

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE**

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**Sr. M. Regina Fahy, RSM,  
Haliyantu Theo Amani, Sarra Ali,  
Eva Castillo-Turgeon, and  
Annagreta Swanson,  
Plaintiffs**

**v.**

**Commissioner, New Hampshire Department  
of Safety, In his Official Capacity,  
Defendant**

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**Civil Action No. \_\_\_\_\_**

**MEMORANDUM OF LAW SUPPORTING PLAINTIFFS’  
MOTION FOR PRELIMINARY AND PERMANENT INJUNCTION**

Plaintiffs are immigrants permanently residing in New Hampshire. They are legal permanent residents, a refugee and an asylee. The United States is their new home, and they are here indefinitely and lawfully. Most have been residents and licensed drivers in New Hampshire for over a decade.

Two rules recently adopted by the New Hampshire Department of Safety, Division of Motor Vehicles (“DMV”) single plaintiffs out for disparate, and harsher, treatment in the obtaining and renewing of their New Hampshire drivers’ licenses. Now, solely because of their alienage, they are required to travel to the central DMV office in Concord to apply for, or even simply renew, their driver’s licenses. By contrast, residents of New Hampshire who are U.S. citizens may apply for or renew their driver’s licenses at any DMV substation, or in person or by mail at the Concord main office. These new rules (“the DMV Non-Citizen Rules”) discriminate against plaintiffs in other ways as well.

The DMV Non-Citizen Rules violate the guarantees, proclaimed in the Fourteenth Amendment to the Constitution of the United States, that every person is entitled to the equal protection of the laws. They also create an unconstitutional burden on plaintiffs' constitutional right to travel. In addition, related but unannounced and uncodified policies adopted by the DMV violate plaintiffs' right to due process.

Plaintiffs will be irreparably harmed unless enforcement of these discriminatory rules is enjoined. The loss of a constitutionally protected right, by definition, cannot be remedied by money damages. This case illustrates particularly well why that is true. The humiliation of being packed off to apply for one's driver's license in a segregated non-citizens' line in Concord because "you are not one of us," not to mention the hardship and upheaval that this policy creates for non-citizens of limited means who often cannot obtain transportation, daycare or time off from work, will never be compensated with a check. A "pilot program" instituted by the DMV, allowing non-citizens to renew their drivers' licenses at DMV substations, remedies only one of the DMV's many discriminatory policies, and provides no guarantee that the remedy will be permanent. The public interest, and indeed, the belief in a government which promises equal protection of the laws, an uninhibited right of travel, and the due process of law to all persons, demands that the DMV be enjoined from enforcing the DMV Non-Citizen Rules and the related, uncodified policies.

### **FACTS**

Since at least September 1, 2001, the DMV has subjected those residents of New Hampshire who are not U.S. citizens with unwritten and discriminatory policies and practices regarding the obtaining and renewing of drivers' licenses. The DMV did eventually codify most, but not all, of these policies as Saf-C 1002.06 and 1003.04, (the "Non-Citizen Rules") effective June 24, 2004. Copies of the DMV Non-Citizen Rules are included in Exhibit 1 to Affidavit of Christine

Wellington, Esquire (“Wellington Affidavit”). The Non-Citizen Rules, and certain related, uncodified polices, impose the following discriminatory treatment on plaintiffs:

**Travel to Concord:** A non-U.S. citizen applying for an original or renewal driver’s license may do so only at DMV headquarters at 23 Hazen Drive in Concord. Saf-C 1002.06(b). In contrast, a United States citizen may submit an original or renewal application in person to a substation, or in person or by mail to Concord. Saf-C 1002.01(b). A DMV “pilot program,” effective January 20, 2005, allows most non-citizens to renew their licenses at DMV substations, but non-citizens must still apply for their original licenses in Concord. Plaintiffs are not aware of any formal action to repeal or amend Saf-C 1002.06(b).

**More Frequent Renewals:** RSA 263:10 requires that “all [drivers’] licenses shall expire on the fifth anniversary of the license holder’s date of birth following the date of issuance.” However, pursuant to an uncodified, unannounced policy, plaintiffs have been issued drivers’ licenses with expiration terms ranging from a few months to four years. This is the case even though each plaintiff’s immigration status is permanent, not subject to visa or employment status expiration. Cf. Saf-C 1003.04(g). RSA 263:39-a provides for shorter license terms for non-citizens temporarily residing in New Hampshire, but since plaintiffs are not temporary residents, this statute does not apply to them.

**Differences in Temporary License:** A U.S. citizen coming to New Hampshire from another state receives a standard photo identification which is valid for six months. Saf-C 1003.03(c). By contrast, non-citizens applying for an original drivers’ license receive a flimsy, handwritten paper with no photograph, which is valid only for 45 days. *See* Exhibit 1 to the Affidavit of H. Theo Amani (“Amani Affidavit”); Exhibits 1 and 3 to the Affidavit of Sarra Ali (“Ali Affidavit”); Exhibit 1 to the Affidavit of Annagreta Swanson (“Swanson Affidavit”); Saf-C 1003.04(e). Although Saf-C 1003.04(e) purports to apply only to original drivers’ licenses, the DMV has been extending the 45-day temporary license procedure to renewals, pursuant to an uncodified and unannounced policy.

