Jill Gibson OSB #973581
Gibson Law Firm, LLC
1500 SW Taylor Street
Portland, OR 97205
Tel: (503) 686-0486
Fax: (866) 511-2585
jill@gibsonlawfirm.org
Lead Counsel

Julie B. Axelrod DC #1001557
Pro Hac Vice to be filed
Immigration Reform Law Institute, Inc.
25 Massachusetts Ave, NW, Suite 335
Washington, DC 20001
Tel: (202) 232-5590
Fax: (202) 464-3590
litigation@irli.org
Out-of-State Counsel

Attorneys for Proposed Intervenor-Defendant

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

M.S., an individual, *et al.*

Plaintiffs,

vs.

KATE BROWN, in her official capacity as Governor of the State of Oregon; *et al.*,

Defendants,

Case No.:6:15-cv-02069-AA

PROPOSED INTERVENOR-DEFENDANT MOTION TO DISMISS
Civil Rights: Equal Protection/ Due Process/ 42 U.S.C. § 1983

vs.

OREGONIANS FOR IMMIGRATION REFORM,
a domestic non-profit organization,

Proposed Intervenor-Defendant.

In compliance with Local Rule 7-1, Proposed Intervenor has conferred with counsel regarding this motion and Plaintiffs' counsel opposes the motion and Defendants' counsel takes no position at this time.

MOTION

Oregonians for Immigration Reform, Proposed Intervenor-Defendant, by Jill Gibson, Gibson Law Firm, LLC and Julie B. Axelrod, Immigration Reform Law Institute, their attorneys, move pursuant to Rule 12(b)(6) for dismissal of the Class Action Allegation Complaint, as set forth more fully in the memorandum filed herewith.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS CLASS ACTION ALLEGATION COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

State Statues

Other

I. INTRODUCTION

An unsatisfying outcome of an election does not make the election unconstitutional. Plaintiffs have sued to overturn the outcome of the November 2014 election in Oregon, when, through the Oregon Constitution's referendum veto process (Or Const, Art. IV, § 1 (3)), the electorate overwhelmingly rejected a bill that would have extended eligibility for driving privileges to any person without requiring proof of legal presence in the United States. The outcome of the election was certainly disappointing to Plaintiffs, who have alleged that they would have otherwise been able to obtain driving privileges. However, to obtain relief from this Court, they first must plead a valid claim under the law. Plaintiff's complaint fails to fulfill minimum pleading requirements. Moreover, the benefit they seek—the right to drive legally in Oregon—is not a benefit granted to them by the Constitution. Because the result does not infringe on any rights of Plaintiffs, their claims under the Equal Protection and Due Process Clauses are completely meritless. The Court should grant this Motion to Dismiss with prejudice.

II. STATEMENT OF FACTS

Plaintiffs' claims originate with Legislative Referendum 301 ("LR 301"), listed on the November 2014 ballot as Oregon Ballot Measure 88 ("Measure 88"). Measure 88 was a voter referendum that vetoed Oregon Senate Bill ("SB") 833, a 2013 bill passed by the Oregon Legislature and signed by the governor that would have directed the Department of Transportation to issue, renew or replace a "driver's card" without requiring a person to provide proof of legal presence in the United States. To properly understand the voters' choice not to

implement driver's cards, the court must consider the recent history of driver's licenses issuance within the United States as well as Oregon specifically.

In 2005, Congress passed the REAL ID Act (REAL ID) that "enacted the 9/11 Commission's recommendation that the Federal Government 'set standards for the issuance of sources of identification, such as driver's licenses.'" U.S. Department of Homeland Security, *REAL ID Frequently Asked Questions for the Public*, Jan. 8, 2016, http://www.dhs.gov/real-id-public-faqs. "The Act established minimum security standards for state-issued driver's licenses and identification cards and prohibits Federal agencies from accepting for official purposes licenses and identification cards from states that do not meet these standards." *Id.* One such standard requires that states, before issuing a driver's license or identification card to a person, obtain valid documentary evidence that the applicant is lawfully present in the United States. *See* Pub. L. No. 109-13 § 201, 119 Stat. 231, 312 (2005). In response to REAL ID, the Oregon Legislative Assembly passed SB 1080 in 2008. SB 1080, now codified in ORS 807.021, requires that an applicant for a driver's license prove lawful presence in the United States. Significantly, ORS 807.021 has never been challenged as unconstitutional.

