SUPREME COURT FOR THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

No Argument Requested

MARIA CUBAS; ROBERT McINTYRE; ERIS LUMI; JOHN DOE V; JOHN DOE VI; JOHN DOE VII; JOHN DOE VIII; and JOHN DOE IX, on behalf of themselves and others similarly situated,

Index No. 04/112371

Plaintiffs-Respondents,

- against -

RAYMOND MARTINEZ, Commissioner, New York State Department of Motor Vehicles, in his Official and Individual Capacity,

Defendant-Appellant.

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* are more fully set forth in their Motion for Leave to Appear. In brief, the Washington Legal Foundation (WLF) is a public interest law and policy center with supporters in all 50 States, including many in New York. WLF devotes a substantial portion of its resources to promoting America's security. To that end, WLF has appeared before this Court and other State and federal courts to ensure that federal, State, and local government officials possess the tools necessary to protect the nation's citizens from those who seek them harm. *See, e.g., Hamdi v. Rumsfeld,* 542 U.S. 507 (2004); *Juan C. v. Cortines,* 89 N.Y.2d 659 (1997).

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in the State and federal courts on security-related issues on a number of occasions.

Amici are concerned that, if the trial court's decision is allowed to stand, the ability of New York State to ensure the identity of those possessing New York driver licenses will be seriously undermined. That inability in turn raises serious national security issues. Law enforcement personnel unanimously agree that the failure to ensure that driver licenses are issued only to those whose identity has been confirmed greatly facilitates a wide range of criminal activity, from money laundering to check fraud to terrorism. Moreover, a fake identity established through procurement of a driver license serves to conceal criminals who are already being sought by law enforcement officials. *Amici* believe not only that the administrative actions at issue in this case fully comply with New York and federal law but

also that those actions are vital to carrying out DMV's mandate that it verify the identity of all applicants for driver licenses.

QUESTIONS PRESENTED

Amici address the following questions only:

(1) Does DMV's statutory right to require applicants for driver licenses to provide "proof of identity" include the right to limit the types of documentary evidence that can be used to prove identity, to those documents that DMV deems verifiable – even though that limitation may make it extremely difficult for undocumented aliens to establish identity?

(2) Have Respondents established that the balance of equities tips in their favor, such that they are entitled to an award of preliminary injunctive relief?

STATEMENT OF THE CASE

New York's Vehicle and Traffic Law ("VTL") authorizes the Commissioner of the Department of Motor Vehicles ("DMV") to issue licenses for the operation of motor vehicles within New York State. The principal requirements imposed by the VTL on those seeking such licenses are that "[t]he applicant shall furnish such proof of identity, age, and fitness as may be required by the commissioner" and that "the applicant provide his or her social security number," VTL § 502(1), as well as "such other information as the commissioner shall deem appropriate." VTL § 508(2).[1] The statute further provides, "The commissioner shall promulgate such rules and regulations as are necessary to carry out the provisions of this section." VTL § 502(4)(f).

As explained in Appellant's brief, the DMV over the years has established elaborate rules for determining whether an applicant has met the statutory requirement that he/she prove

[1] DMV has adopted regulations that permit applicants to provide, in lieu of a social security number, evidence that they are ineligible to receive a social security number.

"identity." Because certain types of documents are easily forged and their authenticity is not easily verifiable, DMV historically has not permitted them to be used to prove an applicant's identity. For example, since 1995 DMV has not accepted foreign passports as proof of identity because foreign passports are often forged and are difficult for DMV personnel to authenticate. The September 11, 2001 terrorist strike on New York City focused renewed attention on the strong law-enforcement rationale for withholding driver licenses from those whose identity cannot be verified. Thereafter, DMV tightened its "proof of identity" requirements; in particular, because of difficulties in verifying the accuracy of *any* foreign-source document, DMV no longer will accept such documents as proof of identity. Supreme Court May 9 Order and Decision ("Slip Op.") at 6. All parties agree that as a result of this new rule, it is extremely difficult for undocumented aliens to provide sufficient "proof of identity" to obtain driver licenses. Respondents contend that DMV adopted the no-foreign-source-documents rule for the specific purpose of ensuring that undocumented aliens could not get driver licenses. Respondents Br. 11-15.

