

PROTECTING A DREAM: ANALYZING THE LEVEL OF REVIEW APPLICABLE TO DACA RECIPIENTS IN EQUAL PROTECTION CASES

Tania P. Linares Garcia*

I. INTRODUCTION

At the age of five, Cesar Vargas came to the United States with his family.¹ Since then, Cesar has graduated with honors from both college and law school despite lacking access to financial aid, legal employment, and a driver's license.² Yet, after rating him a "stellar" candidate, the State Supreme Court of New York recommended he not be admitted to the New York bar because of his status as an undocumented noncitizen.³ Moreover, under federal law, he would not be allowed to legally work in any field because of his undocumented status.⁴ Like Cesar, young undocumented noncitizens across the country have been unable to pursue their desired careers, even if they manage to get the necessary education, because of their lack of immigration status.⁵

Faced with congressional inaction, the Department of Homeland Security (DHS) implemented the Deferred Action for Childhood Arrivals

* J.D. Candidate, Southern Illinois University School of Law, May 2015. I would like to thank my parents for their unconditional love and unwavering support. I would also like to thank my friends, April Wolber, Jordan Homer, and Corrigan Clouston, for their encouragement, help, and support throughout this writing process. Lastly, I would like to thank Professor Cindy Buys for her guidance.

1. Kirk Semple, *Bar Exam Passed, Immigrant Still Can't Practice Law*, N.Y. TIMES, Dec. 4, 2013, at A30.
2. *Id.*; 2012–2013 *Financial Aid Guide for Undocumented Students*, EDUCATORS FOR FAIR CONSIDERATION 4, http://www.e4fc.org/images/E4FC_FinAidGuide.pdf (last visited Mar. 28, 2014) (undocumented students are not eligible for federal financial aid, government loans, government grants, or work study).
3. Semple, *supra* note 1.
4. David M. Herszenhorn, *Senate Blocks Bill for Young Illegal Immigrants*, N.Y. TIMES (Dec. 18, 2010), <http://www.nytimes.com/2010/12/19/us/politics/19immig.html>. The DREAM Act, which "would have created a path to citizenship for certain young illegal immigrants who came to the United States as children, completed two years of college or military service and met other requirements, including passing a criminal background check," failed in the Senate after a 55–41 vote in favor of the bill. *Id.*
5. JEANNE BATALOVA ET AL., MIGRATION POLICY INST., DEFERRED ACTION FOR CHILDHOOD ARRIVALS AT THE ONE-YEAR MARK: A PROFILE OF CURRENTLY ELIGIBLE YOUTH AND APPLICANTS 3 (2013), available at <http://www.migrationpolicy.org/research/deferred-action-childhood-arrivals-one-year-mark-profile-currently-eligible-youth-and> (estimating that "up to 1.9 million unauthorized youth are potentially eligible for DACA" and approximately 1.09 million currently meet all the application requirements).

(DACA) program in an effort to give young undocumented noncitizens like Cesar the opportunity to contribute their skills and education to the American community. Acknowledging that these young noncitizens “lacked the intent to violate the law” when they were brought to the United States as children and, in many instances, “know only this country as home,” Secretary of Homeland Security Janet Napolitano directed the DHS, in exercise of its prosecutorial discretion, to grant young undocumented noncitizens deferred prosecutorial action and temporary work permits, provided they meet certain standards.⁶

To date, DHS has granted DACA relief to over 521,825 young immigrants who would not otherwise be able to legally work in the United States.⁷ Yet, although DACA recipients enjoy federal work authorization, states have adopted policies which restrict the benefits they receive from their employment authorization and bar them from pursuing certain professions. At least two states, Arizona and Nebraska, have refused to issue driver’s licenses to DACA recipients.⁸ Moreover, there are cases currently on appeal in at least two states, one of which is Cesar’s case in New York, where the board of admissions to the state’s bar have denied bar admission to DACA recipients because of their immigration status.⁹ These policies treat DACA recipients differently from other noncitizens with temporary work permits (nonimmigrants). Yet, it is still unclear what level of review courts should apply to Equal Protection challenges arising from these policies because,

-
6. Memorandum from Janet Napolitano, Sec’y of Homeland Sec. to David V. Aguilar, Acting Comm’r, U.S. Customs and Border Enforcement; Alejandro Mayorkas, Dir., U.S. Citizenship and Immigration Serv.; and John Morton, Dir., Immigration and Customs Enforcement (June 15, 2012), available at <http://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf> [hereinafter Napolitano Memo]; *Ariz. Dream Act Coal. v. Brewer (Ariz. Dream Act Coal. II)*, 757 F.3d 1053, 1058 (9th Cir. 2014) (“To be eligible for DACA, immigrants must have come to the United States before the age of sixteen and have been under thirty-one years old as of June 15, 2012; they must have been living in the United States when DACA was announced and have continuously resided in the United States for at least the previous five years; and they must have graduated from high school, or obtained a GED, or have been honorably discharged from the United States Armed Forces or the Coast Guard, or be currently enrolled in school. Additionally, they must not pose any threat to public safety: anyone who has been convicted of multiple misdemeanors, a single significant misdemeanor, or any felony offense is ineligible for DACA.”).
 7. U.S. CITIZENSHIP AND IMMIGRATION SERV., NUMBER OF I-821D, CONSIDERATION OF DEFERRED ACTION FOR CHILDHOOD ARRIVALS BY FISCAL YEAR, QUARTER, INTAKE, BIOMETRICS AND CASE STATUS: 2012-2014 FIRST QUARTER (Feb. 6, 2014), <http://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/DACA-06-02-14.pdf> (521,815 DACA requests had been approved as of December 31, 2013).
 8. *Are Individuals Granted Deferred Action Under the Deferred Action for Childhood Arrivals (DACA) Policy Eligible for State Driver’s Licenses?*, NAT’L IMMIGRATION LAW CTR., <http://www.nilc.org/dacadriverslicenses.html> (last visited Feb. 20, 2014).
 9. Semple, *supra* note 1.

although the DACA program effectively deems recipients lawfully present,¹⁰ it grants them no immigration status.¹¹ Moreover, courts have not been consistent in their review of equal protection challenges for different categories of noncitizens.¹² Thus, it is imperative that courts apply an adequate level of protection to ensure that DACA recipients are not discriminated against in a manner that would effectively abrogate the DACA program's purpose of allowing undocumented noncitizen youths the opportunity to fully contribute to the American society.