In 2010, the Legislative Assembly passed SB 833. The bill directed the Department of Transportation to issue a driver's card to an applicant who did not provide proof of legal presence in the United States but otherwise fulfilled Oregon's requirements. Effectively, this created a two-tier system for driving privileges within Oregon. Oregonians who can prove lawful presence in the United States could apply for a driver's license. Those who could not prove lawful presence could apply for a driver's card.

In response to SB 833, Oregonians for Immigration Reform ("OFIR"), in conjunction with other supporters of the current legislative scheme, began a referendum petition process to

allow the voters of the state to either vote yes to enact SB 833, or vote no to veto SB 833. After gathering the required amount of signatures, the referendum was placed on the November 2014 Election Ballot as Measure 88. Oregon Secretary of State, *Election Division, Initiative, Referendum, and Referral Search*, http://egov.sos.state.or.us/elec/web_irr_search.record_detail?p_reference=20140301..LSC.Y.DRIVER (last visited Jan. 12, 2016). To assist voters in gaining knowledge about Measure 88, the Secretary of State issued the Voters' Pamphlet. The Pamphlet included an explanatory statement and other information pertaining to Measure 88. Interestingly, the Secretary of State included 28 arguments from citizens who favored Measure 88 while only including 9 arguments that opposed Measure 88. *Id.*

In the 2014 election, approximately 66% of voters voted against Measure 88, which, if passed, would have codified SB 833. As a result, the current law requiring lawful presence for driving privileges remained in place without any changes being made to statutory language.

III. PROCEDURAL HISTORY

On November 4, 2015, Plaintiffs filed a Complaint alleging three claims against the Governor of Oregon as well as members of the Oregon Department of Transportation (ODOT). The first and third claims allege Measure 88 as defeated violates the Equal Protection Clause of the U.S. Const. Amend. XIV and 42 U.S.C. § 1983. The second claim alleges Measure 88 as defeated violates the (substantive) Due Process Clause of U.S. Const. Amend. XIV. As of the filing of this motion, the state Defendants have yet to file a responsive pleading. In conjunction with the filing of this Motion to Dismiss, OFIR has also filed a Motion to Intervene in the matter.

IV. STANDARD OF REVIEW FOR MOTION TO DISMISS

Where a plaintiff fails to state "a claim upon which relief can be granted," the court must dismiss the claim. Fed. R. Civ. P. 12(b)(6). On a motion to dismiss, the court construes the plaintiff's factual allegations and inferences in a light most favorable to the plaintiff. *See Mazarek v. St. Paul Fire Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). However, while construing those facts in favor of the plaintiff, it is the obligation of the plaintiff "to provide the grounds of his entitlement to relief [which] require[] more than labels and conclusions, and a formulaic recitation of the elements of a cause of action. . . ." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation omitted). Courts are not required to accept legal conclusions as factual allegation. *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). But even if there are "well pleaded factual allegations" the court must determine if, assuming their veracity, they "plausibly give rise to an entitlement to relief." *Id.*

V. ARGUMENT

Plaintiffs' Complaint cannot survive this motion to dismiss under Rule 12(b)(6) for three different reasons. First, Plaintiffs' claims do not fulfill the minimum pleading requirements. Second, Plaintiffs do not have standing to bring the actual claim that they brought—a challenge to Measure 88. Measure 88 is not a statute, but a citizen's veto referendum, and the Court cannot undo an election that prevented a law from passing when the outcome of the referendum process is constitutional. Measure 88 itself is therefore not a proper target for Plaintiff's challenge of Oregon law. Third, even if they had properly pled the Complaint, and challenged the actual Oregon statute that affects their entitlement to driver's licenses under the law, ORS 807.021, they still could not have stated a claim for which relief could be granted. No valid claim for the relief they seek exists under the law. Furthermore, they have no way to cure this third barrier to the survival of their Complaint through amending their pleading. There are no meritorious claims

to the relief they seek under either the Constitution, federal statutes or regulations. Their Complaint must therefore be dismissed with prejudice for failure to state a claim upon which relief can be granted.

