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“Branded to Drive: Obstacle Preemption of North Carolina Driver’s Licenses for DACA Grantees”

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Introduction

On March 25, 2013, North Carolina began issuing special driver’s licenses (“N.C. licenses”) to qualified undocumented immigrants protected from removal under Deferred Action for Childhood Arrivals (“DACA”).¹ The front of these licenses contain the words “LEGAL PRESENCE NO LAWFUL STATUS” in bold red letters, conspicuously publicizing DACA grantees’ delicate immigration status.² The key issue is whether states can publicize the immigration status of individuals who are protected from deportation by the federal government.³ I contend that DACA preempts the N.C. licenses because the N.C. licenses draw attention to DACA grantees’ immigration status in a way that frustrates the federal policy to integrate DACA grantees.

On June 15, 2012, the Obama Administration announced it would defer action for qualified undocumented immigrants under DACA.⁴ DACA preserves administrative resources by refocusing removal efforts on “high priority” persons.⁵ President Obama

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² Id.
³ Note that a Westlaw search for case law and secondary sources has yet to yield other instances in which a state agency publicizes an individual’s immigration status in an analogous manner to the N.C. licenses.
⁵ Napolitano Memo.
stated that DACA protects individuals who “are Americans in their heart, in their minds, in every single way but…on paper,” by “lift[ing] the shadow of deportation from these young people.”  

DACA does not grant any immigration status, but offers lawful presence in the U.S. and clears a path for qualified immigrants to work legally and obtain driver’s licenses.

According to the most recent statistics, 48 states permit DACA grantees to apply for driver's licenses. Though some states were initially hesitant in issuing driver’s licenses to DACA grantees, only Arizona and Nebraska expressly prohibit DACA grantees from obtaining licenses. Arizona Governor Jan Brewer has gone as far as to issue an Executive Order stating that DACA grantees are not legally present in the U.S.

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12 See Arizona Executive Order 2012-06. Arizona is the only state that does not recognize DACA’s validity. I will not examine whether Governor Brewer’s Executive Order is preempted.
North Carolina initially denied DACA grantees driver’s licenses, but eventually issued special driver’s licenses to DACA grantees.\textsuperscript{12} The original designs for the North Carolina licenses singled out DACA grantees with a bright pink stripe.\textsuperscript{13} After much controversy, North Carolina issued licenses to DACA grantees with “LEGAL PRESENCE NO LAWFUL STATUS” in bold red letters on the face of the license without the pink stripe.\textsuperscript{14}

While DACA grantees are granted deferred action at the federal level, the attention drawn to an individual’s immigration status by the N.C. licenses is problematic at the local enforcement level. The N.C. licenses draw attention to the precarious immigration status of DACA grantees. This puts DACA grantees at risk of unnecessary detention due to states’ “show your paper” laws and involvement with the federal 287(g) and Secured Communities (S-COMM) programs.\textsuperscript{15}


\textsuperscript{13} \textit{Id.}

\textsuperscript{14} Michael Hennessey, \textit{Licenses for DACA Qualifiers Pink Stripes Removed}, WCTI 12.com, March 22, 2013, \url{http://www.wcti12.com/news/Licenses-for-DACA-qualifiers/13530444/19433972/-/dy8ys4/-/index.html}. Furthermore, while not a focus of this paper, it is noteworthy that North Carolina has also announced it will issue specially marked driver’s licenses for all non-citizens including lawful permanent residents in December 2013. See Bertrand M. Gutierrez, \textit{Planned N.C. Driver’s License Irks Some Noncitizens}, Winston-Salem Journal, February 22, 2013, \url{http://www.journalnow.com/news/local/article_65c8a826-7d56-11e2-9d3b-001a4bcf6878.html}.

\textsuperscript{15} Note, that U.S. Immigration and Customs Enforcement agency has phased out large parts of the 287(g) program. The “task force” model, in which state police are deputized to enforce immigration laws in the regular course of their activities on the street have been suspended. See \textit{ICE Scaling Back 287(g) Program}, Immigration Impact, October 19, 2012 \url{http://immigrationimpact.com/2012/10/19/ice-scaling-back-287g-program/}; \textit{Immigration Enforcement Program to be Shut Down}, USA Today, February 17, 2012, \url{http://usatoday30.usatoday.com/news/nation/story/2012-02-17/immigration-enforcement-program/53134284/1}. 
The N.C. licenses affect a significant number of individuals. As of March 14, 2013, USCIS received 438,372 applications, 338,334 of which are Mexican applicants. USCIS has approved of 435,589 applications. 16,554 applicants were North Carolina residents, the sixth most applicants from one state. While comprehensive immigration reform seems on the horizon, the N.C. licenses will remain an issue unless any new law settles the immigration status of DACA grantees. 

Although other scholars have focused on a potential Equal Protection challenge to driver’s licenses such as the N.C. license, given the Court’s focus on federalism and preemption in the immigration law context, this paper will analyze North Carolina driver’s licenses in light of the Supreme Court’s use of obstacle preemption in Arizona v. United States, even though an Equal Protection challenge would offer substantive rights to effected immigrants and would not be vulnerable to changing political views.

DACA obstacle preempts N.C. licenses because the licenses disrupt the federal government’s careful balance of policy goals to integrate qualified “low priority” undocumented immigrants and focus removal efforts on “high priority” criminals by

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17 Id.
18 Id.
20 Dan Nowicki, ‘Amnesty’ Losing Emotional Punch in Immigration Debate, USA Today, June 19, 2013, http://www.usatoday.com/story/news/nation/2013/07/19/amnesty-losing-emotional-punch-immigration-debate/2567509/ (Under the current bill, undocumented immigrants must wait 10 years and pay certain fines before becoming a permanent resident. Even if the bill is passed, the status of undocumented immigrants would not be immediately resolved.)
21 See Maria Pabon Lopez, More Than A License to Drive: State Restrictions on the Use of Driver's Licenses by Noncitizens, 29 S. Ill. U. L.J. 91, 104 (2005) (Professor Lopez examines several types of different driver’s licenses that can be issued to noncitizens, including N.C. license type licenses, which she describes as a “branding.”)
drawing undue attention to DACA grantees’ lack of “lawful status.” Additionally, the N.C. licenses’ interaction with state “show your papers” laws, 287(g), and S-COMM exacerbates such disruption of federal policy goals because the “no lawful status” language on the N.C. licenses subject DACA grantees to an increased risk of wrongful detention. Most troubling is how a N.C. license holder would fare in Arizona, where DACA grantees’ lawful presence is ignored and thus, N.C. licenses would offer no protection from Arizona law enforcement.

In Part I, I provide a background of DACA and the N.C. licenses. In Part II, I provide a brief overview of Arizona v. United States and modern obstacle preemption jurisprudence. Part III.B.1 explores the interaction of the licenses with state law, 287(g) and Secure Communities, and N.C. licenses are obstacle preempted. To illustrate the interaction of N.C. licenses with state and federal law, I set forth a hypothetical where a N.C. license holder is stopped by local law enforcement and is subsequently put through 287(g) and S-COMM processes. In Part III.B.2, I explore how Arizona law exacerbates the effect of the N.C. licenses. Part IV concludes that the N.C. licenses are preempted and thus, unconstitutional.

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23 This paper will not focus on delegation of powers issues as scholars have considered those issues in detail. See Gilbert Article; Ernest A. Young, Executive Preemption, 102 Nw. U. L. Rev. 869 (2008); Peter Marguiles, Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion, and the Separation of Powers (February 11, 2013). Roger Williams Univ. Legal Studies Paper No. 133. Available at SSRN: http://ssrn.com/abstract=2215255.