For many years a driver license with the licensee's photograph has been the principal document used throughout the United States to establish the bearer's identity. Because the lack of such an identification document posed a problem for those who did not drive, New York adopted legislation providing such individuals with the right to apply to DMV for an "identification card." *See* VTL § 490. The principal prerequisite for a non-driver to obtain a non-driver identification card ("ID") is proof of identity: the individual must establish to the DMV's satisfaction that "the person described [in the identification card] is the applicant." VTL § 490(3)(a)(i). A 2002 amendment to the statute added a requirement (similar to the

driver license requirement) that the identification card applicant "provide his or her social security number." *Id.* The trial court found, based on the legislative history of the 2002 amendment, that it was adopted in order to provide "an additional element of verification to the identification process." Slip Op. 4.

Respondents are eight non-citizens who have lived in New York City for many years and who complain that due to DMV's new policies they have been unable to obtain driver licenses or IDs; or have been unable to renew their licenses or IDs; or face having their licenses or IDs revoked. At least five of the Respondents are undocumented aliens who cannot provide DMV with documents sufficient to meet DMV's proof-of-identity requirement. They filed suit in New York County Supreme Court, alleging *inter alia* that DMV's current proof-of-identity requirement amounts to a requirement that license applicants demonstrate legal presence in the United States, and that DMV lacks statutory authority to impose a legal presence requirement.

On May 9, 2005, the trial court granted a preliminary injunction, enjoining DMV during the pendency of this action "from requiring or in any way imposing a legal presence requirement or any immigration status as a condition of receipt of a driver's license, renewal license, learner's permit or non-driver identification card." Slip Op. 19. The court held that Respondents were likely to prevail on their claim that DMV lacks statutory authority to limit the range of documents acceptable to prove "identity" to such an extent that no undocumented alien can make the requisite showing:

> The statutory requirements to obtain a license are proof of: 1) identity, 2) age, 3) fitness, and 4) a social security number or ineligibility for a social security number. DMV may exercise its discretion to request documentation to verify those elements,

> including all of the INS/DHS documents. However, under this state's law, **DMV cannot make current immigration documents, or any other documentary proof of one's immigration status, the *only* documents that are acceptable to verify an applicants identity** because such a policy creates a *de facto* fifth requirement (legal presence) that is not currently part of the statute. DMV cannot use its rule making authorization to usurp the function of the legislature by creating requirements for eligibility which appear nowhere in the statute.

Slip. Op. 8 (emphasis and boldface in original). The trial court also found that Respondents would suffer irreparable harm if a preliminary injunction were not issued and that those harms outweighed any harms that DMV would suffer if an injunction were issued. *Id.* 16- 18.

SUMMARY OF ARGUMENT

The New York Legislature has mandated that DMV not issue anyone a driver license unless that individual has proven his or her identity, and it has granted DMV broad discretion in setting rules to determine the level of proof necessary to establish identity. The Commissioner has acted well within his discretion in establishing the rules challenged in this case. The court decisions relied on by Respondents do not support their contention that the challenged rules are *ultra vires*.

The trial court stated that the challenged rules were motivated at least in part by national security concerns. But that is not a proper basis for striking down the rules. The requirement that applicants establish "identity" is not based solely on a concern that licenses be issued only to those who have demonstrated sufficient driving skills. It is also based on the legislature's recognition that driver licenses are routinely used by virtually all members of society to establish their identity in non-driving contexts, and that issuance of licenses to those whose identity has not been sufficiently established can facilitate a broad range of criminal and terrorist activities. Accordingly, it is wholly appropriate for DMV to take such matters into

account when establishing rules regarding what applicants must do to establish their identity. Congress's recent adoption of the Real ID Act of 2005, P.L. 109-13, demonstrates that DMV's concerns regarding the need to verify identity are well-founded; indeed, that statute mandates that all States in the near future adopt measures at least as stringent as those challenged here.

