

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Nos. 565 C.D. 2010,
568 C.D. 2010,
569 C.D. 2010,
570 C.D. 2010,
572 C.D. 2010,
573 C.D. 2010

MARIA SERNA-DEANDRADE,
JUAN WILLIAM POSADA,
JUAN CARLOS RAMIREZ,
SANDRA L. GONZALEZ,
PEDRO A. CAMARGO,
JESSE LATORRE,
Appellees,

vs.

COMMONWEALTH OF PENNSYLVANIA,
DEPARTMENT OF TRANSPORTATION,
BUREAU OF DRIVER LICENSING,
Appellant.

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BRIEF FOR APPELLEES

*Consolidated Appeals from the Orders of the Court of Common Pleas of
Philadelphia County, Civil Division, November Term 2009 at Docket Numbers
04763, 05044, 05057, 05066, 05282, and 05310 filed March 29, 2010.*

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I. COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Whether the Pennsylvania Department of Transportation may cancel lawfully-issued drivers' licenses because it mistook Individual Tax Identification Numbers, appearing on license applications, to be Social Security Numbers and decided, following issuance of the licenses, to no longer accept Individual Tax Identification Numbers in lieu of Social Security Numbers absent a special waiver from the Social Security Administration.

The lower court held that the Department may not cancel drivers' licenses lawfully-issued on the basis of Individual Tax Identification Numbers rather than Social Security Numbers.

2. Whether the Pennsylvania Department of Transportation may cancel lawfully-issued drivers' licenses without affording the drivers due process-compliant, pre-cancellation notice and an opportunity to be heard.

The lower court held that the Department may not cancel drivers' licenses in this way.

II. COUNTER-STATEMENT OF THE CASE

Between August 1999 and October 2001 the Pennsylvania Department of Transportation Bureau of Driver Licensing (“the Department”) issued Appellees Jesse Latorre, Pedro A. Camargo, Juan William Posada, Juan Carlos Ramirez, Sandra L. Gonzalez and Maria P. Serna-Deandrade (collectively “the Drivers”) their first Pennsylvania drivers’ licenses. R.R. 111a, 128a, 144a, 162a, 179a, 199a. Since then, the Department has renewed their licenses many times. *Id.*; R.R. 75a, 85a. The Drivers’ current licenses are set to expire between May 2011 and August 2013. R.R. 111a, 128a, 144a, 162a, 179a, 199a.

The Drivers applied for their Pennsylvania licenses using federal Individual Taxpayer Identification Numbers (“ITINs”) because they are non-citizens unable to obtain Social Security Numbers (“SSNs”). R.R. 75-78a, 223a. ITINs, like SSNs, are used by the Internal Revenue Service (“IRS”) “to identify individual persons.” 26 C.F.R. § 301.6109-1(a)(1)(ii). Like SSNs, ITINs “take the form 000-00-0000 but include a specific number or numbers designated by the IRS.” 26 C.F.R. § 301.6109-1(a)(1)(ii). Like applicants for SSNs, applicants for ITINs “must submit such documentary evidence as the Internal Revenue Service may prescribe in order to establish alien status and identity.” 26 C.F.R. § 301.6109-1(d)(3)(iii); *compare* Social Security Administration, Application for a Social Security Card, Form SS-5 (2009) *available at* www.ssa.gov. Non-citizens who do not qualify for SSNs are issued ITINs as substitutes. 26 C.F.R. § 301.6109-1(d)(4).

Appellee Drivers depend upon their licenses in order to make their livings and care for their families. R.R. 75a. In approximately sixty combined years of driving, they have been involved in only two accidents. R.R. 129a, 201a. Aside from one driver’s “stop sign violation,” they have violated no traffic laws. R.R. 111-12a, 128-29a, 144-45a, 160-63a, 179-83a, 199-201a, 220a.