Part I Background

A. Background of the DACA Program

DACA was created to protect qualified undocumented immigrants from removal and was intended to protect undocumented immigrants who are “Americans in their heart, in their minds, in every single way but one: on paper.”25 On June 15, 2012, the Obama Administration announced that the Department of Homeland Security (“DHS”) would exercise its prosecutorial discretion to defer action for qualified undocumented immigrants who arrived in the U.S. as children.26

DHS Secretary Janet Napolitano issued a memorandum instructing U.S. Immigration and Customs Enforcement (“ICE”) and U.S. Citizenship and Immigration Services (“USCIS”) to defer action for qualified individuals for a renewable two-year period.27 The DACA program blocks deportation of persons who entered the U.S. before they turned 16, are not older than 31, have graduated high school or attended college, or served in the military and do not have a criminal background.28 DACA grantees are eligible for employment authorization and a Social Security number.29

DHS has reiterated that while DACA grantees do not have formal immigration status, they are lawfully present.30 Lawful status is distinct from lawful presence.31 An

26 See Gilbert Article at 15; Napolitano Memo.
27 See Napolitano Memo.
28 See Napolitano Memo.
29 Consideration for Deferred Action for Childhood Arrivals Frequently Asked Questions, USCIS, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD, (last visited March 12, 2013).
30 Consideration for Deferred Action for Childhood Arrivals Frequently Asked Questions, USCIS, Q6,
individual can lack lawful status but still be lawfully present.\textsuperscript{32} Unlawful presence triggers once an individual is physically present in the U.S. without lawful status (i.e. lawful permanent resident, asylee, etc.);\textsuperscript{33} or a non-immigrant visa;\textsuperscript{34} or a parolee.\textsuperscript{35} DHS, however, can stop the accrual of unlawful presence of an individual without lawful status as a matter of prosecutorial discretion.\textsuperscript{36} In which case, an individual can be lawfully present in the U.S. even without lawful status. Accordingly, a DACA grantee will not accrue any unlawful presence, although any unlawful presence prior to obtaining DACA status is not forgiven.\textsuperscript{37}

Generally, individuals who are unlawfully present are ineligible for federal public benefits.\textsuperscript{38} Such individuals may also be ineligible for state public benefits,\textsuperscript{39} but states have the discretion to offer public benefits to unlawfully present individuals.\textsuperscript{40}

With lawful presence, DACA grantees can access state public benefits and various state licenses.\textsuperscript{41} Central to the Obama Administration’s goal to integrate DACA

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http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD. (last visited March 12, 2013).  
\textsuperscript{31} Neufeld Memo, Part 3.  
\textsuperscript{32} Neufeld Memo, Part 3.  
\textsuperscript{33} 8 U.S.C. § 1621(a)(1); 8 U.S.C. § 1641; Memorandum from Donald Neufeld, Acting Associate Director, U.S. Citizenship and Immigration Services, on Consolidation of Guidance Concerning Unlawful Presence for Purposes of Sections 212(a)(9)(B)(i) and 212(a)(9)(C)(i)(I), Revision to and Re-designation of \textit{Adjudicator’s Field Manual (AFM) Chapter 30.1(d) as Chapter 40.9 (AFM Update AD 08-03).} (May 6, 2009) [hereafter Neufeld Memo].  
\textsuperscript{34} 8 U.S.C.A. § 1621(a)(2); 8 U.S.C. § 1101(a)(15).  
\textsuperscript{36} Neufeld Memo, Part 3.  
\textsuperscript{37} Consideration for Deferred Action for Childhood Arrivals Frequently Asked Questions, USCIS, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=3a4dbc4b04499310VgnVCM100000082ca60aRCRD&vgnextchannel=3a4dbc4b04499310VgnVCM100000082ca60aRCRD, (last visited March 12, 2013); \textit{see also} INA § 212(a)(9)(B) (note that “[n]o period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence.”)  
\textsuperscript{38} See 8 U.S.C. § 1611.  
\textsuperscript{39} 8 U.S.C. § 1621(a).  
\textsuperscript{40} 8 U.S.C. § 1621(d).  
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grantees is to provide DACA grantees access to state driver’s licenses. Indeed, state driver’s licenses are essentially de facto national identification cards, and are vital to daily activities. Driver licenses are used to prove identity in many situations, including, but not limited to, opening bank accounts, cashing checks, and using credit cards.

DACA was announced in response to Congress’s inability to pass the DREAM Act. In light of legislative inaction, law school professors outlined the legal authority for deferred action in a letter to President Obama and urged the President to take Executive action. The letter explained that Immigration and Nationality Act (“INA”) § 103(a) grants the Secretary of Homeland Security broad authority to exercise prosecutorial discretion and that deferred action is a form of prosecutorial discretion historically used by the Executive Branch.

DACA’s opponents, however, question its legality. Kris Kobach, Kansas’ Secretary of State and the main author of Arizona’s S.B. 1070 statute, filed a complaint against Janet Napolitano, and John Morton, the director of ICE on behalf of ICE officers.

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41 See 8 U.S.C.A. § 1621(c).
46 See Gilbert Article at 15.
47 Letter from Immigration Law Professors to President Obama, Executive Authority to Grant Administrative Relief to Dream Act Beneficiaries (May 28, 2012).
claiming that DACA is unconstitutional and violates administrative law.\textsuperscript{49} Despite the backlash, many undocumented immigrants are applying for deferred action.\textsuperscript{50}

**B. Brief Background on Driver’s Licenses to Undocumented Immigrants**

Generally, states have wide latitude in determining whether to issue driver’s licenses to undocumented immigrants.\textsuperscript{51} Even before September 11, several states prohibited undocumented immigrants from obtaining driver’s licensees to discourage immigration.\textsuperscript{52} After September 11, state efforts to deny undocumented immigrants driver’s licenses greatly increased.\textsuperscript{53}

As the majority of immigrants and non-immigrants come to this country to work, the lack of a driver's license directly threatens the livelihood because driving is the most important mode of transportation in the U.S.\textsuperscript{54} Yet, to meet their daily needs, some undocumented immigrants continue to drive without licenses and are often are unable to obtain automobile insurance because of their unlicensed status.\textsuperscript{55} Thus, there are safety concerns regarding undocumented immigrants who are not able to legally drive.\textsuperscript{56}

Moreover, as noted in Part I.A supra, driver's licenses issued by the states are essentially de facto national identification cards. The denial of driver’s licenses injures

\textsuperscript{49} Complaint, Crane v. Napolitano, No. 12CV03247 (N.D.Tex. Aug. 23, 2013) (In Crane v. Napolitano, Kris Kobach argues that DACA was enacted without proper notice and comment per the APA and in turn does not have the force of law. Kobach further contends that DACA improperly impedes DHS officers from enforcing INA § 235. Note that the State of Mississippi joined the complaint two months later).

\textsuperscript{50} As of March 14, 2013, USCIS has received 438,372 applications, 338,334 of which are Mexican applicants. USCIS has approved of 435,589 applications. 16,554 applicants were North Carolina residents, the sixth most applicants from one state.


\textsuperscript{53} Id.

\textsuperscript{54} Maria Pabon Lopez, 29 S. Ill. U. L.J. at 96, 97.

\textsuperscript{55} Maria Pabon Lopez, 29 S. Ill. U. L.J. at 97, 98.

\textsuperscript{56} Id.
immigrants by exacerbating fears of arrest and deportation, limits access to jobs, and generally increases immigrant vulnerability to exploitation in the workplace and elsewhere. Indeed, the lack of a license more likely relegates a person to the secondary labor market, with low wages and poor conditions.

C. Background of North Carolina Driver’s Licenses & Recent State Legislation

North Carolina wavered several times between issuing and not issuing licenses to DACA grantees. The North Carolina Division of Motor Vehicles (N.C. DMV) ultimately decided to issue licenses to DACA grantees after the state Attorney General explained that “lawful presence” under DACA comports with federal law as well as the state’s driver’s license laws. North Carolina’s Department of Transportation (N.C. DOT) announced that it would issue DACA grantees licenses with a pink stripe and the words "NO LAWFUL STATUS" and “LIMITED TERM” starting on March 25, 2013.