The trial court also erred in finding that the balance of hardships tilted toward Respondents. The trial court suggested that the injury that its preliminary injunction would inflict amounted to nothing more than administrative inconvenience. To the contrary, the evidence is overwhelming that the preliminary injunction is depriving DMV of the ability to keep driver licenses out of the hands of those who seek to do harm to our society. Respondents argue that law enforcement officials are better off if driver licenses are widely distributed; they cite the 9/11 Commission in support of an argument that doing so allows law enforcement officials to better track the activities of criminals and terrorists. Respondents Br. 7-8 n.2. The 9/11 Commission said no such thing; to the contrary, the 9/11 Commission and every major law enforcement group in this country support tightening "identity" requirements for the issuance of driver licenses. The harms to law enforcement caused by the preliminary injunction far outweigh any harms that would accrue to Respondents if the injunction were lifted.

ARGUMENT

POINT I: RESPONDENTS HAVE FAILED TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS

A. The Commissioner Acted Well Within His Discretion in Adopting the Rules Challenged by Respondents

The trial court conceded that New York law requires DMV to condition award of driver licenses on proof of one's identity, and "give[s] the commissioner seemingly unfettered discretion to demand any document he deems appropriate" for establishing identity. Slip Op. 7. The trial court nonetheless insisted that New York law does not permit DMV to impose document requirements that are exceedingly difficult for those not legally present in the United States to meet,[2] because such requirements amount to creation of "a *de facto* fifth requirement (legal presence) that is not currently part of the statute." *Id.* at 8. It held, "The implementation of the rule requiring legal presence is an arbitrary abuse of DMV's discretion and is *ultra vires*." *Id.*

The trial court's *ultra vires* finding is a clear error of law. None of the case law cited by the trial court and Respondents supports that finding.

The VTL grants DMV extremely broad discretion in enforcing driver license requirements. It does not spell out how an applicant can go about establishing his/her identity, but rather provides that applicants must furnish such proof of identity "as may be required by the commissioner." VTL § 502(1). The statute further requires that they furnish "such other information as the commissioner shall deem appropriate." VTL § 508(2). The statute also

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[2] Such aliens are referred to herein as "undocumented aliens."

directs the Commissioner to "promulgate such rules and regulations as are necessary to carry out the provisions of this section." VTL § 502(4)(f). It is difficult to conceive how the Legislature could have granted DMV any greater discretion than it did with respect to the formulation of rules for determining whether an applicant has sufficiently established identity.

Moreover, nothing in the statute suggests that the legislature intended to limit DMV's rulemaking authority to the extent that any "identity" rules infringed on undocumented aliens' ability to obtain driver licenses. Every court decision relied on by the trial court and Respondents to support their *ultra vires* contention is inapposite because each involved administrative action that strayed into an area that the Legislature had indicated was off-limits for the agency. For example, *Jones v. Berman*, 37 N.Y.2d 42 (1975), struck down a Department of Social Services regulation that mandated denial of emergency welfare assistance to destitute children in certain limited instances, even though the governing statutes indicated that destitute children were in all instances entitled to such assistance. The Court of Appeals held that the regulation was *ultra vires* not simply because it addressed a subject not expressly covered in the governing statute, but because it "conflict[ed]" with the statute. The Court said, "Administrative agencies can only promulgate rules to further implementation of the law as it exists; they have no authority to create a rule *out of harmony* with the statute." *Jones*, 37 N.Y.2d at 53 (emphasis added). It is difficult to see how the challenged rules could be deemed "out of harmony" with the VTL in light of the VTL's explicit grant of authority for DMV to establish such proof-of-identity requirements "as may be required by the commissioner," VTL § 502(1), and "as the commissioner shall deem appropriate." VTL § 508(2).