This Comment will analyze why DACA recipients are entitled to heightened scrutiny in equal protection claims by analyzing the different levels of scrutiny applied to the various classifications of noncitizens and how they provide guidance for an adequate standard of review for DACA recipients. Section II of this Comment will provide an overview of judicial decisions in Equal Protection challenges regarding various categories of noncitizens. Section III will then argue that DACA recipients are entitled to heightened scrutiny under the Equal Protection Clause.

II. BACKGROUND

Under the Constitution's Fourteenth Amendment, states cannot "deny any *person* within [their] jurisdiction the equal protection of the laws."¹³ It is well established that noncitizens are "persons" for purposes of the Fourteenth Amendment and, thus, entitled to Equal Protection rights.¹⁴ However, the level of protection afforded to a group depends on the nature of the right involved and the group's status as a suspect, semi-suspect, or non-suspect class.¹⁵ In the case of noncitizens, courts have reached different conclusions about their suspect classification and the applicable level of scrutiny, based on their immigration status.¹⁶ This Section will discuss judicial decisions on Equal Protection challenges involving different types of

-
10. *Ariz. Dream Act Coal. II*, 757 F.3d at 1059 ("DHS considers DACA recipients not to be unlawfully present in the United States because their deferred action is a period of stay authorized by the Attorney General.") (citing 8 U.S.C. § 1182(a)(9)(B)(ii) (2013); 8 C.F.R. § 214.14(d)(3) (2013); U.S. IMMIGRATION AND NATURALIZATION SERVS., ADJUDICATOR'S FIELD MANUAL Ch. 40.9.2(b)(3)(J), available at <http://www.uscis.gov/iframe/ilink/docView/AFM/HTML/AFM/0-0-0-1.html>).
 11. Napolitano Memo, *supra* note 6 (acknowledging the DACA program "confers no substantive right, immigration status or pathway to citizenship. Only the Congress, acting through its legislative authority, can confer these rights.").
 12. *See In re Griffiths*, 413 U.S. 717 (1973); *Plyler v. Doe*, 457 U.S. 202 (1982); *LeClerc v. Webb*, 419 F.3d 405 (5th Cir. 2005); *Dandamudi v. Tisch*, 686 F.3d 66 (2d Cir. 2012).
 13. U.S. CONST. amend. XIV, § 2 (emphasis added).
 14. *Sugarman v. Dougall*, 413 U.S. 634, 641 (1973) (citing *Graham v. Richardson*, 403 U.S. 365, 371 (1971); *Truax v. Raich*, 239 U.S. 33, 39 (1915); *Wong Wing v. United States*, 163 U.S. 228, 238 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).
 15. 16B AM. JUR. 2D *Constitutional Law* § 857 (1998).
 16. *See, e.g., Griffiths*, 413 U.S. at 729; *Plyler*, 457 U.S. at 216, 223–24; *LeClerc*, 419 F.3d at 421–22.

noncitizens. First, it will discuss the different levels of scrutiny the courts apply in equal protection cases generally. Then, it will give an overview of the various classifications of noncitizens under current immigration law. Lastly, it will discuss how courts have applied different levels of scrutiny to various classifications of noncitizens.

A. Judicial Application of the Equal Protection Clause

The judicial level of scrutiny applied to an Equal Protection challenge depends on the classification of the challenging party and the nature of the right affected.¹⁷ The Supreme Court has found claims involving certain rights to be automatically subject to heightened scrutiny because of their fundamental nature.¹⁸ Thus far, the Court has found that rights such as the right to interstate travel,¹⁹ marry,²⁰ procreate,²¹ and the right for a family to live together²² are fundamental and, thus, entitled to strict scrutiny.

When a challenge does not involve a fundamental right, however, the level of judicial review applicable depends on the classification of the injured group.²³ To determine the classification and whether the class is suspect or likely to be discriminated against, courts look to whether there is a history of discrimination against the class, the class shares immutable characteristics, the class constitutes a discrete and insular minority, and whether the class's shared immutable characteristic has a bearing on its ability to contribute to society.²⁴

When the government action at issue involves disparate treatment of a "suspect class" or a fundamental right, courts apply strict scrutiny, which requires that the government narrowly tailor its action to further a compelling government interest.²⁵ The requirement that the government have a compelling purpose in enacting a law that restricts a fundamental right or treats a suspect class differently allows courts to ensure "that the legislative body is pursuing a goal important enough to warrant use of a highly suspect

17. *Id.*

18. *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942) (applying strict scrutiny because the state action at issue "involve[d] one of the basic civil rights of man").

19. *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969).

20. *Skinner*, 316 U.S. at 541.

21. *Id.*

22. *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (acknowledging that "freedom of personal choice in matters of marriage and family life" is a fundamental right protected by the Fourteenth Amendment).

23. *See Romer v. Evans*, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.").

24. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

25. 16B AM. JUR. 2D *Constitutional Law* § 857 (1998).

tool.”²⁶ The narrow tailoring requirement, then, mandates that the action be neither over-inclusive nor under-inclusive and, thus, ensures that the government uses the least restrictive or discriminatory means of achieving its compelling interest.²⁷

When a challenge does not involve a fundamental right and the court finds a classification to be “semi-suspect,” it will apply intermediate scrutiny, which requires that the government action further an important government interest and that the action be substantially related to that important interest.²⁸ A classification will be semi-suspect when, although not immediately suspect, it is entitled to heightened scrutiny based on the factors listed above. Once a semi-suspect classification has been established, the requirement that the state’s interest be an important one ensures that the government action is not based on generalizations and stereotypes of the class.²⁹ Moreover, by requiring that the action be substantially related to the state’s important purpose, courts ensure that the state action is more than rationally related to the purpose but do not require that it be narrowly tailored.³⁰

Lastly, when a court finds that a classification is not suspect and the challenge does not involve a fundamental right, the court will apply rational basis scrutiny, which requires only that the government action be rationally related to a legitimate state interest.³¹ A legitimate end is one “within the scope of the constitution.”³²

B. Noncitizen Categories Under Current Immigration Law

Under current immigration law, noncitizens are divided into three major categories: lawful permanent residents (LPRs), nonimmigrants, and undocumented noncitizens. LPRs are noncitizens who have legal permits allowing them to remain in the United States permanently.³³ Nonimmigrants, on the other hand, have only temporary permission to remain in the United States.³⁴ Nonimmigrants include noncitizens present in the United States as “temporary workers, students, foreign diplomats, tourists, and business

26. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

27. *See Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

28. 16B AM. JUR. 2D *Constitutional Law* § 857 (1998).

29. *See Craig v. Boren*, 429 U.S. 190, 197–98 (1976).

30. *See Michael M. v. Superior Ct. of Sonoma Cnty.*, 450 U.S. 464, 473 (1981).