Following issuance of the Drivers' licenses, the Department altered its interpretation of § 1510 of the Vehicle Code, 75 Pa.C.S. § 1510 (issuance and content of driver's license), which requires it to issue drivers' licenses to qualified applicants who pay a fee and provide certain identifying information. R.R. 75a, 78a, 225-26a. At the time the Drivers applied for their licenses, the Department interpreted § 1510 to mean that it may accept ITINs in lieu of SSNs. *Id.*; *see also Kocher v. Bickley*, 722 A.2d 756, 758 (Pa. Commw. Ct. 1999). It did not require that the ITINs be accompanied by waivers indicating an inability to obtain a SSN. *Id.*

In support of these facts, the lower court cited the following evidence of record (R.R. 223a, 226a):

Testimony of Driver Maria Serna-Deandrade:

When I came to this country I wanted to keep driving because I have a license in my country. I go to the transportation – I went to PennDOT – went to the transportation center and I said I'm here to get permission to drive – to get a license to drive. They asked me what documents do you have to apply for a license. I showed them all of my documents, my visa, my passport, all of my documents. *They asked me if I had a Social number. I said no. I said I have a tax ID, and they told me with this I could get a license . . .* Since then I renewed my residence three times. *In none of these papers that he submitted and at no time in the office did they tell me that I needed to apply for a waiver to use my tax ID number PennDOT was telling people they could use their tax ID numbers*

R.R. 78c (emphasis added).

Testimony of Paula Camargo, Daughter of Driver Pedro Camargo:

My dad has had his license for nine years on a tax ID number. Like every one here, I can say my dad has bought a car, paid for insurance. . . . [H]e depends on it to go to work, to help out our family. . . .

R.R. 75a (emphasis added).

Testimony of Christina Posada on behalf of Driver Juan William Posada:

[Mr. Posada has had his license for] 11 years. And he had to renew it four times already *We know that he got it under a tax ID number. That was a long time*

ago. That's what he presented to the Department of Transportation. They took it. *We did not know that a waiver—nobody told us we needed a waiver.*

Id. (emphasis added).

The lower court also noticed the Department's past acceptance of ITINs in lieu of SSNs, memorialized in *Kocher v. Bickley*, 722 A.2d at 758. R.R. 225a. In *Kocher*, two learner's permit applicants, who refused to supply SSNs for religious reasons, sought to compel the Department to issue their permits without the SSNs. The Department refused "[b]ecause Applicants did not provide a social security number, a waiver from the federal government, *or* a taxpayer identification number. . . ." *Id.* at 757-58 (emphasis added). As the lower court noted, the Department, in *Kocher*, took the position that ITINs are *an alternative* to SSNs. R.R. 225-26a. The *Kocher* Court wrote: "[T]he Department contents that . . . the Vehicle Code allows the Applicants to provide federal taxpayer identification numbers *as an alternative* to providing a social security number. . . ." *Id.* at 758 (emphasis added).

The record is devoid of evidence indicating that the Department had never accepted ITINs in lieu of SSNs. When explicitly asked whether the Department had changed its procedure, its lawyer said he did not know.

THE COURT: Let me ask counsel. Has there been a change in the procedure employed by PennDOT in granting or is a requirement for the information necessary to the applications for driver's licenses?

MR. WERLINSKY: Your Honor, I don't know.

THE COURT: Do you know whether there has been a change?

MR. WERLINSKY: I do not know.

R.R. 75a.

Lastly, in proceedings before the lower court, the Department's attorney pointed out that the "909" numbers appearing on the Drivers' applications are indeed "taxpayer ID" numbers.

R.R. 74a, 85a, 88a, 109a, 125a, 142a, 158a, 176a, 196a.

The lower court concluded, as a factual matter, that the Department previously “did allow tax identification numbers to be used in lieu of social security numbers” and that its “authorized agents . . . continued to allow [the Drivers] to renew [their] licenses using their tax identification numbers for many years.” R.R. 226a.

The relevant language of § 1510 has remained unchanged since the issuance of the Drivers’ licenses. *See* 75 Pa.C.S. § 1510 (West 2010) (historical and statutory notes revealing no changes to relevant language). Consequently, the change in policy was not the result of a change in the governing statute. The lower court recognized (R.R. 224-25a) and the Department argued (R.R. 86a; Br. 15-16) that the policy change was prompted by the federal REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231. Section 202 of the REAL ID Act provides in relevant part:

(a) MINIMUM STANDARDS FOR FEDERAL USE.—

(1) IN GENERAL.—*Beginning 3 years after the date of the enactment of this division, a Federal agency may not accept, for any official purpose, a driver’s license or identification card issued by a State to any person unless the State is meeting the requirements of this section.*

* * *

(c) MINIMUM ISSUANCE STANDARDS.—

(1) IN GENERAL.—To meet the requirements of this section, a State shall require, at a minimum, presentation and verification of the following information *before* issuing a driver’s license or identification card to a person:

* * *

(C) Proof of the person’s social security account number or verification that the person is not eligible for a social security account number.