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57 Kevin R. Johnson, 5 Nev. L.J. at 221-22.
58 Id.
Republican Governor of North Carolina Pat McCrory called the pink stripes “a pragmatic compromise.”62 N.C. DOT maintained that the pink stripes were necessary to combat fraud, and specifically voter fraud.63 On the other hand, the back of currently issued North Carolina licenses already discreetly indicate that a license holder is not a U.S. citizen by stating the validity period of the non-U.S. citizen’s authorized presence.64

DACA applicants expressed concerns about being singled out on account of their immigration status.65 Religious groups in North Carolina also criticized the state’s decision to issue the pink licenses and have described the licenses as “punitive.”66

In light of such controversy, the N.C. DOT decided to remove the pink stripe days before March 25, 2013.67 Nonetheless, the redesigned licenses issued to DACA grantees still state “LEGAL PRESENCE NO LAWFUL STATUS” in bold red letters on the front of the license.68 To obtain licenses, DACA grantees need to demonstrate DACA

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62 Kim Severson, *North Carolina to Give Some Immigrants Driver’s Licenses, with a Pink Stripe*, N.Y. Times, March 5, 2013, http://www.nytimes.com/2013/03/06/us/north-carolina-to-give-some-immigrants-drivers-licenses-with-a-pink-stripe.html. Note, it is not entirely clear what are the points that are “compromised” according to Governor McCrory. Given that DACA grantees are lawfully present for a limited duration as per the Napolitano memo, they are presumably entitled to state benefits, such as driver’s licenses for limited duration.62


64 Id.


66 Id.


status. As of March 27, 2013, exactly 693 DACA grantees in North Carolina received driver licenses, permits or ID cards.

On April 10, 2013, North Carolina House Republicans took a further step and introduced H.B. 786. The bill proposes driver’s licenses for undocumented immigrants. The bill also proposes the addition of § 15A-506 to the North Carolina General Statute, which would allow law enforcement officers to check the immigration status of anyone they stop and detain them for up to 24 hours. Recently, the bill’s sponsors offered an

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69 North Carolina Department of Transportation, DACA FAQs, http://www.ncdot.gov/download/dmv/DACA/DACA_FAQS_English.pdf, (last visited March 31, 2013). (Per the N.C. DMV’s website, a DACA grantee must present proof of “lawful status,” which likely means any USCIS receipt notices of notices of approval demonstrating DACA status.) Note that N.C. DOT also announced plans to issue special driver’s licenses for all non-citizens, including lawful permanent residents. See Bertrand M. Gutierrez, Planned N.C. Driver’s License Irks Some Noncitizens, Winston-Salem Journal, February 22, 2013, http://www.journalnow.com/news/local/article_65c8a826-7d56-11e2-9d3b-001a4bce6878.html. See also Colleen Jenkins, Immigrants Decry ‘Scarlet Letter’ Driver’s Licenses in N.C., Thomas Reuters News & Insight, March 14, 2013, http://newsandinsight.thomsonreuters.com/Legal/News/2013/03_-_March/Immigrants_decr _scarlet_letter_driver_s_licenses_in_N_C_/ (Alabama will also issue specially marked driver’s licenses to DACA grantees. Note, however, unlike the North Carolina licenses, driver’s licenses of all non-citizens, including lawful permanent residents will be identically marked with “FN.” Thus, DACA grantees are not distinguished like they are in North Carolina.)


71 H.B. 786 Gen. Assemb. Reg. Sess. (N.C. 2013); http://thinkprogress.org/justice/2013/04/12/1855831/north-carolina-arizona-immigration-bill/ (Undocumented immigrants who have lived in the state for at least one year may obtain driver’s licenses. These licenses, however, will be different from regular driver’s licenses, and will be even more distinct than the N.C. licenses for DACA grantees. The licenses to undocumented immigrants will be vertical and contain the cardholder’s fingerprint.)

72 H.B. 786 Gen. Assemb. Reg. Sess. (N.C. 2013); http://www.aclu.org/immigrants-rights-racial-justice/aclu-nc-bill-would-lead-racial-profiling. (Essentially, North Carolina Republicans seek to adopt a “show your papers” law akin to Arizona’s S.B. 1070 section 2(B). The bill would also make it harder for undocumented immigrants to post bail, require anyone who is undocumented
amendment to the bill requesting the Department of Public Safety to study the ideas proposed in the bill.\textsuperscript{73} The state agency would submit its findings and recommendations to a legislative oversight committee by March 2014.\textsuperscript{74}

### Part II Overview of Arizona v. United States & Preemption Doctrine

#### A. General Background on Preemption Analysis and Case Law

The Supreme Court has long recognized that federal power over immigration is plenary and exclusive.\textsuperscript{75} The Supremacy Clause provides that federal law “shall be the supreme Law of the Land….\textsuperscript{76} Accordingly, the federal government may preempt otherwise valid state law.\textsuperscript{77}

Preemption can be express or implied.\textsuperscript{78} Express preemption occurs when federal law expressly precludes a state or locality from regulating a particular field.\textsuperscript{79} Implied preemption occurs when field or conflict preemption exists.\textsuperscript{80} Field preemption occurs when the federal government creates a comprehensive regulatory scheme that crowds out

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\textsuperscript{73} NC Immigration Bill Turned Mostly Into a Study, July 17, 2013, http://www.wsoctv.com/news/news/local/nc-immigration-bill-turned-mostly-study/nYsj6/. (Essentially, the bill has been transformed into an informational research and study bill rather than actual legislation.)

\textsuperscript{74} Id.

\textsuperscript{75} See Toll v. Moreno, 458 U.S. 1, 10 (1982).

\textsuperscript{76} Art. VI, cl. 2.


\textsuperscript{78} See Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992) (“Pre-emption may be either expressed or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.”) (citations omitted) (internal quotation marks omitted).


state legislation in a particular field.\textsuperscript{81} Courts generally adopt a presumption against preemption where Congress acts in a field that states traditionally occupy.\textsuperscript{82}

**B. Broad Overview of Obstacle Preemption Jurisprudence**

Conflict preemption occurs when there is a direct conflict between federal and state law such that it is physically impossible to comply with both federal and state law.\textsuperscript{83} Obstacle preemption is a subset of conflict preemption that occurs when state law is an obstacle to the accomplishment of a federal law’s policy goals and objectives.\textsuperscript{84}

I contend that the N.C. licenses are obstacle preempted by DACA. The Supreme Court’s decision in *Arizona v. United States* offers guidance as to how the N.C. licenses are obstacle preempted by examining obstacle preemption jurisprudence prior to *Chamber of Commerce of U.S. v. Whiting*.\textsuperscript{85} Before examining the N.C. licenses, I will set forth an overview of the Supreme Court’s obstacle preemption jurisprudence in Part II.B. infra. In Part II.B.1 infra, I provide a summary of the obstacle preemption jurisprudence prior to *Whiting*, in which the Supreme Court adopted a searching, fact specific balancing analytical framework. Then in Part II.B.2 infra, I provide an overview *Chamber of Commerce of U.S. v. Whiting* and how the *Whiting* court’s deviation from Supreme Court precedent was seemingly abandoned in *Arizona v. United States*.

**1. Obstacle Preemption Jurisprudence Pre-Whiting**

In *Hines v. Davidowitz*, the Court relied on legislative history to find that Pennsylvania’s Alien Registration Act was an obstacle to the federal government’s

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“plainly manifested [purpose].” The state law required adult noncitizens to register annually, pay a fee, carry their alien identification card at all times, and show it upon request. Noncitizens who failed to register or carry their card were subject to fines. A year after Pennsylvania passed the law, Congress enacted the federal Alien Registration Act, which did not require noncitizens to carry a registration card, and criminalized willful failure to register.

In striking down the state law, the Court stated that rules and regulations touching on “the rights, privileges, obligations or burdens of aliens implicate the national foreign affairs power.” Moreover, “states cannot, inconsistently with the purposes of Congress, conflict or interfere with, curtail or complement the federal law, or enforce additional or auxiliary regulations.” The Court balanced the federal government’s policy goals against the effects of the state law and emphasized that the federal government sought to “protect the personal liberties of law-abiding aliens through one uniform national registration system, and to leave them free from the possibility of inquisitorial practices and police surveillance that might not only affect our international relations but might also generate the very disloyalty which the law has intended guarding against.”