A. Plaintiffs' Claims Do Not Fulfill the Minimum Pleading Requirements Under *Twombly* and *Iqbal*.

Rule 8 provides that a pleading must contain "a short and plain statement of the claim." Fed. R. Civ. P. 8(a)-(b). The Supreme Court has analyzed Rule 8 to provide additional guidance for parties to ensure that the pleading standards are properly met. *See generally Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (applying uniform pleading standards to all civil cases brought in federal court); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) (requiring sufficient factual context beyond bald accusations to survive a motion to dismiss). Plaintiffs' three claims contain nothing more than "unadorned . . . accusations" against the Defendants which does not fulfill the pleading requirements under Rule 8. *See Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). Plaintiffs have not fulfilled any requirements under Rule 8 because the Complaint does not provide the court or Defendants with a clear statement showing why Plaintiffs are entitled to relief.

Plaintiffs' first claim against Defendants states that Measure 88 does not have a rational relationship to any state interest and is thus unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Compl. at ¶¶ 38-42, 45-46. The second claim asserts that Measure 88 is "arbitrary, capricious, and not rationally related to any legitimate state interest[]" in violation of the Fourteenth Amendment's Due Process Clause. Compl. at ¶¶ 43-44. These statements are all that compose Plaintiffs' claims against Defendants. The two claims do not clarify what the elements are for each claim; what fundamental right is being infringed upon by the state; or what the appropriate standard of review is for each claim. Plaintiffs merely provided

the court with a "formulaic recitation" of *a* standard but do not provide the court with any information as to why this is the appropriate standard by which to judge the claims. *See Iqbal*, 556 U.S. at 681 (citing *Twombly*, 550 U.S. at 555). Such bald conclusions without proper support are not to be assumed true by the court. *Id.*

The final claim presented by Plaintiffs is also categorized as an equal protection claim based upon voter "animus towards Mexicans and Central Americans, and is [thus,] not narrowly tailored to advance any state interest that is legitimate. . . ." Compl. at ¶ 46. Again, Plaintiffs do not explain the elements of their constitutional claim, what fundamental right has been breached by Measure 88, or by what legal standard the court should judge the claim. It contains no more than a conclusory statement and does not provide any evidence that Defendants acted unlawfully during the referendum process. *Iqbal*, 556 U.S. at 678-79.

Plaintiffs' claims must also be plausible in order to be accepted by the court. "As between [an] 'obvious alternative explanation' . . . and the purposeful invidious discrimination ask[ed] [of] us to infer, discrimination is not a plausible conclusion." *Iqbal*, 5556 U.S. at 682 (internal citation omitted). Several other "obvious alternative explanations" for the enactment create a plausible purpose for the enactment of Measure 88. *See Twombly*, 550 U.S. at 567. For example, citizens may see no reason to deviate from the law in its present form. Oregonians could be concerned about textually complying with REAL ID instead of creating a confusing two-tier driving privilege system. Other plausible reasons for the decisive voter support garnered by Measure 88 include citizen concerns about road congestion and maintenance, uninsured drivers within the state, or implementation integrity concerns such as prevention of fraud and abuse. Plaintiffs have not even attempted to plead that any of the other "obvious alternative

explanations" are not sufficient to explain why 66% of Oregonians voted against Measure 88. Thus, their pleading must be dismissed as conclusory and insufficient under Rule 8 requirements.

B. Plaintiffs Do Not Have Constitutional Standing.

"From Article III's limitation of the judicial power to resolving 'Cases' and 'Controversies,' and the separation-of-powers principles underlying that limitation," the U.S. Supreme Court has "deduced a set of requirements that together make up the 'irreducible constitutional minimum of standing.'" *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Constitutional standing requires a plaintiff establish three elements: (1) an injury-in-fact which is concrete and particularized to the plaintiff; (2) the injury is fairly traceable to the defendant's conduct; and (3) the injury will be redressed by a favorable finding by the court. *Lujan*, 504 U.S. at 560-61. Plaintiffs in this case have failed to establish all three prongs of the U.S. Supreme Court's standing test and, thus, this lawsuit should be dismissed.

1. Measure 88 Did Not Injure Plaintiffs Because It Functioned as a Veto of State Action to Maintain the Current Requirements For Obtaining Driving Privileges in Oregon.

"In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature." *City of Eastlake v. Forest City Enter., Inc.*, 426 U.S. 668, 672 (1976) (citing *Hunter v. Erickson*, 393 U.S. 385, 392 (1969)). The referendum is an important part of the state's legislative process. *Spaulding v. Blair*, 403 F.2d 862, 863 (4th Cir. 1968). The referendum process functions to correct "the sins of commission" by the legislative assembly where the will of the people is not properly represented. *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2660 (2015) (internal citation omitted). The Supreme Court has stated that a state referendum is a *veto*

of the legislature's decision to enact a bill. *See City of Eastlake*, 426 U.S. at 673 (emphasis added).