* * *

(d) OTHER REQUIREMENTS.—To meet the requirements of this section, a State shall adopt the following practices in the *issuance* of drivers’ licenses and identification cards:

* * *

(5) Confirm with the Social Security Administration a social security account number presented by a person using the full social security account number . . .

119 Stat. at 312-14 (emphasis added).

The lower court found, as a matter of law, that the REAL ID Act requires a state to adopt certain practices in the issuance of drivers’ licenses “going forward” and does not apply to

licenses “already in use.” R.R. 224a. The lower court pointed out that the plain language of the Act mandates such a conclusion. Indeed, the SSN verification practices described in Section 202 are to be applied “in the *issuance* of drivers’ licenses” and “*before issuing* a driver’s license.” 119 Stat. at 312, 314 (emphasis added). Furthermore, the lower court reasoned, “There is no indication in the REAL ID Act that it should be applied retroactively.” R.R. 224a-225a.

Prior to proceedings in the lower court, the Department had never notified the Drivers of its new position that, absent a waiver indicating inability to obtain a SSN, an ITIN is an unacceptable substitute for a SSN. Instead, on May 29 and November 3, 2009, the Department mailed nearly identical license cancellation notices, designating the upcoming cancellation date and instructing the Drivers to return their licenses to the Department unless they could present valid SSNs. R.R. 99-105a, 115-21a, 132-38a, 148-54a, 166-72a, 186-92a. Neither letter instructed the Drivers’ to present waivers from the Social Security Administration, indicating their inability to obtain SSNs. *Id.* The letters did not mention waivers at all. *Id.* The letters warned the Drivers that their “Social Security number[s]” could not be verified. *Id.*

Because the Drivers were unable to present SSNs, the Department cancelled their licenses on December 15, 2009. R.R. 80a, 99a, 115a, 132a, 148a, 166a, 186a. The Drivers appealed *pro se* to the Court of Common Pleas of Philadelphia County, and their cases were consolidated for review on January 29, 2010. R.R. 15a, 20-21a, 23a, 26-27a, 29a, 32-33a, 35a, 38-39a, 41a, 44-45a, 56a, 71a. On that date, the lower court issued a supersedeas—suspending the cancellations while the appeal continued.¹ R.R. 80a. Even at that late date, the Department’s attorney refused to say where a person could get a waiver.

¹ Apparently, from December 15, 2009 to January 29, 2010, none of the Drivers had valid licenses. R.R. 80a.

PAULA CAMARGO: How does one obtain a waiver?
MR. WERLINSKY: That would be an administrative question best placed to the agency that issued a waiver to my client on an administrative level.
THE COURT: Say that again.
MR. WERLINSKY: It's not a legal question. It's a question I don't have the information to answer.
THE COURT: A waiver would have to be obtained, however, through the Social Security Department.

R.R. 75a. Because only two of the Drivers speak English, four proceeded in the lower court with unprofessional interpreters—friends and family. R.R. 75-78a, 84-85a.

During proceedings before the lower court, the Drivers attempted to supply evidence of their lawful immigration status and waivers indicating their inability to obtain SSNs. R.R. 80a, 88a. Because the lower court ruled in their favor on other grounds, this evidence was rejected as unnecessary. R.R. 88a. On March 26, 2010, the lower court sustained the Drivers' appeals, effectively rescinding the Department's cancellation of their drivers' licenses. R.R. 226a. On April 5, 2010, the Department appealed to this Court.

