UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MICHAEL P. KEARNS, in his official capacity as Clerk of the county of Erie, New York,

Plaintiff,

v.

Civil Case No. 1:19-CV-00902-EAW

ANDREW M. CUOMO, in his official capacity as Governor of the state of New York, LETITIA A. JAMES, in her official capacity as Attorney General of the state of New York, and MARK J.F. SCHROEDER, in his official capacity as Commissioner of the New York State Department of Motor Vehicles,

Defendants.

AMICUS CURIAE BRIEF OF THE IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PLAINTIFF AND HIS MOTION FOR A PRELIMINARY INJUNCTION

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INTEREST OF AMICUS CURIAE

The Immigration Reform Law Institute ("IRLI") is a nonprofit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed amicus curiae briefs in many immigration-related cases before federal courts and administrative bodies, including: *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec*., No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

ISSUES PRESENTED

Whether the newly enacted New York Driver's License Access and Privacy Act, 2019 N.Y. Laws 37 ("DLAPA"), is conflict preempted and field preempted on grounds additional to those adduced by Plaintiff, and whether to grant Plaintiff's motion for a preliminary injunction.

SUMMARY OF THE ARGUMENT

A preliminary injunction should be granted because Plaintiff is likely to prevail on his substantive claims that DLAPA is both conflict preempted and field preempted under the Supremacy Clause of the U.S. Constitution. DLAPA is conflict preempted because it forces civil servants to commit multiple federal crimes, such as inducing aliens to remain in the United States illegally, shielding such aliens from detection, and transporting or moving such aliens within the United States. Thus, under DLAPA, compliance with both federal and state

regulations is impossible. Also, DLAPA is field preempted because it establishes a state-specific system for registering and admitting aliens and reviewing foreign citizenship documents even though the Federal Government has occupied the field of alien registration, foreclosing any state regulation therein. In addition, the public interest favors Plaintiff, who seeks a prohibitory injunction to preserve the regulatory status quo and preclude irreparable harm.

ARGUMENT

The Constitution provides that "Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization." U.S. CONST. art. I, § 8, cl. 4. When read together with the Necessary and Proper clause, the Constitution grants Congress plenary power over the admittance of aliens into, and the conditions of their lawful presence in, the United States. *Id.* at cl. 18. The plenary power of Congress in this arena has long been affirmed by the Supreme Court. *See, e.g., De Canas v. Bica*, 424 U.S. 351, 354 (1976) ("Power to regulate immigration is unquestionably exclusively a federal power."); *Hines v. Davidowitz*, 312 U.S. 52, 62 (1941) ("The supremacy of the national power in the general field of foreign affairs, including power over immigration, naturalization and deportation, is made clear by the Constitution . . . ."); *Truax v. Raich*, 239 U.S. 33, 42 (1915) ("The authority to control immigration—to admit or exclude aliens—is vested solely in the Federal Government.").

Under the Supremacy Clause, U.S. CONST. art. VI, cl. 2, state laws may be preempted by federal law. Two kinds of preemption are conflict preemption and field preemption. A state statute is conflict preempted if compliance with both that statute and federal law is impossible. *E.g., Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963). Also, a state law, including an immigration-related one, is conflict preempted if it "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress." *De Canas*, 424

U.S. at 363 (quoting *Hines*, 312 U.S. at 67). "[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (internal quotation marks omitted).

"[S]tate law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *English v. Gen. Electric Co.*, 496 U.S. 72, 79 (1990). Congress's intent to occupy a field can be inferred where a federal regulatory scheme is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," *Gade*, 505 U.S. at 98, or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). While Congress has never intended a "complete ouster of state power" from the immigration arena, *De Canas*, 424 U.S. at 357, some fields within that arena have been occupied by Congress, including that of alien registration. *Arizona v. United States*, 567 U.S. 387, 401 (2012) ("[T]he Federal Government has occupied the field of alien registration.").

I. DLAPA conflicts with the Immigration and Nationality Act in numerous ways.

As Plaintiff has shown, if he carries out DLAPA's requirements, he will violate the federal anti-harboring statute, section 274(a) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1324(a)(1)(A)(iii). Doc. No. 3-16 at ¶¶ 11–13. The U.S. Court of Appeals for the Second Circuit takes a broad view of the criminal conduct subject to a felony conviction under this INA subsection. "Harboring" encompasses a "wide range of conduct" that tends substantially to facilitate "an alien's remaining in the United States illegally." *United States v. Kim*, 193 F.3d 567, 574 (2d Cir. 1999).

