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Volume 126 | Issue 1

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Fall 2021

## Removing Roadblocks: Alternatives to Lawful Status and Social Security Number Requirements for Pennsylvania Driver's Licenses

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### Recommended Citation

Miranda Sasinovic, *Removing Roadblocks: Alternatives to Lawful Status and Social Security Number Requirements for Pennsylvania Driver's Licenses*, 126 DICK. L. REV. 305 (2021).  
Available at: <https://ideas.dickinsonlaw.psu.edu/dlr/vol126/iss1/12>

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# Removing Roadblocks: Alternatives to Lawful Status and Social Security Number Requirements for Pennsylvania Driver's Licenses

Miranda Sasinovic\*

## ABSTRACT

As part of their traditional state police powers, states determine the eligibility requirements for their driver's licenses. Standard eligibility requirements include proof of age, residency, identity, and knowledge. In the 1990s, some states amended their vehicle codes to require proof of lawful status, effectively barring undocumented immigrants from obtaining driver's licenses.

In response to inconsistent issuance and verification standards, Congress passed the REAL ID Act of 2005. The Act prohibits federal agencies from accepting state driver's licenses for official purposes unless states comply with minimum issuance and verification standards. These standards include requirements to verify Social Security numbers and lawful status. However, the REAL ID Act also allows states to continue issuing non-compliant driver's licenses if those licenses have a design that distinguishes them from compliant ones.

Currently, Pennsylvania requires an applicant to provide her Social Security number and proof of lawful status to obtain a driver's license. This Comment recommends that Pennsylvania should amend its vehicle code to offer alternatives to its Social Security number and lawful status requirements. Doing so would allow undocumented immigrants to apply for driver's licenses, leading to benefits in public safety, community relationships, and increases in the Commonwealth's revenue.

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\* J.D. Candidate, Penn State Dickinson Law, Class of 2022. Thank you to all of my family and friends who supported and encouraged me as I wrote this Comment. Special thanks to Dean Emeritus, Peter G. Glenn for his friendship and mentorship throughout law school. Finally, thank you to the Dickinson Law Review members who helped improve this piece.

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## I. INTRODUCTION

After September 11, 2001 (“9/11”), Congress created the National Commission on Terrorist Attacks Upon the United States (“Commission”).<sup>1</sup> The Commission’s purpose was to investigate facts relating to the terrorist attacks and recommend how to avoid them in the future.<sup>2</sup> The investigation revealed weaknesses in state

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1. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT xv (2004), <https://bit.ly/34PPfJi> [<https://perma.cc/UNF5-Z7PH>].

2. *Id.* at xv–vi.

verifications of identity documents.<sup>3</sup> All but one of the 9/11 hijackers acquired some form of U.S. identification, which would have helped them board commercial flights.<sup>4</sup> A terrorist could easily build a “document chain” with a counterfeit document and obtain valid U.S. identification to travel.<sup>5</sup> As a result, the Commission recommended that the federal government set standards for the issuance of driver’s licenses to help law enforcement verify an individual’s identity.<sup>6</sup>

Soon after the Commission’s report, Congress passed the REAL ID Act of 2005<sup>7</sup> (“Act”). The Act prohibited federal agencies from accepting state driver’s licenses for official federal purposes where states did not set minimum issuance and verification standards.<sup>8</sup> Under these standards, states must require proof of an applicant’s lawful status and a Social Security number (“SSN”) and verify the documentation provided.<sup>9</sup> However, states could still issue non-compliant licenses without proof of lawful status or a SSN and remain compliant with the Act if the non-compliant licenses had a distinct design.<sup>10</sup>

The Act was not the first law to require proof of lawful status and a SSN in state licensing schemes. In 1993, California amended its vehicle code to include similar requirements.<sup>11</sup> The bill prohibited the California Department of Motor Vehicles (“DMV”) from issuing licenses to individuals who could not establish their U.S. citizenship or residency.<sup>12</sup> The effect of this bill, and similar bills in other states, was to bar undocumented immigrants from obtaining driver’s licenses and lawfully operating motor vehicles. Since then, 16 states and the District of Columbia passed legislation creating non-compliant licenses for residents who cannot prove their lawful status.<sup>13</sup> Most recently, Virginia created a driving privilege card for applicants who could not prove lawful status.<sup>14</sup>

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3. H.R. Rep. No. 109-72, at 179 (2005) (Conf. Rep.).

4. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., *supra* note 1, at 390.

5. H.R. Rep. No. 109-72, at 180 (2005) (Conf. Rep.).

6. NAT’L COMM’N TERRORIST ATTACKS UPON THE U.S., *supra* note 1, at 390.

7. 49 U.S.C. § 30301 note (Improved Security for Driver’s Licenses and Personal Identification Cards).

8. *Id.* § 202(a)(1).

9. *Id.* § 202(c)(1)(C), (2)(B).

10. *Id.* § 202(d)(11)(A)–(B).

11. PEW CHARITABLE TRUSTS, *DECIDING WHO DRIVES: STATE CHOICES SURROUNDING UNAUTHORIZED IMMIGRANTS AND DRIVER’S LICENSES* 4 (2015), <https://bit.ly/3cQSTFg> [<https://perma.cc/SRC8-2PVE>].

12. See 1993 Cal. Stat. 4450.

13. *States Offering Driver’s Licenses to Immigrants*, *infra* note 60.

14. *Id.*

Pennsylvania is not among these states, but recently introduced legislation would change that. House Bill 279<sup>15</sup> is a proposal to remove lawful status requirements and allow applicants to provide an alternative to a SSN when applying for a driver's license.<sup>16</sup>

Policymakers who advocate for these changes in their licensing statutes should consider three critical areas: eligibility requirements, issuance standards, and outreach.<sup>17</sup> The program's success will depend on what documentation is needed to apply, the level of difficulty of the application process, and whether the community trusts that their information will be protected.

This Comment advocates for Pennsylvania to extend its licensing program to undocumented immigrants. It begins by discussing the REAL ID Act of 2005. It then analyzes the licensing schemes of Maryland, California, and New York, comparing their document requirements and procedures, data privacy protections, and benefits of licensing undocumented immigrants. The Comment ultimately recommends that Pennsylvania should provide alternatives to its lawful status and SSN requirements. In doing so, the Commonwealth should accept a variety of identity documents and restrict the disclosure of applicants' personal information. Issuing licenses to undocumented immigrants would lead to benefits in public safety, improve immigrants' quality of life, and increase the Commonwealth's revenue.

## II. BACKGROUND

### A. *The REAL ID Act of 2005*

#### 1. *Compliant and Non-Compliant License Requirements*

The REAL ID Act of 2005 prohibits federal agencies from accepting state driver's licenses that do not satisfy minimum documentation and verification requirements.<sup>18</sup> Each license must contain an individual's full legal name, date of birth, gender, identification card number, digital photograph, and principal residence.<sup>19</sup>

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15. H.B. 279, 2021 Gen. Assemb., Sess. (Pa. 2021).

16. *Id.* § 1506(a).

17. PEW CHARITABLE TRUSTS, *supra* note 11, at 1. The program's scope is another important consideration. Determining the scope requires an estimate of the eligible population, a determination of how many people will actually apply, and an analysis of the cost of the program. *Id.* at 1, 11. Information related to scope is briefly addressed in Part II.C.

18. 49 U.S.C. § 30301 note § 202(a)(1) (Improved Security for Driver's Licenses and Personal Identification Cards).

19. *Id.* § 202(b)(1)–(6)

The purpose of this standard information is to improve law enforcement's ability to verify identities.<sup>20</sup>

States must require and verify documentation before issuing a compliant driver's license.<sup>21</sup> An applicant must provide an identity document containing her photo, but a non-photo document is acceptable if it contains her full legal name and date of birth.<sup>22</sup> Additionally, an applicant must also provide her SSN or verify she is ineligible to receive one.<sup>23</sup> Lastly, an applicant must establish her lawful status with documentation that shows she falls into one of the ten categories enumerated in the Act.<sup>24</sup> The state then verifies these documents with the relevant issuing agencies.<sup>25</sup> If the state satisfies all requirements under the Act, federal agencies can accept the compliant licenses for official purposes, which includes access to federal buildings and aircrafts.<sup>26</sup>

However, the Act also permits states to issue non-compliant driver's licenses.<sup>27</sup> The non-compliant license must indicate on its face that it is not acceptable for official federal purposes and must have a unique design to alert federal officials of this limitation.<sup>28</sup> Under this provision, states can issue non-compliant licenses to undocumented immigrants to allow them to legally operate a motor vehicle.<sup>29</sup>

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20. H.R. Rep. No. 109-72, at 178 (2005) (Conf. Rep.). The date of birth requirement helps officials differentiate between people with the same name. *Id.*

21. § 30301 note § 202(c).

22. *Id.* § 202(c)(1)(A).

23. *Id.* § 202(c)(1)(C).

24. *Id.* § 202(c)(2)(B). An applicant can establish her status in the United States with documentation that she is a United States citizen or national; is a permanent or temporary resident; has conditional permanent status; has an approved asylum application; has a valid, unexpired nonimmigrant visa or visa status; has deferred action status; has an approved application for adjustment of status; or is a citizen of the Republic of Marshall Islands, the Federal States of Micronesia, or the Republic of Palau who has been admitted into the United States as a nonimmigrant under a Compact of Free Association. *Id.*

25. *Id.* § 202(c)(3)(A), (d)(5). Before 9/11, Congress opposed and blocked funding for legislation that required states to use and verify SSNs for driver's license applications. MICHAEL JOHN GARCIA ET AL., CONG. RSCH. SERV., RL32754, IMMIGRATION: ANALYSIS OF THE MAJOR PROVISIONS OF THE REAL ID ACT OF 2005 38 n.117 (2005).

26. § 30301 note § 201(3); GARCIA ET AL., *supra* note 25, at 40.

27. § 30301 note § 202(d)(11).

28. *Id.* § (d)(11)(A)–(B).

29. TODD B. TATELMAN, CONG. RSCH. SERV., RL34430, THE REAL ID ACT OF 2005: LEGAL, REGULATORY, AND IMPLEMENTATION ISSUES 30 (2008).

## 2. Preemption Under Federal Immigration Law

The issuance and regulation of driver's licenses is a traditional state police power.<sup>30</sup> The federal government lacks the authority to obstruct state licensing schemes except when those schemes interfere with spheres of federal power.<sup>31</sup> One of these spheres is federal immigration law, an area where the federal government enjoys the exclusive power to create immigration classifications.<sup>32</sup> States expanding or restricting eligibility for their driver's licenses should consider whether federal immigration law will preempt their licensing statutes. In some of these cases, courts look at the language of the REAL ID Act of 2005 to determine whether the state statute mirrors and incorporates the Act.<sup>33</sup>

There are three forms of preemption under the Supremacy Clause.<sup>34</sup> Express preemption occurs when a federal statute explicitly demonstrates Congress's intent to displace state law.<sup>35</sup> Conflict preemption occurs when it is impossible to comply with both state and federal law or when the state law is an obstacle to the objectives of the federal law.<sup>36</sup> Field preemption occurs when "a congressional legislative scheme is 'so pervasive as to make the reasonable inference that Congress left no room for the states to supplement it.'"<sup>37</sup>

State licensing statutes that impact noncitizens are not always preempted by federal law.<sup>38</sup> The key inquiry is whether the licensing statutes "mirror federal objectives and incorporate federal immigration classifications."<sup>39</sup> If the statutes do not meet this requirement, federal law will preempt them—even in an area of traditional state police power.<sup>40</sup>

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30. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); see also *United States v. Snyder*, 852 F.2d 471, 475 (9th Cir. 1988).