III. SUMMARY OF ARGUMENT

Pennsylvania's Department of Transportation is tasked with maintaining the Commonwealth's highways, licensing safe drivers and supporting public transportation. Commonwealth of Pennsylvania, Governor's Report on State Performance 65 (2007-08) *available at* www.portal.state.pa.us. With some 40,000 miles of roadways and 2,432,976 licensed drivers, this is an enormous job. *Id.* at 65, 72. Fortunately, Pennsylvania's Vehicle Code sets forth explicit qualifications for drivers. Among other things, a driver must be at least 16 years of age, her license may not be suspended or revoked in another state, she may not be an alcoholic incapable of safe driving, she must be physically capable of driving, and she must pass an examination that tests her knowledge of traffic laws as well as her driving skill. 75 Pa.C.S. §§ 1503, 1508. It is undisputed that Driver Appellees met all of these requirements before they were issued their Pennsylvania drivers' licenses. The Department quibbles only with the fact that the Drivers identified themselves, on their license applications, by ITINs instead of SSNs. Both numbers are issued by the federal government on the basis of similar identity documents. The federal government uses both numbers to identify people for official purposes. 26 C.F.R. § 301.6109-1. Indeed, the Department, at the time it issued the licenses of these six drivers, in accordance with Department policy, accepted their ITINs in lieu of SSNs. Furthermore, the Vehicle Code explicitly permits the use of ITINs in lieu of SSNs. 75 Pa.C.S. § 1510(a), (f).

Now, some ten years after lawfully receiving their licenses and driving safely, the Drivers face license cancellation without ever being given notice and an opportunity to present the Social Security waivers the Department claims they now need. Why? According to the Department, "[f]ollowing the September 11, 2001 terrorist attacks (the '9/11 Attacks'), the federal government enacted legislation that *requires* an individual to supply a Social Security number –

or proof that he is exempt from having such a number – to a state before it may issue a driver license to that individual.” Br. 11-12 (emphasis added).

Importantly, the federal government has no power to control driver licensing. Having not been “delegated to the United States by the Constitution,” this power is reserved for the states. U.S. Const. amend. X. While Pennsylvania’s General Assembly could enact such a measure, it has not done so. In fact, on June 15, 2010, Pennsylvania’s Senate passed a bill prohibiting the Department from “participat[ing] . . . in the REAL ID Act of 2005 or regulations promulgated thereunder.” S.B. 621, 1st Reg. Sess. (Pa. 2010).

Lastly, although it is unnecessary to reach this point, the Department incorrectly assumes that because the Drivers reside in the United States, they are eligible for SSNs. Br. 24. If, given notice and an opportunity to present letters from the Social Security Administration, demonstrating their inability to obtain SSNs, all six drivers could have done so. However, the Department never gave them this option. Not until their second appellate hearing in the lower court on March 26, 2010, did the Department indicate that, in its view, the Drivers must submit Social Security waiver letters to be entitled to their licenses (R.R. 86a). As such, the Department denied them procedural due process.

IV. ARGUMENT

A. Because the Drivers Were Entitled to Issuance of Their Licenses and, at the Time of Application, Correctly Provided All Required Information, the Lower Court Properly Prohibited the Department from Cancelling the Licenses.

That the Drivers met all of the many qualifications² to apply for their licenses is undisputed.³ Br. at 11-25. This controversy arises from a solitary fact: The Drivers failed, in their license applications, to provide SSNs or “waiver[s] obtained from the Federal Government permitting [them] not to have [] Social Security number[s]. . . .” 75 Pa.C.S. § 1510(f). Instead, they identified themselves by their federally assigned ITINs, a practice authorized by the Department at the time. *Supra* at 2-5. While the Department “may cancel any driver’s license upon determining that . . . [t]he licensee was not entitled to the *issuance*” or “[t]he person failed to give the required or correct information . . . in *obtaining* the license” (75 Pa.C.S. § 1572(a)(i), (ii) (emphasis added)), the Department has no authority to cancel licenses obtained in accordance with law. Although the Department has decided to discontinue acceptance of ITINs in lieu of SSNs, unless accompanied by a waiver demonstrating inability to obtain a SSN, the relevant law regulating license issuance has not changed. *See* 75 Pa.C.S. § 1510 (West 2010) (historical and statutory notes indicating no amendments to relevant language). Only the Department’s interpretation of it has. New Department policy cannot invalidate earlier legal benefits assigned

² Some qualifications include: A driver must be at least 16 years of age, her license may not be suspended or revoked in another state, she may not be an alcoholic incapable of safe driving, she must be physically capable of driving, and she must pass an examination that tests her knowledge of traffic laws as well as driving skill. 75 Pa.C.S. §§ 1503, 1508.