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86 Hines v. Davidowitz 312 U.S. 52, 74 (1941). See also Lauren Gilbert, Immigrant Laws, Obstacle Preemption and the Lost Legacy of McCulloch, 33 Berkeley J. Emp. & Lab. L. 153, 202 (2012). (Professor Gilbert notes that “Hines v. Davidowitz frequently has been categorized in the literature as a field preemption case, even though the Court used the language of obstacle preemption in striking down Pennsylvania’s registration requirements.”) (citations omitted).  
87 Id. 59-60.  
88 Id. at 59-60.  
89 Id. at 60-61.  
90 Id at 66.  
91 Id. at 66-67.  
92 Id. at 74 (emphasis added).
Similarly, in *Crosby v. National Foreign Trade Council*, the Court held that a Presidential Executive Order obstacle preempted a Massachusetts statute. The Court focused on the Executive intent and broad foreign policy concerns underlying the Executive Order to determine that the state law interfered with the President's authority to speak on *foreign policy matters*, which, in turn, impeded the development and execution of a national policy concerning Burma (Myanmar).

Additionally, the Supreme Court has held that a state law may be an obstacle to achieving the purposes of a federal law when it balances policy goals differently than federal law. In *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, the Court found that the state law at issue was preempted because it struck the balance differently between “the encouragement of invention and free competition in unpatented ideas” than federal law. Similarly, in *Buckman Co. v. Plaintiffs' Legal Comm.*, the Court held that state law tort claims against a manufacturer of orthopedic bone screws for misrepresenting its products to the FDA was obstacle preempted because the “balance sought by the Administration can be skewed by allowing fraud-on-the-FDA claims under state tort law.”

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94 *Crosby* 530 U.S. at 381 (The Court stated that “[t]he state Act undermines the President's capacity, in this instance for effective diplomacy. It is not merely that the differences between the state and federal Acts in scope and type of sanctions threaten to complicate discussions; they compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments.” The Court examined Congressional intent in delegating power to the Executive to handle relations and economic sanctions with Burma.)
95 *Id.* at 376-384 (2000) (emphasis added).
97 *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) (The Court examined the state statute which prohibited the use of a particular process to duplicate unpatented boat hulls conflicted with federal law that promoted free competition in unpatented areas.)
98 *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 348 (2001) (The state law tort plaintiffs alleged the orthopedic screws manufacturers made fraudulent misrepresentations to obtain FDA
In *Lozano v. Hazelton*, the Third Circuit adopted this balancing approach in examining obstacle preemption in the immigration context. In *Lozano*, the Court of Appeals found that the local ordinance regulating employment of undocumented immigrants and prohibiting rentals to undocumented immigrants was obstacle preempted. The Court of Appeals examined Congress’ efforts to carefully balance multiple policy objectives by deeply searching the legislative history and the overall structure of Immigration and Reform Control Act of 1986 (“IRCA”). The Court found that the Hazleton ordinance chose to prioritize only one of the various policies considered by Congress and disregarded Congress’ other objectives.

2. The Supreme Court’s Decisions in *Whiting* and *Arizona*

In *Chamber of Commerce of U.S. v. Whiting*, however, the Court deviated from the fact intensive balancing approach noted in Part III.B.1 *supra*. In *Whiting*, the Court examined the Legal Arizona Workers Act (“LAWA”), which provides that the licenses of “state employers who knowingly or intentionally employ unauthorized aliens” may be revoked under certain circumstances. LAWA also requires every employee “[to] verify the employment eligibility of the employee” by using E–Verify.…“}

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101 *Lozano v. City of Hazelton*, 620 F.3d 170, 210 (3d Cir. 2010) cert. granted, judgment vacated sub nom. City of Hazelton, Pa. v. Lozano, 131 S. Ct. 2958 (U.S. 2011) (“[I]t is indisputable that Congress went to considerable lengths in enacting IRCA to achieve a careful balance among its competing policy objectives of effectively deterring employment of unauthorized aliens…”).
102 *Lozano* 620 F.3d 170 at 219.
104 *Whiting* 131 S. Ct. at 1976-77.
The Court found that the state law at issue was not preempted. First, the Court held that the provision revoking business license was not expressly preempted.\(^{105}\) The Court broadly interpreted “licensure” in the business context and held that LAWA fell within the ambit of the Immigration Reform and Control Act (IRCA)’s savings clause.\(^{106}\) The Court found it significant that Arizona relied solely on the federal government’s determination of who is an unauthorized individual, which in turn, was not in tension with federal law.\(^{107}\) Then, the Court found that the LAWA licensure provision was not obstacle preempted and refused to engage in a “freewheeling… inquiry into whether a state statute is in tension with federal objectives” to determine whether federal law preempted LAWA.\(^{108}\)

In stark contrast to the Whiting Court’s reluctance to utilize a searching obstacle preemption analysis, the Court in Arizona relied on numerous sources of legislative history to find Congressional intent obstacle preempted two of the four challenged provisions of S.B. 1070.\(^{109}\) Indeed, the Arizona Court seemed to revisit the broad pre-Whiting obstacle preemption analysis.\(^{110}\)

First, the Court found that Section 3 of the law, which made failure to carry immigration documents a crime, was field preempted.\(^{111}\) In striking down Section 3, the

\(^{105}\) Id. at 1981.

\(^{106}\) Id. at 1980.

\(^{107}\) Id. at 1981.

\(^{108}\) Id. at 1985.

\(^{109}\) David A. Martin, 98 Va. L. Rev. 41,43 Reading Arizona (2012). (Professor Martin notes that the Arizona Court’s reliance on obstacle preemption was a surprise, particularly because the Arizona law in Whiting was far more specific and closer to federal law managed to withstand an obstacle preemption challenge.)

\(^{110}\) See Part III.B.1 supra.

\(^{111}\) Id. at 2503.
Court stated that “even complementary state regulation is impermissible” where Congress has adopted a comprehensive regulatory scheme.\(^{112}\)

The Court then relied on obstacle preemption to uphold a preliminary injunction against Section 5(C) of S.B. 1070, which imposed criminal penalties on immigrants who work without employment authorization.\(^{113}\) The Court examined the text, structure, and legislative history of IRCA to determine that the state law criminalizing immigrant workers was an obstacle to the regulatory regime Congress had chosen.\(^{114}\) The Court held that Section 5(C) interfered with “the careful balance struck by Congress with respect to unauthorized employment of aliens. Although [Section] 5(C) attempts to achieve one of the same goals as federal law… it involves a conflict in the method of enforcement.”\(^{115}\) In doing so, the Arizona Court deviated from Whiting and examined a wide range of legislative background materials, including Congressional studies, recommendations, and hearings to ascertain the federal objectives underlying IRCA.\(^{116}\)

Section 6 of S.B. 1070, which allowed state law enforcement to arrest noncitizens who commit “removable offenses” without a warrant, was similarly struck down as the Court found that Arizona law enforcement had greater authority to enforce immigration laws than even federal immigration officers.\(^{117}\) The Court examined a guidance

\(^{112}\) Arizona, 132 S. Ct. at 2502.
\(^{113}\) Id. at 2505.
\(^{114}\) Id.
\(^{115}\) Id. (emphasis added).
\(^{116}\) Id. at 2504, 2505. (“In the end, IRCA’s framework reflects a considered judgment that making criminals out of aliens engaged in unauthorized work—aliens who already face the possibility of employer exploitation because of their removable status—would be inconsistent with federal policy and objectives…. Under § 5(C) of S.B. 1070, Arizona law would interfere with the careful balance struck by Congress with respect to unauthorized employment of aliens. Although § 5(C) attempts to achieve one of the same goals as federal law—the deterrence of unlawful employment—it involves a conflict in the method of enforcement”) (citations omitted).
\(^{117}\) Arizona, 132 S. Ct. at 2506.
memorandum issued by DHS to determine what factors the federal government perceived to be crucial in determining whether to prosecute a removable individual, and found that the state law was an obstacle to federal objectives. In striking down Section 6, the Court expressed concerns the law “could [result in] unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) whom federal officials determine should not be removed,” which was an obstacle to the federal enforcement scheme.