Respondents' reliance on *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987), is similarly misplaced. *Boreali* identified four circumstances that, in combination, persuaded the Court that the Public Health Council ("PHC") exceeded its delegated authority when it issued regulations governing smoking in public places: (1) although the PHC was created to address health concerns, its regulations governing smoking in public places were largely driven by considerations unrelated to public health, such as economic and social concerns; (2) the regulations "did not merely fill in the details of broad legislation describing the over-all policies to be implemented," but rather "wrote on a clean slate" without any legislative guidance whatsoever; (3) the Legislature had previously considered but failed to adopt legislation designed to restrict smoking in public places; and (4) no special expertise in the field of public health was involved in the development of the challenged regulations. *Boreali*, 71 N.Y.2d at 11-14. None of those four circumstances are present here: (1) the challenged DMV rules directly relate to establishing the identity of applicants; (2) DMV is not writing on a "clean slate" but rather is acting to provide substance to the Legislature's "identity" requirement; (3) there is no indication that the legislature has ever addressed the issue of how undocumented aliens might be affected by proof-of-identity requirements; and (4) DMV has developed extensive expertise in determining what documents submitted to establish identity it can plausibly verify.

Nor do the *Trump-Equitable* decisions support Respondents. In a series of cases challenging New York City's denial of a partial tax exemption, the Court initially overturned the denial because it was based on an administrative regulation "clearly inconsistent with the plain words of the governing statute." *Trump-Equitable Fifth Avenue Co. v. Gliedman*, 57

N.Y.2d 588, 593 (1982). Later, after the City again denied the exemption based on a different rationale, the Court again reversed, holding that the City's new interpretation was once again "inconsistent with the governing statute." *Trump-Equitable Fifth Avenue Co. v. Gliedman*, 62 N.Y.2d 539, 547 (1984). Respondents assert that the *Trump-Equitable* decisions stand for the proposition that an agency's interpretation of a statute is unreasonable if it amounts to "an augmentation of the statutory text." Respondents Br. 19-20. Those cases held no such thing. Rather, they quite sensibly held merely that a regulation is invalid when it is "inconsistent" with the governing statute. In the absence of evidence that the governing New York statutes frown on proof-of-identity requirements that have adverse effects on undocumented aliens, there is nothing "inconsistent" between those requirements and the governing statutes. *See also New York State Health Facilities Ass'n, Inc. v. Axelrod*, 77 N.Y.2d 340, 348 (1990) (rejecting challenge to regulations that required nursing homes to accept minimum numbers of Medicaid patients; *Boreali* distinguished because here the implementing agency was acting within a field of "special competence" and was operating under a broad legislative grant of authority to take steps necessary to ensure that the needs of Medicaid patients were met).

In support of its *ultra vires* holding, the trial court analogized to a hypothetical DMV regulation that only marriage certificates would be accepted as proof of identity. Such a requirement would, of course, deny driver licenses to all those who have never been married. The trial court said that such a requirement "would be an arbitrary abuse of DMV's discretion"; the court reasoned that DMV's refusal to accept all foreign-source documents as proof of identity – a refusal that precludes most undocumented aliens from obtaining driver licenses – for the same reasons "is an arbitrary abuse of DMV's discretion." Slip Op. 8.

The trial court's analogy does not hold water. The validity of the hypothetical marriage certificate requirement would depend on whether DMV lacked a reasonable basis for concluding that marriage certificates were the best verifiable forms of identification and that other forms of identification could not be reliably verified.[3] Similarly, current DMV proof-of-identity requirements would be invalid if Respondents could demonstrate that DMV has no reasonable basis for concluding that foreign-source documents cannot be reliably verified. But Respondents are not mounting an arbitrary-and-capricious challenge to DMV rules; rather, they assert that the legislature has not authorized DMV to adopt those rules, no matter how reasonable they may be.[4] Pointing to hypothetical examples of absurd and arbitrary proof-of-identity requirements does nothing to further Respondents' claim that the Legislature did not authorize DMV to adopt the rules being challenged here.

In sum, Respondents have failed to demonstrate that the challenged DMV rules are

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[3] One challenging such a requirement likely would have little difficulty demonstrating that DMV lacked such a reasonable basis. Marriage certificates generally lack security features designed to prevent forgeries, and other documents (e.g., United States birth certificates) are generally far more reliable evidence of identity.