³ Although the Department suggests that the Drivers may be ineligible for licenses because they “failed to establish their lawful presence in the United States,” (Br. at 18) this argument was neither raised in the cancellation notices nor before the lower court. The Drivers had neither notice nor opportunity to present evidence demonstrating their lawful presence, and the Department has waived the argument. *See* Pa.R.A.P. 302(a) (providing that “[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal.”)

according to pre-existing—and enduring—law. Only a new, retroactive law could cancel such benefits, and as the lower court aptly found (R.R. 223-26a), none exists.

1. The law governing issuance of drivers' licenses permits the use of ITINs in lieu of SSNs.

According to the Department's current interpretation of § 1510 of the Vehicle Code, drivers must provide either a SSN or a waiver of this requirement in order to obtain a license. Br. 13. However, from 1999 to 2001, the Department accepted ITINs unaccompanied by waivers. *Supra* at 3-5. While the Vehicle Code requires the Department to issue licenses to people who provide SSNs or waivers, it in no way prohibits the Department from issuing licenses absent these. 75 Pa.C.S. § 1510(a), (f).

Section 1510, "Issuance and content of driver's license," lists information to be included on drivers' licenses and requires issuance of licenses to otherwise qualified individuals who, *inter alia*, pay a fee, provide an address (with certain exceptions), submit to a photograph and provide a Social Security Number (with certain exceptions).

(a) General rule.—The department *shall*, upon payment of the required fee, issue to every qualified applicant a driver's license indicating the type or general class of vehicles the licensee is authorized to drive and any endorsements or restrictions, which license, except as provided in subsection (j) shall contain a distinguishing number assigned by the department to the licensee, the actual name, date of birth, residence address, a color photograph or photographic facsimile of the licensee, such other information as may be required by the department, and either a facsimile of the signature of the licensee or a space upon which the licensee shall write his usual signature with pen and ink. Program participants in the Address Confidentiality Program under 23 Pa.C.S. Ch. 67 (relating to domestic and sexual violence victim address confidentiality) may use a substitute address designated by the Office of Victim Advocate as their address. Personal medical data and other information for use in an emergency may be included as a part of the license. Information other than that required to identify the licensee, the distinguishing number and the class of license issued may be included in microdata form. Except as provided in subsection (f), an applicant shall include his Social Security number on his license application, but the Social Security number shall not be included on the license. No driver's license shall be valid until it has been signed by the licensee.

* * *

(f) Waiver.—Notwithstanding the provisions of subsection (a), the department *shall* issue a driver’s license to an otherwise eligible person who has no Social Security number if the person submits a waiver obtained from the Federal Government permitting him not to have a Social Security number. *The department may require other identifiers, including, but not limited to, a taxpayer identification number, before issuing the license.*

75 Pa.C.S. § 1510 (emphasis added).

Section 1510 plainly states that the Department is required to issue a driver’s license to an otherwise qualified applicant who either provides her SSN or a wavier. Section 1510 in no way requires an otherwise qualified applicant to supply a SSN or waiver in order to obtain a license. The Department “may,” in lieu of a Social Security Number, “require other identifiers, including, but not limited to, a taxpayer identification number, before issuing the license.” 75 Pa.C.S. § 1510(f) (emphasis added); *see also Kocher v. Bickley*, 722 A.2d at 758. Indeed, it issued licenses for many years on this basis. *Supra* at 3-5.

Section 1506, “Application for driver’s license or learner’s permit,” not § 1510, sets forth driver’s license *application* requirements. In this regard, § 1506(a) requires: “Every application for a learner’s permit or driver’s license shall be made upon a form furnished by the department and shall contain such information as the department may require to determine the applicant’s identity, competency and eligibility.” 75 Pa.C.S. § 1506(a). Section 1506 does not require that the Department obtain a SSN or waiver. It merely requires that the Department use a form containing information sufficient to verify, among other things, the applicant’s identity. Not only has the Department accepted ITINs in lieu of SSNs in order to identify license applicants for many years but, also, the federal government still uses ITINs to identify people for tax purposes (26 C.F.R. § 301.6109-1). Pursuant to the Vehicle Code and the Department’s

interpretation of it from 1999 to 2001, the Drivers' were entitled to their licenses at the time of issuance.