31. *Snyder*, 852 F.2d at 475.

32. *Ariz. Dream Act Coal. v. Brewer*, 818 F.3d 901, 914 (9th Cir. 2016).

33. See, e.g., *Cnty. Refugee and Immigr. Servs. v. Petit*, 393 F. Supp. 3d 728, 736 (S.D. Ohio 2019); *Ariz. Dream Act Coal. v. Brewer*, 818 F.3d 901, 917 (9th Cir. 2016); *United States v. Alabama*, 691 F.3d 1269, 1298 (11th Cir. 2012).

34. *United States v. Alabama*, 691 F.3d 1269, 1281 (11th Cir. 2012) (citing *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1167 (11th Cir. 2008)); U.S. CONST. art. VI, cl. 2.

35. *Alabama*, 691 F.3d at 1281.

36. *Id.*

37. *Id.*

38. *Ariz. Dream Act Coal. v. Brewer*, 818 F.3d 901, 914 (9th Cir. 2016).

39. *Id.* (citing *Plyler v. Doe*, 457 U.S. 202, 225 (1982)).

40. *Id.*

Federal law preempted a state licensing scheme in *Arizona Dream Act Coalition, v. Brewer*,<sup>41</sup> where Arizona denied driver's licenses to Deferred Action for Childhood Arrivals ("DACA") recipients who presented employment authorization documents as proof of lawful status.<sup>42</sup> At the same time, Arizona accepted these documents from applicants in other deferred action programs.<sup>43</sup> The Ninth Circuit held that federal immigration law preempted the statute because Arizona's policy created new classifications of deferred action immigrants that neither mirrored nor incorporated federal classifications.<sup>44</sup> To support its conclusion, the court noted that the REAL ID Act of 2005 undermined Arizona's definition of "lawful presence" because it listed deferred action status as a category of lawful status.<sup>45</sup>

Another example is *Community Refugee and Immigration Services v. Petit*,<sup>46</sup> where the Ohio Bureau of Motor Vehicles distinguished between refugees based on the issuance dates on their I-94 arrival and departure documents ("I-94").<sup>47</sup> To obtain an Ohio driver's license, refugees presenting I-94s with issuance dates of two years or more needed to supplement the I-94 with an approval no-

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41. *Ariz. Dream Act Coal. v. Brewer*, 818 F.3d 901 (9th Cir. 2016).

42. *Id.* at 907.

43. *Id.*; see also 18 *Ariz. Admin. Reg.* 2237 (Sept. 7, 2012) (directing state agencies to enact policies that prevent DACA recipients from obtaining driver's licenses and other public benefits and stating that employment authorization documents do not confer upon them any lawful status).

44. *Ariz. Dream Act Coal.*, 818 F.3d at 915 ("And by arranging federal classifications in the way it prefers, Arizona impermissibly assumes the federal prerogative of creating immigration classifications according to its own design."). Plaintiffs also challenged Arizona's licensing policy under the Equal Protection Clause, alleging that the policy treated similarly situated persons differently and had no rational basis. *Id.* at 907. The court found that the Equal Protection claim may have been successful but avoided the issue by deciding on preemption grounds. *Id.* at 920.

45. *Id.* at 917; see 49 U.S.C. § 30301 note § 202(c)(2)(B)(viii) (Improved Security for Driver's Licenses and Personal Identification Cards).

46. *Cnty. Refugee and Immigr. Servs. v. Petit*, 393 F. Supp. 3d 728 (S.D. Ohio 2019).

47. *Id.* at 731–32. The Department of Homeland Security ("DHS") issues I-94 documents to "aliens" who are either admitted to the U.S., adjusting status while in the U.S., or extending their stay. *Form I-94, Arrival/Departure Record, Information Completing USCIS Forms*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Nov. 18, 2020), <https://bit.ly/3c5iN8k> [<https://perma.cc/YT7Y-44VP>]. A Customs and Border Protection officer attaches the I-94 to the nonimmigrant visitor's passport upon entry to the U.S. *Id.* The visitor must leave the U.S. on or before the departure date on the I-94. *Id.* In contrast, refugees receive I-94 documents that do not expire. *Refugees and Asylees*, U.S. CITIZENSHIP & IMMIGR. SERVS. (July 13, 2020), <https://bit.ly/3qnJ2Mm> [<https://perma.cc/77D5-CW7C>]. The unexpired refugee admission stamp is an acceptable receipt for establishing employment authorization and identity for 90 days. *Id.*

tice for an adjustment of status.<sup>48</sup> At the same time, Ohio accepted other I-94 documents with issuance dates of less than two years without requiring additional documents.<sup>49</sup> The plaintiffs argued that Ohio created its own definition of “lawful status” unrelated to federal law by treating refugees differently based on the issuance dates on their I-94 documents.<sup>50</sup> The court concluded that Ohio’s policy created a “subclassification of immigration status.”<sup>51</sup> Unlike Ohio’s policy, federal law did not strip refugees of their lawful status for failing to apply for or receive approval of an adjustment of status.<sup>52</sup> As a result, the court found that Ohio’s licensing statute was preempted by federal immigration law.<sup>53</sup>

In contrast, federal law did not preempt a state law consistent with the purpose and requirements of the REAL ID Act of 2005.<sup>54</sup> In *United States v. Alabama*,<sup>55</sup> Alabama passed an act that made it a felony for undocumented immigrants to apply for a driver’s license.<sup>56</sup> The United States argued the act impermissibly sought to regulate immigration law.<sup>57</sup> The court, however, held that federal immigration law did not preempt the state law because Congress required states to verify lawful status for REAL-ID licenses.<sup>58</sup> As a result, Alabama could make it a crime for an undocumented immigrant to apply for a license.<sup>59</sup>

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48. *Cnty. Refugee and Immigr. Servs.*, 393 F. Supp. 3d at 731. A refugee must apply for a green card after being in the United States for one year by filing Form I-485, which is an application to register permanent residence or adjust status. *Become a Lawful Permanent Resident (Green Card Holder) Through Refugee Status*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 16, 2020), <https://bit.ly/39EoEkX> [<https://perma.cc/VL69-DKB8>]. Form I-797 is a notice indicating that USCIS has received or approved the application. *Form I-797: Types and Functions*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 12, 2021), <https://bit.ly/3pFrJXf> [<https://perma.cc/WK3R-5KC6>].

49. *Cnty. Refugee and Immigr. Servs.*, 393 F. Supp. 3d at 731–32.

50. *Id.* at 734.

51. *Id.* at 734, 737.

52. *Id.* at 734, 736 (“Congress made no distinction in this category between refugees admitted before a certain period of time and refugees admitted more recently.”). Additionally, the REAL ID Act includes refugees in the categories of people who have lawful status. *See* 49 U.S.C. § 30301 note § 202(c)(2)(B)(iv) (Improved Security for Driver’s Licenses and Personal Identification Cards).

53. *See Cnty. Refugee and Immigr. Servs.*, 393 F. Supp. 3d at 729.

54. *United States v. Alabama*, 691 F.3d 1269, 1298 (11th Cir. 2012).

55. *United States v. Alabama*, 691 F.3d 1269 (11th Cir. 2012).

56. *Id.* at 1278–79. The purpose of the act was to discourage undocumented immigrants’ entry into the state and maximize cooperation with federal authorities. *Id.* at 1276.

57. *Id.* at 1279.

58. *Id.* at 1298.

59. *Id.* at 1299. The court also noted that the provision may conflict with the REAL ID Act. *Id.* at 1298. “[A]lien not lawfully present in the United States” may

## B. *Non-Compliant Driver's Licenses*

Currently, 16 states and the District of Columbia issue non-compliant driver's licenses to residents regardless of their immigration status.<sup>60</sup> There are three main components to these licensing statutes: (1) alternatives to SSNs and lawful status, (2) identity documents and issuance standards, and (3) data privacy and discrimination.<sup>61</sup> The success of expanding licensing programs to undocumented immigrants will depend on their access to the identity documents required, the difficulty of the application process, and whether they trust that their personal information will be protected.<sup>62</sup>

### 1. *Alternatives to a SSN and Proving Lawful Status*

States require a SSN and proof of lawful status for REAL-ID compliant licenses but have alternative requirements for their non-compliant licenses.<sup>63</sup> In 2013, Maryland amended its vehicle code to allow its Motor Vehicle Administration (“MVA”) to issue licenses to applicants who could not prove lawful status.<sup>64</sup> An applicant must certify that she does not have a SSN and provide an Individual Tax Identification Number (“ITIN”) as an alternative.<sup>65</sup> She must also provide evidence that she filed a Maryland income tax return for the past two years or that another claimed her as a dependent during that time.<sup>66</sup> The tax filings are verified by scheduling an ap-

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be interpreted against asylum applicants who are eligible for licenses under the REAL ID Act. *Id.* However, the court found that Section 30 could be interpreted to avoid this problem. *Id.* For challenges to licensing statutes on grounds other than preemption, see generally *Sanchez v. Iowa*, 692 N.W.2d 812 (Iowa 2005); *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523 (6th Cir. 2007); *Doe v. Ga. Dep't of Pub. Safety*, 147 F. Supp. 2d 1369 (N.D. Ga. 2001).

60. See generally, *States Offering Driver's Licenses to Immigrants*, NAT'L CONF. OF STATE LEGISLATURES (Aug. 9, 2021), <https://bit.ly/3cc1Knm> [<https://perma.cc/FV67-58N3>] (providing a chart of states that issue licenses to undocumented immigrants). These states are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, New Jersey, New Mexico, New York, Nevada, Oregon, Utah, Vermont, Virginia, and Washington. *Id.*

61. See PEW CHARITABLE TRUSTS, *supra* note 11, at 1.

62. See *id.* at 3–4.

63. See MD. CODE ANN., TRANSP. § 16-122 (West 2021); N.Y. VEH. & TRAF. LAW § 502(1) (McKinney 2021).

64. See 2013 Md. Legis. Serv. 2999 (West).

65. MD. CODE ANN., TRANSP. § 16-122 (a)(1)(ii)(2) (West 2021); *Obtain MVA Tax Certifications*, COMPTROLLER OF MD., <https://bit.ly/2JC2GEk> [<https://perma.cc/97CT-VRBC>] (last visited Aug. 26, 2021).

66. MD. CODE ANN., TRANSP. § 16-122 (a)(1)(ii)(3)(A)–(B) (West 2021).

pointment with the Comptroller's office to obtain a tax certification letter.<sup>67</sup>

Using ITINs as an alternative may limit the eligible pool of applicants or make their application process more burdensome.<sup>68</sup> Applicants must submit Form W-7 and mail their original documents to the Internal Revenue Service ("IRS") to obtain an ITIN.<sup>69</sup> Original documents can include an applicant's passport, visa, and birth certificate.<sup>70</sup> The National Immigration Law Center ("NILC") argues these mailing requirements prevent applicants from accessing important identity documents and discourage applicants from obtaining ITINs.<sup>71</sup> An applicant can hire an IRS-authorized Certifying Acceptance Agent or make an appointment with an IRS Taxpayer Assistance Center to avoid mailing her original documents.<sup>72</sup> She can also avoid mailing original documents by obtaining certified copies from the relevant agency.<sup>73</sup> Regardless of these alternatives, some people may not earn enough income to be required to file tax returns.<sup>74</sup>

California and New York have simplified processes for their alternatives to SSN and lawful status requirements. A California applicant must simply indicate in her application that she has never

67. *Obtain MVA Tax Certifications*, COMPTROLLER OF MD., <https://bit.ly/2JC2GEk> [<https://perma.cc/97CT-VRBC>] (last visited Mar. 6, 2021). Maryland residents must also provide identity and residency documents, but this Comment will focus only on permissible identity documents. See *Online Document Guide*, MD. DEP'T OF TRANSP., <https://bit.ly/2HMGZRa> [<https://perma.cc/6LJA-YSRZ>] (last visited Aug. 26, 2021). To view these acceptable documents through Maryland's guide, select "New to Maryland—Driver's License Only."