Even so, the conflicts between DLAPA and 8 U.S.C. § 1324 are not limited to the anti-harboring provision. The anti-harboring provision is but one part of a comprehensive congressional sanction of 1) any act of knowingly assisting an alien who has not been inspected and admitted to come to, enter, travel in, or remain in the United States, or 2) any act of such assistance taken in reckless disregard of an alien's unlawful status. 8 U.S.C. § 1324(a)(1)(A). For example, criminal convictions can be obtained for inducing or encouraging an illegal alien to reside in the United States, § 1324(a)(1)(A)(iv); attempting to harbor or shield an illegal alien from detection while in "any means of transportation," § 1324(a)(1)(A)(iii); attempting to "move or transport" an illegal alien within the United States "by means of transportation or otherwise" in furtherance of the alien's illegal presence, § 1324(a)(1)(A)(ii); and aiding or abetting any of the preceding acts. § 1324(a)(1)(A)(v)(II).

Aliens aged 18 or older who lawfully remain in the United States will already possess and carry documentation of alien registration. *See* 8 U.S.C. § 1304(e). Thus, virtually every non-citizen driver's license applicant to whom Plaintiff issues a non-federally compliant license will have failed to present such documentation, but will have presented evidence of foreign citizenship, N.Y. VEH. & TRAF. LAW § 502.1 (Consol. 2019), and Plaintiff will be acting in reckless disregard of whether that applicant remains in the United States in violation of federal immigration law.

A. DLAPA will cause Plaintiff to commit criminal "inducement" under 8 U.S.C. § 1324(a)(1)(A)(iv).

Any person who "encourages or induces" an alien to remain in the United States illegally shall be fined or imprisoned for up to 5 years per alien. 8 U.S.C. § 1324(a)(1)(A)(iv); 8 U.S.C. § 1324(a)(1)(B)(ii).

DLAPA requires Plaintiff to commit such encouragement or inducement by providing in-state driving privileges to aliens who lack registration. N.Y. VEH. & TRAF. LAW § 502.1 (Consol. 2019). Bestowal of a driving privilege on illegal aliens in New York plainly encourages or induces them to remain in the United States. Indeed, it is meant to do so: Defendants themselves promised a number of benefits from DLAPA that it can only deliver if issuing divers' licenses to illegal aliens in fact induces them to remain in New York in greater numbers than they would otherwise. For example, DLAPA will "keep our economy moving," provide "significant economic growth," raise "millions of dollars in revenue," promote a "boom as earnings and spending increase," while "State and private companies [in New York] stand to benefit from increased economic activity . . . ." Doc. No. 3-16 at 17–18 (quoting principal legislative and business sponsors of DLAPA).

DLAPA also bars Plaintiff from preventing, curing, or mitigating the effects of this crime. Specifically, DLAPA prohibits Plaintiff from disclosing information about the alien to federal immigration authorities, and compels Plaintiff to disclose to the alien any knowledge he may obtain of investigation of or enforcement against the alien by federal immigration officials. N.Y. VEH. & TRAF LAW § 201.12 (Consol. 2019).

Thus, issuing drivers' licenses to illegal aliens directly contradicts federal law and places Plaintiff in unconscionable jeopardy. Under DLAPA, "compliance with both federal and state regulations is a physical impossibility," *Fla. Lime*, 373 U.S. at 142–43, and DLAPA therefor violates the Supremacy Clause.

B. DLAPA will cause Plaintiff to commit criminal "shielding" under 8 U.S.C. § 1324(a)(1)(A)(iii).

Any person who "conceals, harbors, or shields from detection" an alien remaining in the United States illegally, or attempts to do so, shall be fined or imprisoned for up to 5 years per

alien. 8 U.S.C. § 1324(a)(1)(A)(iii). Yet DLAPA requires Plaintiff to commit such offenses by prohibiting Plaintiff from disclosing any information about the alien to federal immigration authorities, and requiring Plaintiff to disclose to the alien any knowledge he may obtain of investigation of or enforcement against the alien by federal immigration officials. In these ways, DLAPA patently compels Plaintiff to conceal or shield illegal aliens from detection by federal authorities. Again, because "compliance with both federal and state regulations is a physical impossibility" under DLAPA, 373 U.S. at 142–43, DLAPA violates the Supremacy Clause.