2. Though it requires license applicants to present SSNs or waivers before license issuance, the REAL ID Act of 2005 is neither retroactive nor the law of this Commonwealth.

The REAL ID Act, not Pennsylvania's Vehicle Code, prohibits the issuance of licenses absent SSNs or waivers. 119 Stat. at 313. However, as the lower court correctly concluded (R.R. 224-25a), the REAL ID Act is not retroactive. Furthermore, it only requires SSNs or waivers "*before* issuance of licenses"⁴—"going forward."⁵ More profoundly, the REAL ID Act is not the law of Pennsylvania. It cannot *require* anything of this Commonwealth, whose legislature has enacted none of the relevant provisions. *Supra* at 9. Because driver licensing was "not delegated to the United States by the Constitution, nor prohibited by it to the States," it is "reserved to the States respectively. . . ." U.S. Const. amend. X. The language of the REAL ID Act subtly confesses this.

. . . [A] Federal agency may not accept, for any official purpose, a driver's license or identification card issued by a State to any person unless the State is meeting the requirements of this section.

119 Stat. at 313. Federal agencies may refuse to recognize drivers' licenses issued by states that fail to follow the REAL ID Act's rules for license issuance. However, the federal government has no power to prohibit states from issuing licenses according to their own laws and policies. The REAL ID Act *requires nothing* of the Department with respect to license issuance.

⁴ 119 Stat. at 313 (emphasis added).

⁵ R.R. 224a.

Pennsylvania's Vehicle Code Section 1510 is the singular law governing SSNs and noncommercial drivers' licenses issuance in the Commonwealth.⁶

3. According to Department policy, the Drivers provided valid ITINs in lieu of SSNs, not invalid SSNs.

Because, at the time the licenses were issued, the Department permitted ITINs as substitutes for SSNs and the Vehicle Code itself requires nothing more, the Drivers are entitled to their licenses according to both law and Department policy. While the Drivers' inserted their ITINs into spaces designated for SSNs, it would be wrong to conclude, as the Department does (Br. at 18), that the Drivers "supplied invalid Social Security numbers." The Drivers' were told by Department agents to supply ITINs in place of SSNs. R.R. 75a. That they wrote their ITINs in place of SSNs on their application forms does not transform their valid ITINs into invalid SSNs. The forms contained no space for ITINs (R.R. 109a, 125a, 142a, 158a, 176a, 196a), in spite of Department policy to accept these identifying numbers. Federal tax regulations (26 C.F.R. § 301-6109-1(g)(1)(iii)) make clear that ITINs are acceptable substitutes for IRS purposes, and the procedures for obtaining ITINs are similar to those for obtaining SSNs. *Supra* at 2.

The Department's suggestions that the Drivers are *ineligible* for ITINs (Br. 24) and that the numbers provided by the Drivers may not even be ITINs (Br. 18) are similarly incorrect. First, the Department has already acknowledged that the Drivers provided ITINs on their application forms. R.R. 74a, 85a, 88a. Accordingly, the argument that the numbers are not ITINs has been waived. Pa.R.A.P. 302(a) (providing that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal.") Second, the Department never

⁶ Section 1609 addresses SSNs and commercial drivers' licenses. 75 Pa.C.S. § 1609.

notified the Drivers that it sought to verify their *ITINs*. Consequently, the Drivers cannot have been expected to present evidence that the ITINs were valid. *See infra* at Subsection II. Third, in contending that the Drivers are ineligible for ITINs, the Department makes vast assumptions contrary to the evidence and misunderstands immigration law.