The Court found no facial flaw in Section 2(B), the “show your papers” law, but stated that it that it could be challenged as applied, particularly in situations involving racial profiling and violations of the Fourth Amendment. The Court left the door open for future challenges to Section 2(B).

**Part III N.C. Licenses Are Preempted by DACA**

The central issue regarding the N.C. licenses is whether states can publicize the immigration status of individuals protected from deportation by the federal government, and thus, draw attention to such individuals’ immigration status. As a general matter, states have the authority to issue driver’s licenses. Federal legislation, however, may preempt state legislation regarding driver’s licenses.

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118 *Arizona*, 132 S. Ct. at 2505.
120 *Arizona*, 132 S. Ct. at 2510.
121 *Arizona*, 132 S. Ct. at 2510.
123 Art. VI, cl. 2.
The Supreme Court has recognized that it is within the absolute discretion of the Executive Branch to not pursue enforcement action.\footnote{See Heckler v. Chaney, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion").} As such, any Executive Branch exercise of prosecutorial discretion may preempt otherwise valid state legislation regarding driver’s licenses. In the immigration context, DHS frequently exercises its prosecutorial discretion to “defer action.”\footnote{Napolitano Memo.} DHS has used “deferred action” in various contexts to ensure efficient resource allocation with an eye towards humanitarian concerns.\footnote{Gilbert Article at 7, 37; Lennon v. Immigration & Naturalization Serv., 527 F.2d 187 (2d Cir. 1975) (John Lennon was found to be eligible for deferred action despite a prior drug conviction. Arguably, one of the more prominent examples of “deferred action,” then termed “nonpriority status.”) See also INA § 103(a)(3).} Examples of individuals receiving deferred action include survivors of domestic violence with approved VAWA self-petitions who are not immediately eligible to adjust as well as certain widows of U.S. citizens who are ineligible for immigration status.\footnote{DHS, DHS Establishes Interim Relief for Widows of U.S. Citizens, http://www.dhs.gov/news/2009/06/09/dhs-establishes-interim-relief-widows-us-citizens, (last visited March 30, 2013).} DACA is merely an extension of DHS policy to not remove “low priority” persons.\footnote{Napolitano Memo; Memorandum from John Morton, Director, U.S. Immigration and Customs Enforcement, on Exercising Prosecutorial Discretion Consistent with Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens (June 17, 2011) (Setting forth the different priority levels of removable individuals and stating that that only higher priority level individuals should be pursued and removed).} Indeed, the Napolitano memo adopted measures to ensure federal resources are not wasted on removing DACA grantees, who are “low priority” persons.\footnote{Napolitano Memo.}

In Part III.A \textit{infra}, I first examine whether federal law expressly preempts the N.C. licenses. In Part III.B \textit{infra}, I examine the N.C. licenses under the Supreme Court jurisprudence set forth in Part II \textit{supra} and conclude that DACA obstacle preempts the
N.C. licenses. To illustrate DACA’s preemptive effect on N.C. licenses, I envision a hypothetical N.C. license holder who is stopped by local law enforcement and held by local law enforcement because the N.C. license holds out such license holder’s “unlawful” status in the U.S.

As a threshold matter, before I examine the N.C. licenses under the preemption framework, it should be noted that DACA is not legislation created by Congress nor is it a federal regulation created as result of a formal rulemaking process per the Administrative Procedure Act (APA). A potential issue in determining the viability of the DACA program is whether the Obama Administration overstepped Constitutional bounds by announcing the policy.

Recent litigation brought forth by Kris Kobach, ICE officials and the State of Mississippi seeks to dismantle the DACA program by arguing that the Obama Administration did indeed overstep its Constitutional bounds. Scholars have also

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130 Gilbert Article at 28
131 See Jill E. Family, Administrative Law Through the Lens of Immigration Law, 64 Admin. L. Rev. 565, 572 (2012) (“Nonlegislative rules” are nonbinding and do not have the force of law. Legislative rules, on the other hand, are binding and have the force of law. Generally, legislative rules create a “new law” that results in a substantive change. There are various criteria for determining whether an agency document (i.e. policy memoranda) is indeed binding. Professor Family notes the various procedural concerns that nonlegislative rules raises, particularly in the immigration law context.); William Funk, A Primer on Nonlegislative Rules, 53 Admin. L. Rev. 1321, 1322 (2001) (Professor Funk provides a broad overview of the rulemaking process in administrative law.); United States v. Mead Corp., 533 U.S. 218, 231 (2001); Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).
132 See Gilbert Article at 28; Amended Complaint, Crane v. Napolitano, (N.D.Tex. Oct. 10, 2012) (No. 3:12-cv-03247-O ) (In Crane v. Napolitano, Kris Kobach argues that DACA was enacted without proper notice and comment per the APA and in turn does not have the force of law. Kobach further contends that DACA improperly impedes DHS officers from enforcing INA § 235.) See also Amended Complaint ¶ 50, Crane v. Napolitano, (N.D.Tex. Oct. 10, 2012)( No. 3:12-cv-03247-O ) (Plaintiff Doebler faced a three-day suspension for arresting and processing the alien for a hearing rather than exercising the “prosecutorial discretion” commanded by his supervisors).
expressed concerns regarding the constitutionality of preemption by the federal agencies and the Executive Branch.¹³³

Professor Lauren Gilbert, however, counters that DACA falls within the general statement of policy exception to rule making under the APA.¹³⁴ Furthermore, she argues that DACA is a result of the Secretary of Homeland Security’s broad authority under INA § 103(a) to establish rules and regulations to further the goals of the INA.¹³⁵ Professor David A. Martin has also argued that the plain language of the INA does not prevent DHS from exercising its prosecutorial discretion through DACA.¹³⁶

For the purposes of examining N.C. licenses under the preemption framework, it is assumed that DACA does not violate any provisions of the APA.¹³⁷ It is assumed that

¹³³ Ernest A. Young, Executive Preemption, 102 Nw. U. L. Rev. 869, 878 (2008) (“When executive actors add preemptive mandates not clearly set forth in the underlying statute, the notice and deliberation facilitated by clear textual statement is lacking.”)
¹³⁴ Gilbert Article at 27, 28; 5 U.S.C. § 553. (Professor Gilbert explains that the DACA program is a “general statement of policy” that is rooted in the “foreign affairs function” exception to the formal rulemaking process per the APA. Thus, even if the DACA program is indeed a binding rule, the Executive Branch did not violate rulemaking procedures by foregoing the notice and comment process.)
¹³⁵ Gilbert Article at 28; See INA § 103(a)(3) (“[The Secretary] shall establish such regulations; prescribe such forms of bond, reports, entries, and other papers; issue such instructions; and perform such other acts as he deems necessary for carrying out his authority under the provisions of this chapter.”)
¹³⁶ For further discussion, see David A. Martin, A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach’s Latest Crusade, 122 YALE L.J. ONLINE 167 (2012), http://yalelawjournal.org/2012/12/20/martin.html (Professor Martin argues that not only does DHS have broad prosecutorial discretion under INA § 103(a), but the agency has broad discretion in determining not to remove otherwise removable individuals under INA § 235. Professor Martin addresses the arguments Kris Kobach set forth in Crane v. Napolitano and ultimately concludes that the DHS properly exercised its broad discretion as an enforcement agency. Furthermore, Professor Martin dismisses the argument that individual ICE officers are necessarily bound to removing individuals under INA § 235, even though DHS has already exercised its prosecutorial discretion).
DACA is not a product of an improper delegation of power and is otherwise Constitutional.\textsuperscript{138} This paper also adopts Professor Gilbert’s argument that DACA was created pursuant to the Executive Branch’s broad discretion under INA § 103(a)(3).\textsuperscript{139}