**Onerous Proof of Residency Requirements:** A non-citizen applicant for an original driver’s license must prove his or her New Hampshire residency. Saf-C 1002.06 (a)(3)(b). By uncodified and unannounced policy, the DMV has begun requiring proof of residency even from non-citizens who are merely renewing their drivers’ licenses. Fahy Affidavit at ¶10; Amani Affidavit at ¶11; Ali Affidavit at ¶8. There is no uniform set of acceptable documents to prove residency, and enforcement of the residency requirement has been inconsistent. Compare Amani Affidavit at ¶11; Ali Affidavit at ¶8 and Affidavit of Eva Castillo-Turgeon (“Castillo-Turgeon Affidavit”) at ¶7. By contrast, a U.S. citizen is not required to prove residency unless his application for driver’s license is rejected because it “does not bear a permanent address within the State of New Hampshire.” Saf-C 1002.08.

**Unequal Road Test Standards:** All non-citizens, even those with valid drivers’ licenses from other states, must re-take a road skills examination. Saf-C 1003.04(a)(3). U.S. citizens from another state need not re-take the road skills examination except in unusual circumstances. Saf-C 1003.03(a)(2).

**Onerous Verification Requirements:** Saf-C 1003.04(c) states: “In the event a non-United States citizen does not hold a driver license from his/her home country, he/she shall provide verification from his/her home country that he/she: (1) Has never held a driver license; or (2) Has held a driver license in the United States.” This regulation requires that a non-citizen who has not yet been issued a drivers’ license in the United States prove the negative, that he has never held a driver license. It also potentially requires documentation that is non-existent or impossible to obtain, depending on the political conditions of the applicant’s home country.

### **Purpose of the DMV Non-Citizen Rules and Policies**

The most striking thing about the DMV Non-Citizen Rules, and the related policies, is what they were *not* enacted to do. They were not enacted to further any compelling state interest. Notably, the policies and practices which these rules partially codified were in place before the events of September 11, 2001 focused national attention on security issues. At the public hearings held before the Joint Legislative Committee on Administrative Rules (“JLCAR”), DMV Legal Counsel Sheri Kelloway (“Kelloway”) testified that the DMV Non-Citizen Rules simply codified policies and practices which had been in place for “quite a few years.” Transcript of JLCAR Proceedings, 5/21/04 at 56, Exhibit 2 to Wellington Affidavit. DMV Director Virginia Beecher explained even more pointedly that the unwritten policy, now codified by the DMV Non-Citizen Rules, predated September 11, 2001: “I think it’s very important that this committee hear this, prior to September 11, we had moved the non-U.S. citizen function into the Concord headquarters.” *Id.* at 92. *See also id.* at 94.

Director Beecher’s testimony before JLCAR revealed that the DMV Non-Citizen Rules, particularly the requirement that non-citizens obtain and renew their drivers’ licenses only at the main DMV office in Concord, were motivated, not by national security, but by something far more mundane. The simple reason for the rules was that non-citizens with limited fluency in English created an inconvenience at DMV substations such as Manchester, where “we have 60 to 80 people at this juncture coming in a day, non-U.S. citizens, to get licenses.” *Id.* at 93. Director Beecher offered the following picture of a DMV substation:

Okay, let me give you an example. You go in to get your driver license, somebody in front of you really speaks [no] English; they had a difficult time understanding people. Lines of people backed up. So we were receiving comment cards from U.S. citizens complaining that they were waiting for three and four hours to get a driver license, or they'd come back another day. Well, when you have a large volume of people coming in, and you have two employees who are struggling to understand what someone is saying, then, obviously, it backs things up.

*Id.* at 95. *See also* Testimony of Director Beecher before JLCAR, 6/4/04 at 42, Exhibit 3 to Wellington Affidavit.

Director Beecher advised JLCAR that “[m]ost of our satellite locations are minimally staffed,” Exhibit 2 to Wellington Affidavit at 92, and that “[u]nless this legislative body can produce 15 additional employees for me, there is no way that I can accommodate these people [non-citizens] other places.” *Id.* at 93. DMV Legal Counsel Kelloway also noted that:

at the substations, they're not going to be trained in some of the documents that even I learned about in doing these rules. These I-94 documents, I-20 documents. Your average counter clerk in Twin Mountain is not going to have that basis of understanding what's required .... *Id.* at 99.

For these reasons, and because the DMV claims to have three bilingual employees in Concord, Director Beecher concluded that “Concord was the logical place for me to move the [non-citizen] function.” *Id.* at 93. DMV Legal Counsel Kelloway suggested that the real issue was, “why don't you take people that you don't understand and have them come to Concord. And if they can understand English, they can go to the substations.” *Id.* at 99. She acknowledged that this solution “smacks of discrimination” and “would be very problematic legally.” *Id.* The proxy that the DMV settled on was “to try to accommodate as many of the non-U.S. citizens as we can. And that was to come to Concord.” *Id.*

JLCAR held hearings on the proposed rules on May 21 and June 4, 2004. Attorney Michael Morrell, counsel for JLCAR, expressed grave concerns at these hearings about the constitutionality, as “a matter of equal protection,” of requiring non-citizens to apply for original and renewal driver licenses only in Concord, while citizens “could go to their local DMV branch

office.” Transcript of JLCAR proceedings, 5/21/04 at 69, Exhibit 2 to Wellington Affidavit. *See also* JLCAR Testimony of Michael Morrell, 6/4/04 at 51, Exhibit 3 to Wellington Affidavit. (“I strongly feel, though, that there is a constitutional violation here.”) When the JLCAR deadlocked on the rules at its June 4, 2004 meeting, they were tabled until June 18, 2004. Exhibit 3 to Wellington Affidavit at 70. At the June 18, 2004 JLCAR meeting, no vote was taken to remove the rules from the table, and so the rules became effective by operation of law. *See* Transcript of JLCAR proceedings, 6/18/04 at 3-4, Exhibit 4 to Wellington Affidavit.