In the instant case, Plaintiffs argue that Measure 88 took driving privileges from them. Comp. at ¶ 39. Measure 88 did no such thing as SB 833 never became law. *See* Or Const, Art. IV, § 1(4)(d) (referendum measure only becomes effective 30 days after the day on which it is enacted or approved by a majority of the votes cast thereon.). Measure 88 functioned exactly as a veto. Functioning as a veto, Measure 88 is not reviewable by this Court.

Similar to a federal bill being subject to bicameralism and presentment, an Oregon bill is subject to the referendum process. *See* Or Const, Art. IV, § 1. Just as an individual does not have standing to challenge a gubernatorial veto or a vote by one chamber of a legislature, Plaintiffs cannot challenge a referendum that functions as a veto. Measure 88 merely corrected the Legislature's mistake in passing a bill that did not reflect the electorate's will. The decision of the people through the referendum process not to enact a state bill is plainly not justiciable by a court.

Furthermore, Plaintiffs have sued the wrong defendants. The Governor and Department of Transportation officials have caused Plaintiffs no harm. These officials were in no way involved with Measure 88,[1] and as SB 833 never became law, the Defendants have no present duties regarding the same. These state officials are merely enforcing Oregon law as written.

[1] In fact, the opposite is true. The former governor backed SB 833 by signing the bill, http://gov.oregonlive.com/bill/2013/SB833/, and the current governor voted against SB 1080 (codified as ORS 807.021), which restricted driver's license eligibility to lawfully present persons. *See* Oregon State Legislative Assembly, 74th Legislative Assembly of the State of Oregon, 2008 Special Session, J. of the Senate, at SS-SJ-47, https://www.oregonlegislature.gov/secretary-of-senate/Documents/2008_specialsession_journal.pdf.

Current Oregon law states that a person applying for a driver's license must provide proof of legal presence in the United States. ORS 807.021. If Plaintiffs believe Oregon's current driver's license law is unconstitutional, they should redirect their claims to ORS 807.021, the only law on the books that restricts driving privileges based on lawful presence. But tellingly, the current Oregon requirements pertaining to driver's licenses has never been challenged in court or deemed unconstitutional as any such lawsuit would have no merit as explained below.

2. Plaintiffs Do Not Have Constitutional Standing Because the Referendum Process Is Not Redressable By the Court.

The referendum process is an essential part of the legislative process in Oregon and other states. The U.S. Supreme Court has consistently upheld the electorate's use of the referendum process as a check on a state legislature's actions. *See Ariz. State. Legislature*, 132 S. Ct. 2652 (2015); *City of Cuyahoga v. Buckeye Comty. Hope Found.*, 538 U.S. 188 (2003); *City of Eastlake*, 426 U.S.668 (1976). The Supreme Court has specifically upheld Oregon's use of the referendum. *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118 (1912) (finding that the decision to add the referendum process to a state constitution is not justiciable).

Plaintiffs attack Measure 88 because they conclude it was motivated by voter animus towards Mexicans and Central Americans. However, neither the referendum process nor the motivations of individual referendum voters are appropriate matters for judicial review. *See City of Cuyahoga*, 538 U.S. 188 (2003); *S. Alameda Spanish Speaking Org. v. City of Union City*, 424 F.2d 291 (9th Cir. 1970) ("[W]e do not believe that the question of motivation for the referendum (apart from a consideration of its effect) is an appropriate one for judicial inquiry.").

In *City of Cuyahoga*, a housing developer alleged officials violated the Fourteenth Amendment by submitting an ordinance to the referendum process and refusing to issue building permits while the referendum was pending. 583 U.S at 157-58. The developer relied on a line of

cases where enacted measures were subject to equal protection scrutiny. *Id.* at 195. The High Court found that because the developer was claiming injury from the referendum process and not from the enacted referendum itself, a review of voter sentiment and motivation was inappropriate. *Id.* at 195-97 ("[A]gain, statements made . . . may constitute relevant evidence of discriminatory intent in a challenge to an ultimately enacted initiative.") (citation omitted).