\textbf{A. N.C. Licenses Are Not Expressly Preempted by the REAL ID Act}

Express preemption occurs when Congress plainly declares a federal law's preemptive effect, usually through an express preemption provision.\textsuperscript{140} In such cases, the Court focuses “on the plain wording of the [express preemption] clause,” as it is considered “best evidence of Congress' pre-emptive intent.”\textsuperscript{141}

Based on \textit{Whiting}, the N.C. licenses are not expressly preempted. The \textit{Whiting} Court only interpreted “licenses” as used in the context of 8 U.S.C. § 1324a, which governs business’ employment of undocumented immigrants. The IRCA provision at

(Professor Marguiles argues that the validity of DACA cannot be fully explained by the Executive exercise of prosecutorial discretion. Instead, DACA is justified by the President’s power to protect “intending citizens” from violations of law by the States. This Presidential “stewardship” arises from the Supreme Court’s ruling in \textit{Youngstown Sheet & Tube Co. v. Sawyer}; Gilbert Article at 22. (Professor Gilbert notes that it is arguable that the language of the INA § 103(a) pushes the limits of the non-delegation doctrine as it may not provide an “intelligible principle” for Executive Branch action as per \textit{Whitman v. American Trucking Associations}, Inc., 531 U.S. 457 (2001).)

\textsuperscript{139} See Gilbert Article.
\textsuperscript{141} \textit{Sprietasma v. Mercury Marine, a Div. of Brunswick Corp.}, 537 U.S. 51, 61 (2002). (The Court held that the express preemption clause of the Federal Boat Safety Act (FBSA) did not expressly preempt common law tort claims.) \textit{See also Geier v. Am. Honda Motor Co., Inc.}, 529 U.S. 861 (2000) (Court held that the express preemption clause of the National Traffic and Motor Vehicle Safety Act did not expressly preempt common law tort claims.)
issue in *Whiting* contained an express savings clause for business licenses.\(^{142}\) The Court broadly interpreted “licenses” as used in the federal statute savings clause to find that LAWA was not preempted.

The language of 8 U.S.C. § 1324a is irrelevant to driver’s licenses. There is no provision in the INA expressly prohibit the N.C. licenses. The DACA memorandum issued by Secretary Napolitano does not expressly require states to issue driver’s licenses with particular uniformity.\(^{143}\) 49 U.S.C. § 30301 is the only federal statute that defines driver’s licenses and it merely states that a “motor vehicle operator's license” is “a license issued by a State authorizing an individual to operate a motor vehicle on public streets, roads, or highways.”\(^{144}\) Unlike 8 U.S.C. § 1324a, the plain language of 49 U.S.C. § 30301 does not expressly address the type of immigration information on the face of the N.C. licenses.\(^{145}\) Thus, it would seem that federal law does not expressly preempt the N.C. licenses, as the language of the federal law does not directly address the publication of immigration status.\(^{146}\)

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\(^{142}\) 8 U.S.C. § 1342a(h)(2) (The statute preempts “any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.”)

\(^{143}\) See Napolitano Memo.

\(^{144}\) 49 U.S.C.A. § 30301(5).

\(^{145}\) 49 U.S.C.A. § 30301(5).

\(^{146}\) Section 202 of the REAL ID Act, however, proposed a note to 49 U.S.C.A. § 30301 detailing how state driver's licenses and identification documents should be issued. Section 202(c)(2)(B)(viii) contemplates a situation where states issue driver’s licenses to persons with deferred action status. Section 202(c)(2)(C) provides that persons with temporary status (i.e. deferred action status) may receive a temporary driver’s license valid for the individual’s period of authorized stay or one year if the individual is authorize to stay in the U.S. indefinitely. Interestingly, Section 202(c)(2)(C)(iii) of the REAL ID Act provides that “[a] temporary driver's license or temporary identification card issued pursuant to this subparagraph shall clearly indicate that it is temporary and shall state the date on which it expires.” But, it is unclear how this note would impact the preemption analysis. The language of the REAL ID Act Section 202(c) does not seem to expressly preempt the N.C. licenses, because it does not address the type of immigration information that is permitted on driver’s licenses. *But see League of United Latin Am. Citizens (LULAC) v. Bredesen*, 3:04-0613, 2005 WL 2034935 (M.D. Tenn. Aug. 23, 2005)
B. N.C. Licenses Are Obstacle Preempted Because the Licenses Disrupt Federal Government’s Policy Objectives and Interfere with the Federal Government’s Allocation of Resources

That federal law does not expressly preempt the N.C. licenses does not necessarily preclude it from being preempted. As illustrated in Part II supra, the Supreme Court’s obstacle preemption jurisprudence focuses on the federal government’s balancing of policy goals. In Arizona v. United States, the Supreme Court utilized a broad analysis of legislative history to determine federal government’s balance of policy goals. In Part III.B.1 infra, I examine the N.C. licenses under the Arizona court’s federal policy balancing analysis, including the licenses’ impact on U.S. foreign policy. I then further examine the interaction between the N.C. licenses and “show your papers” laws as well as the risk of wrongful detention of N.C. license holders because of the 287(g) and S-COMM programs. In Part III.B.2 infra, I examine the dangers of N.C. licenses if a N.C. license holder were to travel to Arizona because of Arizona Governor Brewer’s executive order to not recognize the lawful presence of DACA grantees.

1. N.C. Licenses Disrupt the Federal Government’s Balancing of Policies

The Court in Arizona recognized that “a principal feature of the removal system is the broad discretion exercised by immigration officials,” which in turn, “embraces

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(The Court found that that the REAL ID Act impliedly preempted a state statute which provided that the "department [of Safety] shall not accept matricula consular cards as proof of identification for driver license application and issuance purposes" as the REAL ID Act set forth guidance for documents that are acceptable for “federal purposes”). See also National Conference of State Legislatures, April 18, 2013, [http://www.ncsl.org/issues-research/transport/count-down-to-real-id.aspx](http://www.ncsl.org/issues-research/transport/count-down-to-real-id.aspx); 6 C.F.R. § 37 for applicable rules for states who issue driver’s licenses for use by federal government.

148 Arizona, 132 S. Ct. at 2505.
immediate human concerns.”  

DACA reflects the federal government’s use of its “broad discretion” to “embrace immediate human concerns” by using federal policy to prevent the marginalization of qualified young undocumented immigrants. Moreover, the Court in *Hines* emphasized that the federal immigration system seeks to “protect the personal liberties of law-abiding aliens…and to leave them free from the possibility of inquisitorial practices and police surveillance that might not only affect our international relations but might also generate the very disloyalty which the law has intended guarding against.”  

Indeed, the Court in *Arizona* echoed the concerns raised in *Hines* and struck down Section 6 of S.B. 1070.  

The Executive Branch is entitled to base its decision-making on balancing of a number of factors within its expertise. The Napolitano memo states that the DACA program is an exercise of prosecutorial discretion designed to prevent the removal of “productive young people to countries where they may not have lived or even speak the language.” The federal government acknowledged DACA grantees entered the U.S. without authorization, but did so “[without intent] to violate” immigration law by providing DACA grantees only lawful presence, and not lawful status. As such, the

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149 *Arizona*, 132 S. Ct. at 2499 (emphasis added). Note that this prosecutorial discretion is rooted in INA § 103(a). *See supra* Fn 140.
150 *Hines* 312 U.S. at 74. (emphasis added).
151 *Arizona*, 132 S. Ct. at 2506 (Federal immigration law seeks to prevent the “unnecessary harassment of some aliens (for instance, a veteran, college student, or someone assisting with a criminal investigation) whom federal officials determine should not be removed.”)
152 *Heckler*, 470 U.S. at 831.
153 Napolitano Memo. *See also* David A. Martin, *A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach’s Latest Crusade*, 122 YALE L.J. ONLINE 167, 181-83 (2012), [http://yalelawjournal.org/2012/12/20/martin.html](http://yalelawjournal.org/2012/12/20/martin.html). (Professor Martin addresses the broad discretion that DHS and ICE enjoy in enforcing immigration law against removable individuals. Professor Martin notes that such discretion is common across all enforcement agencies).
154 Napolitano Memo
DACA program carefully balances the government’s need to remove “high priority” criminals while also integrating “low priority” undocumented individuals who entered the U.S. without fault and have developed ties to the U.S.