68. *Requiring Driver's License Applicants to Produce an Individual Taxpayer Identification Number Prevents Otherwise-Eligible People from Obtaining a License*, NAT'L IMMIGR. L. CTR. 1 (Nov. 2013), <https://bit.ly/3isDAUn> [<https://perma.cc/HR2P-FPSV>].

69. *How Do I Apply For an ITIN?*, INTERNAL REVENUE SERV., <https://bit.ly/2W3Zurl> [<https://perma.cc/7PCQ-SPV9>] (last visited Aug. 26, 2021). For instructions on Form W-7, see *Instructions for Form W-7*, INTERNAL REVENUE SERV. (Sept. 2020), <https://bit.ly/3lb5oyl> [<https://perma.cc/K55D-R9BE>].

70. *Id.*

71. *Requiring Driver's License Applicants to Produce an Individual Taxpayer Identification Number Prevents Otherwise-Eligible People from Obtaining a License*, NAT'L IMMIGR. L. CTR. (Nov. 2013), <https://bit.ly/3isDAUn> [<https://perma.cc/HR2P-FPSV>].

72. *How Do I Apply For an ITIN?*, INTERNAL REVENUE SERV., <https://bit.ly/2W3Zurl> [<https://perma.cc/7PCQ-SPV9>] (last visited Aug. 26, 2021).

73. *Id.*

74. *Id.* For a table detailing who is required to file a federal income tax return, see INTERNAL REVENUE SERV., DEP'T OF THE TREASURY, DEPENDENTS, STANDARD DEDUCTION, AND FILING INFORMATION 2 (2021), <https://bit.ly/2OacrMH> [<https://perma.cc/6XXL-VS8H>].

received a SSN and is ineligible for one.<sup>75</sup> The Green Light Law<sup>76</sup> amended New York's vehicle code in 2019 to provide a similar exception.<sup>77</sup> An applicant can obtain a non-compliant license by signing an affidavit that states she has not received a SSN.<sup>78</sup> An applicant is not required to prove lawful status, and the New York DMV may not ask about her immigration status when issuing the license.<sup>79</sup>

New York's Green Light Law recently faced legal challenges from clerks who did not want to implement the law.<sup>80</sup> In *Kearns v. Cuomo*,<sup>81</sup> a county clerk alleged federal immigration law preempted the Green Light Law because it would require him to harbor undocumented immigrants.<sup>82</sup> The Western District of New York found that the clerk lacked standing in his official and individual capacity and dismissed his claims.<sup>83</sup> Among other reasoning, the court noted that several states do not require proof of lawful status or SSNs and that state officials issuing these licenses have not been charged with violating federal law.<sup>84</sup> In a similar case, the Northern District of New York found that a county clerk had standing to challenge the Green Light Law under the oath-of-office test.<sup>85</sup> The court, however, ultimately found that the county clerk lacked the

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75. CAL. VEH. CODE § 12801(c)(1) (West 2021).

76. 2019 N.Y. Sess. Laws 214 (McKinney).

77. See 2019 N.Y. Sess. Laws 214 (McKinney).

78. See N.Y. VEH. & TRAF. LAW § 502(1) (McKinney 2021).

79. *Id.* § 502(8)(b), (e)(i).

80. See generally *Kearns v. Cuomo*, 415 F. Supp. 3d 319 (W.D.N.Y. 2019), *aff'd*, 981 F.3d 200 (2d Cir. 2020); *Merola v. Cuomo*, 427 F. Supp. 3d 286 (N.D.N.Y. 2019), *appeal dismissed*, No. 1:19-cv-899, 2020 WL 409789 (Jan. 24, 2020).

81. *Kearns v. Cuomo*, 415 F. Supp. 3d 319 (W.D.N.Y. 2019), *aff'd*, 981 F.3d 200 (2d Cir. 2020).

82. *Id.* at 323, 329. Plaintiff also argued there was a risk he would be fired if he refused to comply with the law. *Id.* at 334.

83. *Id.* at 326.

84. *Id.* at 332–33. These states submitted an Amici Curiae Brief in support of the Green Light Law. See generally Amici Curiae Brief of the States of Conn., Cal., Haw., Ill., Md., Nev., Wash., and D.C. in support of Defendant's Motion to Dismiss, *Kearns v. Cuomo*, 415 F. Supp. 3d 319 (W.D.N.Y. 2019) (1:19-CV-00902-EAW) (arguing that the issuance of driving credentials is a core police power, that the REAL ID Act allows states to set their own credentials for non-compliant licenses, and that there is a history of states declining to use immigration status as a criterion for issuing licenses).

85. *Merola*, 427 F. Supp. 3d at 291. The oath-of-office test examines whether a public official has taken an oath to support the United States Constitution and believes that a state law is unconstitutional. *Bd. of Educ. of Cent. Sch. No. 1 v. Allen*, 392 U.S. 236, 241 n.5 (1968). If the official must choose between violating their oath and refusing to comply with the state law which would likely bring their expulsion from office, they have a personal stake in the outcome. *Id.*

capacity to sue as an officer of the municipality and dismissed the case.<sup>86</sup>

## 2. *Identity Documents and Issuance Procedures*

Undocumented immigrants do not qualify for the same identity documents as United States citizens or lawful permanent residents.<sup>87</sup> Given the limited access, identity documents required for non-compliant licenses should be expansive, and translation requirements should not impede eligible drivers from obtaining a license.<sup>88</sup> Maryland, California, and New York vary in the expansiveness of their identity documents and in the difficulty of their application process.

Maryland requires applicants to provide an unexpired foreign passport or a consular identification card from Guatemala, Mexico, or Ecuador as proof of identity.<sup>89</sup> If an applicant lacks both, she must present two documents, one of which must contain a photo that is not more than eight years old.<sup>90</sup> Acceptable documents include a foreign birth certificate, a national identification or voter card, a state license or identification card, a foreign driver's license, a U.S. military or military dependent identification card, an employment authorization card, or a certified school record not more than 12 months old.<sup>91</sup>

California lists similar documents but requires an additional secondary review, which complicates the application process for some individuals. Under California regulations, an applicant must present either a foreign document approved by its DMV, a foreign

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86. *Merola*, 427 F. Supp. 3d at 293 (finding that the Supremacy Clause did not fall under the constitutional proscription exception for municipalities). The court also rejected plaintiff's argument that the licensing statute would require him to violate the state constitution's proscription on voting by non-citizens. *Id.* The licensing statute would not require this conduct because non-citizens would have to affirmatively lie about their eligibility to vote and county boards of election had the responsibility to verify identities. *Id.*

87. PEW CHARITABLE TRUSTS, *supra* note 11, at 16.

88. For a list of sample identity documents, see *Sample List: Documents to Establish Identity/Age & Residence*, NAT'L IMMIGR. L. CTR. 1, 1–3 (Oct. 2019), <https://bit.ly/3laseWW> [<https://perma.cc/KE8D-A97Q>]. See also *Recommendations Regarding Identity Documents and Verification Procedures for Driver's License and ID Card Applicants*, NAT'L IMMIGR. L. CTR. 1, 1–2 (Oct. 2019), <https://bit.ly/3iwPRa9> [<https://perma.cc/CY4P-YKPB>].

89. Information on acceptable identification can be accessed by selecting “New to Maryland—Driver's License Only” and clicking through the document guide. See *Online Document Guide*, MD. DEP'T OF TRANSP., <https://bit.ly/2HMG-ZRa> [<https://perma.cc/6LJA-YSRZ>] (last visited Aug. 26, 2021).

90. *Id.*

91. *Id.*

passport approved by its DMV, or a California driver's license or identification card issued after October 1, 2000.<sup>92</sup> Alternatively, the applicant may present two foreign documents that are approved by the DMV and California regulations.<sup>93</sup> If an applicant cannot satisfy either of these provisions, she undergoes a secondary review where she must interview with the department's investigative division and submit as many of the listed documents as possible.<sup>94</sup>

New York's vehicle code lists a foreign passport, consular identification card, and driver's license with the applicant's photo as acceptable proof of identity.<sup>95</sup> The New York DMV expands this list to include a permanent resident card, employment authorization card, border crossing card, foreign marriage or divorce decrees, foreign birth certificates, and a U.S. municipal ID card.<sup>96</sup> Applicants have discretion in the documents they bring, but the documents must collectively reach New York's six-point requirement.<sup>97</sup>

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92. CAL. CODE REGS. tit. 13 § 16.04(a)(1)–(3) (2021).

93. *Id.* § 16.04(b). For California's approval criteria for foreign documents, see *id.* § 16.08.

94. *Id.* § 16.06(a). NILC encourages states to work with foreign consulates to verify identity documents and describes California's process as flexible. *Recommendations Regarding Identity Documents and Verification Procedures for Driver's License Driver's License and ID Card Applicants*, NAT'L IMMIGR. L. CTR. 1, 1–2 (Oct. 2019), <https://bit.ly/3iwPRa9> [<https://perma.cc/4GHU-HSAF>]. States may treat applicants differently when allowing documents from specific countries. *Id.* at 2. Individuals have studied California's licensing program and criticized it for favoring Spanish-speaking, Latino immigrants, particularly from Mexico. See Laura E. Enriquez et al., *Driver's Licenses for All? Racialized Illegality and the Implementation of Progress Immigration Policy in California*, 41 UNIV. DENV. L. & POL'Y 34, 43 (2019), <https://bit.ly/3muuCZF> [<https://perma.cc/DV67-PWN7>]. The authors argued that non-profit and community organizations, foreign consulates, and government offices are key actors in implementing subfederal laws. *Id.* at 35. The authors found that Latino organizations were best prepared to inform and serve Latino immigrants in their application process while smaller organizations did not always have the capacity to do so. See *id.* at 44. Additionally, the authors noted that non-Latino immigrants often underwent secondary review while Mexican immigrants had a simpler process due to California's agreement to verify documents with the Mexican consulate. See *id.* at 47 (“Mexican nationals were then, and still are, the only group that can use a single identification document for their A.B. 60 application.”).

95. N.Y. VEH. & TRAF. LAW § 502(1) (McKinney 2021).

96. *Driver's Licenses and the Green Light Law*, N.Y. DEP'T OF MOTOR VEHICLES, <https://on.ny.gov/3lbRnjT> [<https://perma.cc/778N-JLRQ>] (last visited Aug. 26, 2021).