Similarly, Plaintiffs do not challenge current Oregon law as unconstitutional. Instead, they attack voter motivations for voting in opposition to Measure 88. However, where the referendum process is valid and a bill approved by the voters is constitutional, which does not apply here as voters rejected a bill, voter sentiment expressed in the privacy of the polling booth is not reviewable. *See id.* at 195-197. Without any allegations that the referendum process was somehow tainted or procedurally flawed, voter motivations are not reviewable and therefore, not redressable by the court.

C. Plaintiffs Cannot Establish Any Meritorious Challenge to Oregon Laws Limiting Oregon Driving Privileges to Persons Legally in the Country.

The most insurmountable legal barrier to the relief Plaintiffs seek is, however, that they have no right under the Constitution or any of the nation's laws to force the state of Oregon to issue them driving privileges. Even if Plaintiffs had filed a well-pled complaint bringing a constitutional challenge to an actual Oregon law (for example, ORS 807.021) naming an injury capable of being redressed, that complaint would still fail to state a claim for which relief can be granted. Every court that has examined the issue of whether states may limit driver's license eligibility to persons lawfully present in the country has determined that they can. *See League of Latin Am. Citizens v. Bredesen*, 500 F.3d 523 (6th Cir. 2007) (holding that Tennessee law requiring legal status to obtain a driver's license was constitutional); *John Doe No. 1 v. Georgia*

Dep't of Pub. Safety, 147 F. Supp. 2d 1369 (N.D. Ga. 2001) (holding that Georgia law requiring legal status to obtain a driver's license was constitutional).

All potential legal claims arguing otherwise fail on the merits. Plaintiffs cannot show that the Fourteenth Amendment, either under the Equal Protection Clause or the Due Process Clause, prevents the state of Oregon from denying them driving privileges based on their illegal presence in the country, as their Complaint alleges. Compl. at ¶¶ 38-46. Nor can they show that federal laws preempt the state of Oregon from doing so, as their Complaint inchoately implies. Compl. at ¶ 41.

1. Plaintiffs' Equal Protection Claims Cannot Survive a Motion to Dismiss.

Plaintiffs claim Defendants have violated their 14th Amendment Equal Protection rights. Compl. at ¶¶ 38-42, 45-46. The Fourteenth Amendment provides that "no State shall … deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend XIV, § 1. The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." *Plyer v. Doe*, 457 U.S. 202, 216 (1982) (citation and internal quotation marks omitted). Nonetheless, "the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Id.*

The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, [courts] thus seek only the assurance that the classification at issue bears some fair relationship

to a legitimate public purpose. *Id.* Courts do treat as presumptively invidious, however, classifications that disadvantage a "suspect class," or that impinge upon the exercise of a "fundamental right." *Id.* at 216-17.

The "first step in equal protection analysis is to identify the state's classification of groups." *Country Classic Dairies, Inc. v. Milk Control Bureau*, 847 F.2d 593, 596 (9th Cir. 1988). In this matter, if Plaintiffs would have challenged a valid law, such as Org. Rev. Stat. § 807.021 (2015), the two groups at issue would be those persons who are lawfully present in the United States and those who are not. The next step in an equal protection analysis is to determine the appropriate level of scrutiny the classification should receive. If the law targets a fundamental right or "suspect" class, such as race, alienage, or national origin, then the courts use "heightened" review. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985). If it does not, then the law receives only rational basis review, which means the law "will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *Id.* at 440.

a. Driving is not a fundamental right and illegal aliens have no fundamental right to interstate travel.

Plaintiffs have failed to explain the fundamental right they believe was violated. There is no fundamental right to drive whatsoever. *See Miller v. Reed*, 176 F.3d 1202, 1206 (9th Cir. 1999) (there is no "fundamental right to drive" and denial of a driver's license is not "tantamount to denial of a constitutional right."). For citizens, there is at least a fundamental constitutional right to move freely throughout the United States. Illegal aliens, however, do not possess that right as federal law makes their very presence in the United States unlawful. [2] As one court has

[2] Proposed Intervenor-Defendant uses the term "illegal alien" because it is the term used by the U.S. Supreme Court in *Plyer* and is the legally precise and preferred term to describe a person unlawfully present in the United States. *See Texas v. USA*, 2015 U.S. App. LEXIS 19725, *14-15 (5th Cir. 2015) ("Although '[a]s a general rule, it is not a

said, "it strains all bounds of reason" to say that a person whose "mere presence here is a violation of federal law" has a fundamental right of interstate travel. *John Doe No. 1*, 147 F. Supp. 2d at 1373-75 (quoting the landmark right to travel case *Edwards v. California*, 314 U.S. 160, 183-186 (1941) in order to illustrate that the right to travel is derived from federal—not state—citizenship).

b. Illegal aliens are not a suspect class.