The N.C. licenses undercut the Obama Administration’s balancing of policy goals to integrate DACA grantees and removing high priority criminals. The N.C. licenses prominently display DACA grantees’ lack of permanent immigration status. The N.C. licenses overemphasize DACA grantees’ lack of immigration status while ignoring the federal government’s careful plan to integrate such individuals. Despite being technically accurate, “LEGAL PRESENCE NO LAWFUL STATUS” in bold read letters on the licenses intentionally differentiates DACA grantees. Such an action serves to reinforce the outsider status of DACA grantees. In highlighting the DACA grantee’s precarious immigration status, North Carolina limits the number and size of the communities to which immigrants without lawful status can belong. In turn, this creates a risk that DACA grantees would not apply for driver’s licenses for fear of exposing their immigration status, which would frustrate the government’s goal to bring DACA grantees out of the shadows and integrate such productive young immigrants. Thus, the N.C. license disproportionately focuses on DACA grantee’s lack of formal immigration status,

155 Note, that in jurisdictions with documented and undocumented immigrants, as well as U.S. citizens have suffered from racial profiling and discriminatory actions by the local police. Despite the Arizona court’s decision regarding S.B. 1070, it is unclear what factors other than race and ethnicity would trigger reasonable suspicion” of unlawful presence.
156 Maria Pabon Lopez, More Than A License to Drive: State Restrictions on the Use of Driver's Licenses by Noncitizens, 29 S. Ill. U. L.J. 91, 104 (2005) (Note that this language suggests that licenses such as the N.C. license singles out the license holders, thus, violating their Equal Protection rights. Though Professor Lopez uses Equal Protection analysis, given the Court’s language in Arizona, the protection of a group of undocumented immigrants can be a broad goal of federal action).
which compromises the government’s goal to “lift the shadow of deportation” by discreetly integrating DACA grantees.

Moreover, the Court in Arizona acknowledged the complex interaction between a removable individual’s ties to the U.S. community and the impact of removal orders on the broader U.S. foreign policy. The dynamic nature of relations with other countries requires the Executive Branch to ensure that immigration enforcement policies are consistent with U.S. foreign policy. Similarly, the Court in Crosby noted that the Executive Branch had broad discretion in the development of foreign policy.

Given the Court’s broad deference to the federal government’s foreign policy in Arizona, the N.C. licenses would disrupt the government’s foreign policy goals. The DACA program reflects the federal government’s use of prosecutorial discretion on young individuals who should not be removed to “countries where they may not have lived or even speak the language.” The DACA program protects DACA grantees from removal while also promoting the integration of qualified individuals. As such, the

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158 Arizona, 132 S. Ct. at 2499.
159 Arizona, 132 S. Ct. at 2499.
160 Crosby 530 U.S. at 381 (“[T]he state Act undermines the President's capacity, in this instance for effective diplomacy. It is not merely that the differences between the state and federal Acts in scope and type of sanctions threaten to complicate discussions; they compromise the very capacity of the President to speak for the Nation with one voice in dealing with other governments”).
161 Note, that the Court in Arizona expressed broad deference to the federal government’s foreign policy goals in the field preemption context in striking down Section 3 of S.B. 1070. Admittedly, it is unclear if the DACA’s link to the federal government’s foreign policy is sufficient to be determinative that the N.C. licensees are preempted. At the very least, however, the impact of the N.C. licenses in the government’s foreign policy would be a factor in the court’s balancing of the federal government’s policy objectives, given the Court’s willingness to dig deep into the federal government’s intent when undergoing obstacle preemption analysis.
162 Napolitano Memo. See also David A. Martin, A Defense of Immigration-Enforcement Discretion: The Legal and Policy Flaws in Kris Kobach’s Latest Crusade, 122 YALE L.J. ONLINE 167, 181-83 (2012), http://yalelawjournal.org/2012/12/20/martin.html. (Professor Martin addresses the broad discretion that DHS and ICE enjoy in enforcing immigration law against removable individuals. Professor Martin notes that such discretion is common across enforcement agencies).
federal government is ensuring that a class of individuals who will have difficulty in integrating in another foreign nation will not be removed to such other foreign nation. Conversely, the federal government seeks to facilitate such individuals’ integration into the U.S. The N.C. licenses undermine the integration of such individuals, which in turn, compromises the Obama Administration’s overall foreign policy goals.

Additionally, the N.C. licenses places undue attention on DACA grantee’s unlawful status, thereby putting them at risk of removal. The impact of N.C. licenses on federal objectives can be illustrated by examination of a hypothetical N.C. license holder who encounters local law enforcement. Theoretically, a N.C. license holder can be stopped pursuant to a “show your paper” law, or can otherwise be stopped for any other reason. If a N.C. license holder is so stopped by local law enforcement, she also faces the risk of encountering the 287(g) or S-COMM detainer programs. First, I will examine the interaction between the N.C. licenses and “show your papers” and then I will examine the interaction between the N.C. licenses with 287(g) and S-COMM.

Assuming that the hypothetical DACA grantee is stopped pursuant to a “show your paper” law, the N.C. licenses ostensibly would be sufficient documentation that a DACA grantee is “lawfully present.” But, the N.C. license would subject a DACA grantee to further police scrutiny, as the licenses would alert local law enforcement of the DACA grantees’ lack of formal immigration status. In which case, the local police would need to spend extraneous time to check with DHS to confirm the N.C. license holder’s legal presence. Such a process would be an inefficient use of federal resources because the federal government has already deemed such persons legally present. This

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163 See e.g. S.B. 1070 Section 2(B), proposed § 15A-506 of H.B. 786.
inefficiency in turn frustrates the federal policy to focus prosecution of “high priority” criminals and to mitigate wasting resources on “low priority” undocumented immigrants.

In the 287(g) and S-COMM context, the N.C. licenses may increase the risk of wrongful detention of DACA grantees. Generally, USCIS has stated that any information obtained used to determine whether an applicant qualifies for DACA may be shared with national security and law enforcement agencies, including ICE, for purposes other than removal. For example, such information may be shared with ICE for national security purposes, or for the investigation or prosecution of a criminal offense. Essentially, a DACA applicant’s information is not relayed to ICE unless USCIS deems it necessary for national security.

In contrast, 287(g) and S-COMM allow ICE to access to DACA grantees’ immigration information for removal purposes. Under INA § 287(g), states in current contracts with DHS only implement the Detention Model, where local jail officers are trained to screen inmates for potential immigration violations. If the local jail officers believe an individual is removable, they can then inform ICE, who may issue a detainer. Under S-COMM, the fingerprints of individuals arrested by local law enforcement are shared with ICE, who can then notify local authorities.

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164 http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=3a4dcb4b04499310VgnVCM100000082ca60aRCRD&vgnextchannel=3a4dcb4b04499310VgnVCM100000082ca60aRCRD. (last visited March 25, 2013).  
165 Consideration for Deferred Action for Childhood Arrivals Frequently Asked Questions, USCIS Q11, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=3a4dcb4b04499310VgnVCM100000082ca60aRCRD&vgnextchannel=3a4dcb4b04499310VgnVCM100000082ca60aRCRD. (last visited March 25, 2013).  
enforcement are checked against the FBI criminal history database and the DHS biometric databases. If the federal database shows that the individual is deportable, it will issue a “detainer” to the local law enforcement requesting the arrested individual be detained until ICE agents interview and determine whether or not to transfer the individual to ICE custody. An arrest for any infraction, no matter how minor, is sufficient to trigger a 287(g) detainer or S-COMM database check. No past or current conviction is necessary for ICE to issue a detainer.

