UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

City of El Cenizo, Texas, Mayor Raul L. Reyes of City of El Cenizo, Maverick County, Maverick County Sheriff Tom Schmerber, Maverick County Constable Pct.3-1 Mario A. Hernandez, and League of United Latin American Citizens,	:	
Plaintiffs,	:	
v.	:	
	:	Civil Action No. 5:17-cv-404-OLG
State of Texas, Governor Greg Abbott (In His Official Capacity), and Texas Attorney General Ken Paxton (In His Official Capacity)	:	
Defendants.	:	

DECLARATION OF ROXANA C. BACON

I, Roxana C. Bacon, hereby declare:

I make this declaration based on my own personal knowledge, and if called to testify, I could and would do so competently as follows:

1. I served as the Chief Counsel for the United States Citizenship and Immigration Service (USCIS) in the Department of Homeland Security (DHS) from October 2009 until December 2010. As Chief Counsel, I managed the USCIS lawyers throughout the United States, provided counsel to the Director of USCIS, participated in policy discussions among DHS immigration agencies, and drafted memoranda regarding administrative/executive options to statutory reform, including DACA-type discretion.

2. I received my Bachelor's degree from the University of California at Berkeley, and my J.D. from the University of California at Berkeley Boalt Hall School of Law. My C.V. is attached as Exhibit A.
3. Prior to serving as Chief Counsel for USCIS, I spent over thirty years practicing immigration law at various law firms.
4. I have been teaching immigration law since 1979; I have taught at the Arizona State University College of Law as well as at the University of Miami Law School. I now teach immigration law at the University of Miami School of Law.
5. The Plaintiffs have asked me to provide my opinions concerning SB 4 and the immigration status determinations that local law enforcement officials will be required to make. I have read and reviewed SB 4 and related provisions of the Texas code.
6. SB 4 increases local law enforcement involvement in determinations of immigration status in two ways. First, SB 4 forbids local government from prohibiting officers from investigating an individual's lawful status during stops and detentions. This will lead to more status investigations and may lead to policies mandating such status investigations. Second, SB 4 requires officers to determine if a person is a U.S. citizen or has "lawful immigration status" as a prerequisite to complying with requests from the federal government to detain an individual.
7. Allowing local law enforcement officers, during routine traffic stops or other infractions and during arrests, to inquire about and investigate place of birth and immigration status will lead to unnecessary delays and prolonged and wrongful detention, inevitable errors in identifying immigration status and rights, and an

increased likelihood that local officers will rely on impermissible factors, such as race or ethnicity, in making such determinations.

8. As explained in detail below, there are several reasons why SB 4 is problematic with regards to immigration status determinations.

9. **First**, there is no one definition that establishes when an individual has "lawful immigration status" in the United States.

10. The Immigration and Nationality Act (INA) does not contain a definition or category that establishes when an individual has "lawful immigration status" that could be used in the administration of SB 4. In federal immigration practice, an individual's "immigration status" is generally understood to refer to particular federal immigration classifications under which an individual was admitted. This applies, for example, to individuals admitted as "non-immigrants," or those admitted temporarily for reasons defined by statute; those admitted as "immigrants," or permanent residents (generally known as "green card holders"); and other, more limited classifications established by federal law (i.e., temporary protected status, or TPS). Even when a noncitizen lacks formal immigration status, it does not necessarily mean that their presence in the United States is unauthorized. This is because our federal immigration system distinguishes authorized presence from formal immigration status, and treats them as distinct.

11. **Second**, there are a variety of different circumstances where a person may be in the country without a formal immigration status without being subject to removal and may also not have documentary evidence of that fact. Many individuals are permitted to remain and work in United States, despite the fact that they may not have a

recognized immigration status or classification. Furthermore, there is no federal immigration classification that covers all individuals who the federal government has allowed to remain in this country in the course of the proper administration of the immigration laws.

12. For example, people with pending applications for asylum or adjustment of status may be authorized by DHS to remain in the United States and granted employment authorization although they lack status. The same is true of certain survivors of domestic violence who have filed petitions under the Violence Against Women Act (VAWA). Individuals required to be released from indefinite detention have no formal status under federal immigration law, but have a constitutional right to remain undetained in the United States. Other individuals may obtain deferral or withholding of removal in under the Convention Against Torture, allowing them to stay in the United States without a formal immigration status.

13. Deferred action operates in a similar manner: individuals who receive deferred action have no formal immigration status, but they have received permission by the federal government to remain in the United States for a given period of time. They have, in effect, *per se* legal authorization to reside in the United States. Deferred action allows the federal government to authorize the presence of individuals who would otherwise be subject to removal. For example, the federal government may grant deferred action for a period of one year to an undocumented immigrant whose testimony is required for a criminal prosecution. This serves to authorize the individual's presence for the given period and enables the government to move forward with the prosecution of a crime.

14. **Third**, determining whether an individual has lawful immigration status is a complex legal inquiry, governed by a wide range of federal statutory and regulatory provisions.

15. The determination of an individual's immigration status is a convoluted determination that local law enforcement officers are unable to make. Requiring local officials to make this determination can lead to the wrongful detention of individuals who, for a variety reasons, may not be able to demonstrate or prove that they have some immigration status or are not subject to being removed or arrested for immigration violations, including, for example, lawful permanent residents; individuals with non-immigrant visas, such as employment visas; U-visas and T-visas; individuals who are in the process of adjusting their status; and other individuals who may be in the United States lawfully due to TPS, parole, orders of supervision, deferred action, VAWA, release after prolonged detention, withholding, and asylum.

16. In many cases, individuals will not have clear documentation to demonstrate their status and local officials are not trained to make determinations based on immigration documentation. Certain immigration documents would not provide an untrained official with evidence that they are lawfully present, and may instead convey to an untrained official that they are removable. Further, citizens are not required to carry proof of citizenship, increasing the risk that citizens suspected of being present unlawfully will be detained.

17. **Fourth**, federal immigration officials also exercise discretion in determining who is subject to being removed or detained, and in the general administration of immigration law. Local law enforcement officials do not have the authorization or

training to determine whether or not a person should be subject to removal or detained or arrested for immigration violations.

18. What follows is a non-exhaustive and more detailed explanation of the complexities of immigration law and why it is impractical for local law enforcement officers to assess status accurately.