In its zeal to shorten the lines at its substations, the DMV initially imposed the “non-citizen” rules on New Hampshire residents of Puerto Rican heritage. Thus, these individuals, who are of course United States citizens by birth, were required to endure the hardship of traveling to Concord in order to obtain or renew their drivers’ licenses, pursuant to a rule entitled “Requirements for Non-United States Citizens.” The DMV relented only after community groups and plaintiffs’ counsel brought significant pressure to bear. The DMV now accommodates persons from Puerto Rico, regardless of their language proficiency, at all of its substations. *See* DMV Policy Statement, 9/21/04, Exhibit 5 to Wellington Affidavit.

### **The Hardship That The DMV Non-Citizen Rules Have on Plaintiffs**

The plaintiffs have suffered numerous hardships because of the DMV’s discriminatory regulations and practices. Plaintiffs must contend with many inconsistencies and uncertainties when conducting business with the DMV. *See* Fahy Affidavit at ¶¶8, 10, 12; Amani Affidavit at ¶¶11, 15, 19; Ali Affidavit at ¶¶8-10, 15, 18.

Each one of them has had to make more than one trip to the DMV to secure or renew a license. *See* Fahy Affidavit at ¶¶8-11; Amani Affidavit at ¶¶8-11; Ali Affidavit at ¶¶ 13, 15, 18; Castillo-Turgeon Affidavit at ¶¶6-7; Swanson Affidavit at ¶¶8-10. Each has been required to travel to the Concord DMV office and stand in a segregated line. *See* Fahy Affidavit at ¶¶9-11;

Amani Affidavit at ¶¶9-10; Ali Affidavit at ¶¶11, 15, 18; Castillo-Turgeon Affidavit at ¶7; Swanson Affidavit at ¶¶10-12.

Four plaintiffs have been issued yellow, handwritten forty-five day temporary licenses. *See* Fahy Affidavit at ¶14; Amani Affidavit at ¶¶12,16; Ali Affidavit at ¶¶13,16,18; Swanson Affidavit at ¶14. Two plaintiffs were informed by DMV personnel that the DMV was conducting investigations when they inquired about the reason for the yellow temporary license. *See* Amani Affidavit at ¶13; Swanson Affidavit at ¶14. Two plaintiffs have experienced embarrassment and humiliation when the yellow temporary license was rejected as a form of identification. *See* Amani Affidavit at ¶16; Ali Affidavit at ¶20. One plaintiff refused to drive during the time she had the yellow temporary license because she found it so humiliating. *See* Fahy Affidavit at ¶15.

Four plaintiffs have been issued licenses with less than five-year terms, and two have been required to renew their licenses yearly with each renewal costing \$50.00. *See* Fahy Affidavit at ¶¶16-17; Amani Affidavit at ¶¶14-16, 18; Ali Affidavit at ¶¶13-15, 17, 19; Castillo-Turgeon Affidavit at ¶8. Three plaintiffs have been required to show proof of residency at license application and renewal far beyond what is required of U.S. citizens. *See* Fahy Affidavit at ¶10; Amani Affidavit at ¶¶11-12, 15; Ali Affidavit at ¶¶8-10, 18. Three plaintiffs have blue bars below their license pictures yet none of them have duplicate licenses (which is the official reason for a license with a blue bar) and they worry that the blue bar may have another meaning connected to their immigration status. *See* Amani Affidavit at ¶18; Ali Affidavit at ¶¶17, 19; Castillo-Turgeon Affidavit at ¶8.

Most importantly, plaintiffs have suffered because the DMV has subjected them to disparate treatment solely because they are not U.S. citizens. This treatment has triggered feelings of humiliation, discouragement, disappointment and anger. *See* Fahy Affidavit at ¶¶19-21; Amani

Affidavit at ¶19; Ali Affidavit at ¶¶21-22; Castillo-Turgeon Affidavit at ¶¶9-10; Swanson Affidavit at ¶¶14, 16,-17.

### **The DMV's New "Pilot Program"**

In response to the pressure brought by community groups and plaintiffs' counsel, the DMV, effective January 20, 2005 has instituted a new "pilot program" allowing certain non-citizens to renew their drivers' licenses at DMV substations. *See* DMV Memorandum dated January 19, 2005, Exhibit 6 to Wellington Affidavit. Non-citizens seeking to obtain their initial New Hampshire drivers' license must still travel to Concord. Non-citizens who last renewed their drivers' licenses prior to September 1, 2001 must travel to Concord prior to undertaking future renewals at DMV substations. *Id.* The policy does not indicate whether the "pilot program" will be temporary or permanent, and plaintiffs are aware of no effort to effect formal or permanent changes to the Non-Citizen Rules. The "pilot program" does not address other indignities and hardships imposed upon plaintiffs by the DMV such as more frequent license renewals, ongoing requirements to establish proof of residency, and the issuance of the 45-day temporary licenses. *See* Fahy Affidavit at ¶¶10, 14, 16; Amani Affidavit at ¶¶11, 14-15, Ali Affidavit at ¶¶15-19; Castillo-Turgeon Affidavit at ¶8.