31. *See McCulloch v. Maryland*, 17 U.S. 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”).

32. *Id.*

33. Ariel Subourne, *Alienage As A Suspect Class: Nonimmigrants and the Equal Protection Clause*, 10 SETON HALL CIRCUIT REV. 199, 205 (2013).

34. *Id.*

travelers.”³⁵ Lastly, undocumented noncitizens are those who do not have permission to be present in the United States either because they entered illegally or because their permits have expired.³⁶

C. Judicial Application of Equal Protection Standards of Review to Noncitizens

The difficulty in determining the appropriate standards of review for DACA recipients arises partly as a result of the patchwork of judicial decisions applying different levels of scrutiny to different categories of noncitizens. This Section describes that case law.

1. *Lawful Permanent Residents and the Equal Protection Clause: In re Griffiths*³⁷

In *Griffiths*, the Supreme Court analyzed Connecticut’s rule barring noncitizens from the practice of law.³⁸ Specifically, the Court reviewed Connecticut’s bar examining committee’s decision to deny Griffiths, an LPR, permission to take the state bar exam solely on the basis of her immigration status.³⁹

Acknowledging that “the right to work . . . is of the very essence of the personal freedom and opportunity that was the purpose of the Fourteenth Amendment to secure,”⁴⁰ the Court began its analysis reiterating the well-settled standing of alienage-based classifications as inherently suspect and, as such, entitled to strict scrutiny.⁴¹ Subject to this standard of review, a state

35. *Id.* (internal quotations omitted). This Comment will also refer to noncitizens granted deferred action and/or temporary work authorization as nonimmigrants. Noncitizens granted deferred action include DACA recipients, “individuals suffering serious medical conditions”[,] and “persons temporarily prevented from returning to their home country due to a natural disaster, among others.” CITIZEN AND IMMIGRATION SERVS. OMBUDSMAN, DEFERRED ACTION: RECOMMENDATIONS TO IMPROVE TRANSPARENCY AND CONSISTENCY IN THE USCIS PROCESS (2011), available at <http://www.dhs.gov/xlibrary/assets/cisomb-combined-dar.pdf>. Other noncitizens granted temporary work authorization include refugees, asylees, trafficking victims granted T-visas, domestic violence victims granted relief under the Violence Against Women Act, and victims of other crimes granted U-visas. DEP’T OF HOMELAND SEC. U.S. CITIZENSHIP AND IMMIGRATION SERV., INSTRUCTIONS FOR I-765, APPLICATION FOR EMPLOYMENT AUTHORIZATION 1-6 (2013).

36. WASH. STATE DEP’T OF SOCIAL AND HEALTH SERVS., CITIZENSHIP AND ALIEN STATUS DEFINITIONS (2014), available at <http://www.dshs.wa.gov/manuals/eaz/sections/CitizenshipAndAlienStatus/citizengenelig.shtml> (defining “undocumented aliens” as “noncitizens without a lawful immigration status” who either “[e]ntered the U.S. illegally” or “[w]ere lawfully admitted but whose status expired or was revoked per United States Citizenship and Immigration Services.”).

37. *In re Griffiths*, 413 U.S. 717 (1973).

38. *Id.* at 718.

39. *Id.* at 720.

40. *Id.* at 721.

41. *Id.* (quoting *Graham v. Richardson*, 403 U.S. 365, 372 (1971)).

must show that its action is grounded on an interest that is “both constitutionally permissible and substantial” and that the means, or classification, it employs are necessary to accomplish or safeguard its substantial interest.⁴²

The Court found that Connecticut’s interest in ensuring that licensed attorneys be qualified to practice law is substantial.⁴³ However, this interest did not justify barring noncitizens from the practice of law.⁴⁴ In reaching its decision, the Court found that, since the practice of law does not engage governmental affairs, an attorney’s alienage does not contravene the interest of the United States in such a manner that would require barring noncitizens from law practice.⁴⁵ Moreover, the Court reasoned that, although lawyers are “officers of the court,” they are not officers “in the ordinary sense.”⁴⁶ Rather, lawyers are autonomous, private professionals who, although engaged in court proceedings, are not agents of the government.⁴⁷ Thus, the Court concluded that Connecticut’s rule barring noncitizens from law practice was unconstitutional under the Equal Protection Clause and established the strict level of review applicable to noncitizens in Equal Protection challenges. Since then, however, courts have found that the strict scrutiny applied in *Griffiths* does not apply to all noncitizens.

2. *Undocumented Noncitizens and the Equal Protection Clause: Plyler v. Doe*⁴⁸

The most marked difference within the different categories of noncitizens is between LPRs and undocumented noncitizens. In *Plyler v. Doe*, the Supreme Court acknowledged this difference and analyzed its implications regarding the standard of review applicable to Equal Protection challenges.⁴⁹ The Court reviewed a class action challenge brought by undocumented children to the constitutionality of a Texas statute that effectively denied them a public education by authorizing school districts to deny enrollment to undocumented children and to withhold state funds for their education to those school districts that did allow them to enroll.⁵⁰

The Court began its analysis by rejecting the State’s argument that, because of their undocumented status, the plaintiffs were not “persons within its jurisdiction” and, therefore, not entitled to protection under the Fourteenth

42. *Id.* at 721–22.

43. *Id.* at 725.

44. *Id.* at 729.

45. *Id.* at 724.

46. *Id.* at 728.

47. *Id.* at 728–29.

48. 457 U.S. 202 (1982).

49. *Id.*

50. *Id.* at 205–06.

Amendment.⁵¹ First, the Court emphasized that, “[w]hatever his status under the immigration laws, an alien is surely a ‘person’ in the ordinary sense of that term” and, consequently, for purposes of the Fourteenth Amendment.⁵² Further, the Court concluded, undocumented noncitizens are persons “within [a State’s] jurisdiction” because Congress intended for that language to guarantee “equal protection to all within a State’s boundaries,” regardless of whether his or her “initial entry into [the] State, or into the United States, was unlawful.”⁵³

Having established that undocumented noncitizens are protected by the Fourteenth Amendment, the Court was faced with establishing a proper standard of review for this class. The Court concluded that, unlike LPRs, undocumented noncitizens “cannot be treated as a suspect class because their presence in this country in violation of federal law is not a ‘constitutional irrelevancy.’”⁵⁴ Moreover, the Court found that public education, although of utmost importance to society, is not a fundamental right.⁵⁵ Based on these findings, the Court concluded that undocumented noncitizens, even in the education context, are only entitled to rational basis review in Equal Protection challenges.⁵⁶

The Court acknowledged, however, that undocumented minors, who are unable to affect “[e]ither their parents’ conduct [or] their own status,” are not comparably situated to undocumented adults who violated immigration laws of their own accord and have the ability to return to their home countries.⁵⁷ Because of this, courts may take into account the “costs to the Nation and to the innocent children” when determining the rationality of a state action and afford them a higher level of scrutiny than that applied to undocumented noncitizens generally.⁵⁸ Here, the Court found that barring undocumented children from public education would contravene the goal of the Equal Protection Clause to prevent unreasonable government-imposed “obstacles to advancement on the basis of individual merit”⁵⁹ and impose “a lifetime hardship on a discrete class of children not accountable for their disabling status.”⁶⁰ Thus, the Court concluded, the state action can “hardly be considered rational unless it furthers some *substantial* goal.”⁶¹

51. *Id.* at 210.