97. See *Document Guide for Standard License or Permit*, N.Y. DEP'T OF MOTOR VEHICLES, <https://bit.ly/33rSbLz> [<https://perma.cc/SG2Z-QROC>] (last visited Aug. 26, 2021). Documents range in value from one to four points with foreign passports, consular cards, and driver's licenses each being worth four points. *Id.* An applicant should bring as many documents as possible to verify her name and must also bring at least one proof of date of birth and one proof of residency. *Id.* To access this information, click “[b]egin” on New York's document guide. *Id.*

### 3. *Data Privacy and Discrimination*

Undocumented immigrants face risks in obtaining non-compliant licenses. One risk is possible discrimination based on the distinct license design required under the Act. Another risk concerns the ability of federal and law enforcement agencies to access their personal information through their motor vehicle records.<sup>98</sup>

#### a. *Distinct Designs and Discrimination*

A non-compliant license must indicate on its face that it is not acceptable for official federal purposes, and it must have a distinct design so that federal officials can distinguish it from compliant licenses.<sup>99</sup> Acceptable phrases include, “Not for REAL ID Purposes,” “Not Valid for Federal Identification,” “Not Valid for Federal Official Purposes,” “Not Acceptable for Federal Purposes,” “Not for Federal Identification,” and “Federal Limits Apply.”<sup>100</sup> NILC argues that marked licenses invite discrimination because the unique markings can lead landlords, banks, or businesses to treat individuals differently.<sup>101</sup> NILC also claims distinct designs signal to law enforcement that individuals cannot establish lawful presence in the United States, potentially leading to arrests and deportation.<sup>102</sup>

The DHS accepts stars in the top right corner of a license as a marking that distinguishes compliant and non-compliant licenses.<sup>103</sup> California’s marking is a golden bear with a star.<sup>104</sup> Its original design distinguished non-compliant licenses by containing the letters “DP” for “Driving Privilege” and “DL” for “Driver’s License,” but DHS rejected the design.<sup>105</sup> The non-compliant license now states, “FEDERAL LIMITS APPLY” on its face and “This card is not

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98. PEW CHARITABLE TRUSTS, *supra* note 11, at 27.

99. 49 U.S.C. § 30301 note § 202(d)(11)(A)–(B) (Improved Security for Driver’s Licenses and Personal Identification Cards).

100. Deadline for No Longer Accepting Non-Compliant Driver’s Licenses and Identification Cards for Official Purposes, 84 Fed. Reg. 55017, 55017–18 (Oct. 15, 2019).

101. *Marked Driver’s Licenses Are Wrong for This State*, NAT’L IMMIGR. L. CTR. (Aug. 2013), <https://bit.ly/34kVUK6> [<https://perma.cc/YBU3-7H7P>].

102. *Id.*; see also *Restoring Driving Privileges to Immigrants: Uniform Driver’s Licenses Maximize Benefits to Law Enforcement and Public Safety*, AM. CIV. LIBERTIES UNION, <https://bit.ly/3d6IrcZ> [<https://perma.cc/MW9K-GED9>] (last visited Aug. 26, 2021).

103. See *REAL ID Frequently Asked Questions: For the Public*, DHS, <https://bit.ly/2JwZg5V> [<https://perma.cc/5H3L-F9Q2>] (last visited Aug. 26, 2021).

104. See *id.*

105. Ian Lovett, *Federal Officials Reject Design of California Driver’s Licenses for Illegal Immigrants*, N.Y. TIMES (May 6, 2014), <https://nyti.ms/3uURKF8> [<https://perma.cc/9NE4-26AQ>].

acceptable for official federal purposes. This license is issued only as a license to drive a motor vehicle. It does not establish eligibility for employment, voter registration, or public benefits,” on its back.<sup>106</sup> In contrast, New York’s license contains “NOT FOR FEDERAL PURPOSES” on its face.<sup>107</sup>

California recognizes the risk of discrimination and makes it a violation to discriminate against a person who holds a non-compliant license.<sup>108</sup> It is also a violation of the Unruh Civil Rights Act<sup>109</sup> for businesses to discriminate against non-compliant license holders and a violation of the California Fair Employment and Housing Act<sup>110</sup> for employers to do the same.<sup>111</sup> The California Research Bureau must compile any violations under this section and submit them to the Legislature and Governor.<sup>112</sup>

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106. Cal. Off. of the Att’y Gen., *Consumer Alert Regarding the Use of “Federal Limits Apply” Driver Licenses and Identification Cards to Purchase Firearms*, CAL. DOJ, <https://bit.ly/3qkpJok> [<https://perma.cc/XNF4-C62K>] (last visited Aug. 26, 2021).

107. *Driver’s Licenses and the Green Light Law*, N.Y. DEP’T OF MOTOR VEHICLES, <https://on.ny.gov/3lbRnjT> [<https://perma.cc/778N-JLRQ>] (last visited Mar. 6, 2021).

108. CAL. VEH. CODE § 12801.9(h) (West 2021).

109. CAL. CIV. CODE § 51. (West 2021).

110. CAL. GOV’T CODE § 12940 (West 2021).

111. CAL. VEHICLE CODE § 12801.9(h)(1)–(2) (West 2021). State or local government officials also violate Section 11135 of the Government Code if they discriminate against non-compliant license holders. *Id.* § 12801.9(h)(3). California provides residents with additional protection through the California Consumer Privacy Act. *See* Cal. Off. of the Att’y Gen., *California Consumer Privacy Act (CCPA)*, CAL. DOJ, <https://bit.ly/2L94wxK> [<https://perma.cc/AY7P-VKFE>] (last visited Aug. 26, 2021). The act gives consumers the right to know the information businesses collect, the right to delete that information, the right to opt-out of the sale of that information, and the right to non-discrimination for exercising these rights. *Id.*

112. CAL. VEH. CODE § 12801.9(m) (West 2021). For an example of a discrimination report, see CAL. RSCH. BUREAU, *AB 60 DRIVER’S LICENSES: A MANDATED REVIEW OF INSTANCES OF DISCRIMINATION* (2018), <https://bit.ly/37rtNuk> [<https://perma.cc/JH4K-GXNV>]. In 2018, the California Research Bureau reported that no license holders have filed discrimination complaints due to their AB 60 licenses. *Id.* at 6. However, agencies have received complaints on the basis of national origin and immigration. *Id.* The California Research Bureau mentions two factors that may influence reporting: the tendency for undocumented immigrants to underreport crimes and the overlapping of AB 60 discrimination with immigration and racial discrimination. *Id.* at 6–7. California and New York codes both state that a non-compliant license shall not be used as evidence of immigration status or as a basis for investigating, arresting, or detaining an individual. N.Y. VEH. & TRAF. LAW § 502(8)(e)(i) (McKinney 2021); CAL. VEH. CODE § 12801(c)(3) (West 2021).

b. Disclosures to Law Enforcement and Federal Agencies

Congress passed the Driver's Privacy Protection Act<sup>113</sup> in 1994.<sup>114</sup> The act prohibits state motor vehicle departments and their employees from knowingly disclosing personal information connected to an individual's motor vehicle record.<sup>115</sup>

However, some exceptions are available.<sup>116</sup> Motor vehicle departments may disclose personal information for driver safety, theft, recalls, and other motor vehicle matters.<sup>117</sup> These departments may also disclose the information to government agencies for use in carrying out their functions, to legitimate businesses and employers who need to verify an individual's information, and to insurance companies.<sup>118</sup> Highly restricted information, including an individual's SSN, may be disclosed for limited purposes.<sup>119</sup> Department officials may disclose highly restricted information to government agencies carrying out their official functions; to courts or agencies pursuant to an investigation, order, or litigation; to insurance companies; and to employers.<sup>120</sup> A license holder can sue a DMV employee who knowingly discloses her information in violation of the Driver's Privacy Protection Act.<sup>121</sup>

In Maryland, U.S. Immigration and Customs Enforcement ("ICE") officials can run facial-recognition searches in Maryland's

113. 18 U.S.C. § 2721.

114. 18 U.S.C. § 2721.

115. *Id.* § 2721(a)(1)–(2). The act prohibits the disclosure of two types of information: personal and highly restricted personal information. *Id.* Personal information identifies an individual, including an individual's photograph, SSN, driver identification number, name, address, and medical information. *Id.* § 2725(3). Highly restricted personal information is limited to an individual's photograph, medical or disability information, and SSN. *Id.* § 2725(4). The information must be connected to a motor vehicle record, which is defined as any record pertaining to a motor vehicle operator's permit, title, registration, or identification card issued by the department of motor vehicles. *Id.* § 2725(1).

116. *Id.* § 2721(b).

117. *Id.*

118. *Id.* § 2721(b)(1), (3), (6), (9). Other permissible disclosures are for use in connection to civil, criminal, or administrative proceedings; for research activities; for notice to owners of towed vehicles; for private investigations; for the operation of private toll facilities; for surveys; and for use by any requester with the individual's consent. *Id.* § 2721(b)(4), (5), (7), (8), (10)–(13).

119. 18 U.S.C. § 2721(a)(2).

120. *Id.* § 2721(b)(1), (4), (6), (9).

121. *Id.* § 2724(a). In such an action, the court may award damages, including actual damages, liquidated damages at a \$2500 minimum, punitive damages, reasonable attorney fees and litigation costs, and other equitable relief. *Id.* § 2724(b). In *Kehoe v. Fidelity Federal Bank & Trust*, the court concluded that an individual did not need to prove actual damages to receive liquidated damages under the Driver's Privacy Protection Act. 421 F.3d 1209, 1212 (11th Cir. 2005).

driver's license database without state or court approval.<sup>122</sup> Since 2018, ICE has logged nearly 100 sessions in the database, which gave ICE access to photos, names, addresses, and other personal information of licensed drivers.<sup>123</sup> State senators and community organizations have highlighted immigrants' concerns that their information is being accessed and that other undocumented immigrants may be reluctant to participate in the licensing program.<sup>124</sup>

Maryland currently requires a custodian of records at the MVA to disclose personal information when required by federal law or in connection with a federal, state, or local agency proceeding for service of process, investigation, and execution or enforcement of judgments.<sup>125</sup> The statute prohibits the recipient from using or redisclosing the information for other purposes and requires the recipient to record to whom the information is redisclosed.<sup>126</sup>

However, in response to ICE searches, Maryland legislators introduced a bill on February 3, 2020, that would have prohibited ICE officials from inspecting records without a valid warrant or subpoena, but that bill died in chamber.<sup>127</sup> The proposed legislation would have required the MVA to report the total number of requests for personal information from law enforcement agencies, including those with a valid warrant, the number and purpose of facial recognition searches, and the number of individuals whose information was provided to agencies.<sup>128</sup>

California similarly restricts the disclosure of personal information to law enforcement and immigration officials.<sup>129</sup> Any docu-

122. Drew Harwell & Erin Cox, *ICE Has Fun Facial-Recognition Searches on Millions of Maryland Drivers*, WASH. POST (Feb. 26, 2020), <https://wapo.st/3jgef24>.

123. *Id.*

124. *Id.*; See John Fritze, *Raid Spurs Fear of Driver's Licenses Among Immigrants*, BALT. SUN (Sept. 20, 2014), <https://bit.ly/2NP9uAI> [<https://perma.cc/JT27-YUWU>].

125. MD. CODE ANN., Gen. Provisions § 4-320(c), (f)(4) (West 2021). For a list of circumstances where disclosure is either required or permissible only with the person's consent, see *id.*

126. *Id.* § 4-320(g)(1)–(2).