## **ARGUMENT**

### **I. PLAINTIFFS PREVAIL ON THE MERITS**

#### **A. The Non-Citizen Rules Violate the Guarantee of Equal Protection Contained in the United States Constitution**

Since plaintiffs seek a permanent as well as a preliminary injunction, they must demonstrate actual success, and not merely a likelihood of success, on the merits. *United States v. Mass. Water Resources Authority*, 256 F.3d 36, 51 n.15 (1<sup>st</sup> Cir. 2001); *Planned Parenthood of Northern New England v. Heed*, 2003 DNH 222, 296 F.Supp. 2d 59, 68 (D. N.H. 2003). This standard is met. The DMV Non-Citizen Rules are unconstitutional, since they constitute

invidious and unjustified discrimination against aliens. The Fourteenth Amendment to the United States Constitution states that “No state shall ... deny to any person within its jurisdiction the equal protection of the laws.” Resident aliens are entitled to the benefit of the equal protection clause. *Graham v. Richardson*, 403 U.S. 365 (1971); *Nyquist v. Mauclet*, 432 U.S. 1 (1977).

State laws, regulations and policies that discriminate based on alienage are inherently suspect and subject to strict judicial scrutiny. *Graham v. Richardson*, *supra* at 371; *see also Meloon v. Helgemoe*, 436 F.Supp. 528, 530 (D. N.H. 1977); *Examining Board v. Flores De Otero*, 426 U.S. 572, 601-602 (1976). The United States Supreme Court, in concluding that classification on the basis of mental handicap is subject only to rational basis review, noted in contrast that classification by alienage is:

so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy -- a view that those in the burdened class are not as worthy or deserving as others. For these reasons and because such discrimination is unlikely to be soon rectified by legislative means, these laws are subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest.

*City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985).

The DMV “bears a heavy burden of justification” to survive this strict scrutiny, and demonstrate that rules and policies which, on their face, discriminate against non-citizens do not deny them the equal protection of the laws. *In re Griffiths*, 413 U.S. 717, 721 (1973), *quoting McLaughlin v. Florida*, 379 U.S. 184, 196 (1964). The United States Supreme Court has declared that “Only rarely are statutes sustained in the face of strict scrutiny.... strict-scrutiny review is ‘strict’ in theory but usually ‘fatal’ in fact.” *Bernal v. Fainter*, 467 U.S. 216, 219 n. 6 (1984). To survive this highest level of scrutiny, the DMV must demonstrate that its purpose or interest in enacting the Non-Citizen Rules was compelling, not simply that there was a “rational basis” for doing so. *Graham v. Richardson*, 403 U.S. at 375; *Meloon v. Helgemoe*, 436 F.Supp.

at 530.<sup>1</sup> The DMV must also demonstrate that the Rule is “the least restrictive means available” in order to accomplish the compelling state objective. *Bernal, supra; Meloan, supra.*

Reducing the lines at DMV substations is not a compelling or overriding state interest that justifies singling out non-citizens for different, and harsher, treatment. Although the plight of the harried and late-working DMV employees described by Director Beecher is unfortunate, *see* Transcript of JLCAR proceedings, 5/21/04 at 92, Exhibit 2 to Wellington Affidavit, administrative convenience is not compelling enough to satisfy strict scrutiny. *Wessmann v. Gittens*, 160 F.3d 790, 799 n. 5 (1<sup>st</sup> Cir. 1998). “When we enter the realm of ‘strict judicial scrutiny,’ there can be no doubt that ‘administrative convenience’ is not a shibboleth, the mere recitation of which dictates constitutionality.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 508 (1989), *quoting Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (plurality opinion).

Similarly, the DMV’s complaint that it does not have the resources, the personnel or the training to accommodate non-citizens at substations, Transcript of JLCAR proceedings, 5/21/04 at 93, 99, does not withstand strict scrutiny. “[A] concern for fiscal integrity” is not a compelling justification for invidious discrimination. *Graham v. Richardson, supra* at 374-375; *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969). In any event, in the face of pressure from plaintiffs’ counsel and others, the DMV now allows persons of Puerto Rican heritage to apply for original and renewal licenses at its substations, regardless of their language proficiency. *See* Exhibit 5 to Wellington Affidavit. Further, the DMV’s new “pilot program” allows most non-citizens to renew at substations, again without regard to language proficiency. Exhibit 6 to Wellington Affidavit. Thus, it appears reasonably possible for the DMV to make accommodation at the substations, despite its protestation of budget constraints.

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<sup>1</sup> “The state interest required has been characterized as ‘overriding,’ ... ‘compelling’ ... ‘important’ ... or ‘substantial,’ .... We attribute no particular significance to these variations in diction.” *In re Griffiths*, 413 U.S. at 722, n. 9 (citations omitted).

The DMV's defense that "low level" discrimination is acceptable, as long as the DMV did not altogether deny drivers' licenses to aliens, Transcript of JLCAR proceedings, 5/21/04 at 89, Exhibit 2 to Wellington Affidavit, does not pass constitutional muster. JLCAR counsel, Michael Morrell, correctly pointed out that "[e]qual protection is not a matter of whether somebody is totally barred from something." Transcript of JLCAR proceedings, 6/04/04 at 51, Exhibit 3 to Wellington Affidavit. As Attorney Morrell pointed out, the Arizona statute found unconstitutional in *Graham v. Richardson*, *supra*, did not totally deny welfare benefits to aliens. It simply conditioned eligibility on a residency duration. 403 U.S. at 367. *Graham* also considered a Pennsylvania statute which did deny outright certain forms of public assistance to aliens. *Id.* at 368-369. *Graham* treated both Pennsylvania's outright bar and Arizona's imposition of conditions as equally discriminatory, and equally violative of equal protection. The DMV can find no solace in its claim that it is "only" burdening, and not totally denying, the ability of non-citizens to obtain a driver's license.

