liability insurance is canceled and whose vehicle registrations are then suspended, concluding that the single issue under review—the cancellation of insurance—consists of a relatively simple determination that can be made on documentary evidence.⁷ *Dole*, 118 A.D.2d at 330-31. As explained above, unlike the binary determination of whether a driver has insurance, the present circumstances raise a host of complexities and alternatives requiring an abundance of documentation.

In *Dixon v. Love*, 431 U.S. 105 (1977), the Supreme Court upheld the suspension of a driver license, in the absence of an administrative hearing, where the driver had been repeatedly convicted of various traffic offenses. But in *Dixon*, the motorist had already been given a full and fair hearing in traffic court on the underlying traffic offenses. It is not analogous

⁷ Defendants’ citation to this case is misleading, as the case concerned the suspension of a vehicle registration, not a driver license. The denial of an automobile registration does not impose the same hardship as the denial of a driver license. *See Grinberg v. Safir*, 181 Misc. 2d 444, 448 (Sup. Ct. 1999).

to this matter, where applicants have done no wrong, and have had no opportunity whatsoever for a hearing.

Finally, Defendants contend that Plaintiffs' claims are unripe. This argument is unavailing for two reasons. First, as a factual matter, at least one plaintiff has already been directly harmed by the SSN Verification Project in that his license has since expired, and he has not been able to renew it as a result of Defendants' policies. *See* Maer Aff. Exh. J (Amended Complaint ¶ 59). Clearly, this plaintiff has suffered a concrete harm. Accordingly, Defendants' reliance on case law that dismisses "speculative harm" or harm "contingent upon events which may not come to pass" is inapposite. *See generally Ritterband v. Axelrod*, 149 Misc. 2d 135, 562 N.Y.S.2d 605 (Sup. Ct. 1990); *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 275 A.D. 2d 145, 712 N.Y.S.2d 687 (3d Dep't 2000).

Defendants also claim that they have not finally decided how they will implement the actual suspensions under the Project, and thus, assert that no order is appropriate at this time.⁸ But the SSN Verification Project—by its terms—calls for the issuance of the suspension letters to all residents who did not respond to the initial Verification Letter. *See* Traschen Aff. Exh. F. Thus, the harm is not speculative—it is a question of when, not if. In fact, the cases relied upon by Defendants support the grant of relief. In *Saratoga County Chamber of Commerce*, the court held that "[w]here the harm sought to be enjoined is contingent upon events which may not come to pass, the claim to enjoin the purported hazard is non justiciable as wholly speculative[.]" *Saratoga*, 275 A.D. 2d at 158. But the court went on to explain, that "where the practical

⁸ In conversation with Plaintiffs' counsel regarding this suspension notice, Defendants' counsel stated that no administrative challenge to the suspension would be provided and DMV was not legally obliged to provide notice in it of the alternative documentation requirement.

likelihood is that the future contingency will occur, the action may proceed[.]” *Id.* Accordingly, Plaintiffs claims are justiciable.

POINT II

A PRELIMINARY INJUNCTION IS APPROPRIATE BECAUSE PLAINTIFFS WILL OTHERWISE SUFFER IRREPARABLE INJURY AND ARE FAVORED BY A BALANCE OF THE EQUITIES

On this motion for a preliminary injunction, Plaintiffs need only demonstrate “a potential that irreparable injury will result if the preliminary injunction is not awarded[.]” *Brad H. v. City of New York*, 185 Misc. 2d 420, 430, 712 N.Y.S. 2d 224, 244 (Sup Ct. 2000). *See also Chernoff Diamond & Co. v. Fitzmaurice, Inc.*, 234 A.D.2d 200, 201, 651 N.Y.S.2d 504 (1st Dep’t 1996). Plaintiffs have carried this burden.

For example, Plaintiffs John Doe V through IX are poised to share the fate of over 250,000 licensees awaiting DMV suspension orders to be issued in the next stage of its SSN Verification Project. There is every certainty and no equivocation that suspensions of licenses have already commenced and will continue, despite Defendants’ last-minute posturing that “the manner in which any suspensions . . . will take place has not been finally determined.” *Traschen Aff.* at ¶ 46. The loss of their licenses will be dire. John Doe VI, for example, is a delivery truck driver; the loss of income will irreparably harm him and his dependents. *Maer Aff. Exh. J* (Amended Complaint ¶¶ 114-17).