[4] Indeed, Respondents concede that the Legislature, if it so chooses, is entitled to enact a statute adopting the challenged rules; their only complaint is that DMV has acted without legislative authorization:

> That legislatures weigh in on this important policy issue is right and proper. In New York, however, the Legislature has been silent. Whether this inaction is laudable or damnable is a matter of public debate. But it is not a justification for DMV to usurp the role of the Legislature or for the Commissioner to effect unilaterally his vision of sound policy. Yet that is precisely what has happened.

Respondents Br. 1-2. Tellingly, Respondents never once challenge the factual basis for DMV's conclusion that foreign-source documents cannot be reliably verified.

ultra vires.

B. That the Challenged Rules May Have Been Motivated in Part by National Security Concerns Is Not a Valid Basis for Striking Down the Rules

The trial court also faulted the challenged rules based on a finding that the rules were motivated in part by national security concerns. The court held, "Even if these policies were within DMV's discretionary powers, evidence in the record indicates that DMV's primary motivation has little to do with the identity of the applicants and more to do with national security concerns." Slip Op. 9. The court ruled that policies aimed at "[k]eeping our citizens and the citizens of the world safe from terrorists" are "crucial," but that any such policies should originate with the Legislature, not the DMV. Slip Op. 10-11.

In so ruling, the trial court adopted an inappropriately narrow interpretation of DMV's power to require "proof of identity." The requirement that applicants establish "identity" is not imposed solely for the purpose of ensuring that the person receiving the driver license is actually the person that has demonstrated the requisite driving skills. The Legislature also imposed the "identity" requirement because it was well aware that driver licenses are routinely used throughout the United States to verify the bearer's identity, and thus it wanted to ensure that New York driver licenses not be used to establish a false identity. This legislative intent is perhaps best illustrated by VTL § 490, which establishes a system whereby DMV issues IDs to non-drivers; adoption of § 490 is only explainable as a legislative recognition that our society looks to driver licenses (or equivalent documents issued to non-drivers) as the principal

means of establishing and verifying identification.[5] By requiring that applicants establish their identity before receiving driver licenses or IDs, New York assures that applicants cannot use those documents to establish a false identity that can facilitate criminal activity and terrorism.

Accordingly, the trial court was wrong in concluding that DMV acted inappropriately to the extent that it took national security concerns into account in adopting its challenged rules. In authorizing DMV to adopt proof-of-identity requirements, the Legislature clearly contemplated that those requirements would be based at least in part on ensuring that applicants do not use driver licenses and IDs to facilitate criminal activity and terrorism.

DMV's brief cites numerous instances in which individuals have used driver licenses they obtained inappropriately to facilitate criminal activity. These examples include a Buffalo man who committed numerous crimes using 15 driver licenses and IDs obtained under 15 different names; a Queens man who used a fictitious driver license to perpetrate insurance fraud; and numerous instances of taxi drivers with multiple driver licenses used to avoid incurring penalties for traffic infractions. Appellant Br. 20. DMV is fully empowered to take steps to prevent the issuance of false driver licenses by strengthening proof-of-identity requirements, regardless that the danger that DMV thereby seeks to avoid may have much more to do with national security than with the safe operation of motor vehicles.

Moreover, DMV is not alone in recognizing the need to strengthen proof-of-identity requirements as a means of protecting national security. To the contrary, just this year,

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[5] Indeed, the trial court conceded that when the Legislature amended § 490 to require ID applicants to provide their Social Security numbers, it did so for the purpose of providing "an additional element of verification to the identification process." Slip Op. 4.