Similarly, terming a driver's license to be a privilege, not a right, does not further the DMV's justification, since the United States Supreme Court has, for 40 years, "rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Sherbert v. Verner*, 374 U.S. 398, 404 (1963), *cited in Graham v. Richardson*, 403 U.S. at 374; *Bell v. Burson*, 402 U.S. 535, 539 (1971)(discrediting "right" vs. "privilege" distinction in the context of drivers' licenses). The invidious discrimination represented by the DMV Non-Citizen Rules simply cannot withstand any scrutiny, let alone strict scrutiny. They violate constitutional guarantees of equal protection and thus cannot be enforced.

**B. The DMV's Newly-Found "Justifications" Do Not Save the Non-Citizen Rules From an Equal Protection Challenge**

Since the administrative convenience justification given by the DMV to JLCAR for the Non-Citizen Rules is so obviously doomed to fail the strict scrutiny triggered by plaintiffs' equal protection challenge, the Court is likely to see a different justification in defense of those Rules, one that includes the phrases "public safety" and "prevention of identity theft." The Court should not be taken in by these lately manufactured "justifications" for the Non-Citizen Rules.

Had the DMV truly been motivated by a desire to protect the public safety and prevent document fraud, it would have made its motivation known to the JLCAR, the body charged with acting on the proposed rules. However, the DMV previously specifically disavowed security as a justification for the Non-Citizen Rules. Exhibit 2 to Wellington Affidavit at 92, 94. The Non-Citizen Rules were advocated to the JLCAR simply as a matter of administrative convenience, to prevent long lines from forming at DMV substations behind patrons of limited English proficiency. *Id.* Any invocation now of public safety to explain the Non-Citizen Rules would be simply an after-the-fact pretext, which should not be relied on by the Court.

If the DMV were truly motivated by public safety, then it would apply its standards for road tests, residency requirements and the like equally to both citizens and non-citizens. However, as demonstrated below, most of the DMV's Non-Citizen Rules apparently have no purpose other than to treat plaintiffs differently because they are not U.S. citizens. Even if the DMV is allowed to rely on public safety as a new-found justification, it must still establish compelling reasons for the unequal treatment of non-citizens, and it must achieve any public safety "objective" by the least restrictive means possible. *In re Griffiths*, 413 U.S. 717, 722, 727 (1973); *Meloon v. Helgemoe*, 436 F.Supp. 528, 530 (D. N.H. 1977). As demonstrated below, the DMV cannot seriously contend that the following Rules (and related, uncodified policies) are the most restrictive means possible to achieve even the newfound "justification" of public safety:

**1. Processing Only In Concord, Saf-C 1002.06(b):** The DMV appears to be concerned with the integrity of license documentation, by claiming that non-citizens would present a variety of exotic foreign documents, which can be inspected and verified only by specially trained personnel at the DMV headquarters in Concord. This justification breaks down completely in the case of renewals, since presumably the verification is complete when the non-citizen obtains his or her initial license. The DMV appears to have acknowledged this reality when it enacted a “pilot program” allowing most renewals to take place at substations.

However, even first-time applicants need not all be required to apply in Concord. For example, many first-time applicants will present drivers’ licenses from other states. There is no reason why the DMV cannot complete the necessary verification based on these prior licenses, as it does in the case of U.S. citizens. Other first-time non-citizen applicants will present routine documents issued by the U.S. Citizenship and Immigration Services (“USCIS”), such as a legal permanent resident (“green”) card, an I-94 card or a passport stamp. Saf-C 1002.06(a)(3) specifies a very short list of documents acceptable for the purpose of identity verification for permanent legal residents. DMV substation personnel should be trained to verify or reject a finite list of documents. Requiring all non-citizens to apply for their original drivers’ licenses in Concord is simply not sufficiently narrowly tailored to satisfy the strict scrutiny triggered by plaintiffs’ equal protection challenge.

**2. More Frequent Renewals:** Four plaintiffs have been issued drivers’ licenses with terms ranging from a few months to four years. *See* Fahy Affidavit at ¶16; Amani Affidavit at ¶¶14-16; Ali Affidavit at ¶¶14-19; Castillo-Turgeon Affidavit at ¶8. By contrast, the drivers’ licenses of U.S. citizens are valid for five years, per RSA 263:10. This disparate treatment cannot possibly be supported by any interest, let alone a compelling interest, because it is contrary to the DMV’s own regulations. Saf-C 1003.04(g) states that the driver’s license of non-citizens shall

be valid for up to five years, or until the expiration of the applicant's visa, employment status or other documentation. Plaintiffs are permanent legal residents, an asylee and a refugee. They are not visa holders, nor are they subject to the expiration of any employment status or immigration form. According to Saf-C 1003.04(g), their drivers' license should be valid for five years. RSA 263:39-a provides for shorter license terms for non-citizens temporarily residing in New Hampshire. However, since plaintiffs are not temporary residents, this statute does not apply to them. There is no identifiable purpose for the DMV's uncodified and unannounced policy of requiring renewals on an annual, or even more frequent basis.

**3. 45-Day Temporary License, Saf-C 1003.04(e):** The purpose of the six-month temporary license issued to U.S. citizens is to allow the DMV time to ascertain that the surrendered license is genuine, was actually issued to the applicant, and is not subject to suspension or revocation, and to ascertain that the applicant has no pending actions. *See* Saf-C 1003.03(b) and (d). The purpose of the flimsy 45-day temporary license issued to non-citizens is to allow the DMV time to ascertain that any surrendered license is not under suspension or revocation, and that the applicant has no pending actions. *See* Saf-C 1003.04(e) and (f). Since the purpose of both types of temporary licenses are nearly identical, there is no legitimate reason, let alone a compelling reason, to issue citizens a standard photo identification, of six months' duration, while at the same time issuing to non-citizens a handwritten piece of paper, valid for only 45 days, that will not even allow its bearer to board an airplane or cash a check. *See* Ali Affidavit at ¶20, Amani Affidavit at ¶16.