52. *Id.*

53. *Id.* at 214–15.

54. *Id.* at 223.

55. *Id.* at 222–23.

56. *See id.* at 216, 223–24.

57. *Id.* at 220.

58. *Id.* at 223–24.

59. *Id.* at 221–22.

60. *Id.* at 223.

61. *Id.* at 224 (emphasis added).

By requiring that the state action be rationally related to a substantial state purpose, the Court established a higher standard of review for undocumented minors in the education context than the rational basis review applicable to undocumented noncitizens in general. This standard of review requires that the state action be rationally related to a legitimate, rather than substantial, end. Yet, even this more nuanced review of noncitizens' protection under the Equal Protection Clause failed to encompass the entire spectrum of noncitizen classifications and left the door open for courts to apply a different standard of review to those noncitizens who, although lawfully present, lack permanent resident status.

3. *Nonimmigrants and the Equal Protection Clause: A Split Approach*

Currently, federal circuit courts are split as to the standard of review applicable to nonimmigrants in Equal Protection cases. On one side, the Appellate Courts for the Fifth and Sixth Circuits have found that nonimmigrants are only entitled to rational basis review. The Second Circuit Court of Appeals, however, has held that nonimmigrants are entitled to strict scrutiny.

a. Rational Basis Review: *LeClerc v. Webb*⁶²

In *LeClerc*, the Fifth Circuit Court of Appeals reviewed an Equal Protection challenge to a Louisiana Supreme Court Rule that required an applicant for admission to the state bar to be either a U.S. citizen or LPR.⁶³ Here, the court began by acknowledging the Supreme Court's rationale for applying strict scrutiny to LPRs, their inability to affect the political process in favor of their interests and their similarities to United States citizens.⁶⁴ The court found, however, that because of the temporary nature of their status, nonimmigrants need not be considered a suspect class.⁶⁵

Moreover, the court distinguished nonimmigrants from *Plyler* and the heightened standard of review afforded to undocumented minors there. Unlike the plaintiffs in *Plyler*, the court reasoned, the nonimmigrant plaintiffs in this case "entered this country voluntarily and with an understanding of their limited, temporary status."⁶⁶ Thus, the unfair consequences which moved the court to grant heightened scrutiny to undocumented minors were not present here.⁶⁷ As a result, the court applied rational basis scrutiny and

62. 419 F.3d 405 (5th Cir. 2005).

63. *Id.* at 410.

64. *Id.* at 417.

65. *Id.* at 417–18.

66. *Id.* at 420.

67. *Id.* at 420–21.

found the Louisiana Supreme Court Rule constitutional as it is rationally related to the legitimate state purpose of regulating the practice of law.⁶⁸ Since *LeClerc*, at least one other circuit court has borrowed the Fifth Circuit's reasoning to find that nonimmigrants are entitled only to rational basis review.⁶⁹

b. *Dandamudi v. Tisch*⁷⁰

In *Dandamudi*, the Second Circuit Court of Appeals reviewed the constitutionality of a New York statute requiring U.S. citizenship or legal permanent residence to obtain a pharmacist's license.⁷¹ The court began its opinion acknowledging that, although most nonimmigrants are required to establish their lack of intent to permanently stay in the United States to obtain their nonimmigrant visas, both the Board of Immigration Appeals (BIA) and the State Department recognize the "doctrine of dual intent, which allows aliens to express an intention to remain in the United States temporarily . . . while also intending to remain permanently."⁷²

Further, the court restated the Supreme Court holdings that "alienage is a suspect classification" and that, when a state action "interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class," it must be subject to strict scrutiny.⁷³ Moreover, the court here found that the Supreme Court has established only two exceptions to the view that alienage is a suspect class.⁷⁴ One exception allows for state exclusion of noncitizens from "political and governmental functions."⁷⁵ The other exception allows for courts to apply rational basis review to challenges involving undocumented noncitizens.⁷⁶ Thus, the court found that the Supreme Court has not made any exceptions or distinctions between lawfully present noncitizens.⁷⁷ Accordingly, the Second Circuit Court refused to carve out a third exception and held that nonimmigrants, like LPRs, are a suspect class entitled to strict scrutiny.⁷⁸

In reaching its decision, the court declined to follow *LeClerc* and *League of United Latin American Citizens (LULAC) v. Bredesen's*

68. *Id.* at 421–22.

69. *See League of United Latin Am. Citizens (LULAC) v. Bredesen*, 500 F.3d 523, 533 (6th Cir. 2007) (adopting *LeClerc's* reasoning to find that strict scrutiny only applies to LPRs).

70. 686 F.3d 66 (2d Cir. 2012).

71. *Id.* at 69 (citing N.Y. EDUC. LAW § 6805(1)(6) (McKinney 2014)).

72. *Id.* at 70.

73. *Id.* at 72.

74. *Id.* at 73.

75. *Id.* (citing *Foley v. Connelie*, 435 U.S. 291, 295–96 (1978) (applying rational basis review and upholding a statute prohibiting noncitizens to work as police officers)).

76. *Id.* at 74 (citing *Plyler v. Doe*, 457 U.S. 202, 219 (1982); *DeCanas v. Bica*, 424 U.S. 351 (1976)).

77. *Id.*

78. *Id.* at 79.

assumption that, because nonimmigrants have only temporary interests in the United States, they are not on equal footing with LPRs. First, the court reasoned that this finding would be fundamentally inconsistent with the BIA and State Department's doctrine of dual intent.⁷⁹ Further, the court concluded that the Supreme Court recognizes noncitizens as a suspect class not because of their similarities to United States citizens or their obligations to the country but because of their vulnerable status as a discrete and insular minority unable to affect the political process.⁸⁰ In fact, the court found that nonimmigrants are "more powerless and vulnerable" than their LPR counterparts.⁸¹

Lastly, the court concluded, applying rational basis scrutiny to nonimmigrants would create "absurd results" because it would effectively afford less protection to lawfully present nonimmigrants than that afforded to undocumented minors in *Plyler*.⁸² This analysis, however, becomes more complex in the case of DACA recipients who, although lawfully present, unlawfully entered the country and have been granted no immigration status.