Both “resident” and “non-resident” “aliens” may have ITINs. 26 C.F.R. § 301-6109-1(g)(1)(iii). However, a non-citizen who has been issued an ITIN and “who later becomes a U.S. citizen, or an alien lawfully permitted to enter the United States either for permanent residence or under authority of law permitting U.S. employment, will be required to obtain a social security number.” 26 C.F.R. § 301-6109-1(d)(4)(i). The Drivers, whose applications for adjustment of status to that of lawful permanent residents are pending before the United States Citizenship and Immigration Service (“USCIS”),⁷ are neither U.S. citizens nor “alien[s] lawfully permitted to enter the United States for permanent residence.” *Id.* Their applications for lawful permanent residence are *pending*. While such non-citizens are lawfully present and generally authorized to work,⁸ they are not necessarily “lawfully permitted to *enter* the United States for *permanent residence*” *Id.* (emphasis added). Permission to *enter* the United States *permanently* or under authority permitting U.S. employment is altogether different from pending permission to stay permanently with temporary, accompanying employment authorization. The very structure of the Immigration and Nationality Act (“INA”) demonstrates this. The INA classifies all non-citizens into the following categories: “immigrants” and “non-immigrants.” 8 U.S.C. §

⁷ Although all Drivers possess documents demonstrating this, such evidence is not a part of the record on appeal. This is so because the Drivers were never given notice and an opportunity to present such evidence (*infra* at Section B of Argument). The Drivers have not moved for admission of such evidence before this Court because they do not believe it is necessary for adjudication of this appeal, which should be dismissed on other grounds set forth in this brief.

⁸ *See* 8 C.F.R. § 274a.12(c)(9) (indicating that “[a]n alien who has filed an application for adjustment of status to lawful permanent resident pursuant to part 245 of this chapter” is eligible for employment authorization).

1101(a)(15). “Immigrants” are those who stay permanently, and “non-immigrants” are temporary visitors. *Id.* People are also classified into these categories: those permitted to enter—“admissible” people (8 U.S.C. § 1182) and those, already present, who are permitted to stay—those who are not “deportable” (8 U.S.C. § 1227). It is common for a non-citizen to be inadmissible for permanent residence (unable to enter and remain permanently) and yet not deportable—permitted to stay. The Department assumes that because the Drivers live in the United States, they are entitled to SSNs. Br. 24. This assumption is incorrect and ignores the complexity of the INA, which allows many non-citizens to remain lawfully in the United States without being either permanent residents or admissible “under authority of law permitting U.S. employment.”

B. Because the Department Failed to Afford the Drivers Procedural Due Process Prior to Cancelling Their Licenses, the Lower Court Correctly Prohibited the Cancellations.

Retroactive application of Department policy to cancel lawfully-issued drivers’ licenses absent pre-cancellation hearings that comport with procedural due process would violate the United States and Pennsylvania Constitutions. U.S. Const. amend. IVX; Pa. Const. art. I, §§ 1, 11 (affording procedural due process rights). “[I]t is beyond peradventure that procedural due process must be met before one’s operating privilege can be revoked or recalled.” *Commonwealth of Pennsylvania Dept. of Transportation v. Clayton*, 546 Pa. 342, 351 (Pa. 1996) citing *Bell v. Burson*, 402 U.S. 535, 539 (1971).

In *Clayton*, the Supreme Court of Pennsylvania held that a driver’s procedural due process rights had been violated where the Department, upon learning that the driver had suffered an epileptic seizure, suspended his license for at least one year without first affording him notice and a meaningful opportunity to be heard—an administrative hearing. *Id.* at 343-47, 350-52. Although the driver in *Clayton* had a right of appeal to a court of common pleas, the

Court found this process, which followed the license suspension, to be constitutionally inadequate. *Id.* The Court held that, “[w]hile procedural due process is a flexible notion” it required, in the license suspension situation, a pre-suspension hearing. *Id.* at 351, 352, 355; *see also Piercy v. Heyison*, 565 F.2d 854, 857 (3d Cir. 1977) (procedural due process requires “an effective *pre-termination* inquiry”) (emphasis added).

In *Piercy v. Heyison*, the Third Circuit similarly held that a driver’s procedural due process rights had been violated where the Department, pursuant to statute, suspended a driver’s license upon learning that an insurance company had entered a judgment against the driver for collection of payments to cover the cost of an accident. *Id.* at 855-57, 860. It did this without first holding a hearing. *Id.* This prompted the court to explain why post-suspension hearings are constitutionally inadequate: “[O]f the approximately 56,000 suspension proceedings under the statute in an eight-month period, only 179 were followed by petitions for de novo review. . . . [M]any of the remaining individuals were deterred from exercising their right of de novo review by the need for paying a filing fee and for obtaining counsel.” *Id.* at 857.