**4. Onerous Residency Requirements, Saf-C 1002.06(a):** The DMV may have an interest in establishing that *all* applicants for drivers' licenses are bona fide New Hampshire residents. However, it has no legitimate, let alone compelling, interest in applying more difficult standards of proof to non-citizens. Yet this is precisely the DMV's practice. A U.S. citizen is

not required to prove residency unless his application for his original driver's license is rejected because it does not list a New Hampshire address. Saf-C 1002.08. Once the citizen receives his original driver's license, no further proof of residency is required. By contrast, every non-citizen applicant for an original driver's license must prove New Hampshire residency, regardless of the address listed on the application. Saf-C 1002.06 (a)(3)(b). Further, pursuant to an unannounced and uncodified policy, the DMV requires proof of residency even from non-citizens who are merely renewing their licenses. See Fahy Affidavit at ¶10; Amani Affidavit at ¶11; Ali Affidavit at ¶18. There is no legitimate reason, let alone a compelling state interest, justifying this double standard.

**5. Unequal Road Test Standards Saf-C 1003.04(a)(3):** Obviously, the DMV has an interest in maintaining an acceptable level of driving competence for *all* licensed drivers. However, this interest does not justify applying different standards to two original license applicants with valid licenses from other states, one a citizen and one a non-citizen. Yet, the non-citizen must take a road skills examination, Saf-C 1003.04(a)(3), while the U.S. citizen need not take the road skills examination except in unusual circumstances. Saf-C 1003.03(a)(2). If the DMV has a compelling interest in requiring road tests, then it must impose those requirements on citizens and non-citizens alike. There is no compelling interest in creating a double standard.

**6. Onerous Verification Requirements Saf-C 1003.04(c):** Saf-C 1003.04(c) states: "In the event a non-United States citizen does not hold a driver license from his/her home country, he/she shall provide verification from his/her home country that he/she: (1) Has never held a driver license; or (2) Has held a driver license in the United States." The DMV cannot have a compelling interest in requiring a non-citizen without a previous license to prove the negative that he "has never held a driver license." In fact, the DMV issued a driver's license to Ali

without the necessity of proving this negative. Ali Affidavit at ¶¶7-8. Similarly, the DMV cannot have a compelling interest in requiring the proof of another impossibility, that the applicant's home country would have a record that the applicant "has held a driver license in the United States." Finally, the DMV cannot have a compelling interest in requiring documentation that may be non-existent or impossible to obtain, depending on the record keeping practices or the political conditions of the applicant's home country.

### **C. The DMV Non-Citizen Rules Violate the Plaintiffs' Right to Travel**

The "right to travel" protected by the United States Constitution

embraces at least three different components. It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

*Saentz v. Roe*, 526 U.S. 489, 500 (1999).<sup>2</sup>

Nothing is more symbolic of the right to travel than a driver's license. These DMV Non-Citizen Rules leave no doubt in the plaintiffs' minds that they are being treated as "an unfriendly alien" rather than as a "welcome visitor." Although permanent residents as defined in RSA 21:6, they are treated very differently from other residents of the State of New Hampshire. The DMV Non-Citizen Rules seriously impede plaintiffs' ability to obtain and renew drivers' licenses. The requirement to travel to Concord is a significant burden on them. *See* Amani Affidavit at ¶¶8-16; Ali Affidavit ¶¶14-15, 17-18; Swanson Affidavit at ¶¶10.

This burden on plaintiffs' ability to maintain a valid driver's license impedes their ability, and their right, to travel from state to state. Of course, plaintiffs need not show an outright

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<sup>2</sup> The United States Supreme Court has not directly decided whether the right to travel applies specifically to non-U.S. citizens. *Graham v. Richardson*, 403 U.S. 365, 375 (1971). However, the District of Puerto Rico, a sister district in the First Circuit, has referred at least in passing to a "right to travel of citizens and aliens." *Lopez v. Aran*, 649 F.Supp. 853 (D. P.R. 1986), *aff'd in part, rev'd in part*, 844 F.2d 898 (1<sup>st</sup> Cir. 1988).

inability to travel, but only a discriminatory classification in their new state of residence. *Saentz v. Roe*, 526 U.S. at 504-505.

The DMV's purported financial justification for the new rules does not rescue them from their unconstitutionality on right to travel grounds, any more than it rescued them from an equal protection violation. "... [T]he State's legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens." *Saentz v. Roe*, 526 U.S. at 507. The DMV Non-Citizen Rules impermissibly impede the plaintiffs' constitutional right to travel, and thus cannot be enforced.

**D. The DMV's Uncodified Policies Violate Plaintiffs' Right to Due Process**

The Fourteenth Amendment to the United States Constitution states in relevant part: "Nor shall any state deprive any person of life, liberty or property, without due process of law..." As with the Equal Protection clause, the term "person" in this context encompasses aliens as well as citizens of the United States. *Graham v. Richardson, supra*, 403 U.S. at 371.

The renewal of a driver's license is a property interest protected by the Due Process clause. "Once licenses are issued,...their continued possession may become essential in the pursuit of a livelihood." *Bell v. Burson*, 402 U.S. 535, 539 (1971). Thus, the DMV may not interfere with continued licensure without the procedural due process required by the Fourteenth Amendment. This is so whether entitlement to a driver's license is denominated a "right" or a "privilege." *Id.*

The DMV's adoption of uncodified, unannounced policies that burden plaintiffs' entitlement to renew their drivers' licenses violates plaintiffs' rights to due process of law. These uncodified policies include: (1) requiring yearly license renewals, or at least more frequent than contemplated even in the Non-Citizen Rules themselves, *see* Saf-C 1003.04(g); (2) requiring proof of residency upon each renewal, although Saf-C 1002.06 (a)(3)(b) purports to apply only to original drivers' license applications; and (3) issuing 45-day temporary licenses

upon each renewal, although Saf-C 1003.04(e) purports to apply only to original drivers' licenses.