19. My conclusions are based on a number of factual and experience-based factors which will be discussed separately in order to show both the stunning and bewildering complexity of the laws that law enforcement officers would have to understand at an expert level to interpret the responses to any interrogation about immigration status.

20. Furthermore, there is no one database in which all immigration information is contained. Different federal agencies have access to different systems and databases, whereas local law enforcement officers do not. Even upon contacting federal officials, there is no one database that can be quickly accessed in order to determine if there is any basis on which the individual is lawfully present or potentially in violation of federal immigration laws.

21. **SB 4 creates the risk of the wrongful detention of U.S. citizens.**

22. United States citizens are not required to carry proof of citizenship under U.S. or Texas law. In addition to persons born in the U.S., certain persons born outside of the country are citizens under an intricate scheme of naturalization and derivative and acquired citizenship. *See generally* Daniel Levy, *U.S. Citizenship and Naturalization Handbook*, § 1.1 (Charles Roth ed., 2016–17 ed.).

23. For example, persons born abroad may naturalize to obtain citizenship. *See* 8 U.S.C. § 1421 *et. seq.* (2012). In fact, there are more than a dozen ways that a non-citizen may naturalize. Levy, *U.S. Citizenship and Naturalization Handbook*, § 1.1

24. Others may acquire citizenship through one or both of their parents. *See* 8 U.S.C. § 1401. Acquired citizenship depends on the year the citizen was born, whether one or two parents is a citizen, the marital status of the parents, and their length of residence in the U.S. In border states such as Texas it is not unusual for persons to have acquired U.S. citizenship from their grandparents through the chain of grandparent to parent to child. *See* Lee J. Teran, *Mexican Children of U.S. Citizens: "Viges Prin" and Other Tales of Challenges to Asserting Acquired U.S. Citizenship*, 14 The Scholar: St. Mary's Law Review on Minority Issues 583, 587–88 (2012).

25. Still others may derive citizenship through the citizenship or naturalization of one or both parents. 8 U.S.C. § 1431.

26. In all of these cases, the citizen who is stopped or arrested may not even be aware of his or her acquired U.S. citizenship, even though absolute legal protection from any DHS immigration action is guaranteed by citizenship.

27. A person is not required and normally would not carry her birth certificate, U.S. passport, naturalization certificate or certificate of citizenship with her, much less the chain of birth certificates and residency records to prove U.S. citizenship through more than one generation, so providing proof on the spot is unlikely.

28. Given these complexities of citizenship status, a law enforcement officer could easily, albeit mistakenly, prolong detention of a U.S. citizen after learning that she was born in a foreign country.

29. **SB 4 creates the risk of the wrongful detention of individuals with legal immigration status.**

30. The Immigration and Nationality Act, 8 U.S.C. § 1101, *et. seq.* sets up a bifurcated system of immigrant and non-immigrant categories. In addition, the statute and related regulations create numerous other complex, temporary categories and statuses that allow persons to be lawfully in the United States, as discussed below.

31. This myriad of options for foreigners reflects the fact that Congress uses immigration laws to support U.S. policy across many national interests, including international trade, economics, education, politics, anti-discrimination, religious freedom, scientific research, the arts, national security, family relationships, humanitarianism, and even the consequences of environmental changes. To reduce those policy options to a quick assessment of immigration status by untutored officers and single dimension systems is akin to asking one's DNA code based on eye color. It is so simplistic that it guarantees major errors.

32. Lawful permanent residents, commonly referred to as "green card" holders, are considered immigrants under the immigration laws. They are issued an I-551 laminated document as proof of status. The card is valid for ten years, but the status is permanent. While producing an I-551 permanent resident card may satisfy a Texas officer, not every green card holder has the document. During the time USCIS renews the document, the person may only have a receipt or may be waiting to receive a receipt. Further, the filing fee to renew, replace a lost card or obtain a new card because of a name change is $540.00 with additional charges for photographs, a cost that can be prohibitive for some permanent residents. In addition, USCIS has its

own problems with renewals, including delayed processing times that increase the chances of lost filings and receipts.

33. Currently it takes approximately seven months to obtain a new card. The processing times vary greatly depending on allocation of resources within USCIS, but they are growing longer. During the renewal period, the only proof of lawful status is a receipt from USCIS, that may be printed or electronic, and that makes no reference to legal status or an extension date. A person who does not carry the receipt (not required by law) or have access to an electronic filing notice might be subject to prolonged detention by a confused local law enforcement officer attempting to discern immigration status.

34. The critical fact for SB 4 purposes is that even though the permanent resident card expires every ten years and even if the permanent resident fails to renew or loses her card, she continues to be a lawful permanent resident, regardless of whether she has proof of status.

35. Major additional problems occur with lawful permanent residents who apply for permanent resident status abroad. Numerically, this is a larger group than those who are able to "adjust their status" to permanent residents without leaving the U.S. The largest U.S. Consulate that processes immigrant visa applications is located in Ciudad Juarez, where all Mexicans must apply for permanent residence status. In 2016, the Ciudad Juarez Consulate issued 89,428 immigrant visas. Department of State, *Summary of Visas Issued by Issuing Office Fiscal Year 2016*, https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2016AnnualReport/FY16AnnualReport-TableIV.pdf (last visited June 1, 2017). Lawful permanent

residents who obtain their status at a U.S. Consulate enter the U.S. with an immigrant visa stamp in their foreign passport, not with the laminated I-551 document.

36. A permanent resident granted status at a U.S. Consulate is given a visa stamp generally valid for six months when she presents herself for entry at the border. A request is sent by the admitting DHS officer to USCIS to manufacture the I-551 permanent resident card. That process can take months, often longer than the temporary stamp date. Regardless of DHS bureaucratic issues, or the lapse of the stamp date, the individual is lawfully in the U.S. Neither a Texas officer nor an ICE officer would necessarily know about these seeming details that are actually dispositive of status.

37. Additionally, errors in the name on the I-551 are frequent, especially in Hispanic cultures, since any change in marital status results in a name change in which some of the maiden name remains while a new "last name" is taken. Given the common surnames in Hispanic culture, the loss of a "Gonzales" or the addition of a "Rodrigues" with the first name of "Juan" or "Maria" can lead to hundreds of false responses when checking any immigration database. Similarly, the legal names of children born of two Hispanic parents incorporate both parents' names in a sequence not used in non-Hispanic culture. While I was USCIS Chief Counsel, the name confusion was highlighted as a chronic issue in both developing and maintaining databases.