The Supreme Court has long rejected the idea that illegal aliens are a suspect class. *Plyer*, 457 U.S. at 219 ("[w]e reject the claim that 'illegal aliens' are a "suspect class.'"). The Court noted that entry into the class of illegal aliens is "the product of voluntary action" and "entry into the class is itself a 'crime.'" *Id*. Therefore, the Court concluded, it can "hardly be

---

crime for a removable alien to remain present in the United States,' it is a civil offense. *Arizona v. United States*, 132 S. Ct. 2492, 2505, 183 L. Ed. 2d 351 (2012); *see* 8 U.S.C. §§ 1182(a)(9)(B)(i), 1227(a)(1)(A)-(B). This opinion therefore refers to such persons as 'illegal aliens':

> The usual and preferable term in [American English] is illegal alien. The other forms have arisen as needless euphemisms, and should be avoided as near gobbledygook. The problem with un-documented is that it is intended to mean, by those who use it in this phrase, 'not having the requisite documents to enter or stay in a country legally.' But the word strongly suggests 'unaccounted for' to those unfamiliar with this quasi-legal jargon, and it may therefore obscure the meaning.
>
> More than one writer has argued in favor of undocumented alien . . . [to] avoid[] the implication that one's unauthorized presence in the United States is a crime . . . . Moreover, it is wrong to equate illegality with criminality, since many illegal acts are not criminal. Illegal alien is not an opprobrious epithet: it describes one present in a country in violation of the immigration laws (hence 'illegal').

BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 912 (Oxford 3d ed. 2011) (citations omitted). And as the district court pointed out, 'it is the term used by the Supreme Court in its latest pronouncement pertaining to this area of the law.' Dist. Ct. Op., 86 F. Supp. 3d at 605 n.2 (citing *Arizona v. United States*, 132 S. Ct. 2492, 2497, 183 L. Ed. 2d 351 (2012)). '[I]llegal alien has going for it both history and well-documented, generally accepted use.' Matthew Salzwedel, The Lawyer's Struggle to Write, 16 SCRIBES JOURNAL OF LEGAL WRITING 69, 76 (2015).").

suggested" that unlawful status in the country is "a constitutional irrelevancy." *Id*. According to the Court, though immigration status is a federal matter, "the States may, of course, follow the federal direction," that is, pass laws that distinguish between those who follow the law and those who do not. *Id*.

In this case, Plaintiffs make a number of assertions that are legally irrelevant in an attempt to circumvent their basic problem that class membership based on law breaking cannot form a "suspect" class. Plaintiffs claim that Oregon law has targeted an "unpopular" class. If a minority group is "unpopular" because the common condition of class membership is that each member has broken the same law, this unpopularity is not considered a "suspect" classification under equal protection analysis. No laws could exist if it were unconstitutional to target those who broke them.

Perhaps in an attempt to avoid these implications, Plaintiffs state that seeking and engaging in "unauthorized work" or simply being "present" in this country is "not a crime." Compl. at ¶ 41. The Supreme Court itself used the word "crime" to describe the act of staying in this country illegally in *Plyler v. Doe*. *Id*. Notwithstanding Plaintiffs' assertions, their actions in being present, seeking, and engaging in work are unlawful under federal law—whether criminal penalties attach or not.

Plaintiffs also try to get around this legal barrier by suggesting, at least by implication, that true suspect classifications, such as race and national origin, are at issue. Plaintiffs allege that Measure 88 "bears more heavily" on individuals from countries such as Mexico and Central America. Compl. at ¶¶ 35, 40. However, regardless of whether the Oregon law affects persons of all races and national origins in precisely the same proportions to their presence in the country at all, it clearly applies equally to all races. Those in the country illegally cannot obtain driving

privileges in Oregon, no matter their race or national origin. Those in the country legally can. The Oregon law at issue does not target a suspect classification.

c. Restricting driving privileges to lawfully present persons is rationally related to legitimate state interests.