127. S.B. 649, 2020 Sess. § 4-320(j)(1) (Md. 2020), <https://bit.ly/3jwgNIs> [<https://perma.cc/3EQW-FLNQ>]; see also *Maryland Senate Bill 679 (Prior Session Legislation)*, LEGISCAN, <https://bit.ly/38gM2TX> [<https://perma.cc/7BZ4-RTZV>] (last visited Aug. 26, 2021).

128. § 4-320(j)(2)(I)–(IV).

129. See 2018 Cal. Legis. Serv. 5710 (West); CAL. VEH. CODE § 12801.9 (West 2021); see also NAT'L IMMIGR. L. CTR., *How California Driver's Licenses Records Are Shared with the Department of Homeland Security* 1, 3–10 (Dec. 2018), <https://bit.ly/36sxK2O> [<https://perma.cc/7F32-SABA>] (describing which systems the DHS can access and noting that DHS is not required to list the purpose of its inquiries). The center lists the number of inquiries made by DHS agencies in California's DMV and registration database. *Id.* at 5. NILC recommends that California in-

ment used to prove an applicant's identity, name, residency, or lawful status is not a public record and may not be disclosed by its DMV except in response to a subpoena, an urgent health or safety need, or a court order.<sup>130</sup> The statute prohibits state officials from notifying a law enforcement agency of an applicant's identity or the fact that she carries a non-compliant license if the disclosure is not required or would not have been made against individuals who have a compliant license.<sup>131</sup> California also prohibits the disclosure of an applicant's ineligibility for a SSN with limited exceptions, none of which include a court order or subpoena in criminal proceedings.<sup>132</sup>

New York's privacy provisions especially focus on disclosing information to immigration authorities. New York restricts the disclosure of an applicant's personal information except where it is necessary to comply with a court order, judicial warrant, or subpoena.<sup>133</sup> The Commissioner may not disclose documents that prove identity or age without a lawful order, warrant, or subpoena.<sup>134</sup> This prohibition includes information on whether the driver has a federally-compliant license, unless the disclosure is to the driver herself or required by a court order, warrant or subpoena.<sup>135</sup> Disclosure must be limited to the information specifically contained in an order.<sup>136</sup> The statute also prohibits disclosures of information to agencies that primarily enforce immigration law unless those agencies have a court order, warrant, or subpoena.<sup>137</sup> The Commissioner must notify the individual that her information has been requested by an agency and must disclose the agency's identity.<sup>138</sup> An agency receiving the information must certify that it will

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crease its transparency by notifying individuals when their information is obtained by DHS. *Id.* at 11. NILC also recommends that California limit disclosure where the purpose is noncriminal and maintain records of both requested and disclosed information. *Id.*

130. CAL. VEH. CODE § 12801.9(k) (West 2021). The license also may not be used as evidence of an individual's immigration status. *Id.*

131. *Id.* § 12801.9(h)(3). The California Research Bureau must compile and submit to the legislature and Governor a report of any violations of subsections (h) and (k). *Id.* § 12801.9(m).

132. *See id.* § 1653.5(f).

133. N.Y. VEH. & TRAF. LAW § 201(8) (McKinney 2021).

134. *Id.* § 201(9)

135. *Id.* § 201(10).

136. *Id.* § 201(11).

137. *Id.* § 201(12)(a).

138. *Id.*

not use the information for civil immigration purposes or disclose it to an agency that primarily enforces immigration law.<sup>139</sup>

### C. *Benefits of Licensing Undocumented Immigrants*

There are economic and societal benefits to providing non-compliant licenses to undocumented immigrants. These benefits include increased public safety, lower car insurance premiums, improvements in family and community relationships, and increased state revenues.

Like all other applicants, undocumented immigrants who are eligible for driver's licenses must take knowledge and road tests before obtaining a license.<sup>140</sup> California acknowledges its responsibility to make sure its drivers are properly trained, tested, and insured.<sup>141</sup> Additionally, New York City's Comptroller's Office advocated to extend licenses to undocumented immigrants because immigrants would need to pass knowledge and road tests, contributing to safer roads.<sup>142</sup>

Increased public safety includes lower rates of hit-and-run accidents. One study highlighted the short-term impacts of California's new licensing statute on traffic safety.<sup>143</sup> Researchers compared county accident reports before and after the statute took effect and

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139. *Id.* § 201(12)(b). The provision does allow disclosure if it is "pursuant to a cooperative arrangement between city, state, and federal agencies which arrangement does not enforce immigration law and which disclosure is limited to specific records or information being sought pursuant to such arrangement." *Id.* In contrast, California and Maryland statutes do not explicitly prohibit disclosure to immigration agencies or require their DMVs to notify license holders when their information is shared with agencies.

140. *Knowledge And Drive Tests Preparation, CA. DEP'T OF MOTOR VEHICLES*, <https://bit.ly/3jajceH> [<https://perma.cc/FE3E-RH8M>] (last visited Aug. 26, 2021).

141. 2013 Cal. Legis. Serv. 4306 § 1(f) (West). The state amended its licensing statute in light of research showing that 1 in 5 fatal crashes involved unlicensed drivers and that approximately 1.4 million drivers were unlicensed and uninsured. *Id.* § 1(b), (e).

142. N.Y.C. COMPTROLLER, *THE ROAD TO OPPORTUNITY: GRANTING DRIVER'S LICENSES TO ALL NEW YORKERS 4* (2017) <https://on.nyc.gov/3moy8EN> [<https://perma.cc/C6YH-VB2P>]. The Comptroller listed New Mexico and Utah as states that offered licenses to undocumented immigrants and had lower fatality and uninsured rates. *Id.* at 8. The office states that Utah's fatality rate decreased by 32 percent from 1999 to 2012 and New Mexico's fatality rate decreased by approximately 43 percent from 2003 to 2013. *Id.* Utah's uninsured rate at the time of the report was also 5.8 percent, less than half of the national average of 12.6 percent. *Id.* Similarly, New Mexico's uninsured rate fell from 33 percent to approximately 9 percent between 2002 and 2011. *Id.*

143. Hans Lueders et al., *Providing Driver's Licenses to Unauthorized Immigrants in California Improves Traffic Safety*, 114 PNAS 4111, 4112 (2017) <https://bit.ly/2KPvbdG> [<https://perma.cc/F9K4-2GHQ>].

estimated that reduced hit-and-run accidents had positive externalities, including lower insurance premiums.<sup>144</sup> Results suggested that the statute had a significant effect on reducing hit-and-run accidents between 7 and 10 percent, or roughly 4,000 fewer accidents.<sup>145</sup> Researchers noted these findings may relate to California's practice of prohibiting law enforcement from disclosing non-compliant license holders to immigration enforcement agencies, therefore reducing fears of deportation and incentives to flee the scene of an accident.<sup>146</sup>

Lower insurance premiums and accident costs are other benefits of issuing non-compliant licenses. California researchers found that the decrease in hit-and-run accidents improved insurance deficiencies by roughly \$17 million a year because drivers and insurance companies were no longer absorbing the costs of fleeing drivers.<sup>147</sup> Researchers also estimated that not-at-fault drivers avoided paying \$3.5 million in car damages because there were 4,000 fewer accidents.<sup>148</sup>

Similarly, New York City's Comptroller's Office found that despite New York's low uninsured rate of 5.3 percent, drivers continued to pay high premiums to cover the costs of accidents involving uninsured drivers.<sup>149</sup> The Comptroller's Office noted that drivers paid approximately \$17 more per year for car insurance in states that bar undocumented immigrants from obtaining licenses than drivers in states that issue licenses to undocumented immigrants.<sup>150</sup> The Comptroller's Office ultimately concluded that given New York's large undocumented immigrant population, expanding its licensing program to include this group could produce savings for other drivers.<sup>151</sup>

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144. *Id.* at 4111. In that year, California issued 600,000 licenses to undocumented immigrants. *Id.* Researchers argued that serious injuries and fatalities are more likely when a person leaves the accident without calling for emergency assistance. *Id.* at 4111–12.

145. *Id.* at 4113.

146. *Id.* at 4115. The study also found that the TRUST Act did not have an impact on hit-and-run accidents. *Id.* at 4114. The TRUST Act prohibits California law enforcement officials from detaining individuals who are eligible for release pursuant to an immigration hold from ICE. 2013 Cal. Legis. Serv. 4651 (West). Officials may use their discretion to cooperate with federal immigration officials by detaining individuals who have been convicted of the crimes listed in the act, including violent felonies and driving under the influence of alcohol. *Id.*

147. Lueders et al., *supra* note 143, at 4115.

148. *Id.* at 4115.

149. N.Y.C. COMPTROLLER, *supra* note 142, at 10.

150. *Id.*

151. *Id.*

Licensing undocumented immigrants improves their relationships with law enforcement. New York's Comptroller's Office found that undocumented immigrants may feel hesitant to engage with police if they are a victim or witness to a crime.<sup>152</sup> By issuing them licenses, undocumented immigrants may feel more relaxed during traffic stops and more willing to participate in investigations.<sup>153</sup> NILC argues that licensing undocumented immigrants makes police work more efficient because officers can use licenses to identify people and determine whether they are threats to society.<sup>154</sup> As a result, resources originally spent on identifying a person through alternative means can be diverted to other critical functions.<sup>155</sup>

Licensing undocumented immigrants can also help increase their participation in family and society. Issuing licenses to undocumented parents would allow them to engage in their children's education and avoid using unreliable public transportation.<sup>156</sup> Additionally, access to a license can contribute to financial stability and inclusion within one's community.<sup>157</sup> For example, undocumented immigrants would have increased employment opportunities and identification that could be used to open a bank account.<sup>158</sup>

Finally, issuing licenses to undocumented immigrants can increase state revenues, but states may need to front the initial costs of implementing the program. To project the anticipated costs and revenues of expanding their licensing programs, states often create fiscal notes that accompany their proposed legislation.<sup>159</sup> California estimated that it would cost approximately \$140 to \$220 million to issue licenses to approximately 1.4 million individuals across 3

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152. *Id.* at 8.

153. *See id.* at 9.

154. *Limited-Use Licenses and Public Safety: Trained and Tested Drivers = Safer Road for Everyone*, NAT'L IMMIGR. L. CTR <https://bit.ly/3irqUNq> [<https://perma.cc/SJQ9-JA75>] (last visited Aug. 26, 2021).