38. The complexities continue. Lawful permanent residents who obtain status based on a marriage of less than two years duration to a U.S. citizen obtain conditional permanent residence status. 8 U.S.C. §1186a. This status is only valid for two years,

and the I-551 permanent resident card has a two-year expiration date. Upon expiration, the conditional permanent resident must apply to remove the conditions on her permanent resident status. The filing fee for the application to remove the conditions of conditional residence status is $680.00, a cost that at times is beyond the reach of the immigrant so that removal requests are not always timely.

39. While the conditional resident is filing to remove the two-year limitation, a process that currently takes more than eight months, she only has a receipt from USCIS to show that the application has been filed and that status has been extended for a year. A line ICE officer, who has no role of any kind in the processing or adjudication of any petition or application for permanent resident status, would not be familiar with these conditional removal documents.

40. Similarly, a lawful permanent resident who obtained her "green card" through an EB-5 investment (one of the "employment-based" immigration categories) has a similar conditional resident status period and is subject to the same prolonged procedure for removing the conditions. 8 U.S.C. § 1153(b)(5). Although there are thousands of individuals in the "EB-5 conditional removal step," a Texas officer would have little exposure to them, since they have absolutely no contact with the filing, processing, adjudication or follow-up of EB-5 status.

41. A Texas law enforcement officer could easily prolong detention of a permanent resident after learning that a person was born in a foreign country in an attempt to understand the person's immigration status or even to alert immigration officials. Escalating the issue to ICE is not a guarantee of either a quick or accurate response since permanent resident processing is not within ICE'S jurisdiction, expertise or

authority. There is no "hotline" between USCIS and ICE to escalate questions of a person's status, and the USCIS internal escalation process to make a definitive conclusion regarding status can take more than a month. In addition, other Cabinet-level agencies (DOL, Health and Human Services, OITR) have their own databases that include immigration-related information not accessible to ICE but that impacts the lawful presence of an individual migrant.

42. **SB 4 creates the risk of the wrongful detention of individuals with non-immigrant visas who are lawfully present in the United States.**

43. Millions of foreign-born persons are in the U.S. at any given time with non-immigrant visas. There are twenty-three non-immigrant visas that allow non-citizens and their spouses and children to enter or remain in the U.S. for varying lengths of time. 8 U.S.C. § 1101(a)(15)(A)–(V). Each category has separate rules and guidelines for their grant, maintenance, and termination, and jurisdiction for such adjudications lay primarily with USCIS, with a small percentage under the authority of the Department of State (DOS). ICE is not involved in a non-immigrant visa holder's status processing, adjudication, extension or termination. To make matters more complicated, even after the original period for a non-immigrant visa ends, non-immigrant visa holders may remain in the U.S. lawfully while they pursue an extension of stay or a change of status to another non-immigrant visa category. 8 C.F.R. §§ 214.1, 248.1. Under this provision, the person receives permission to remain in the U.S. without having to obtain a new visa from a U.S. Consulate abroad. While this process is pending, the non-immigrant's date of authorized stay noted on her immigration document (Form I-94) is not extended, although she still has lawful

status by operation of regulation. Frequently, USCIS, which is exclusively in charge of all extension and change of status requests, has processing times in excess of six months. Even longer delays have been known to occur, and with the current reduction of USCIS personnel are likely to become commonplace. However long the processing time, and however faulty the underlying receipts, the person seeking the benefit is considered by law to be in status, i.e., lawfully present in the U.S.

44. A Texas or ICE law enforcement officer, unfamiliar with these complicated rules, could erroneously conclude that a person awaiting an extension or change of status was in the country unlawfully.

45. Other non-immigrant categories do not have a clear expiration date on their immigration documents. For example, F-1 visa holders (students), J-1 visa holders (exchange visitors), and M-1 visa holders (vocational students) are admitted for "duration of status," an administrative convenience which allows them to remain in the U.S. for the period of time necessary to complete their studies or activities. 8 C.F.R. §§ 214.2(f)(5)(i), (j)(1)(ii), (m)(5). Their I-94 entry or status document contains no expiration date, but instead is annotated as "D/S." Even after completing their course of studies, by regulation, these visa holders are allowed an additional 30–60 days to depart the United States**.** 8 C.F.R. §§ 214.2(f)(5)(iv), (j)(1)(ii), (m)(10)(i). Further, some students can obtain automatic work authorization related to their studies and others can obtain permission to work on campus. Some work authorizations require a separate USCIS document and others do not. Some extension or status decisions are made by the Department of and some are not. Only

a seasoned expert can decipher the validity of a student status in all but the most ordinary circumstances.

46. Canadians present another perplexing set of rules. Canadian citizens may enter the U.S. as visitors for pleasure or for business without obtaining a visa from a U.S. Consulate. 8 C.F.R. § 212.1(a); 22 C.F.R. § 41.2(a). They are automatically admitted for a period of six months, but are given no immigration document to prove their status or their entry and required departure date. Again, Texas ICE officers are not likely to be familiar with the unique rules regarding Canadians although there are many in Texas, especially during winter.

47. The most frequently used of the non-immigrant temporary work categories, known as H-1B, presents many unique problems for verifying status. First, the employer identified on the receipt may not have the same name or address as the employer where the immigrant works each day. Associations, holding companies, partnerships, even labor contracting agencies are all eligible to sponsor the H-1B immigrants, and second them to certain co-employers. Indeed, this aspect of the H-1B category is managed by yet another Cabinet-level federal agency, the Department of Labor, Alien Employment Certification (AEC). The AEC also manages the labor pool testing for H-2A and 2B temporary worker categories; neither USCIS nor ICE plays a role in determining what employers are properly included under the primary employer's umbrella. A Texas officer would not know such nuances, and an ICE officer, who by law does not process and of the "H" petitions, would also see the different employer information and likely conclude that an impropriety has occurred. This erroneous assumption would cause delay, irrelevant inquiries, and even possible detention.