4. *DACA Recipients and the Equal Protection Clause: Arizona Dream Act Coalition v. Brewer*⁸³

To date, *Arizona Dream Act Coalition* is the only decision regarding an Equal Protection challenge to a state action discriminating against DACA recipients. The Arizona Dream Act Coalition, a youth-led immigration advocacy group, along with a number of DACA recipients, brought suit against the State of Arizona challenging the constitutionality of its policy to deny driver's licenses to DACA recipients.⁸⁴ The Plaintiffs asked the District Court of Arizona for a preliminary injunction barring the State of Arizona from continuing its policy.⁸⁵ Although the District Court of Arizona denied the preliminary injunction, on appeal, the Circuit Court of Appeals for the Ninth Circuit reversed the district court's decision, granting Plaintiffs' motion for preliminary injunction.⁸⁶ Since this was the first time a federal district and appellate court spoke on the issue of which standard of review should be applied to DACA recipients, it is an interesting preview of what the District Court of Arizona will ultimately hold on the issue and what other courts may decide.

79. *Id.* at 77.

80. *Id.* at 75.

81. *Id.* at 77.

82. *Id.* at 78.

83. *Ariz. Dream Act Coal. II*, 757 F.3d 1053 (9th Cir. 2014).

84. *Ariz. Dream Act Coal. v. Brewer (Ariz. Dream Act Coal. I)*, 945 F. Supp. 2d 1049, 1052 (D. Ariz. 2013).

85. *Id.* at 1053.

86. *Ariz. Dream Act Coal. II*, 757 F.3d at 1075.

After the DACA program came into effect, Arizona Governor Jan Brewer issued an executive order barring DACA recipients “from obtaining eligibility, beyond those available to any person regardless of lawful status, for any taxpayer-funded public benefits and state identification, including a driver’s license.”⁸⁷ As a result, DACA recipients, who receive employment authorization documents (EADs) as part of the DACA program, would be denied driver’s licenses in Arizona while other EAD-holding noncitizens would be allowed to continue to receive driver’s licenses.⁸⁸ Thus, the court found that DACA recipients were similarly situated to other EAD holders, despite the differences in deferred action programs, yet treated differently.⁸⁹

Having established the existence of disparate treatment, the court then analyzed the level of scrutiny applicable under the Equal Protection analysis. First, the court analyzed whether Plaintiffs are entitled to strict scrutiny. In so doing, the court looked at Supreme Court decisions, finding that the Supreme Court’s rationale in holding alienage as a suspect class was grounded on the “similarities between legal resident aliens and citizens” such as the fact that LPRs pay taxes, may be drafted into the army, and may live, work, and contribute to the economy of a state for an extended period of time.⁹⁰ Thus, based on Plaintiffs’ dissimilarities to United States citizens, the court decided to follow the Fifth and Sixth Circuits’ decisions in *LULAC* and *LeClerc* to conclude that Plaintiffs are not entitled to strict scrutiny.⁹¹

Having rejected strict scrutiny, the court then analyzed whether Plaintiffs are entitled to intermediate scrutiny. First, the court acknowledged intermediate scrutiny may apply to “plaintiffs who (1) have suffered a history of discrimination; (2) exhibit obvious, immutable, or distinguishing characteristics that define them as a distinct group; and (3) show that they are a minority or politically powerless.”⁹² The court concluded, however, that because of the recency of the DACA program, Plaintiffs cannot establish they have suffered a history of discrimination.⁹³ Moreover, the court noted, the DACA program itself disproves Plaintiffs’ political powerlessness since it shows that they “have attracted the attention of policymakers in the federal government.”⁹⁴

Next, the court looked at the “hybrid form of review” applied to undocumented minors in *Plyler* to decide whether it may apply to Plaintiffs

87. *Ariz. Dream Act Coal. I*, 945 F. Supp. 2d at 1055.

88. *Id.* at 1060 (noncitizens may receive EADs as part of other deferred action programs).

89. *Id.* at 1062 (“[a]ll deferred action recipients are permitted to remain in the country without removal for a temporary period of time”).

90. *Id.* at 1062.

91. *Id.* at 1065.

92. *Id.*

93. *Id.* at 1066.

94. *Id.*

here.⁹⁵ In doing so, the court pointed to two facts that justified the heightened scrutiny in *Plyler*: “(1) the age of the undocumented children . . . , and (2) the importance of education to those children and the entire nation.”⁹⁶ Based on those facts, the court found that Plaintiffs here are not entitled to hybrid heightened scrutiny because they are not minor children and driver’s licenses do not have the same importance to Plaintiffs and the nation as primary education since they are not “the basic tools by which individuals might lead economically productive lives to the benefit of us all.”⁹⁷

Thus, the court concluded that Plaintiffs are not a suspect or quasi-suspect class and are, therefore, only entitled to rational basis review.⁹⁸ In reviewing the likelihood of success of Plaintiffs’ Equal Protection challenge to Arizona’s policy, the court acknowledged the statements of Governor Brewer regarding the DACA program, which point to her motives for issuing the executive order barring DACA recipients from driver’s licenses.⁹⁹ Then the court concluded that, although Governor Brewer is entitled to disagree with the federal government, she lacked a rational basis for issuing the executive order.¹⁰⁰ Therefore, based on this preliminary analysis, the court found that Arizona’s policy is likely to fail a rational basis review.¹⁰¹ The court, however, ultimately denied Plaintiffs’ motion for preliminary injunction on the basis that Plaintiffs are unlikely to suffer irreparable harm.¹⁰²

After the district court’s finding that Arizona’s policy was likely to fail even under a rational basis standard, Arizona revised its discriminatory policy in an effort to survive this most deferential test. To pass constitutional muster, Arizona decided to simply widen their net of discrimination, refusing driver’s licenses to other deferred action recipients.¹⁰³

On appeal, the Court of Appeals for the Ninth Circuit framed Plaintiffs’ claim narrowly, finding that DACA recipients are “similarly situated to other categories of noncitizens who may use Employment Authorization Documents to obtain driver’s licenses in Arizona.”¹⁰⁴ Based on this framing, the court concluded that, because Arizona’s policy denies driver’s licenses to

95. *Id.*; *Plyler v. Doe*, 457 U.S. 202, 224 (1982) (requiring that the state action be rationally related to a *substantial* state goal).