Congress adopted the Real ID Act of 2005, P.L. 109-13, to mandate that *every State* impose proof-of-identity requirements on driver license applicants that are at least as stringent as those challenged here; Congress acted to prevent criminals and terrorists from obtaining driver licenses under false names. Among other things, the Real ID Act mandates that applicants be required to provide a valid Social Security number or verification of ineligibility for a Social Security number, § 202(c)(1)(C); States may not accept any foreign-source documents other than an official passport, § 202(c)(3)(B); and by September 11, 2005 States must enter into a memorandum of understanding with the U.S. Department of Homeland Security indicating that they will routinely utilize the SAVE system to verify the immigration status of aliens applying for driver licenses. § 202(c)(3)(C).[6]

In light of the Real ID Act, DMV's challenged rules cannot plausibly be deemed to be based on animus against undocumented aliens. Rather, DMV is acting to tighten proof-of-identity requirements based on very legitimate national security concerns. That the challenged rules make it much more difficult for undocumented aliens to obtain driver licenses does not in any way undermine the legitimacy and legality of those rules.

POINT II: THE TRIAL COURT ERRED IN CONCLUDING THAT THE BALANCE OF HARDSHIPS TILTED TOWARD RESPONDENTS

The trial court also erred in finding that the balance of hardships tilted toward

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[6] Technically, States have the option not to comply with the requirements of the Real ID Act. However, as a practical matter they are forced to comply: unless a State comes into compliance by May 11, 2008 (three years after adoption of the Real ID Act), no federal agency may accept for any official purpose a driver license or ID issued by the State. *See* § 202(a)(1). Thus, for example, unless New York complies with the Real ID Act, New Yorkers will not be permitted past the security gates at airports because their New York driver licenses will not be accepted as proof of identification.

Respondents. To the contrary, the issuance of the preliminary injunction is causing significant harm to DMV and the people of New York by preventing DMV from taking effective steps to protect national security by verifying the identity of all those to whom driver licenses are issued. That harm far exceeds whatever harm Respondents will suffer if the preliminary injunction is lifted.[7]

As noted above, Congress felt sufficiently strongly about the national security implications of strengthening driver license proof-of-identity requirements that it adopted the Real ID Act of 2005 last May. The Real ID Act requires *all* States within the next several years to adopt, in the interests of national security, the very DMV rules that were enjoined by the trial court. Given Congress's determination that those rules are important for national security, there can be no serious dispute that the injunction against enforcement of those rules causes serious harm to DMV and the people of New York.

Respondents attempt to obscure these national security concerns by suggesting that we are actually better off if driver licenses are widely distributed; they suggest that doing so allows law enforcement officials to better track the activities of criminals and terrorists. Respondents Br. 7-8 n.2. There is no empirical evidence to support that fanciful argument; to the contrary, law enforcement groups in this country are unanimous in their support of tightening proof-of-identity requirements as a means of keeping driver licenses out of the

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[7] *Amici* seriously question whether Respondents would suffer any harm if the injunction is lifted. Respondents contend that the absence of driver licenses will impair their ability to drive. However, five of the Respondents admit to being in this country illegally. If the threat of detention, prosecution, and removal is insufficient to cause Respondents to comply with United States immigration laws, we seriously doubt that the threat of prosecution for driving without a license will cause them to stop driving.

hands of criminals and terrorists.

For example, Steve McCraw, Assistant Director of the FBI's Office of Intelligence, testified before Congress in 2003 that "in order to protect the American people, we must be able to determine whether an individual is who he purports to be. This is essential in our mission to identify potential terrorists, locate their means of financial support, and prevent acts of terrorism from occurring." Steve McCraw, "Consular ID Cards in a Post-9/11 World," Testimony before the House Judiciary Subcommittee on Immigration, Border Security, and Claims (June 26, 2003), available at www.fbi.gov/congress/congress03/mccraw062603.htm. In warning against acceptance of foreign-source documents that are often forged and difficult to verify, McCraw stated:

> Once in possession of a driver's license, a criminal is well on his way to using the false identity to facilitate a variety of crimes, from money laundering to check fraud. And of course, the false identity serves to conceal a criminal who is already being sought by law enforcement. . . . The ability of foreign nationals to use [foreign-source documents] to create a well-documented, but fictitious, identity in the United States provides an opportunity for terrorists to move freely within the United States without triggering name-based watch lists that are disseminated to local police officers. It also allows them to board planes without revealing their true identity.