48. Not only may H-1B non-immigrants have different employers noted on their key documents, but those who have spent an extended period of time in the U.S. and whose employers are considering filing for permanent resident status for them are granted the right to change employers (known as "portability") within the same job family without prior USCIS or DOL approval. Such a seeming anomaly would not be within either the Texas or ICE officer's knowledge base.

49. Non-immigrant status based in part on international treaties pose especially tricky assessments. A Canadian in Texas under NAFTA has a non-visa status, known as "TN," issued at the border. She does not need the same level of supporting documents as an H-1B temporary worker, but is entitled to live and work in the U.S. indefinitely, in grants of one or two years. The document she presents may vary from a passport notation to an entry document that has no "visa category," and no expiration date. Further, she may change employers without notifying USCIS; she can simply leave the U.S. and re-enter with a new sponsor. None of this information would be familiar to a Texas officer or even ICE since ICE does not handle any aspect of immigrant or non-immigrant visa/status processing.

50. While NAFTA includes immigration provisions for both Canadians and Mexicans, Mexicans under NAFTA are treated entirely differently from Canadians in terms of immigration benefits, filing procedures, and evidence of status. Their processing is akin, but still different than, H-1B procedures. Again, such variations are not likely to be known to Texas officers or ICE, but they do occur, and make immigration status verification knotty, if not impossible.

51. Two other categories of non-immigrant visas depend on international treaties that can be changed by the DOS or the Office of the United States Trade Representative (USTR), yet another Cabinet-level agency with authority over aspects of immigration, without changing the underlying immigration statute. Such visas automatically involve the other nation signatory to the treaty, and questions about a person holding such a visa raise issues that are handled by USCIS, DOS, or USTR, not ICE or a Texas law enforcement officer. These "E Visa" categories concern treaty investors or traders, and their employees. Only citizens of certain countries may hold such visas, and their designation is integrated into our international treaties of Trade Commerce and Friendship. 8 U.S.C. § 1101(a)(15)(E); 8 C.F.R. § 214.2(e). These categories have a variety of authorizations for what their holders may do and for how long. Without knowledge of the treaty category and its specifics, it would not be possible to identify whether the person is operating within the allowed framework or not. No ICE or Texas officer would have that knowledge and could not acquire it in any general training course, and yet because the category concerns international relations and persons investing significant sums in the U.S., it is a complex inquiry where investigative delay is especially offensive.

52. Similarly, the J visa category, 8 U.S.C. § 1101(a)(15)(J), is so complex private practitioners consider it a specialty that is often done to the exclusion of other types of immigration law. J visas are also based on treaties with other nations, and are available to scholars, researchers, professors, students at advanced and undergraduate levels. It is also the exclusive path for foreign doctors, except for certain exemptions for Canadian doctors, to obtain licenses and ultimately visas that allow them to

practice medicine in the U.S. Each of these sub-categories has separate rules and requirements, some of which are managed by yet another Cabinet-level federal agency, the Department of Health and Human Services (HHS), some by state health organizations and some by universities. None of the underlying information necessary to evaluate status is readily available to ICE, nor within their expertise, much less that of Texas law enforcement officials, and yet Texas has thousands of scholars, professors and physicians holding J visas.

53. U visas are another complex visa category, available for victims of certain criminal activity who have been or are likely to be helpful to law enforcement. 8 U.S.C. § 1101(a)(15)(U). By law, there are only 10,000 visas available each year in this category. If the annual 10,000 visa cap is reached, the applicant is placed on a waiting list, provided a Notice of Conditional Approval, and granted either deferred action or parole, statuses discussed below in this affidavit. 8 C.F.R. § 214.14(d)(2). This Notice is proof of lawful status, although there is little chance that Texas officer or even an ICE officer would be familiar with it. U visa applicants who have final orders of removal may request a stay of removal that should be considered favorably by DHS. Memorandum from Peter S. Vincent, Principal Legal Advisor, U.S. Immigration and Customs Enforcement to OPLA Attorneys (Sep. 25, 2009), https://www.ice.gov/doclib/foia/dro_policy_memos/vincent_memo.pdf. Arresting or detaining someone who is in a U visa process likely would be catastrophic to the criminal case or on-going investigation as well as to the individual.

54. Victims of severe trafficking, who comply with law enforcement's request for assistance in prosecution or investigation of trafficking crimes, are eligible for T

visas, a category rife with complexity. 8 U.S.C. § 1101(a)(15)(T). Even before approval of the visa, if USCIS determines that the application is *bona fide*, the agency will automatically grant an administrative stay of removal until final adjudication. 8 C.F.R. § 214.11(d)(1)(ii). Information regarding the applicant is confidential and may only be disclosed to law enforcement in a manner that ensures the confidentiality of such information. 8 C.F.R. § 214.11(p); 8 U.S.C. § 1367(b)(2). This confidentiality provision further complicates a state officer's interrogation about immigration status. Only 5,000 T visas may be issued each year. If this annual cap is reached, applicants are issued a written notice and placed on a waiting list. 8 C.F.R. § 214.11(j). This Notice operates as permission for the person to stay lawfully in the U.S., a fact that would not be readily known by a Texas or ICE officer since they are not the processing or issuing sub-agency.

55. For obvious reasons, U and T visa categories (victims of crime or informants for law enforcement) are subject to specific confidentiality requirements that further complicate open discussions with Texas or ICE officers, neither of whom is the adjudicating agency for either category. 8 U.S.C. § 1367.

56. **SB 4 may cause the detention of individuals who are legally in the United States pending adjustment of status.**

57. Persons who are in the process of applying for lawful permanent residency through adjustment of status, 8 U.S.C. § 1255, a large category numerically, pose an especially difficult group for determining immigration status. Such persons are allowed to remain in the U.S., pending an adjudication of their application, even after their non-immigrant status and their I-94 immigration document have expired. Not

all of these persons would have proof of their lawful status in U.S., and those documents that they do possess may be unfamiliar to ICE officers as well as local law enforcement officials. For example, they might only have a filing fee receipt (Notice of Action) with no additional information and because it is their only proof of lawful status, they would not be likely to carry this document with them for fear of loss or theft. The delays in processing the underlying "green card" or employment authorization card, pursuant to a pending application, can exceed one year. Again, however long the bureaucratic delays, the applicant is lawfully present in the interim, but without any easy way to prove that fact.