C. DLAPA will make Plaintiff liable for human trafficking under 8 U.S.C. § 1324(a)(1)(A)(ii).

Any person who "attempts to transport or move" an alien illegally remaining in the United States shall be fined or imprisoned. 8 U.S.C. § 1324(a)(1)(A)(ii). Granting a driver's license to an illegal alien is a cause of that alien's subsequent transportation and movement in furtherance of his or her continued unlawful presence in the United States. Because DLAPA thus requires Plaintiff to cause the transportation or movement of illegal aliens in furtherance of their continued unlawful presence, it exposes him to criminal liability under § 1324(a)(1)(A)(ii). *See, e.g., United States v. Rodriguez*, 587 F.3d 573 (2d Cir. 2009) (affirming the conviction of defendant who transported an illegal alien by luring her into a vehicle driven by a co-conspirator); *United States v. Alvillar*, 575 F.2d 1316 (10th Cir. 1978) (holding that causing transportation of illegal aliens by chartering a flight for them was offense under 8 U.S.C. § 1324(a)(2), since intent to punish generally persons who cause an unlawful act to be done is evident from the language of 18 U.S.C. § 2(b)). Further, DLAPA forces Plaintiff to facilitate the transportation or movement of illegal aliens anywhere in the United States in which a New York non-federally compliant driver's license is accepted. Thus, again, under DLAPA, "compliance

with both federal and state regulations is a physical impossibility," 373 U.S. at 142–43, and DLAPA violates the Supremacy Clause.

II. DLAPA is preempted by federal laws that occupy the field of the admission and registration of aliens.

Congress has already regulated the means by which federal, state, and local government agencies may verify the foreign citizenship or immigration status of individuals. But DLAPA substitutes its own alien registration scheme for Congress's. DLAPA even requires New York officials to make independent judgments when scrutinizing foreign-issued passports, a uniquely federal competency and function. Accordingly, DLAPA encroaches upon a federally regulated field and is therefore preempted. "[T]he Federal Government has occupied the field of alien registration." *Arizona v. United States*, 567 U.S. 387, 401 (2012).

DLAPA requires Plaintiff to accept, as a "primary forms of . . . proof of identity . . . a valid, unexpired foreign passport issued by the applicant's country of citizenship" and "a valid, unexpired consular identification document issued by a consulate from the applicant's country of citizenship . . . ." N.Y. VEH. & TRAF. LAW § 502.1 (Consol. 2019). DLAPA's plain language requires Plaintiff to apply an idiosyncratic state standard to (1) determine whether a proffered foreign passport or consular ID card is "valid" and (2) accept that the applicant is a citizen of the foreign country that issued the document in question. The state standard is idiosyncratic because a consular identification card only indicates that the foreign state issuing the card claims the bearer to be its citizen or national for purposes of compliance with the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Federal law provides for the verification of these claims only by the Department of Homeland Security or the Department of State. *E.g.* 8 U.S.C. § 1373(c). Yet it is just such verification that DLAPA forecloses. N.Y. VEH. & TRAF. LAW § 201.12 (Consol. 2019).

Likewise, a foreign passport can only be lawfully "validated" for purposes of ascertaining foreign citizenship—an immigration classification—if the passport has been inspected by a U.S. consulate or U.S. immigration inspector. *See* 8 U.S.C. §§ 1301–1306 (Registration of Aliens); 8 U.S.C. § 1181(a) (describing documents required for admission of immigrants); 8 U.S.C. § 1184(a) (regulations for admission of nonimmigrants); 8 U.S.C. § 1101(a)(3) (defining "alien"). It must contain the visa or entry stamp affixed therein, as evidence of mandatory alien registration. *Id.* The statutory procedure for confirming that an identity or travel document issued by a foreign state is "valid" is entrusted by Congress exclusively to the U.S. Department of Homeland Security or the U.S. Department of State. Accordingly, state and municipal authorities rely upon these agencies when ascertaining the legitimacy of foreign passports in the United States—they do not make the determination on their own. *See, e.g.*, 8 U.S.C. § 1373(c) ("The Immigration and Naturalization Service shall respond to an inquiry by a Federal, State, or local government agency, seeking to verify or ascertain the citizenship or immigration status of any individual within the jurisdiction of the agency . . . .").