Furthermore, the U.S. Supreme Court in *Bell v. Burson*, 402 U.S. 535, 542 (1971), held that, before the State of Georgia could, pursuant to statute, “deprive petitioner of his driver’s license and vehicle registration it must provide a forum for the determination of the question whether there is a reasonable possibility of a judgment being rendered against him as a result of the accident.” Without first providing a meaningful hearing as to fault, Georgia had suspended the license of an uninsured driver who failed to post a bond for full damages. *Id.* at 537-38. In often-quoted language, the court reasoned:

Once licenses are issued, as in petitioner’s case, their continued possession may become essential in the pursuit of livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process

required by the Fourteenth Amendment. This is but an application of the general proposition that relevant constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a “right” or a “privilege.”

Id. at 539.

Although the Drivers received judicial review following the cancellation of their licenses, this does not satisfy procedural due process. The Drivers, like the petitioner in *Bell*, depend upon their licenses to make a living. For example, Driver Pedro Camargo’s daughter testified, “[H]e depends on it to go to work, to help out our family.” R.R. 75a. Driver Juan William Posada delivers pizzas for a living. In *Commonwealth Dept. of Transportation v. Slater*, 462 A.2d 870, 874-75 (Pa. Commw. Ct. 1983), this Court recognized that “driver’s ‘operating privileges are protectable property interests that may not be terminated without the procedural due process required by the fourteenth amendment, although we earlier had implied that a license approximates a privilege more than a right’” (citations omitted). Though the Department suggests otherwise (Br. at 14 n. 2), the law is abundantly clear that drivers have a property right in their licenses:

It is hard to accept the continued characterization of a license to drive as a privilege. ‘No one will deny that we have reached a time in our modern way of life when the motor vehicle has clearly become a necessity to many people. The very livelihood of many, such as chauffeurs, truckers, traveling salesmen, men who work in skilled or unskilled labor, depends upon the operation of a motor vehicle. Their drivers’ licenses are just as valuable as a license to engage in an occupation or profession.’

Commonwealth v. Quarles, 324 A.2d 452, 461 (Pa. Super. Ct. 1974) (citation omitted).

The Drivers, prior to cancellation of their licenses, were neither afforded notice that they could present waivers to remedy the problem nor a hearing of any kind. *Supra* at 6. Furthermore, unlike the drivers in *Bell*, *Clayton* and *Piercy*, loss of their licenses was to be permanent. Finally, had they been told the Department’s real reason for cancelling their

licenses—not that they possess invalid SSNs but that they failed to present waivers indicating their inability to obtain SSNs—they all could have done so. Five of them could do so *right now*.

V. CONCLUSION AND RELIEF SOUGHT

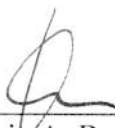
The lower court, sitting in an appellate posture pursuant to 75 Pa.C.S. § 1550(a), appropriately sustained the Drivers' appeals. While this holding necessarily rescinded the cancellation of the Drivers' licenses, the lower court did not resort to the equitable remedy of estoppel, as the Department suggested (Br. 21-22). The lower court merely declined to approve the cancellation of drivers' licenses which had been issued pursuant to law and which were cancelled in violation of it. Ruling on the plain meaning of 75 Pa.C.S. § 1510 and refusing to uphold the Department's administrative order for license cancellation, which was reached in violation of due process, cannot be construed as "fashion[ing] an equitable remedy" requiring discretion (Br. at 21).

Appellee Drivers respectfully request that this Court dismiss the Department's appeal and uphold the decisions of the lower court.

If this Court sustains the appeal, Appellee Drivers respectfully request that this Court order the Department to afford them due process-compliant hearings with certified interpreters⁹ in which they will have an opportunity to present evidence, such as waiver letters from the federal Social Security Administration.

October 12, 2010

Respectfully submitted,



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⁹ 42 Pa.C.S. § 4412(a) requires the appointment of a certified interpreter for state judicial and administrative proceedings that involve a party with limited English proficiency.

CERTIFICATE OF SERVICE


I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121.

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