58. Another common scenario involves applicants for permanent resident status based on employment with a U.S. company. Often such persons have a valid non-immigrant category but are applying for permanent residency. Changing from such non-immigrant categories as student, visiting scholar, or temporary worker is allowed, even encouraged, in the law. Documenting the applicant's lawful presence in the U.S. during the processing of such an "adjustment of status" is, however, not easy. Due to the esoteric features in each category and the long processing times, the underlying documents proving the person is lawfully in the U.S. are multiple, confusing, and at times inconsistent. For example, a common problem occurs when the non-immigrant category document, often an H-1B form, shows a different employer than the one sponsoring the green card. That is a perfectly lawful situation, but one that perplexes those not steeped in the non-deportation side of U.S. immigration law. Further, an immigrant may hold a valid H-1B or J visa while simultaneously holding receipts and work authorizations for permanent resident

status. The number of authorizations, and the fact that they confirm simultaneous immigrant and non-immigrant status, would confuse a line ICE officer trying to make an assessment of lawful presence in the U.S., and simply be beyond the reach of a line Texas officer. Yet from a real-life immigration perspective, on any given day there are several hundred thousand H-1Bs alone in this "adjustment" category.

59. Thus, a Texas or ICE law enforcement officer, unfamiliar with adjustment of status procedures would be unable to ascertain a person's status, which could lead to prolonged detention.

60. **SB 4 may also cause the detention of individuals with other lawful statuses.**

61. There are many other lawful statuses that fall outside the statute's 23 enumerated non-immigrant visa categories. Each of them presents complex to impossible problems for a Texas officer or an ICE officer responding to the Texas officer's inquiries. The most common of these categories are "temporary protected status," or "TPS," "orders of supervision," "parole," and "deferred action."

62. Temporary Protected Status (TPS) is a lawful status granted to citizens of designated countries because of a natural disaster or armed conflict. 8 U.S.C. § 1254a. DHS normally designates these countries (usually at the request of the other foreign nation involved in the situation) for a period of eighteen months. TPS is a category that involves international relations and policy at the highest levels of U.S. government. If DHS extends TPS for an additional time period, applicants must re-register for TPS.

63. However, because of the volume of applications, DHS automatically extends TPS status for six months during the re-registration period. The extension is published in

the federal register and on the DHS website. Thus, the TPS holder has an expired immigration document, even though DHS has extended her stay during the re-registration period. This Administration's recent actions in regard to TPS Haitians are particularly difficult for any Texas or ICE officer. Although agreeing to extend TPS for Haitians again, the decision was to extend for only six months. Since the blanket "grace period" is six months, it is not clear how overlapping extension requests and automatic grace period grants will be identified or what documents will suffice to prove lawful presence. ICE is not a part of those considerations; they reside with USCIS.

64. A local law enforcement officer would be unfamiliar with this automatic extension process, published only in the federal register and on the DHS website. In addition, the delays in extending TPS for all designated countries are growing.

65. "Parole" is a decision by DHS, usually involving USCIS national headquarters but sometimes allowed at the more regional level, to admit a person into the U.S. who has no valid visa but who has an exigent circumstance that, in an exercise of discretion, warrants the admission. For example, paroles are granted for immigrants to care for sick children or close relatives, to attend funerals, to appear in court cases, to settle legal matters, to secure release from detention: all are within the domain of this discretionary power. Once given, parole can be extended by a local immigration office. Documentation about parole can include an I-94 entry document or, in some emergency cases, merely a letter. Grants of parole are seldom entered into any comprehensive database.

66. "Orders of supervision," 8 C.F.R. § 241.5, and stays of removal, 8 C.F.R. § 241.6, are similar to parole; they are used when a removal order is in place, but there are equitable reasons not to execute it. In the case of undocumented immigrants, they may have to appear before ICE officers periodically for "check-ins." The documentation to prove the status can be minimal and may or may not include an employment authorization document.

67. In addition, through regulations and internal policy directives, other categories of non-citizens may still reside lawfully in the United States with or without permission to work. For example, deferred action allows a non-citizen to remain in the U.S. for a period of time designated by USCIS or ICE. Deferred action is not explicitly provided for under either the statute or the regulations. *See, e.g.*, 8 C.F.R. § 274a.12(c)(14). "Deferred action" is the ultimate prosecutorial tool, allowing DHS to grant a variety of relief to those who would otherwise be subject to immigration enforcement.

68. President Obama used deferred action to craft relief from deportation for certain children whose presence in the U.S. began in childhood. His action is known as the DACA program. Currently over 200,000 persons in Texas hold DACA status. USCIS, *DACA Statistics FY2016, Q3*, https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca_performancedata_fy2016_qtr3.pdf (last visited June 1, 2017).

69. DACA beneficiaries may be issued an employment authorization document for a period of two years. They may renew their status upon filing an extension application

and paying a filing fee of $495.00. During the renewal period, the only proof of lawful status is the filing fee receipt, known as the Notice of Action.

70. While DACA involves an application process, prosecutorial discretion itself typically does not. Rather, it can occur informally, based on such immediate factors as Congressional or other political intervention, media pressure, compelling equities. Even immigration judges can find their orders for deportation halted by prosecutorial discretion, a situation that is seldom included in any database.

71. Survivors of domestic violence may apply for permanent resident status under the Violence Against Women Act (VAWA). 8 U.S.C. § 1101(a)(51); 8 U.S.C. § 1154(a)(1) *et. seq*. They are also granted deferred action pending the final adjudication of their cases. Proof of their deferred action status is a USCIS document that again may not be part of an ICE-accessible database, due to confidentiality protections for battered, and vulnerable, spouses. 8 U.S.C. § 1367. VAWA recipients may, but need not, apply for an employment authorization document. Few ICE officers are familiar with this process or documentation, and probably no Texas officers.

72. **SB 4 may cause the detention of individuals who are eligible for Employment Authorization Documents.**

73. Some non-citizens are eligible to apply for an employment authorization document (EAD) based on their immigration status. 8 C.F.R. § 274a.12 *et. seq*. The EAD, a laminated card, contains a photo of the applicant and an expiration date, usually between one and two years, depending on the underlying non-immigrant category. However, there is no requirement that a person eligible for an EAD apply for one.

Further, its issuance and extensions are often delayed and depend upon the underlying qualifying non-immigrant category being extended.