These policies were not preceded by any public notice or opportunity to be heard, the hallmarks of procedural due process. Instead, it appears that the DMV is making up these policies as it goes along. Its imposition of frequent, even annual, license renewals on plaintiffs is directly contradictory to its announced and published rule, Saf-C 1003.04(g). That rule provides that a drivers' license issued to a non-citizen is valid until the earlier expiration of five years or certain immigration documents or status. Although plaintiffs, as legal permanent residents, a refugee and an asylee, are not subject to the earlier expirations, only one of them has enjoyed a driver's license with a duration of five years since the DMV implemented its non-citizen policies. *See Swanson Affidavit at ¶15.*

The DMV's unannounced and uncodified policies are inconsistent with, and violate, the right to due process of law, and their enforcement must be enjoined.

## **II. AN INJUNCTION IS NECESSARY TO PREVENT IRREPARABLE HARM**

Unless the defendant is enjoined and restrained from the unconstitutional enforcement, operation, and execution of the DMV Non-Citizen Rules, plaintiffs will continue to suffer irreparable harm. "When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." 11A Charles A. Wright et al, *Federal Practice and Procedure* § 2948.1 (1995). A sister district in this Circuit has noted that "[a] presumption of irreparable harm flows from and is triggered by an alleged deprivation of constitutional rights." *Wal-Mart Stores, Inc. v. Rodriguez*, 238 F. Supp.2d 395, 421 (D. P.R. 2002), *vacated upon settlement* 322 F.2d 747 (1<sup>st</sup> Cir. 2003), *citing Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996); *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1994).

The harm to plaintiffs from the loss of their constitutional rights is not merely academic, but real and tangible. Forcing plaintiffs to make multiple trips to Concord to obtain or renew their drivers' licenses results in their losing time from work, and making inconvenient transportation arrangements. *See* Fahy Affidavit at ¶¶8-11; Amani Affidavit at ¶¶8-14. At the Concord DMV office, they must stand apart from all other persons with business with the DMV, at the slower, more congested “non-citizens” window. The experience engenders humiliation. *Id.* One plaintiff, standing at this segregated window, was told, erroneously but loudly enough to be heard by bystanders, that she was being given a 45-day temporary license while she was “under investigation.” Swanson Affidavit at ¶14. *See also* Amani Affidavit at ¶13.

Pursuant to uncodified DMV policy, Amani and Ali, who are residents of New Hampshire with refugee or asylee status, are required to renew their yearly licenses yearly, paying the \$50.00 fee and always receiving a temporary paper forty-five day license. *See* Amani Affidavit at ¶¶14, 16; Ali Affidavit at ¶¶13, 16, 18. In contrast, citizens renewing their licenses pay \$50.00 and on the same day receive a photo-identification license that does not expire for five years. The flimsy temporary licenses issued to Amani and Ali are handwritten, on yellow paper, and do not include a photograph. Exhibit 1 to Amani Affidavit; Exhibits 1 and 3 to Ali Affidavit. The temporary license issued to Ali was declined as sufficient identification to board an airplane. Ali Affidavit at ¶20. Amani has on several occasions presented his temporary license to cash a check, and has been declined. Amani Affidavit at ¶16. U.S. Citizens, who receive photo-quality six month temporary licenses on their first application, and then photo-quality five-year licenses on the day they renew, never face this inconvenience and embarrassment.

Unlike citizens, plaintiffs must show proof of residency every time they renew their licenses. *See* Saf-C 1002.06 (a)(3)(b). The DMV has never published exactly what constitutes

acceptable proof of residency, and in fact has claimed to be unable or unwilling to do so. Transcript of JLCAR Proceedings, 5/21/04 at 43-44, Exhibit 2 to Wellington Affidavit. As a result, and because of conflicting information provided by different DMV employees, plaintiffs have been required to make multiple and inconvenient trips to Concord before the DMV is satisfied with their paperwork. *See* Fahy Affidavit ¶¶8-11; Amani Affidavit ¶¶8-11. Ali was particularly severely affected. As the sister of a leaseholder, she had difficulty producing proof of residency, because the DMV insisted that she produce either a vehicle registration (ironically, since she did not yet have the license to drive a vehicle) or a lease and/or utility bills in her name. The DMV's intransigence caused some several weeks' delay in the process of her obtaining her driver's license. Ali Affidavit ¶¶8-10.

Each instance of discriminatory treatment by the DMV violates constitutional protections to which plaintiffs are entitled. Unless the defendant is enjoined and restrained from enforcement, operation, and execution of the DMV Non-Citizen Rules, the DMV will continue to discriminate against plaintiffs, who will as a result suffer irreparable harm.

### **III. THE DMV'S "PILOT PROGRAM" DOES NOT MOOT PLAINTIFFS' CLAIMS**

Any claim by the DMV that the Court need not issue the requested injunction, because the DMV is voluntarily abandoning its unconstitutional policies, can be quickly dispensed with. First, the so-called "pilot program" espoused by the DMV, *see* DMV Memorandum attached as Exhibit 6 to Wellington Affidavit, is of extremely limited application. The "pilot program" allows certain non-citizens only to renew their drivers' licenses at DMV substations. First-time non-citizen applicants, and those who last renewed their drivers' license prior to September 1, 2001, will still be required to travel to Concord. *See* Exhibit 6 to Wellington Affidavit.