Because the fields of alien admission and alien registration have been completely occupied by the federal government, even complementary or supportive state variations violate the Supremacy Clause—let alone schemes expressly purposed toward thwarting federal law. *Arizona*, 567 U.S. at 401 ("Where Congress occupies an entire field, as it has in the field of alien registration, even complementary state regulation is impermissible."). By creating a novel state standard, at odds with federal law, for whether a person has the immigration classification of foreign citizenship, and for whether foreign passports or consular identification cards are "valid," DLAPA regulates in a field Congress has fully occupied, and accordingly is field preempted.

See, a fortiori, Hines v. Davidowitz, 312 U.S. 52 (1941) (holding even a Pennsylvania state registration statute that complemented federal law unconstitutional on field preemption grounds).

III. A preliminary injunction would be in the public interest.

When deciding whether a movant's threatened irreparable injury and probability of success on the merits warrants injunctive relief, the Second Circuit directs courts to consider the objective of avoiding needless injury to the public. *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 424 (2d Cir. 2004) ("[A] district court deciding whether to grant equitable relief should consider and balance private and public interests whenever public interests are implicated."). Here, Plaintiff seeks only a "prohibitory" injunction that will maintain the *status quo*—hence his motion is "taken in furtherance of a regulatory or statutory scheme, which is presumed to be in the public interest." *Id.* Likewise, Congress has firmly established that there is a significant public interest in the effective enforcement of immigration law. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) ("The Government makes a convincing demonstration that the public interest demands effective measures to prevent the illegal entry of aliens at the Mexican border."); *INS v. Miranda*, 459 U.S. 14, 19 (1982) ("An increasingly important interest, implicating matters of broad public concern, is involved in cases of this kind. Enforcing the immigration laws, and the conditions for residency in this country, is becoming more difficult.").

Yet Plaintiff's injuries—which include DLAPA's compelling him to commit federal crimes, *supra* Part I—are irreparable because they cannot be redressed by a later monetary award. *JSG Trading Corp. v. Tray-Wrap, Inc.*, 917 F.2d 75, 79 (2d Cir. 1990) ("Irreparable injury is one that cannot be redressed through a monetary award."). To the extent Defendants would argue that DLAPA protects any liberty, privacy, or other fundamental interests of alien denizens of New York who cannot show eligibility for a New York state REAL ID-compliant

driver's license that meets federal standards for identification, the balance of equities favors the Plaintiff. Even citizens do not have a constitutional due process right to a driver's license, which is a privilege. *Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999) ("In sum, Miller does not have a fundamental right to drive a motor vehicle, and the DMV did not unconstitutionally impede his right to interstate travel by denying him a driver's license.").

The beneficiary illegal aliens are not a suspect class entitled to Fourteenth Amendment-based strict scrutiny of any discriminatory classification based on that status, nor are they classified by an immutable characteristic. Undocumented status is not an immutable characteristic: it is caused by a conscious unlawful act. *Plyler v. Doe*, 457 U.S. 202, 220 (1982) ("Of course, undocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action."). An illegal alien, moreover, has no legitimate expectation of privacy from another person's knowledge of his immigration status. *United States v. Rodriguez-Arreola*, 270 F.3d 611, 616 (8th Cir. 2001) ("Rodriguez has no legitimate expectation of privacy in Molina's knowledge that Rodriguez was illegally present in the United States."). Nor is helping illegal aliens remain in the United States a constitutionally protected activity. *United States v. Merkt*, 794 F.2d 950, 955 (5th Cir. 1986) ("Control of one's borders and of the identity of one's citizens is an essential feature of national sovereignty. Relinquish this control and it may fairly be said that there remains no territorial or social body which can be called a sovereign nation. . . . Although their scope and application may be justly criticized, there can be no doubt that, until Congress changes the border control laws, they must be uniformly obeyed.").

CONCLUSION

For the reasons set forth above, Plaintiff is likely to succeed on his conflict and field preemption claims, and a motion for preliminary injunction to preserve the status quo should be granted.

DATED: August 14, 2019

Respectfully submitted,

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