74. To extend an employment authorization document, the non-citizen must pay a filing fee of $495.00. Because of the delay in adjudication, DHS automatically extends the EAD for certain categories for an additional six months. Notice of such extension only appears on the DHS website. USCIS, *Automatic Employment Authorization Document (EAD) Extension*, https://www.uscis.gov/working-united-states/automatic-employment-authorization-document-ead-extension (last updated Feb. 1, 2017). Thus, a non-citizen, who has filed to extend her EAD card, has no proof of lawful status, other than what is published on the DHS website.

75. **SB 4 places persons in removal proceedings and those granted status by an immigration judge at risk of unlawful detention.**

76. Many persons are present in the U.S. without documentation but are awaiting a court hearing before an immigration judge or an appeal at the Board of Immigration Appeals or in the federal courts. They may be challenging their removal (deportation) or seeking available relief from removal under the immigration statute such as asylum, cancellation of removal, or other benefits. They may even be filing statutory or Constitutional challenges to provisions of the law, immigration-centric Executive Orders, or the implementation of the law or its regulations. Some may be individually named and some may be included in class actions. In fact, there are over 585,000 cases pending in the immigration courts alone, and a current backlog in Texas of 99,690 cases, second only to pending cases in California. TRAC Immigration, *Immigration Court Backlog Tool*,

http://trac.syr.edu/phptools/immigration/court_backlog (last visited June 1, 2017). The current estimate for when an immigrant's deportation case will actually be heard is approximately four years, and the delays are growing.

77. These individuals would not normally be rearrested by ICE because they have already been placed in removal proceedings and are allowed to remain in the community during those pending proceedings. However, the only documentation that a person in this category would have is the Notice to Appear (Form I-862), alleging the grounds for the removal proceedings. Non-citizens do not normally carry the Notice to Appear with them.

78. When a person is granted relief from removal, the immigration judge issues a short memorandum or a longer formal decision, pending the processing of immigration documentation (the I-551 card). The immigration judge cannot issue immigration documents related to such relief from removal. Instead, the non-citizen must apply to USCIS for evidence of status awarded by the judge. The process and wait for issuance of a permanent resident card or an employment authorization card can take many months, depending on the specific relief granted

79. If the person loses her case before the immigration courts, she may file a timely appeal to the Board of Immigration Appeals. Upon such filing, she receives an automatic stay of removal. She is not provided with any additional immigration documentation. If she loses before the Board of Immigration Appeals, she may file a petition for review to the Federal Circuit Court of Appeals and seek a stay of removal. Again, these procedures are outside DHS purview, residing solely within the federal court system. No DHS database automatically tracks them. *Habeas* petitions, and

challenges to certain aspects of immigration law and its implementation are filed in Federal District Courts and may include stays of removal. Again, there is no ICE database of such judicial proceedings.

80. A non-citizen would not normally carry proof of the status of her case on appeal. Even if she did, a law enforcement officer would not be able to interpret or ascertain her immigration status from the appeal notice, and any effort to do so would almost certainly prolong detention without any legal basis.

81. **SB 4 may also cause the unlawful detention of individuals who have been granted withholding of removal.**

82. A person who is granted withholding of removal under 8 U.S.C. § 1231(b)(3), commonly known as "protection from harm" in the home country, is provided with a written decision from an immigration judge. The decision contains no expiration date and simply states that the person cannot be removed to the country from which she fears harm. Such a person is lawfully in the U.S., and detention or arrest violates her rights.

83. Such a person may, but need not, apply for an employment authorization document (EAD); even if she chooses to add this step, she must wait months for approval and issuance of the document. The employment authorization document is valid for a period of one to two years, despite the fact that the person continues to have indefinite withholding of removal status until it is formally terminated by the immigration judge, and only then upon a finding that she may be safely removed from the U.S. In the case of stateless persons, a situation more common than generally thought, withholding may be for a lifetime. A person may have an expired EAD then, but still

be lawfully in the U.S. Further, while she is applying for withholding of removal before the immigration judge, she cannot be removed from the U.S., even though she has no proof of lawful status during proceedings.

84. **SB 4 may also lead to the unlawful detention of individuals who have been granted asylum.**

85. A person who is granted asylum under 8 U.S.C. § 1158 by the immigration judge is similarly issued a written decision. The administrative decision contains no expiration date. Such person may, but need not, apply for an employment authorization document, but doing so is the usual prolonged process. The employment authorization document is generally valid for a period of one to two years, despite the fact that the person continues in indefinite asylee status unless it has been formally terminated by the immigration judge.

86. While she is applying for asylum status before either an immigration judge or the Asylum Office of USCIS, she cannot be removed from the U.S., although she has no proof of lawful status.

87. The "A" file (alien registration file) is a near mythical creature. Supposedly a single archive of all data relating to a lawful permanent resident, in the real world the "A" file may be spread out among other DHS and other federal law enforcement agencies, may include both electronic and paper components, may be updated or not by the immediate user, and may not be returned intact. There are millions of "A" files going back decades, so what is described as "the complete file" seldom is. In my experience as USCIS Chief Counsel, a case that was actively involved in any one of the hundreds of immigration-related processing steps was seldom intact. Cases that

had been sent for particular review by fraud detection experts or were involved in removal proceedings of litigation or involved an especially troubling adjudication were often spread out among different offices and officers. For Texas law enforcement or ICE, the incomplete nature of the records is a serious impediment to understanding a person's immigration status; certainly, it is a shaky foundation on which to determine detention and possibly arrest.

88. Further, as mentioned above, some of USCIS' files are subject to stricter privacy controls, especially those pertaining to refugees, VAWA (Violence Against Women Act), T and U visas and applicants for asylum, since open access to those person's immigration information can place them in physical harm. Files kept by the Immigration Court are subject to yet a different database; housed not by DHS but by the DOJ, Executive Office of Immigration Review. If appeals are filed beyond the EOIR level, any files are the property of the particular Federal Court involved, and are not accessible by or coordinated with ICE or USCIS databases.

89. It is worth noting that decisions by immigration judges are often omitted from ICE files because the underlying cases are still in process. Such routine judicial orders as continuances, administrative closings, voluntary departure with extensions of same, and even grants of permanent resident status that may take a year to activate due to backlogs in the availability of visa numbers would likely not be part of any ICE officer's routine inquiry. As discussed herein, the judicial database gap alone would affect thousands of persons who happen to be in Texas on any given day.