The "pilot program" is silent as to the remainder of the Non-Citizen Rules and the related policies, all of which are challenged in this action. Thus, even if the DMV continues the "pilot

program” indefinitely, plaintiffs will still be required to undergo the hardship of renewing their licenses more frequently than do citizens. They will still have to prove residency at each renewal, still without any guidance as to what is required to make that proof. They will still suffer the indignity of trying to cash a check or board a bus using the flimsy, handwritten paper temporary license for 45 days after each renewal. In short, even if the “pilot program” dispenses with the hardship of traveling to Concord to renew their licenses, plaintiffs will still have to endure many other practical hardships as the result of the DMV Non-Citizen Rules and uncodified policies.

More fundamentally, all of the DMV Non-Citizen Rules, even the requirement of processing renewals in Concord, are still on the books. Plaintiffs are not aware of any DMV proposal to repeal or amend these rules. The “pilot program” could vanish as soon as judicial or public scrutiny diminishes.

The DMV’s “burden of demonstrating mootness ‘is a heavy one.’” *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *see also Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 220 (2000). The government’s voluntary cessation of a challenged practice does not moot the challenge if there is a reasonable expectation that the challenged conduct will be repeated after the case is dismissed. *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982); *D.H.L. Associates v. O’Gorman*, 199 F.3d 50, 55 (1<sup>st</sup> Cir. 1999). If the challenged statute (or regulation) is not sufficiently altered to allow for the conclusion that the conduct will not be repeated, then this reasonable expectation exists, and the case is not moot. *D.H.L. Associates, supra*; *Northeastern Florida Chapter of the Associated General Contractors v. Jacksonville*, 508 U.S. 656, 662 and n. 3 (1993).

The challenged Non-Citizen Rules, and the related, uncodified policies, are not altered in the least by the “pilot program,” let alone sufficiently altered to allow for the conclusion that the

DMV's conduct will not be repeated. The "pilot program" may be dismantled as quickly as it was promulgated. The DMV has done nothing, not even promulgate a pilot program, to address plaintiffs' other constitutional challenges to the Non-Citizen Rules. Therefore, the Court need not long be detained by any claim of mootness.

#### **IV. THE BALANCE OF HARDSHIPS FAVORS THE INJUNCTION**

The continued violation of plaintiffs' constitutional rights and the ensuing humiliation and harm to them far exceeds any claimed inconvenience to the DMV. The DMV's assertions of administrative convenience and lack of trained personnel noted above, are not sufficient to outweigh the real and irreparable harm to plaintiffs if the DMV Non-Citizen Rules remain in force and effect.

#### **V. THE INJUNCTION SERVES THE PUBLIC INTEREST**

A sister District in this Circuit has described "guaranteeing the rule of law and preventing deprivations of constitutional and civil rights under color of law" as an "unceasing public interest." *Wal-mart Stores, Inc. v. Rodriguez*, 238 F.Supp. 2d 395, 421 (D. P. R. 2002), *vacated upon settlement* 322 F.2d 747 (1<sup>st</sup> Cir. 2003). The DMV Non-Citizen Rules, unlike many of the other DMV regulations, are designed for the convenience of the DMV at the expense of a discrete class of persons entitled to the same level of access to governmental services as their neighbors and co-workers who are U.S. citizens. Treating residents of New Hampshire differently based solely upon their alienage does not serve the public interest. "Resident aliens, like citizens, pay taxes, support the economy, serve in the Armed Forces, and contribute in a myriad of other ways to our society." *In re Griffiths*, 413 U.S. 717, 722 (1973); *Opinion of the Justices*, 115 N.H. 222, 223 (1975).

#### **VI. NO BOND IS REQUIRED**

Fed. R. Civ. P. 65(c) requires that an applicant for a *preliminary* injunction give security “in such sum as the court deems proper.” The purpose of requiring a bond as a condition for a preliminary injunction is to remedy any costs and damages incurred by a party who suffers a preliminary injunction that is wrongfully granted. *See* Fed. R. Civ. P. 65(c), *Hill Design, Inc. v. Hodgdon*, 2003 DNH 059, 2003 U.S. Dist. LEXIS 5848, \*32-33 (D. N.H. 2003), *rev’d and remanded other grounds*, 2003 DNH 86, 2003 U.S. Distr. LEXIS 8947 (D. N.H. 2003).

Here, plaintiffs are requesting that the preliminary injunction be consolidated with a decision and injunction on the merits. Thus, there is no threat that the final decision on the merits will reveal that the preliminary injunction was granted in error. The bond requirement of Rule 65(c) simply does not apply where the plaintiff requests a permanent, in addition to a preliminary, injunction.

### **CONCLUSION**

For the foregoing reasons, plaintiffs respectfully request that this Court:

- (a) preliminarily and permanently enjoin the defendant from enforcing Saf-C 1002.06 and 1003.04;
- (b) Preliminarily and permanently enjoin the defendant from enforcing the following uncodified policies: (1) Requiring that the license of any non-U.S. citizen be renewed more frequently than indicated by RSA 263:10 or RSA 263:39-a, as the case may be; (2) Requiring any non-U.S. citizen to prove his or her New Hampshire residency upon license renewal; and (3) Issuing a 45-day temporary license in connection with renewals of the drivers’ licenses of non-U.S. citizens;
- (c) order that no bond is required of plaintiffs; and
- (d) grant such other relief as may be just and equitable.

Respectfully submitted,

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