Plaintiff McIntyre has stated by affidavit that he depends upon his ability to drive as a part of his employment. *Maer Aff. Exh. J* (Amended Complaint ¶¶ 67). Moreover, Mr. McIntyre relies on his ability to drive to transport his daughter to medical treatment and evaluations for her epileptic condition. *Id.* at ¶ 66. Surely, DMV’s revocation of Mr. McIntyre’s

method of providing financial support and health services to his family—which is precisely what has occurred here—is more than the mere inconvenience that Defendants callously suggest.

Defendants miscast *Grinberg v. Safir*, 181 Misc. 2d 444, 448 (Sup. Ct. 1999) as standing for the proposition that ‘inconvenience’ and not an irreparable injury exists upon the loss of the ability to drive. In *Grinberg*, the court addressed a situation where a person’s car had been seized under civil forfeiture law as an instrumentality of a crime. The plaintiff in *Grinberg* had not been deprived of his right to drive. Rather, the state seized his car. In contrast, DMV here proposes to strip absolutely the right to drive from Plaintiffs, who are not accused of any crime.

Defendants’ surmise that “outside of the five boroughs of New York City, many ways of getting to work, schooling, religious services, and healthcare, apart from driving one’s own vehicle, do exist.” Def. Response at 64. Defendants casually ignore the realities that define our modern existence. They draw on baseless and sweeping assumptions that Plaintiffs have the means and ease with which to beg favors or to remunerate third parties, friends, or co-workers. *Id.* These casuistic arguments do not alleviate the real and legitimate needs of the numerous New York residents who have been traumatized by DMV’s actions.

Clearly, the balance of equities weighs heavily in favor of Plaintiffs. Plaintiffs seek the Court’s intervention to protect fundamental constitutional and statutory rights and face present and future irreparable deprivation of these rights if preliminary relief is denied.

“Strongly tipping the scales in favor of the preliminary injunction is the necessity of preserving the plaintiff’s constitutional rights[.]” *Lily Pond Lane Corp. v. Technicolor, Inc.*, 98 Misc. 2d 853, 854, 414 N.Y.S.2d 596, 597 (Sup. Ct. 1979). *See id.* (“Plaintiff has established that failure

to preserve the status quo would result in deprivation of its constitutional right to due process. This alone demonstrates irreparable harm.”).

In contrast, the administrative strain placed on DMV pales in comparison. In fact, the State and its residents would stand to accrue substantial benefits in the form of attaining its goals of increasing or improving public safety on the roads and streets of this state, reducing the fear of non-licensed motorists fleeing from the scene of an accident, maintaining viability and accessibility to automobile insurance coverage for all drivers, and providing that all motorists are properly evaluated regularly for fitness in the operation of a motor vehicle in this state.

POINT III
THE COURT MUST DENY
DEFENDANTS' MOTION TO DISMISS

Plaintiffs concede that their claims against Governor Pataki should be dismissed. The remaining claims, however, should proceed.

On a motion to dismiss a complaint for failure to state a cause of action, the complaint must be liberally construed in the light most favorable to Plaintiffs. *See* CPLR 3026; *Leon v. Martinez*, 84 N.Y.2d 83, 638 N.E.2d 511 (1994). The court must accept the facts alleged in the complaint, and reasonable inferences therefrom as true, and determine whether the facts as alleged fit within any cognizable legal theory. *Leon*, 638 N.E.2d at 513. Furthermore, the court may consider affidavits submitted by the Plaintiffs to remedy any defects in the complaint.

The question on a motion to dismiss for failure to state a cause of action is “not whether an issue of fact exists warranting trial, or, even whether there is any evidentiary support for the complaint, but whether it can be determined, from within the four corners of the complaint, that plaintiffs have stated any cognizable cause of action.” *Glassman v Catli*, 111 A.D.2d 744, 745, 489 N.Y.S.2d 777, 778 (2d Dep’t 1985).

CONCLUSION

For the foregoing reasons, Plaintiffs motion for preliminary relief should be granted, and Defendants' motion to dismiss should be denied.

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DATED: March 24, 2005