90. Due to the bifurcation of missions, where ICE is the enforcement arm of immigration and USCIS the benefit side, ICE officers are not trained in and do not work with the visa categories or statuses. They do not know the implementing regulations, policy memos, legal memoranda or operating guidelines necessary to determine whether a person is lawfully in the U.S. State law enforcement has no knowledge whatsoever of these complicated issues. Indeed, it is the overwhelming complexity of these edicts that have even the most erudite courts concluding that: "Immigration laws bear a "striking resemblance . . . [to] King Minos's labyrinth in ancient Crete. The Tax Laws and the Immigration and Nationality Acts are examples we have cited of Congress's ingenuity in passing statutes certain to accelerate the aging process of judges." *Lok v. INS,* 548 F.2d 37, 38 (2nd Cir. 1977).

Date: June 3, 2017
Executed in Rockport, New York

Respectfully submitted,

Roxana C. Bacon

EXHIBIT A

CURRICULUM VITAE
ROXANA BACON
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Education:

University of California at Santa Barbara, 1961-1963, Honors at Entrance and California State Scholarship

Peace Corps Volunteer 1963-1965; trained at Notre Dame University, Puerto Rico and stationed for 2 years in Copiapo, Chile in the Atacama Desert. Established "head start" programs and mining cooperatives.

University of California at Berkeley, 1965-1967. B.A. in interdisciplinary honors major, Communication and Public Policy. Recipient, California State Scholarship.

University of California at Berkeley, Boalt Hall School of Law, 1971-1974. JD

Employment:

International Institute of the East Bay, 1965-1968. Designed, obtained funding and directed program matching new arrival immigrants from rural areas of Central and South America with politically active U.S. teenagers for 5 hours a week. Goal was to provide real life orientation to urban living for people who had extremely limited resources and no experience with bureaucracies. Program received Congressional recognition and had over 500 "matches". In addition, more than 15 of the U.S. teenage volunteers received scholarships to continue their University education as a direct result of their work in the program.

San Francisco International Institute, 1968-1971. Social worker/community development manager with new arrival immigrant groups. Established out-reach programs in high schools and hospitals offering cultural and language translators to expedite services to this hidden population. Developed innovative group approaches [yoga and meditation, cooking events, dance classes] to counter isolation of mono-lingual, uneducated women recently arrived from Central America and rural Mexico. Continued teen-age matching program.

Jackson & Hertogs, San Francisco, CA 1971-1974. Clerked throughout law school [20-30 hours per week] with premier immigration law firm mentored by Joseph Hertogs and Z.B. Jackson, both national experts in the field.

Jennings, Strouss & Salmon, Phoenix AZ summer 1973 and 1974-1984. Law clerk 1973, associate 1974 -1977, partner 1977 -1984. Specialized in all aspects of employment and labor law while developing immigration practice. First immigration practice in the state to provide services in business immigration law. Donated over 500 hours annually to low/no income family and refugee immigration cases.

Sacks, Tierney, Phoenix AZ partner 1984-1986. Managed and grew immigration law practice. Left with another partner to form own firm.

Daughton, Hawkins & Bacon 1986-1988 Owned, managed and grew law firm that offered immigration, employment and litigation services. Firm's success led to its acquisition by national law firm seeking Phoenix presence.

Bryan Cave, 1988-1997. 1,000+lawyer firm based in St. Louis, Missouri. Partner, first woman Member of 15 person Executive Committee [served 3 appointments, for 6 years], Resident Manager of Phoenix office, member of Compensation, Diversity and Marketing Committees. During tenure, Bryan Cave established first international offices and expanded national footprint coast to coast. Directed Immigration practice, which quadrupled in revenues and tripled in staff.

Bacon & Dear. 1997-2006. Founding partner of woman-owned firm. Firm's innovations include first interactive database for case management and preparation, no billable hours, and team format for client service. Practice limited to immigration law, emphasizing business and management of volume processing. In 2003 affiliated with national employment law firm, Littler Mendelson, to assist with international expansion. At time of retirement, July 2006, firm had grown from 10 to 150 employees with offices in Shanghai and Bangalore and extensive international migration practice. Clients included 10 Fortune 100 businesses and annual income in excess of $20 million.

Western Progress, January 2007 – June 2008. Accepted 6-month assignment from Center for American Progress as CEO. Set up a non-profit policy and communication firm devoted to issues of concern in the 8 Rocky Mountain States. Establish Board, secured funding for first 3 year cycle, obtained 501c3 tax status, hired staff, opened offices in Colorado, Montana and Phoenix, produced first 8-state workshop on solar energy, developed website, e-newsletter, partnerships with each Governor's office and working relationships with Universities and experts in the areas of interest.

Western Progress, June 2007 to December 2008: Distinguished Fellow-Immigration.
Work with immigration policy, process and legislation in the Rocky Mountain States.

Department of Homeland Security, Chief Counsel United States Citizenship & Immigration Service October 2009 – December 2010 Managed 180 USCIS lawyers throughout the U.S., counseled Director of USCIS, participated in policy discussions among DHS immigration agencies, drafted memoranda regarding administrative/executive options to statutory reform, including DACA-type discretion.

Teaching:

Visiting Professor of Law, Arizona State University College of Law, 1979-1980. Taught torts, professionalism and immigration/labor seminar. On leave from Jennings Strouss & Salmon.

Adjunct Professor of Law, Arizona State University College of Law, 1981-2005; 2008. Taught professionalism and immigration seminar at least once each academic year as well as participate in orientation programs, student mentoring and career counseling as requested by ASU.

Lecturer, University of Arizona College of Law, periodically since 1995.

Keynote Lecture IL: Syracuse University Law School, 2015

Distinguiished Practitioner, University of Miami Law School, Spring semester, 2012, 2013, 2014, 2016. Taught seminar to 3L and LLM students on Global Migration Policy and Law; guest lectured at UM Law School immigration law course and clinic. Presented at panels related to immigration.