155. *See id.*

156. N.Y.C. COMPTROLLER, *supra* note 142, at 9.

157. *Id.*

158. *Id.* at 9–10. SSNs are not required to open bank accounts. *Can I Get a Checking Account Without a Social Security Number?*, CONSUMER FIN. PROT. BUREAU (Mar. 15, 2017), <https://bit.ly/3qlWlww> [<https://perma.cc/EDD5-UMYU>]. Instead, applicants can provide an ITIN, and some banks will accept a passport number, alien identification card, or other government-issued ID number instead of a SSN or ITIN. *Id.*

159. PEW CHARITABLE TRUSTS, *supra* note 11, at 12. Legislative staff sometimes include a fiscal note with proposed legislation to explain the financial impact a bill will have on the state. *Understanding Fiscal Notes*, NAT'L CONF. OF STATE LEGISLATURES (July 17, 2014), <https://bit.ly/3inal7n> [<https://perma.cc/4LNP-XK67>].

years.<sup>160</sup> The estimated cost included \$20 to \$60 million on computer programming and temporary facilities for application processing and \$100 million for hiring and training.<sup>161</sup> For its privacy bill, California anticipated potential costs related to litigation, administrative delays, and loss of federal funding.<sup>162</sup>

Similarly, Maryland estimated that it would cost approximately \$8.5 million to issue licenses to undocumented immigrants from 2014 to 2017.<sup>163</sup> The costs accounted for hiring 10 permanent and 55 contractual employees, training, outreach, computer programming, and equipment.<sup>164</sup> Maryland did not anticipate additional costs outside of its existing budget to prohibit the disclosure of personal information to ICE officials.<sup>165</sup>

States can offset some costs with revenue from licensing fees. California's fiscal note anticipated revenues of approximately \$50 million in the first 3 years of implementing the program.<sup>166</sup> Maryland estimated a profit from the program with approximately ten million dollars in revenue from 2014 to 2017.<sup>167</sup>

Fiscal notes, however, anticipate potential revenue only from licensing fees, even though additional revenue may be raised through indirect means. New York City's Comptroller's Office, for example, considered additional revenue from registration and title fees, car purchases, and sales tax.<sup>168</sup> It found that licensing undocumented immigrants could result in \$9.6 million in driver's license

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160. Transp. Comm., Assemb. Floor Analysis, A.B. 60 (Cal. Sept. 12, 2013), <https://bit.ly/34qgdWF> [<https://perma.cc/D9XU-7UHQ>]; S. Appropriations Comm., Fiscal Summary, A.B. 60 (Cal. Aug. 30, 2013), <https://bit.ly/30vGz8o> [<https://perma.cc/D9XU-7UHQ>].

161. S. Appropriations Comm., Fiscal Summary, A.B. 60 (Cal. Aug. 30, 2013), <https://bit.ly/30vGz8o> [<https://perma.cc/D9XU-7UHQ>].

162. Assemb. Floor Analysis, S.B. 244 (Cal. Aug. 31, 2018), <https://bit.ly/3cXZFsA> [<https://perma.cc/BQ9K-FG4B>].

163. Fiscal and Pol'y Note, Md. Highway Safety Act of 2013, S.B. 715, Md. Gen. Assemb., 2013 Sess., (2013) <https://bit.ly/3cVgJPY> [<https://perma.cc/W3EK-UEQA>]. These estimates are based on the Pew Research Center's estimate of 275,000 undocumented immigrants living in Maryland. *Id.*

164. *Id.*

165. Fiscal and Pol'y Note, Public Information Act, S.B. 649, Md. Gen. Assemb., 2020 Sess., (2020) <https://bit.ly/36pFoL5> [<https://perma.cc/H2M5-UADY>].

166. Transp. Comm., Assemb. Floor Analysis, A.B. 60 (Cal. Apr. 19, 2013), <https://bit.ly/34qgdWF> [<https://perma.cc/D9XU-7UHQ>]; S. Appropriations Comm., Fiscal Summary, A.B. 60 (Cal. Aug. 30, 2013), <https://bit.ly/30vGz8o> [<https://perma.cc/D9XU-7UHQ>].

167. Fiscal and Pol'y Note, Md. Highway Safety Act of 2013, S.B. 715, Md. Gen. Assemb., 2013 Sess., (2013) <https://bit.ly/3cVgJPY> [<https://perma.cc/RXD5-JKE9>].

168. N.Y.C. COMPTROLLER, *supra* note 142, at 11. *See generally* THE CTR. FOR POPULAR DEMOCRACY, SAFE ROADS ACROSS THE TRI-STATE AREA: THE CASE FOR EXPANDING ACCESS TO DRIVER'S LICENSES IN N.Y. & N.J. (2019),

fees, \$4.2 million in one-time registration and title fees, \$730,000 annual revenue in registration fees, a 2.7 percent boost in car sales, and \$10.3 million in vehicle and gas sales taxes.<sup>169</sup>

### III. ANALYSIS

#### A. *Pennsylvania's Vehicle Code*

To obtain a Pennsylvania license, an applicant must provide a SSN or a waiver indicating that she is ineligible for one.<sup>170</sup> In 2002, Pennsylvania amended its vehicle code to allow noncitizens to apply for a license if they have been lawfully present in the United States and the Commonwealth for at least one year.<sup>171</sup> Licenses issued to non-citizens may indicate that the licensee is a non-citizen who has valid immigration credentials.<sup>172</sup> The license expires on the expiration date of the immigration documents provided unless the expiration date exceeds four years.<sup>173</sup> In that case, the expiration date will be one day after the non-citizen's birthday, not exceeding four years.<sup>174</sup>

Pennsylvania can issue licenses to individuals who are ineligible for SSNs and unable to prove lawful status while complying with federal law.<sup>175</sup> To do so would not be the first time in the Commonwealth's history.<sup>176</sup> In fact, state legislators in Pennsylvania's House of Representatives recently introduced a bill proposing to amend the vehicle code and extend non-compliant licenses to undocumented immigrants.<sup>177</sup>

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<https://bit.ly/30L9SnJ> [<https://perma.cc/D5MJ-R4LK>] (describing additional benefits in licensing New York's undocumented immigrant population).

169. N.Y.C. COMPTROLLER, *supra* note 142, at 11.

170. 75 PA. CONS. STAT. § 1510(a), (f) (2021).

171. 2002 Pa. Legis. Serv. 1278 § 1501(a.1) (West). For a table that lists accepted immigration documents, see *Fact Sheet: Identification and Legal Presence Requirements for Non-United States Citizens*, PA. DEP'T OF TRANSP. 1, <https://bit.ly/39u6bb7> [<https://perma.cc/7DZY-83K9>] (last visited Aug. 26, 2021).

172. *Id.* § 1510(i).

173. *Id.* § 1514(e)(1)–(2).

174. *Id.*

175. See 49 U.S.C. § 30301 note § 202(d)(11) (Improved Security for Driver's Licenses and Personal Identification Cards).

176. SOC. JUST. LAWYERING CLINIC, DRIVER'S LICENSES FOR ALL 3 (June 2015), [<https://perma.cc/UW5R-AWDK>].

177. See H.B. 279, 2021 Gen. Assemb., Sess. (Pa. 2021).

## B. Amending Pennsylvania's Vehicle Code

### 1. House Bill 279

House Bill 279 would amend Pennsylvania's SSN, lawful presence, and privacy requirements for driver's licenses.<sup>178</sup> The bill would remove the ineligibility waiver as an alternative to a SSN and allow an applicant to provide an Individual Tax Identification Number instead.<sup>179</sup> Additionally, the bill would eliminate the section requiring a non-citizen to prove lawful presence in the United States and the Commonwealth.<sup>180</sup> Lastly, the bill would add a section on privacy for non-compliant licenses.<sup>181</sup> The Pennsylvania Department of Transportation ("PennDOT") would be prohibited from disclosing an applicant's personal information, including her SSN, ITIN, and country of origin.<sup>182</sup> PennDOT would, however, be permitted to disclose such information to the applicant, for the national driver register, and pursuant to a court order, judicial warrant, or subpoena.<sup>183</sup> While House Bill 279 addresses eligibility standards, issuance standards, and data privacy, it is important to consider whether the bill satisfies the requirements of the REAL ID Act of 2005.

### 2. Complying with REAL ID

In 2017, Pennsylvania passed legislation establishing its compliance with the Act.<sup>184</sup> Pennsylvania still allows residents to apply for a non-REAL-ID license if they satisfy SSN and lawful presence requirements.<sup>185</sup> I use the term "non-REAL-ID" because, unlike a non-compliant license, the non-REAL-ID license still requires proof of a SSN and lawful status.

Pennsylvania's current SSN and lawful status requirements align with the Act's issuance standards for compliant licenses.<sup>186</sup> Pennsylvania also would not need to create a new design for a non-

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178. *Id.*

179. *See id.* §§ 1506(a), 1510(f).

180. *See id.* § 1506.

181. *See id.* § 1510(k).

182. *Id.* § 1510(k)(1).

183. *Id.* § 1510(k)(1)(i)–(iii).

184. 2017 Pa. Legis. Serv. 873 § 3 (West).

185. *Id.* § 4. The legislation states that "eligible" applicants have the option to apply for non-REAL-ID licenses. *Id.* § 3. The Commonwealth claims it does not compel applicants to apply for REAL-ID licenses. *Id.* § 4. Still, non-citizens must satisfy lawful presence and SSN requirements, two issuance standards found in the REAL ID Act. 75 PA. CONS. STAT. §§ 1506(a.1), 1510(a) (2020).

186. 49 U.S.C. § 30301 note § 202(c)(1)(C), (2)(B) (Improved Security for Driver's Licenses and Personal Identification Cards).

compliant license; it can use the distinct design from its non-REAL-ID license to satisfy the Act.<sup>187</sup> However, House Bill 279's complete removal of the lawful status requirement from the vehicle code would threaten compliance under the Act for its REAL-ID licenses.

Pennsylvania may issue licenses to undocumented immigrants as long as the licenses are distinct in their design and language.<sup>188</sup> Pennsylvania already provides two distinct designs to separate its REAL-ID and non-REAL-ID licenses.<sup>189</sup> The REAL-ID license contains a gold star in the right corner.<sup>190</sup> In contrast, the non-REAL-ID license has the phrase "Not For REAL ID Purposes" in the top right corner.<sup>191</sup> These designs comply with the Act; the golden star, its placement, and the alternative language on the non-REAL-ID license match DHS's guidelines.<sup>192</sup> Extending these licenses to undocumented immigrants would not require an additional design.<sup>193</sup>

The Act would not preempt Pennsylvania from offering non-compliant licenses without proof of lawful status. Federal law preempted state licensing statutes in cases where states redefined lawful status, contradicting the categories of lawful status provided by the Act.<sup>194</sup> However, by issuing licenses to undocumented immigrants, Pennsylvania would not be redefining lawful status. Instead, Pennsylvania would be operating outside of the lawful status requirement for its non-compliant license, an option available under the Act.<sup>195</sup>

House Bill 279 would completely eliminate lawful status requirements, a proposal that threatens compliance under the Act for its REAL-ID licenses.<sup>196</sup> In contrast, California, Maryland, and New York continue to require lawful status but offer alternatives

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187. *See id.* § 202(d)(11).

188. *Id.*

189. *See* Larissa Newton, *Real Ids Now Available In Pennsylvania*, PA. DEP'T OF TRANSP. (Mar. 6, 2019, 12:00 AM), <https://bit.ly/3atJylZ> [<https://perma.cc/TZP6-W5EH>].

190. *See id.*

191. *See id.*

192. *See* DHS, DEPARTMENT OF HOMELAND SECURITY REAL ID SECURITY PLAN GUIDANCE HANDBOOK 3–16 (Feb. 2009).

193. *See* 49 U.S.C. § 30301 note §§ 201–202 (Improved Security for Driver's Licenses and Personal Identification Cards).

194. *See* *Ariz. Dream Act Coal. v. Brewer*, 818 F.3d at 901, 915 (9th Cir. 2016); *Cnty. Refugee and Immigr. Serv. v. Petit*, 393 F. Supp. 3d 728, 734 (S.D. Ohio 2019).

195. *See* 49 U.S.C. § 30301 note § 202(d)(11) (Improved Security for Driver's Licenses and Personal Identification Cards).