As long as the classification does not target a fundamental right or suspect group, the burden on the state to demonstrate that the law does not violate equal protection is extremely minimal. The court need only look at "whether there is any reasonable conceivable state of facts that could provide a rational basis for the classification." *FCC v. Beach Commc'ns., Inc*., 508 U.S. 307, 313 (1993). The law in question does not have to contain wise policy. In the rational basis context, "even improvident decisions will eventually be rectified by the democratic process" and "judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." *McLean v. City of Big Bear Lake*, 270 F. App'x. 498, 499 (9th Cir. 2008). Nor does the law have to be narrowly tailored, or even substantially related, to the goal. The "relationship of the classification to its goal" need only be "not so attenuated as to render the distinction arbitrary or irrational." *Nordlinger v. Hahn*, 505 U.S. 1, 11 (1992). Nor does rational basis review require the state to "actually articulate at any time the purpose or rationale supporting its classification." *Id.* at 15.

States actually have a number of perfectly legitimate public purposes that are rationally served by laws that restrict driving privileges to lawfully present persons. For instance, states have a legitimate interest in "limiting their services to citizens and legal aliens" and a legitimate interest in not allowing their "government machinery to be a facilitator for the concealment of illegal aliens." *John Doe. No. 1*, 147 F. Supp. 2d at 1376. States also have a legitimate concern that persons subject to immediate or subsequent deportation will not be financially responsible for property damage or personal injury due to automobile accidents. *Id*.

In addition, states have a legitimate interest in promoting national security. Granting driving privileges to illegal aliens harms national security because, unlike aliens who receive temporary protected status and other classes of lawfully present aliens recognized by federal law, illegal aliens have not undergone background checks or face-to-face interviews to determine whether they pose a national security threat. Driver's licenses normally grant individuals access to air travel and federal buildings, which means that granting them to those who may have entered the country without screening in order to carry out a terrorist attack creates a national security risk. While some states have created a two-tiered system with "driver's cards" that purport not to allow such access, under rational basis review states are not required to expend administrative resources doing so, nor take the security risk that officials will not notice the difference between the two types of cards.

This danger is not just academic. As the 9/11 Commission noted in its report on the September 11, 2001 terrorist attacks on the homeland, the terrorists carried among them over 30 state driver's licenses and identification cards. These documents allowed them to obtain housing, transportation and other accommodations without raising suspicion while they planned and executed their deadly conspiracy. In 2005, Congress even passed a law attempting to address this problem, the 2005 federal Real ID Act, based on the Commission's recommendations. *See* Pub. L. No. 109-13 § 201, 119 Stat. 231, 312 (2005). As a response to the REAL ID Act alone, the Oregon legislature's decision to pass a law denying driving privileges to illegal aliens has a legitimate public purpose.

Finally, Plaintiffs claim that a desire to "avoid 'rewarding'" illegal aliens is not a legitimate state interest. Compl. at ¶ 40. But it is an entirely legitimate goal for a state to work to promote, rather than undermine, compliance with federal laws by those who reside within the

boundaries of a state. *See John Doe No.1*, 147 F. Supp. 2d at 1376. A state need not provide a haven for federal lawbreakers, especially if members of the public believe those law breakers impose costs upon the public. *Id*.

2. Plaintiffs' Due Process Claim Cannot Survive a Motion to Dismiss.

Plaintiffs' due process claim under the 14th Amendment has no more merit than their equal protection claims. Plaintiffs' reference to a refusal to issue "driver's cards" that is "not rationally related to any legitimate state interest" suggests that they are attempting to make a substantive due process claim, asserting a fundamental right that is protected by the Constitution. As explained above in section V(C)(1)(a), Plaintiffs have not asserted, nor do they possess, a fundamental right in this regard. In any event, as explained in section V(C)(1)(c), restricting driving privileges to lawfully present persons is rationally related to legitimate state interests. As a result, Plaintiffs' claim should be dismissed.

3. Plaintiffs' Inchoate Preemption Argument Could Not Survive a Motion to Dismiss if Alleged as a Claim.

Plaintiffs also indirectly imply that restricting driver's licenses to lawfully present persons is preempted by federal law. Plaintiffs allege in their Complaint that "[t]he regulation of immigration is not a legitimate state interest" because the "federal government has broad, undoubted power over the subject of immigration and the status of aliens." Compl. at ¶ 41. If properly pled, this would have been a separate claim from their 14th Amendment claims, a claim that the Oregon law denying them driver's licenses is preempted by federal law. But this hypothetical preemption claim would also fail to survive a motion to dismiss because federal law clearly does not preempt state laws restricting driving privileges to those lawfully in the country.