96. *Ariz. Dream Act Coal. I*, 945 F. Supp. 2d at 1066.

97. *Id.*

98. *Id.*

99. *Id.* at 1070 (“The Governor strongly criticized the program as ‘back door amnesty’ and political ‘pandering’ . . . and her comments show that she disagreed with the federal government’s conclusion that DACA recipients are now authorized by federal law to be present in the country referring to them as ‘illegal people.’”).

100. *Id.* at 1071–72.

101. *Id.* at 1072.

102. *Id.* at 1074.

103. *See Ariz. Dream Act Coal. II*, 757 F.3d 1053, 1060 (9th Cir. 2014).

104. *Id.* at 1064.

some categories of EAD holders, the policy treats DACA recipients disparately.¹⁰⁵ Having concluded that Arizona's policy discriminates against DACA recipients, the court found that it did not need to "decide what standard of scrutiny applies to Defendants' policy: as the district court concluded, Defendants' policy is likely to fail even rational basis review."¹⁰⁶ Yet, the court acknowledged the long-standing principle that alienage is a suspect classification only subject to rational basis review when the persons targeted by the discriminatory actions are unlawfully present in the country.¹⁰⁷ Ultimately, *Arizona Dream Act Coalition* illustrates both the difficulty in establishing an appropriate level of scrutiny for DACA recipients and the importance to do so.

III. ANALYSIS

Based on the Supreme Court's decisions in *Griffiths* and *Plyler*, DACA recipients' Equal Protection challenges should be afforded heightened scrutiny. This Section will first analyze why DACA recipients and other lawfully present noncitizens should be afforded strict scrutiny. In the alternative, it will argue that DACA recipients should be afforded intermediate scrutiny. Lastly, this Section will argue that, at a minimum, DACA recipients should be afforded *Plyler*'s heightened scrutiny.

A. DACA Recipients Are Entitled to Strict Scrutiny

It is well-established that alienage is a suspect classification for purposes of the Equal Protection Clause.¹⁰⁸ This principle has not been abandoned or redefined.¹⁰⁹ Although some courts have decided that nonimmigrants are only entitled to rational basis scrutiny,¹¹⁰ that reasoning is flawed.

105. *Id.*

106. *Id.* at 1065.

107. *Id.* at 1065 n. 4 ("Though we need not decide what standard of scrutiny to apply here, we note that the Supreme Court has consistently required the application of strict scrutiny to state action that discriminates against noncitizens authorized to be present in the United States. Conversely, alienage-based discrimination is subject to rational basis review only when the aliens targeted by that discrimination are "presen[t] in this country in violation of federal law.") (internal citation omitted).

108. *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (equating classifications based on alienage to other immediately suspect classifications such as race and nationality and finding that "[a]liens as a class are a prime example of a 'discrete and insular minority . . . for whom [strict scrutiny] is appropriate.'").

109. *See Plyler v. Doe*, 457 U.S. 202, 223 (1982) (distinguishing undocumented noncitizens from noncitizens in general only because of their unlawful presence).

110. *See LeClerc v. Webb*, 419 F.3d 405, 421 (5th Cir. 2005); *League of United Latin Am. Citizens (LULAC) v. Bredesen*, 500 F.3d 523, 533 (6th Cir. 2007); *see also Ariz. Dream Act Coal. I*, 945 F. Supp. 2d 1049, 1050 (D. Ariz. 2013).

First, the decisions holding that nonimmigrants are only entitled to rational basis scrutiny misinterpret the Supreme Court's holding in *Plyler*. Those decisions are based on the notion that, in *Plyler*, the Supreme Court established that alienage only entitles a group of noncitizens to suspect class status when the group involves LPRs.¹¹¹ This is a misreading because the Court did not hold that *some* types of alienage are suspect and others are not. Instead, the Court carved out a narrow exception for undocumented noncitizens based solely on their unlawful presence.¹¹²

Nowhere in its decisions does the Supreme Court create a sliding scale of protection for noncitizens based on their immigration status. The only relevant factors are those which the Court has consistently used in determining whether a class is suspect, the history of discrimination against the class, shared immutable characteristics among members of the class, the class's status as a discrete and insular minority, and whether the class's shared immutable characteristics have a barring in its ability to contribute to society.¹¹³ Based on these factors, even undocumented noncitizens would be a suspect class but for their unlawful presence.¹¹⁴ It follows, then, that in reviewing an equal protection challenge involving DACA recipients, who are effectively deemed lawfully present in the United States, a court must apply strict scrutiny.

Further, the decisions in *LeClerc* and *LULAC* erroneously focus on the dissimilarities between lawfully present noncitizens and the undocumented noncitizens in *Plyler*.¹¹⁵ In *Plyler*, the Court highlighted the importance of education both to the noncitizen minors and to the American society.¹¹⁶ While it is true that the policy considerations that led the Supreme Court to apply a heightened level of scrutiny in *Plyler* are not present in the cases involving nonimmigrants,¹¹⁷ this is irrelevant because alienage in itself entitles a class to strict scrutiny. The Supreme Court in *Plyler* did not establish those policy considerations as factors for finding a noncitizen classification suspect. Rather, it used them only after finding that the

111. *LeClerc*, 419 F.3d at 419 (“[A]lthough aliens are a suspect class in general, they are not homogeneous and precedent does not support the proposition that nonimmigrant aliens are a suspect class entitled to . . . strict scrutiny.”).

112. *See Plyler*, 457 U.S. at 223; *Ariz. Dream Act Coal. II*, 757 F.3d 1053, 1065 n. 4 (9th Cir. 2014) (“Though we need not decide what standard of scrutiny to apply here, we note that the Supreme Court has consistently required the application of strict scrutiny to state action that discriminates against noncitizens authorized to be present in the United States. Conversely, alienage-based discrimination is subject to rational basis review only when the aliens targeted by that discrimination are present in this country in violation of federal law.”) (internal citations omitted).

113. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

114. *Id.*

115. *See LeClerc*, 419 F.3d at 418-19; *see also League of United Latin Am. Citizens (LULAC)*, 500 F.3d at 533 (adopting *LeClerc*'s rationale).

116. *Plyler*, 457 U.S. at 220-23.

117. *Id.* (acknowledging the importance of education and finding that undocumented minors are not similarly situated to undocumented adults because they did not willingly violate immigration law).

plaintiffs' unlawful presence barred them from suspect status.¹¹⁸ Thus, where a noncitizen's presence in the United States is lawful, a court need not engage in an analysis of *Plyler's* policy considerations because alienage, in itself, is a suspect class entitled to strict scrutiny.