196. H.B. 279, 2021 Gen. Assemb., Sess. § 1506 (Pa. 2021).

for non-compliant licenses. California's vehicle code provides that except for its non-compliant license, the department shall require the person to prove lawful status.<sup>197</sup> Maryland's code requires an applicant to provide satisfactory documentary evidence of her lawful status.<sup>198</sup> In the alternative, an applicant can obtain a non-compliant license if she cannot prove lawful status.<sup>199</sup> New York's code specifies that its non-compliant licenses do not require proof of lawful status.<sup>200</sup>

Completely removing the lawful status requirement from Pennsylvania's vehicle code could prevent Pennsylvania residents from obtaining a REAL-ID license because proof of lawful status is still a requirement under federal law. To ensure compliance with the Act, Pennsylvania legislators should maintain language requiring lawful status for a compliant license but remove the requirement for the non-compliant license.

### 3. *A Signed Affidavit as an Alternative to a SSN*

Instead of a SSN, House Bill 279 would require applicants to provide an ITIN.<sup>201</sup> A memorandum in support of the bill lists other alternatives, including a combination of a foreign passport, consular identification card, birth certificate, and a marriage or divorce record.<sup>202</sup> Because an applicant may struggle to obtain an ITIN or to access identity documents, a better alternative to a SSN is an applicant's signed affidavit that she is ineligible for one.

Pennsylvania has previously accepted ITINs as an alternative to SSNs in driver's license applications.<sup>203</sup> In *Kocher v. Bickley*,<sup>204</sup> PennDOT argued that the applicants had no right to learner's permits because they failed to provide SSNs or ITINs.<sup>205</sup> Similarly, in

197. CAL. VEH. CODE § 12801.5(b) (West 2021).

198. MD. CODE ANN., TRANSP. § 16-104.2(a)(3) (West 2021).

199. *Id.* § 16-122(a)(1)(ii).

200. N.Y. VEH. & TRAF. LAW § 502(8)(b) (McKinney 2021).

201. H.B. 279 § 1506(a).

202. Memorandum from Representative Danilo Burgos et al. (Jan. 21, 2021, 11:54 AM), <https://bit.ly/3c1lozO> [<https://perma.cc/757E-32F4>].

203. See *Kocher v. Bickley*, 722 A.2d 756 (Pa. Commw. Ct. 1999); *Camargo v. Commw. Dep't Transp.*, Nos. 04763, 05044, 05057, 05066, 05310, 05282, 2010 Phila. Ct. Com. Pl. LEXIS 129 (June 16, 2010), *aff'd sub nom. Serna-Deandrade v. Commw. Dep't Transp.*, Nos. 565 C.D. 2010, 568 C.D. 2010, 569 C.D. 2010, 570 C.D. 2010, 572 C.D. 2010, 573 C.D. 2010, 2011 Pa. Commw. Ct. LEXIS 828 (Oct. 11, 2011).

204. *Kocher v. Bickley*, 722 A.2d 756 (Pa. Commw. Ct. 1999).

205. *Id.* at 758. The court disagreed, finding that ITINs were available only to non-citizens who were ineligible for SSNs. *Id.* However, the court ultimately found that the requirement to supply a SSN or waiver does not prevent the applicants from practicing their religion because they can choose to not have a license. See *id.*

*Camargo v. Commonwealth Department of Transportation*,<sup>206</sup> the court noted that non-citizens renewed their Pennsylvania licenses with ITINs for many years.<sup>207</sup> When the applicants told PennDOT that they did not have SSNs, PennDOT advised them to write down their ITINs.<sup>208</sup> Later, PennDOT canceled their licenses for failing to provide a SSN or waiver.<sup>209</sup> The court found that before the REAL ID Act of 2005, PennDOT allowed individuals to use their ITINs if they did not have SSNs.<sup>210</sup> Because PennDOT never informed applicants that they needed to supply a SSN or a waiver, the court found that PennDOT should have never canceled their licenses.<sup>211</sup>

Given this history, using an ITIN as an alternative to a SSN or a waiver would reduce some costs in training PennDOT employees. However, this alternative narrows the pool of undocumented immigrants who would be eligible for non-compliant licenses. Not all undocumented immigrants need ITINs, and the application process for ITINs would require them to mail original identity documents or find other alternatives.<sup>212</sup> Therefore, to ensure that more undocumented immigrants are eligible for driver's licenses, Pennsylvania legislators should require them to sign affidavits stating their ineligibility for SSNs. This alternative would follow the approaches of California and New York, states with two of the largest undocumented immigrant populations.<sup>213</sup>

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at 762. Additionally, the requirement promoted the legitimate government interest of monitoring and identifying drivers to ensure they are competent and qualified to drive. *Id.*

206. *Camargo v. Commw. Dep't Transp.*, Nos. 04763, 05044, 05057, 05066, 05310, 05282, 2010 Phila. Ct. Com. Pl. LEXIS 129 (June 16, 2010), *aff'd sub nom. Serna-Deandrade v. Commw. Dep't Transp.*, Nos. 565 C.D. 2010, 568 C.D. 2010, 569 C.D. 2010, 570 C.D. 2010, 572 C.D. 2010, 573 C.D. 2010, 2011 Pa. Commw. Ct. LEXIS 828 (Oct. 11, 2011).

207. *Id.* at \*2.

208. *Id.*

209. *Id.* Pennsylvania's vehicle code allows PennDOT to cancel any driver's license upon determining that the licensee was not actually entitled to the receive one. 75 PA CONS. STAT. § 1572(a)(1)(i) (2021).

210. *Camargo*, 2010 Phila. Ct. Com. Pl. LEXIS 129 at \*5.

211. *Id.* at \*7–8.

212. *Individual Tax Identification Number*, INTERNAL REVENUE SERV., <https://bit.ly/3ndW2DD> (last visited Mar. 6, 2021); *How Do I Apply for an ITIN?*, INTERNAL REVENUE SERV., <https://bit.ly/2W3Zurl> [<https://perma.cc/7PCQ-SPV9>] (last visited Mar. 6, 2021).

213. *See* CAL. VEH. CODE § 12801(c)(1) (West 2021); N.Y. VEH. & TRAF. LAW § 502(1) (McKinney 2021); *see also Unauthorized Immigrant Population Profiles*, MIGRATION POL'Y INST., <https://bit.ly/3j7cdBe> [<https://perma.cc/V6ZB-S2FG>] (last visited Aug. 26, 2021).

#### 4. *Expanding Permissible Identity Documents*

Currently, PennDOT requires non-citizens to provide a valid passport, original immigration documents proving lawful status, and a SSN or waiver.<sup>214</sup> By removing the lawful status requirement, PennDOT would no longer need to expend as many resources on reviewing immigration documents. As a result, PennDOT could expand its list of permissible identity documents and use these resources to verify the documents.

PennDOT requires a valid passport as proof of identity, and the practice should continue.<sup>215</sup> However, some undocumented immigrants may not have passports or access to their consulates to obtain them.<sup>216</sup> While California and Maryland offer extensive lists of documents as alternatives to passports, some of their requirements make their application processes burdensome.<sup>217</sup> In California's case, applicants must go through a secondary review and interview process if they cannot supply designated primary identity documents.<sup>218</sup> While Maryland does not require a secondary review, its tax document requirements of an ITIN, a Maryland tax return, and a tax certification letter restrict eligibility.<sup>219</sup>

New York's approach, however, is broad and flexible. Acceptable identity documents include unexpired foreign passports, consular identification cards, and foreign driver's licenses.<sup>220</sup> Additionally, New York uses a point system, assigning each document a value and requiring at least six points to satisfy identity re-

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214. *Non-Commerical Learner's Permit Application*, PA. DEP'T OF TRANSP. 1, 2, <https://bit.ly/3lqtnJv> [<https://perma.cc/KKM6-885N>] (last visited Aug. 26, 2021). PennDOT accepts a variety of proof for residency, including tax records, leases, mortgage documents, and utility bills. *Fact Sheet: Identification and Legal Presence Requirements for Non-United States Citizens*, PA. DEP'T OF TRANSP. 1, 1, <https://bit.ly/39u6bb7> [<https://perma.cc/KD7S-GVS3>] (last visited Mar. 6, 2021).

215. See *Non-Commerical Learner's Permit Application*, PA. DEP'T OF TRANSP. 1, 2, <https://bit.ly/3lqtnJv> [<https://perma.cc/RB2H-EFV2>] (last visited Aug. 26, 2021).

216. See Enriquez et al., *supra* note 94, at 47.

217. See *AB 60 User Friendly Guide to Document Options to Obtain a California Driver License*, CAL. DEP'T OF MOTOR VEHICLES 1, 1 (Feb. 2017), <https://bit.ly/2Gy8nlk> [<https://perma.cc/4DCK-XKF6>]; see also *Online Document Guide*, MD. DEP'T OF TRANSP., <https://bit.ly/2HMGZRra> [<https://perma.cc/EC64-43MZ>] (last visited Aug. 26, 2021).

218. See *AB 60 User Friendly Guide to Document Options to Obtain a California Driver License*, CAL. DEP'T OF MOTOR VEHICLES 1, 2 (Feb. 2017), <https://bit.ly/2Gy8nlk> [<https://perma.cc/4DCK-XKF6>]; CAL. CODE REGS. tit. 13 § 16.06 (2021).

219. MD. CODE ANN., TRANSP. § 16-122(a)(1)(ii)(3) (West 2021).

220. N.Y. VEH. & TRAF. LAW § 502(1) (McKinney 2021).

quirements.<sup>221</sup> This approach allows undocumented immigrants who file taxes to include their ITINs within their applications while permitting those who do not file taxes to use other documents. To create an expansive program, Pennsylvania should consider identity documents beyond a valid foreign passport and an ITIN and adopt an approach like the one used in New York.<sup>222</sup>

### 5. *Protections Against Discrimination and Disclosure*

The language on Pennsylvania's non-compliant licenses contrasts that of New York and California. California's license states, "FEDERAL LIMITS APPLY,"<sup>223</sup> while New York's license states, "NOT FOR FEDERAL PURPOSES."<sup>224</sup> Pennsylvania's license, on the other hand, states, "NOT FOR REAL ID PURPOSES."<sup>225</sup> NILC argues that marked licenses could signal to law enforcement and others that the licensee lacks lawful immigration status.<sup>226</sup> However, Pennsylvania minimizes that risk by excluding the word "federal" from its marking, and House Bill 279 would add additional protection. The bill states that the non-compliant license may not be used as evidence of the licensee's immigration status, and PennDOT would be prohibited from asking about the applicant's immigration status.<sup>227</sup>

House Bill 279's privacy provisions resemble proposed legislation in Maryland and existing statutes in California and New York.

221. See *Document Guide for Standard License or Permit*, N.Y. DEP'T OF MOTOR VEHICLES, <https://bit.ly/33rSbLz> [<https://perma.cc/UFS4-2MPQ>] (last visited Aug. 26, 2021).

222. Individuals possessing ITINs already submitted documentation to establish their foreign status and identity. See *Instructions for Form W-7*, INTERNAL REVENUE SERV. 1, 3 (Sept. 2019), <https://bit.ly/3lb5oyl> [<https://perma.cc/K55D-R9BE>]. Acceptable documents included a passport, U.S. visa, foreign driver's license, civil birth certificate, medical records, school records, and a national identification card. *Id.* Therefore, Pennsylvania should permit applicants who have ITINs to supply only their ITINs as proof of identity, provided that their authenticity is verified.

223. Cal. Off. of the Attorney General, *Consumer Alert Regarding the Use of "Federal Limits Apply" Driver Licenses and Identification Cards to Purchase Firearms*, CAL. DOJ, <https://bit.ly/3qkqJok> [<https://perma.cc/XNF4-C62K>] (last visited Aug. 26, 2021).