The courts have recognized that the federal government may invalidate state laws through either express or implied preemption. *Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591, 1595 (2015).

When a state law is expressly preempted, the federal government does so through explicit language in a federal law. *Id*. If there is no express preemptive language in a statute, implied preemption may apply, and it comes in two possible forms: field preemption and conflict preemption. *Id*. With field preemption, "Congress intends that federal law occupy a given field." *California v. ARC Am. Corp*., 490 U.S. 93, 100 (1989). For implied field preemption, the federal regulation in the area must be "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983). The second form of possible implied preemption is conflict preemption, when either it is impossible for a private party to comply with both federal and state requirements or the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Gade v. Nat'l Solid Wastes Mgt. Ass'n*, 505 U.S. 88, 98 (1992) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

None of the variants of federal preemption apply here. Plaintiffs do not, of course, point to any specific federal laws that would preempt states from passing laws restricting driving privileges to those with legal presence, either expressly or implicitly. They cannot because no such laws exist. Express preemption clearly does not apply because there is no federal law that explicitly prevents states from refusing to grant driving privileges to illegal aliens. Nor do either of the implied methods of preemption, field or conflict preemption, prevent states from passing such laws.

Field preemption does not apply because the federal government has clearly not occupied the field of law governing state driving privileges. State licenses to drive are by nature, a field of state law, not a field of federal law. Plaintiffs imply that the Oregon law that denies them driving

privileges is a "regulation of immigration," and assert not incorrectly that such regulation is a federal power. Compl. at ¶ 41. However, the Supreme Court has made it clear that a law is not a "regulation of immigration" merely because "aliens are the subject" of it. *De Canas v. Bica*, 424 U.S. 351, 355 (1976). A regulation of immigration "is essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain." *Id*. Preventing illegal aliens from obtaining driving privileges, therefore, is not a regulation of immigration. On the contrary, "regulating of the driving privilege is a quintessential example of the exercise of the police power of the state." *John Doe No.1*, 147 F. Supp. 2d at 1375. Furthermore, when traditional state police powers are involved, the "presumption against preemption has greatest force." *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2189 (2014)

Conflict preemption also does not apply, because state laws restricting driving privileges to aliens with lawful presence are in harmony, not conflict, with federal law. Though Plaintiffs claim that denying driving privileges to illegal aliens is not "harmonious with federal policy as expressed in REAL ID," this assertion is not true. Compl. at ¶ 41. The REAL ID Act, which was passed in recognition of the security problems highlighted by the 9/11 Commission inherent in allowing illegal aliens forms of government issued identification, certainly does not require states to issue driver's licenses to illegal aliens. In fact, it discourages it. *See* Pub. L. No. 109-13 § 201, 119 Stat. 231, 312 (2005). The harmony between federal laws and the Oregon state laws preventing illegal aliens from obtaining driving privileges through a "driver's card" means that neither of the situations that cause conflict preemption applies. Private parties have no difficulty complying with both federal and state law, and the Oregon laws create no "obstacle" to the objectives and purposes of Congress. *See Gade*, 505 U.S. at 91-92 (Conflict preemption occurs

when a private party finds it "impossible" to follow both state and federal law, or the state law creates an "obstacle" to the goals of a federal law.).

VI. CONCLUSION

For the reasons stated above, the proposed Intervenor-Defendant requests the Court to dismiss with prejudice Plaintiffs' Complaint.

Dated: 1-13-16

Respectfully Submitted,

s/ Jill Gibson
Jill Gibson, OSB # 973581
Gibson Law Firm, LLC
1500 SW Taylor Street
Portland, OR 97205
Telephone: 503-686-511-2585
Fax: 866-511-2585
Email: jill@gibsonlawfirm.org

Julie B. Axelrod, DC # 1001557
Pro Hac Vice to be filed
Immigration Reform Law Institute
25 Massachusetts Ave NW, Suite 335
Washington DC, 20001
Telephone: 202- 232-55990
Fax: 202-4643590
Email: litigation@irli.org

Attorneys for Proposed Intervenor-Defendant