Moreover, courts applying rational basis erroneously engaged in a similarity analysis to find that nonimmigrants are not a suspect class. In *Arizona Dream Act Coalition I*, the Arizona District Court followed the reasoning of *LeClerc* to find that, because nonimmigrants do not pay taxes, may be drafted into the army, or live, work, and contribute to the economy of a state for an extended period of time, they are not entitled to the same strict scrutiny as LPRs.¹¹⁹ That is, the court found that, unlike LPRs who are sufficiently similar to United States citizens, nonimmigrants are not and, therefore, cannot be said to be considered a suspect class. This reasoning disregards the long-standing principle that alienage, not lawful permanent residence, is a suspect classification. In finding alienage suspect, the Supreme Court did not engage in a similarity analysis. It looked at factors such as the political powerlessness of aliens and their standing as a discrete and insular minority.¹²⁰

Alienage, in itself, is a suspect classification because all the relevant factors point to its vulnerability.¹²¹ None of those factors, however, require that the class share characteristics with a non-targeted group. Rather, they emphasize the differences between a "discrete and insular" minority from the majority. To require that a targeted minority be like a majority of the people in society in order to be protected from discrimination would contravene the very purpose of the Equal Protection Clause, which seeks to protect disenfranchised minorities from the tyranny of the majority. Therefore, DACA recipients, like other lawfully present noncitizens, are entitled to strict scrutiny regardless of *Plyler* considerations or their dissimilarities with United States citizens.

B. DACA Recipients, if Not Suspect, Are Entitled to Intermediate Scrutiny

Even if a court were to find that certain classes of lawfully present noncitizens are not entitled to suspect classification, it would still be required to apply intermediate scrutiny. When a class is not immediately suspect, a court must look at "(1) the history of invidious discrimination against the class; (2) whether the characteristics that distinguish the class [affect its members'] ability to contribute to society; (3) whether the distinguishing characteristic is "immutable" or beyond the class members' control; and (4)

118. *Id.* at 223.

119. *Ariz. Dream Act Coal. I*, 945 F. Supp. 2d 1049, 1062 (D. Ariz. 2013).

120. *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

121. *See Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

the political power of the subject class¹²² to determine whether the class is entitled to heightened scrutiny. In applying these factors, a court must find that DACA recipients are entitled to intermediate scrutiny.

First, DACA recipients share the immutable characteristics of having been brought to the United States as children and living in the United States in violation of immigration laws. Although they may someday gain lawful status, their upbringing will remain unchanged. These are young people who, because of their upbringing as undocumented noncitizens, have not had the same opportunities as their lawfully present counterparts. In many states, they lacked the opportunity to attend college at in-state tuition rates and, in the few states which extend in-state tuition benefits, they still lacked access to federal financial aid, student loans, and legal employment to help defray the costs of their education.¹²³ Although the DACA program now allows them access to lawful employment and they may someday gain an immigration status through congressional action, this will not change the psychological scars and loss of opportunities that their undocumented upbringing will leave behind.

Further, they share a characteristic that is beyond their control because, under current immigration laws, they do not have a path to citizenship and, thus, cannot control their status as noncitizens. However, this shared and immutable characteristic does not bear on their ability to contribute to society, especially after receiving a work permit as a result of DACA. The policies that seek to curtail their DACA benefits do, however, affect their ability to contribute to society by denying them state benefits such as professional and driver's licenses. Thus, the first two factors point to DACA recipients being entitled to heightened scrutiny.

Moreover, a court need only look at long standing history as well as the more recent horde of anti-immigrant legislation to find a history of discrimination of noncitizens. Throughout the country, state and local governments have enacted legislation seeking to force undocumented noncitizens out of their jurisdiction.¹²⁴ Many of these laws have been found

122. 16B AM. JUR. 2D *Constitutional Law* § 857 (1998).

123. *Undocumented Student Tuition: Overview*, NAT'L CONFERENCE OF STATE LEGISLATURES (May 5, 2014), <http://www.ncsl.org/research/education/undocumented-student-tuition-overview.aspx>. Currently, three states explicitly prohibit undocumented students from paying in-state tuition; seventeen states allow undocumented students to qualify for in-state tuition; and five states, all of which extend in-state tuition to undocumented students, also allow them to receive state financial aid. *Id.* See also *Advising Undocumented Students*, COLLEGE BOARD, <http://professionals.collegeboard.com/guidance/financial-aid/undocumented-students> (last visited Apr. 16, 2014) (undocumented students do not qualify for federal financial aid, state financial aid in most states, or most private scholarships).

124. Heidi Beirich, *Essay: The Anti-Immigrant Movement*, S. POVERTY LAW CTR., <http://www.splcenter.org/get-informed/intelligence-files/ideology/anti-immigrant/the-anti-immigrant-movement> (last visited Apr. 16, 2014); see, e.g., *Arizona v. United States*, 132 S. Ct. 2492 (2012) (upholding Arizona law which allows state police to detain anyone they have a

unconstitutional. Based on the repeated unconstitutional and discriminatory action of state and local governments, it is clear that noncitizens should be found to be a suspect class.

Lastly, DACA recipients continue to lack access to the political process and remain powerless. First, noncitizens are ineligible to vote in federal elections and are overwhelmingly excluded from voting at the state and local level.¹²⁵ Thus, they have no direct access to the political process. Further proof of their powerlessness is the continued failure of the DREAM Act in Congress as well as Congress's lack of action regarding the enactment of a comprehensive immigration reform bill, despite immigrant activism.¹²⁶ The court in *Arizona Dream Act Coalition* found that the DACA program itself is proof that noncitizens, particularly DREAMers, have a strong influence on the political process.¹²⁷ In fact, however, the DACA program was started to ameliorate Congressional inaction. It, in no way, replaces the Congressional action for which DREAMers have been advocating. By providing them with only two-year temporary work permits, the DACA program provides only a short-term solution and effectively leaves DACA recipients at the mercy of changing political environments and executive administrations. Thus, courts should find that, based on a factor analysis, DACA recipients are entitled to intermediate scrutiny. Yet, even if a court were to disagree, DACA recipients are still entitled to *some* kind of heightened scrutiny.