Id.

Similarly, John S. Pistole, Assistant Director of the FBI's Counterterrorism Division, also testified before Congress in favor of restricting access to driver licenses:

> The FBI is concerned about the issuance of driver's licenses by states without adequate verification of identity. The criminal threats stem from the fact that the driver's license can be a perfect "breeder" document for establishing a false identity. The use of a false identity can facilitate a variety of crimes, from money laundering to check fraud.

John S. Pistole, "Fraudulent Identification Documents and the Implications for Homeland Security," Testimony before the House Select Committee on Homeland Security (October 1,

2003), available at www.fbi.gov/congress/congress03/pistole100103.htm.

Respondents appear to suggest that the 9/11 Commission favored widespread availability of driver licenses to assist in the tracking of terrorists. Respondents Br. 7-8 n.2. Any such suggestion is plainly wrong. To the contrary, the Commission recommended:

> The federal government should set standards for the issuance of birth certificates and sources of identification, such as driver's licenses. . . . At many entry points to vulnerable facilities, including gates for boarding aircraft, sources of identification are the last opportunity to ensure that people are who they say they are and to check whether they are terrorists. . . . All but one of the 9/11 hijackers acquired some form of U.S. identification, some by fraud. Acquisition of these forms of identification would have assisted them in boarding commercial flights, renting cars, and other necessary activities.

9/11 Commission's Final Report at 390.

It is simply not the case, as Respondents suggest, that motor vehicle records are a significant tool in law enforcement efforts, or that undocumented aliens would become "untraceable" if they no longer possessed valid driver licenses. Law enforcement personnel rely far more extensively on other sources of information, including their own law enforcement databases, to track the whereabouts of suspected criminals and terrorists.[8]

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[8] Nor are Respondents correct that the 9/11 Commission determined that law enforcement personnel could have tracked down the 9/11 hijackers if they had more effectively used motor vehicle records. It is true that beginning in late August 2001, the FBI was on the lookout for two of the eventual 9/11 hijackers, Khalid al Mindhar and Nawaf al Hazmi, for questioning in connection with the bombing of the *U.S.S. Cole* in Yemen, and that both of them had obtained driver licenses in their own names. But the 9/11 Commission stated that even if the FBI had learned about those driver licenses, it most likely could not have used that information to determine their whereabouts. *9/11 Commission's Final Report* at 272. Law enforcement personnel had no information regarding the other hijackers (most of whom were chosen based on their lack of known ties to terrorist groups) and thus had no reason to enter their names into DMV databases -- a circumstance which may explain why most of the hijackers (unlike career criminals) were willing to use their own names to obtain driver licenses.

Certainly, any law enforcement benefit that might come from adding more names to DMV databases has not caused law enforcement personnel to endorse relaxed proof-of-identity requirements.

In sum, the trial court erred in dismissing out of hand DMV's injury claims, and in concluding that the balance of harms tilted in Respondents' favor. Under those circumstances, issuance of a preliminary injunction was not justified.

CONCLUSION

Amici curiae Washington Legal Foundation and Allied Educational Foundation respectfully request that the judgment of the court below be reversed and that the Court dismiss the complaint.

Respectfully submitted,

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PRINTING SPECIFICATIONS STATEMENT
PURSUANT TO 22 N.Y.C.R.R. § 600.10(D)(1)(iv)

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Richard A. Samp

Affidavit of Service on Attorneys by U.S. Mail and Email

State of New York, County of New York, ss:

Daniel J. Popeo affirms under penalty of perjury that on October 8, 2005, he served copies of the proposed brief of Washington legal Foundation and Allied Educational Foundation as Amici Curiae in Support of Appellant, upon the following attorneys for the parties to this action, both by electronic mail and by U.S. Mail, by depositing a copy of the same, enclosed in a postpaid wrapper in a United States postbox situated in Arlington, Virginia, regularly maintained by the government of the United States in said city:

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