Professional Affiliations and Appointments:

First women to serve as the **President of the 10,000-member Arizona Bar** Association, 1991-92. Established Law Office Management Assistance Program [LOMAP], state Constitutional amendment to include diversity as criteria for merit selection, revamping of discipline system to establish priorities based on public harm, divert health-based problems to treatment, and professionalize staff, included public members on Board of Governors, established Appointments Committee to ensure equal opportunity to serve on Bar Committees.

First woman to serve as **General Counsel** to 14,000 member American Immigration Lawyers Association, 1993–1996 and **General Counsel** to American Immigration Law Foundation, 2000 to 2006. Chaired numerous AILA INS liaison committees, including DOL, INS Enforcement and Professional Responsibility.

First woman lawyer representative to the **Ninth Circuit Court of Appeals,** 1983-86.

First Arizona women lawyer selected by Ninth Circuit Federal Court of Appeals to its **Advisory Board**, 2006-2009

University of Arizona James E. Rogers College of Law Board of Visitors. Member, 1995 – present, Chair, 2000-2003.

University of Miami School of Law Visiting Committee, Member, 2010-present.

Arizona Court of Appeals Judge pro-tempore, 1985, 1994, 1998.

Served on **Selection Committees for Federal District Court** Magistrate and Commissioner positions.

Served on Appellate Court **Merit Selection Nominating Committee** for Arizona Supreme Court.

Served on Governor-appointed **Selection Committees** for State Land Commission, Director of State Department of Revenue, Director of Corrections.

Member, Editorial Board, **Bender's Immigration Law Publications** 2002 –2008.

Community Activities:

Co-Chair, Mayoral campaign, Terry Goddard 1982. Coordinated volunteers, fund-raising, issues briefing papers for successful campaign of progressive candidate.

Phoenix Citizen's Bond Commission 1988. With 2 co-chairs, appointed by Mayor Terry Goddard to lead campaign that approved over 1 billion dollars in city improvements, at that time the largest in U.S. history. Bond issue included innovative public initiatives, including streetscapes, freeway art, "green" library and museum designs, and was the first to be tied to a comprehensive 5 year City Plan based on citizen input.

Co-Chair, **Phoenix Indian School Design Commission**, 1988-90. With 3 others, chaired controversial land-use decision making process and plan for use of centrally located, and commercially valuable, Phoenix open space previously used as Native American boarding school. Result preserved open space and engaged developers in design and uses acceptable to Native American advisory groups.

Big Sisters of Arizona 1975-1982. Board member, held all offices and served as President 1978-80. During this period organization grew 5 fold and began

merger with Big Brothers of Arizona. Program is considered national model for Big Brother/Big Sister operations across the United States. Remained active contributor.

Valley Leadership 1976-1977. Selected for leadership program established by Phoenix area business leaders to identify leadership talent and provide orientation to pressing area issues, including growth, education, employment and diversity. Remained active in mentoring program.

Established Bacon & Dear ASU College of Law scholarships to serve detainees through the Florence Project. Program involved semester of law school credit and $10,000 grant per recipient. Program folded into immigration law clinic.

Initiated and funded **Immigration Law Clinics** at Arizona State University Sandra Day O'Conner College of Law, and University of Arizona James Rogers College of Law. The latter is now named Bacon Immigration Law Program and Policy. I serve as Advisor on policy issues.

Mentor young lawyers seeking to specialize in immigration law 1980 to present; currently working with 4 lawyers who are developing immigration law practices.

Executive Board, **Arizona Supreme Court's Centennial Commission**, Developing interactive program to celebrate outstanding historic actions and members of Arizona legal community. 2008-present

Awards:

- **Margaret Brent Award**, (highest award given to women lawyer nationally, by the American Bar Association, for lifetime achievement and support for women in the law), 2007.
- Arizona's **100 Outstanding Minority and Women Lawyers** 2000-present.
- **Sarah Herring Sorin Award** (highest award give to an Arizona woman attorney) 2001
- State Bar **Distinguished Service Award** (highest award given to an Arizona State Bar member) 2003
- Arizona State University **Distinguished Achievement Awards** 1985; 2001
- University of Arizona **Distinguished Service Award** 1998
- University of Arizona James E. Rogers College of Law **Honorary Alumni Award**. 2003
- American Immigration Lawyers Association **President's Commendation** 1994, 2004, 2005

- American Immigration Lawyers Association **Appreciation Awards**, 1997, 1998, 2000, 2002
- **Quality of Life award**, Maricopa County Bar Association, given to "best small firm" in Arizona, 1999.

Publications and Speaking Engagements:

Spoken at every AILA annual convention since 1985; spoken at most State Bar of Arizona annual conventions and at more than 50 Continuing Legal Education courses in professionalism, employment law and immigration law; chaired panels and moderated conferences and seminars in Arizona and nationally covering the entire range of immigration issues, from detention to naturalization; given key note addresses at law school orientation, women's law conferences, women law students conferences, community organizations involved in immigration or border issues and inductions of federal and state judges, most recently at Syracuse University, Arizona State University and University of Miami.

Written articles or book chapters relating to immigration law for many specialty publications, including ILW and Arizona Employment Law Handbook, as well as authored columns for The Arizona Attorney, monthly during tenure as Bar President and regularly since 2003. Publications include:

PERM: An Introduction, Lexis/Nexis Immigration Law Recent Developments, http://www.lexisnexis.com/practiceareas/immigration/pdfs/web713.pdf (Feb. 18, 2005) (co-authored with Lori S. Melton).

INS Enforcement at the Workplace: The I-9 Audit and Beyond, in 2 1995-96 Immigration & Nationality Law Handbook 499 (American Immigration Lawyers Ass'n Ed., 1995).

A Practitioner's Guide to Successful Alien Labor Certifications, 88-5 Immigration Briefings 5 (May 1988) (co-authored with Lenni B. Benson).

Estopping INS-'Affirmative Misconduct' Makes Positively Bad Law, 5 Immig. J. 8 (1982).

Regular columnist in *Arizona Attorney* monthly magazine on law-related, and frequently immigration law related, issues.

Writer, *MS Magazine* periodically since 2014, including article on migrant women asylum applicants in ICE detention.

Served as expert witness in *State of Arizona v. MCCCD* (concerning in-state tuition for DACA recipients), 2014 and 2015.

Signatory to various Amici briefs in the USSC regarding immigration issues, including *U.S. v. State of Texas* (Constitutionality of discretionary authority exercised by the Executive branch). 2015