C. DACA Recipients Are, at Minimum, Entitled to *Plyler's* Heightened Scrutiny

In *Plyler*, the Supreme Court applied a heightened rational basis scrutiny to undocumented minors finding that, although their unlawful presence precluded them from suspect status, it is in the best interest of the United States to grant them heightened protection in the education context.¹²⁸

“reasonable suspicion” to believe is unlawfully present in the country); Ga. Latino Alliance for Human Rights v. Deal, 691 F.3d 1250, 1268 (11th Cir. 2012) (denying preliminary injunction of Georgia law similar to Arizona's); Hispanic Interest Coal. of Ala. v. Governor of Ala., 691 F.3d 1236, 1245–46 (concluding that a section of Alabama law requiring verification of citizenship and immigration status of enrolling students was subject to heightened scrutiny and holding that the section violated the Equal Protection clause); Lozano v. City of Hazleton, 724 F.3d 297 (3d Cir. 2013) (striking down anti-immigrant housing and employment ordinances).

125. See Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391 (1993).

126. Herszenhorn, *supra* note 4; Wesley Lowery, *House Democrats Need 27 Signatures to Force Vote on Comprehensive Immigration Reform Bill*, WASH. POST (Apr. 15, 2014, 12:09 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/04/15/house-democrats-need-27-signatures-to-force-vote-on-comprehensive-immigration-reform-bill/>.

127. *Ariz. Dream Act Coal. I*, 945 F. Supp. 2d 1049, 1066 (D. Ariz. 2013).

128. *Plyler v. Doe*, 457 U.S. 202, 220–23 (1982).

Based on the Court's rationale in that case, DACA recipients are entitled to the same heightened rational basis scrutiny.

First, the plaintiffs *Plyler* sought to protect are the very same group who now benefit from DACA. It is not a great leap to imagine the same kind of undocumented children whose public school attendance *Plyler* sought to protect growing up, graduating high school or serving in the United States armed forces, and now being eligible for DACA relief. Having protected their access to public education as children in the interest of the country, it would now be inconsistent to curb their ability to contribute the skills and education they have gained in the United States back to the community.

Moreover, like the plaintiffs in *Plyler*, DACA recipients had no intent to violate immigration law when their families brought them to the United States as children. Some younger DACA recipients may not even have any accumulated unlawful presence¹²⁹ and the rest, although unlawfully present at some point, are now effectively deemed lawfully present in the country for the duration of their work authorization.¹³⁰ Thus, DACA recipients share the same factors that led the Court to apply heightened scrutiny in *Plyler*.

Although most DACA recipients are now adults and could, thus, be said to be able to change their condition as undocumented noncitizens unlike the children in *Plyler*, it is unreasonable to expect them to do so. These young people were brought to the United States as children. Since then, they have grown to know only the United States as their home.¹³¹ They have grown up American in almost every sense; they have attended the same schools, played the same sports, listened to the same music, and shared in the same culture as every other American child. But for the actions of their parents and inaction of Congress, they are American. To hold that they are entitled to less scrutiny simply because they grew up is unreasonable.

Ultimately, it is important to afford DACA recipients, and all lawfully present noncitizens, heightened scrutiny because failing to do so would allow a legislature to simply widen their net of discrimination to survive rational basis review. In *Arizona Dream Act Coalition*, where the court applied rational basis review to Arizona's denial of driver's licenses to DACA recipients, the court advised that Arizona could continue to deny driver's

129. See 8 U.S.C. § 1182(a)(9)(B)(ii-iii) (2013) (“[A]n alien is deemed to be unlawfully present in the United States if the alien is present in the United States after the expiration of the [authorized] period of stay . . . or is present in the United States without being admitted or paroled.” However, “[n]o period of time in which an alien is under 18 years of age shall be taken into account in determining the period of unlawful presence in the United States.”).

130. See *Ariz. Dream Act Coal. I*, 945 F. Supp. 2d at 1061 (“[N]othing about [DACA] suggests that DACA recipients are somehow less authorized to be present in the United States than are other deferred action recipients . . . All deferred action recipients are permitted to remain in the country without removal for a temporary period of time, and the EADs held by those recipients appear to be valid only for a temporary period.”).

131. See Napolitano Memo, *supra* note 6.

licenses to DACA recipients only if it also denies them to other deferred actions recipients.¹³² That piece of judicial guidance may have seemed far-fetched at the time of the decision. After all, it was difficult to imagine that a state would deny driver's licenses to deferred action recipients, such as asylees and victims of domestic violence and human trafficking, just because it disagreed with the DACA program.¹³³ Yet, that is exactly what happened in Arizona. After the district court indicated that, even under rational basis scrutiny, Arizona's policy was likely to be found discriminatory, Governor Brewer decided to follow the court's guidance and deny driver's licenses to all deferred action recipients.¹³⁴

While the Ninth Circuit Court of Appeals ultimately found that even this revised policy is not likely to survive the most deferential standard of review, it did so employing a very narrow framing of the issue. That is, the court found the Arizona policy treated DACA recipients disparately from other EAD holders.¹³⁵ The danger in this approach, however, is that it provides an incentive for states to simply widen their net of discrimination to pass constitutional muster. Therefore, to effectively protect DACA recipients and other noncitizens from discriminatory state practices courts must acknowledge alienage, whatever its type, as a suspect class and afford all lawfully present noncitizens an appropriately heightened level of scrutiny.

IV. CONCLUSION

Alienage classifications, regardless of the type of lawfully present noncitizens at issue, are immediately suspect. Therefore, courts should apply strict scrutiny. In the alternative, courts should find that DACA recipients are a discrete and insular minority entitled to intermediate scrutiny. Lastly, even if a court refuses to apply either of those standards of review, DACA recipients are, at a minimum, entitled to a lesser, heightened scrutiny above rational basis. For the foregoing reasons, Equal Protection challenges involving DACA recipients are entitled to heightened scrutiny.

132. *Id.*

133. See DEP'T OF HOMELAND SEC. U.S. CITIZENSHIP AND IMMIGRATION SERV., INSTRUCTIONS FOR I-765, APPLICATION FOR EMPLOYMENT AUTHORIZATION 1, 4–5 (2013) (listing asylees, DACA recipients, human trafficking victims granted T-visas, crime victims granted U-visas, and domestic violence victims granted VAWA relief as eligible for EADs).

134. David Knowles, *Arizona Expands Ban on Undocumented Immigrant Driver's Licenses to Include Victims of Domestic Violence and Human Trafficking*, N.Y. DAILY NEWS (Sept. 18, 2013, 6:55 PM), <http://www.nydailynews.com/news/national/arizona-tightens-immigrant-driver-license-restrictions-article-1.1460313>.

135. *Ariz. Dream Act Coal. II*, 757 F.3d 1053, 1064 (9th Cir. 2014).