State and local law enforcement act as gatekeepers with the initial discretion to determine how to proceed with an arrested individual in both 287(g) and S-COMM. As an illustration of the importance of local law enforcement’s discretion, police decision to stop drivers for minor traffic violations have frequently led to detention of Latino immigrants under the 287(g) program.

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173 Angela M. Banks, The Curious Relationship Between “Self-Deportation” Policies and Naturalization Rates, 16 Lewis & Clark L. Rev. 1149, 1181-82 (2012) (citing statistics obtained from ICE: “Thirty percent of all ICE detainers issued nationwide in 2010 pursuant to 287(g) agreements were based on traffic offenses….These numbers suggest that the police officers responsible for the most traffic-based arrests leading to ICE detainers were patrol officers with no specific authority or mandate to enforce immigration law. Patrol officers do not need 287(g) authority to support immigration enforcement; they just need to operate within a jurisdiction in which the immigration status of all arrested individuals is checked.”); See also American Civil Liberties Union of Tennessee, Consequences and Costs: Lessons Learned from Davidson County,
The N.C. licenses raise the concerns addressed by the Court in *Arizona* in that the federal government’s immigration enforcement policy to avoid “police surveillance” and “unnecessary harassment” would be undermined. The post-arrest federal prosecutorial discretion does not remedy an individual’s initial interaction with local law enforcement.174 By exposing DACA grantees’ immigration status via the N.C. licenses, North Carolina risk wrongfully detaining DACA grantees for 287(g) and S-COMM purposes. There are numerous reports of errors in the 287(g) and S-COMM databases, which have led to the improper detainment of individuals with legal status.175 While the N.C. licenses provide a proof of identity, they exacerbate DHS database error176 by alerting local law enforcement of an individual’s “unlawful status” which places a DACA grantee through needless 287(g) and S-COMM checks despite her legal presence. This in turn, frustrates the facilitation of legally correct detention.

Assuming a hypothetical N.C. license holder is stopped for a minor traffic offense, local law enforcement may read the language of the N.C. licenses and feel compelled to check the immigration status of the hypothetical license holder, even though DACA grantees are protected from removal. As such, ICE would waste resources on DACA grantees put into 287(g) and S-COMM checks when DHS has already declared its exercise of prosecutorial discretion. Furthermore, such action risks “generat[ing] the very disloyalty” DACA seeks to avoid. Therefore, the N.C. licenses would disrupt the federal government’s policy goals.

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2. Danger in Arizona

Most troubling is how a N.C. license holder would fare in Arizona.\textsuperscript{177} Governor Brewer has steadfastly maintained that DACA grantees are not lawfully present.\textsuperscript{178} Governor Brewer ignores recent DHS guidance reiterating that DACA grantees are lawfully present in the U.S.\textsuperscript{179} Arizona, is unique, in that unlike other states, it does not even recognize the legal presence of DACA grantees.\textsuperscript{180} Thus, Arizona’s “show your papers” law would have an even bigger impact on N.C. license holders than other states’ “show your papers” laws.

Arizona residents who are DACA grantees cannot receive driver’s licenses.\textsuperscript{181} As such, DACA grantees who are Arizona residents that are stopped by local law enforcement pursuant to S.B. 1070 Section 2(B) must present notices from DHS or USCIS to verify their immigration status.

Additionally, Arizona law enforcement have arrested DACA applicants for not presenting a driver’s license.\textsuperscript{182} In the case of Cesar Valdes, Arizona police arrested him for failing to produce a driver’s license upon a traffic-related stop despite his status as a

\textsuperscript{177} See National Immigration Law Center, \textit{Overview of State Driver’s License Requirements Under the DACA Policy}, April 9, 2013. (Note, that Nebraska is the state other than Arizona that has expressly stated that it would not issue DACA grantees driver’s licenses.)


\textsuperscript{179} Consideration for Deferred Action for Childhood Arrivals Frequently Asked Questions, USCIS, Q6, http://www.uscis.gov/portal/site/uscis/menultemeb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=3a4d4bc4b004499310VgnVCM10000082ca60aRCRD&vgnextchannel=3a4d4bc4b004499310VgnVCM10000082ca60aRCRD, (last visited March 12, 2013).

\textsuperscript{180} See Footnote 175 \textit{supra}.

\textsuperscript{181} Arizona Executive Order 2012-06.

DACA applicant. He was subsequently detained by local police and was finally released upon being transferred to ICE.

The N.C. license demonstrates that an individual is a qualified DACA grantee. In Arizona, where the lawful status of DACA grantees are not recognized, the N.C. license will not offer any protection from local law enforcement. Unlike Cesar Valdes, a N.C. license holder possesses a driver’s license and is an actual DACA grantee. But, given that Arizona does not recognize the lawful presence of DACA grantees, it is not certain that owning a license proclaiming “LEGAL PRESENCE NO LAWFUL STATUS” would be any better than not owning a license. After all, the N.C. licenses clearly state that the license holder does not have “lawful status” in the U.S., and Arizona does not recognize a DACA grantee’s “legal presence.” As such, it is highly likely that if a N.C. license holder were stopped or arrested by Arizona law enforcement, the N.C. license would not prevent the Arizona officers from detaining the license holder for 287(g) and S-COMM purposes. Indeed, local police did not even respect Cesar Valdes’s protection from removal as a DACA applicant with a pending application. Thus, the N.C. licenses highly exposes DACA grantees to prolonged detention when Arizona law enforcement complies with 287(g) and S-COMM.

By exposing DACA grantees and putting them at such a risk, the N.C. licenses directly conflict with the federal goal of integrating DACA grantees into the U.S. community. The licenses wrongly emphasize DACA grantees’ lack of legal status, which undermines the federal policy to integrate such individuals. Moreover, the N.C. licenses impedes the federal government’s resource allocation, as the licenses enhance the risk of

183 Id.
184 Id.
185 Arizona Executive Order 2012-06
DACA grantees going through 287(g) and S-COMM background checks even when the DACA grantees have not committed a crime and are legally present in the U.S. The N.C. licenses, particularly in confluence with Governor Brewer’s Executive Order and S.B. 1070, is an obstacle to the federal policy of protecting DACA grantees from removal.

**Part IV Conclusion**

The N.C. licenses undermines the the DACA program’s objective to integrate individuals who are “Americans in every single way but one: on paper.” In *Arizona v. United States*, the Supreme Court emphasized the federal government’s “broad discretion” to “embrace immediate human concerns” in immigration enforcement that is grounded in the Executive Branch’s constitutional powers.

The language used on the licenses, despite accurately stating DACA grantees’ immigration status, frustrates the federal governments attempts to “embrace immediate human concerns” by publicizing the DACA grantees’ status. Indeed, the Obama Administration sought to fully integrate DACA grantees into the U.S. community by making public benefits, such as driver’s licenses available to them. The N.C. licenses impede integration by objective by highlighting the precarious immigration status of DACA grantees. Moreover, the N.C. licenses place DACA grantees at risk for being detained for 287(g) and S-COMM purposes, particularly in states like Arizona, despite the government’s exercise of prosecutorial discretion. As a result, the N.C. licenses

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conflict with federal policy and disrupt the federal government’s resource allocation. Thus, the N.C. licenses are obstacle preempted and should be rescinded.\textsuperscript{188}

Current North Carolina driver’s licenses issued to persons with non-immigrant visas already discreetly state the temporary validity period of the licenses on the back of the licenses without conspicuously highlighting the cardholder’s specific immigration status.\textsuperscript{189} Discreetly placing such information on DACA grantees’ driver’s licenses would not draw attention to their “unlawful status.” In doing so, DACA grantees’ driver’s licenses will contain the same information as other non-citizens. This would lower the risk that DACA grantees are placed into 287(g) or S-COMM programs, and would thus, conform to the federal government’s goal to integrate DACA grantees. Therefore, North Carolina should adopt its current licensing scheme for noncitizens for DACA grantees in lieu of the N.C. licenses.

\textsuperscript{188} It should be noted that even if the N.C. licenses are preempted, there is the risk that some future federal policy could preempt state law favorable to immigrants in some other context. 