224. *Driver's Licenses and the Green Light Law*, N.Y. DEP'T OF MOTOR VEHICLES, <https://on.ny.gov/3lbRnjT> [<https://perma.cc/778N-JLRQ>] (last visited Mar. 6, 2021).

225. Larissa Newton, *Real Ids Now Available in Pennsylvania*, PA. DEP'T OF TRANSP. (Mar. 6, 2021, 12:00 AM), <https://bit.ly/3atJylZ> [<https://perma.cc/TZP6-WSEH>].

226. *Marked Driver's Licenses Are Wrong for This State*, *supra* note 101.

227. H.B. 279, 2021 Gen. Assemb., Sess. § 1510(k)(6)(i)-(ii) (Pa. 2021).

The provisions also mirror federal privacy law.<sup>228</sup> The bill would prohibit PennDOT from disclosing an applicant's personal information, including her SSN, ITIN, and country of origin.<sup>229</sup> PennDOT would, however, be permitted to disclose such information to the applicant, for the national driver register, and pursuant to a court order, judicial warrant, or subpoena.<sup>230</sup> PennDOT must limit disclosure to the items listed in a court order, warrant, or subpoena.<sup>231</sup> PennDOT must also notify the licensee of the disclosure and the identity of the requesting agency.<sup>232</sup> PennDOT employees would be prohibited from maintaining documents used for non-compliant license applications except for the time required to ensure the validity and authenticity of the documents.<sup>233</sup> The bill would permit employees to disclose these documents only at the request of the licensee, when complying with a court order, warrant, or subpoena, or where specifically authorized by law.<sup>234</sup>

These provisions can improve Pennsylvania's current privacy protections. Driving Pennsylvania Forward ("DPF"), a statewide coalition advocating for driver's licenses for all residents, conducted a study on Pennsylvania's data protection.<sup>235</sup> The coalition found that any agency, including ICE, had direct access to drivers' information through PennDOT.<sup>236</sup> PennDOT's "Request for Data" form allowed agencies to request driver information if they explained the purpose of the request, how the information would be stored, and that they'd keep the information confidential.<sup>237</sup> However, the form does not limit requests to criminal investigations or restrict the type of information that can be accepted.<sup>238</sup> Additionally, DPF reported that ICE had access to Pennsylvania's Justice Network which allows users to search through PennDOT's photo

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228. See 18 U.S.C. § 2721.

229. H.B. 279 § 1510(k)(1).

230. *Id.* § 1510(k)(1)(i)–(iii).

231. *Id.* § 1510(k)(1)(iii).

232. *Id.* § 1510(k)(2).

233. *Id.* § 1510(k)(3).

234. *Id.* § 1510(k)(4)(i)–(iii).

235. See generally DRIVING PA FORWARD, SECURE OUR DATA: PROTECTING THE PRIVACY OF PENNSYLVANIA RESIDENTS AND DRIVERS (2020), <https://bit.ly/3rolbxn> [<https://perma.cc/7WB6-3MD2>].

236. *Id.* at 5; see also Raymond G. Lahoud, *PennDOT Shares Drivers' Personal Information: Immigration Advocates Protest*, NORRIS McLAUGHLIN (Sept. 28, 2020), <https://bit.ly/2TcZR1V> [<https://perma.cc/LP4Z-7W3N>] (noting that PennDOT confirmed ICE's access to JNET and CLEAN data but that it was not as concerning because Pennsylvania does not issue licenses to undocumented immigrants).

237. DRIVING PA FORWARD, *supra* note 235 at 5.

238. *Id.*

and license database.<sup>239</sup> ICE was also able to use the network's facial recognition system to compare images from social media websites against the PennDOT photo database.<sup>240</sup> House Bill 279 would limit access to some of this information by requiring a court order, warrant, or subpoena to receive the information and by limiting the request to the contents of the order.

### C. *Benefits in Pennsylvania*

#### 1. *Increased Public Safety*

Fighters for Driver's Licenses ("FDL") interviewed 239 undocumented immigrants in 8 Pennsylvania counties.<sup>241</sup> Based on these interviews and other referenced studies, FDL argues that licensing undocumented immigrants will lead to safer roads because licensed drivers are required to take knowledge and road tests.<sup>242</sup> Similarly, the Pennsylvania Budget and Policy Center ("PBPC"), a nonprofit law firm, reported that expanding licenses to all drivers would make Pennsylvania safer.<sup>243</sup> PBPC noted that the American Automobile Association found an increasing proportion of fatal crashes involved unlicensed drivers and that 85 percent of those drivers were between the ages of 16 and 64, eliminating the idea that most unlicensed drivers are underaged.<sup>244</sup>

#### 2. *Opportunities for Undocumented Immigrants*

Licensing undocumented immigrants would improve access to job opportunities, mobility, and family relationships.<sup>245</sup> 91 percent of FDL survey takers reported they needed a car to take their children to school. 85 percent reported they or someone in their household missed medical appointments because they did not have a license.<sup>246</sup> PBPC similarly argues that driver's licenses would improve immigrant communities by allowing immigrants to access stores, health care, schools, and other critical activities.<sup>247</sup> These

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239. *Id.* at 6.

240. *Id.* at 8.

241. SOC. JUST. LAWYERING CLINIC, *supra* note 176, at 1, 3.

242. *Id.* at 6.

243. Maisum Murtaza, *Making Pennsylvania's Undocumented Immigrants Mobile: Enacting Driver's License Expansion Policy That Works for Everyone*, P.A. BUDGET & POL'Y CTR. (Sept. 22, 2020), <https://bit.ly/3kTUPRu> [<https://perma.cc/CE8A-QAJQ>].

244. *Id.*

245. SOC. JUST. LAWYERING CLINIC, *supra* note 176, at 8.

246. *Id.* at 9.

247. Murtaza, *supra* note 243.

benefits would extend to the children of undocumented immigrants, many of whom may be U.S. citizens.<sup>248</sup>

FDL also found that not having a valid driver's license threatens family unity.<sup>249</sup> A New York Times study found that since 2008, two-thirds of two million undocumented immigrants who were deported either did not commit crimes or committed minor infractions, including traffic violations.<sup>250</sup> Additionally, 46 percent of FDL survey takers said they were cited by police for driving without a license and 29 percent were arrested and detained for that reason.<sup>251</sup>

### 3. *Economic Benefits*

Extending licenses to undocumented immigrants would increase the Commonwealth's revenue and lower costs for residents. The Migration Policy Institute estimates Pennsylvania to have 157,000 undocumented immigrants.<sup>252</sup> Maryland and Illinois, states with comparable undocumented immigrant populations, projected revenues that exceeded the costs of implementing their licensing programs.<sup>253</sup> Illinois found that if 50 percent of its 250,000 undocumented immigrant population applied for a license, the state would receive \$3.75 million.<sup>254</sup> In contrast, Illinois anticipated costs of \$800,000 in the first year of implementation and \$250,000 in later years.<sup>255</sup> If half of Pennsylvania's undocumented immigrants applied for a license, paying a \$34.50 fee, the Commonwealth would receive nearly \$3 million and an additional \$3.5 million in renewal years.<sup>256</sup> FDL estimates that Pennsylvania's cost could range from \$243,000 to \$2.35 million while revenue could range from \$2.67 to \$4.14 million.<sup>257</sup> Given Pennsylvania's previous history of licensing undocumented immigrants and its existing license designs for non-compliant licenses, costs may even be lower than other states' costs.

PBPC estimated that 81,946 undocumented immigrants would obtain licenses within the first 3 years of the non-compliant license program.<sup>258</sup> PBPC argues that Pennsylvania could expect a \$13 mil-

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248. *Id.*

249. SOC. JUST. LAWYERING CLINIC, *supra* note 176, at 8.

250. *Id.*

251. *Id.*

252. *Unauthorized Immigrant Population Profiles*, MIGRATION POL'Y INST., <https://bit.ly/3j7cdBe> [<https://perma.cc/V5BK-ZF87>] (last visited Aug. 26, 2021).

253. *See* SOC. JUST. LAWYERING CLINIC, *supra* note 176, at 11.

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. Murtaza, *supra* note 243.

lion increase in revenues from taxes, registration fees, license fees, and vehicle purchases in the first 3 years.<sup>259</sup> The center estimated 20,487 car sales, \$3,471,145 in tax revenue from consumption and sales, \$4,601,951 in tax revenue from liquid fuels tax, \$1,933,010 in revenue from registration, and \$2,909,083 in driver's license fees.<sup>260</sup> Lastly, FDL noted that undocumented immigrants could obtain car insurance, lowering insurance premium costs for all Pennsylvania residents.<sup>261</sup>

#### D. Recommendations

Pennsylvania should issue non-compliant driver's licenses to undocumented immigrants and offer alternatives to its SSN and lawful status requirements. Rather than provide an ITIN, an applicant should submit a signed affidavit with her application indicating her ineligibility for a SSN.<sup>262</sup> This approach would allow more undocumented immigrants to apply for licenses, contributing to safer streets and increased revenues for the Commonwealth.<sup>263</sup> Pennsylvania should also expand its identity documents beyond foreign passports and ITINs. New York's flexible approach gives applicants discretion in their document selection and addresses the problem of immigrant groups having unequal access to identity documents.<sup>264</sup> Lastly, Pennsylvania should adopt protections against discrimination and the disclosure of personal information. House Bill 279 offers an extensive section on privacy protections.<sup>265</sup> Pennsylvania should also consider the approach of California on discrimination, so that individuals, landlords, and businesses are prohibited from discriminating against a non-compliant license holder.<sup>266</sup>

#### IV. CONCLUSION

This Comment illustrates the benefits associated with issuing non-compliant licenses to undocumented immigrants.<sup>267</sup> Pennsylvania House Bill 279 is an attempt to provide driving privileges to its undocumented population. The bill addresses three main components of a licensing statute: eligibility standards, issuance

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259. *Id.*

260. *Id.*

261. *See* SOC. JUST. LAWYERING CLINIC, *supra* note 176, at 11.

262. *See supra* Part III.B.3.

263. *See supra* Part III.C.

264. *See supra* Part III.B.4.

265. *See supra* Part III.B.5.

266. *See supra* Part II.B.3.a.

267. *See supra* Part II.C.

procedures, and outreach.<sup>268</sup> The eligibility standards selected, including alternatives to a SSN and identity documents, will impact how many Pennsylvania residents can apply for a non-compliant license. The difficulty of the application process should be another consideration. Lastly, eligible undocumented immigrants will be reluctant to participate in a program if they believe their information is unprotected.

Pennsylvania legislators should amend the Commonwealth's vehicle code to allow undocumented immigrants to apply for driver's licenses. Lawful status requirements should not be removed entirely so that Pennsylvania can remain compliant with the REAL ID Act of 2005.<sup>269</sup> Instead, Pennsylvania should remove the lawful status requirement for only its non-compliant license and allow applicants to submit a signed affidavit instead of a SSN.<sup>270</sup> Identity documents should be expansive and issuance procedures should be straightforward.<sup>271</sup> For the program to succeed, Pennsylvania must educate its residents on the program and assure them that their information will remain confidential.<sup>272</sup>

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268. PEW CHARITABLE TRUSTS, *supra* note 11, at 1.

269. *See supra* Part III.B.2.

270. *See supra* Part III.B.3.

271. *See supra* Part III.B.4.

272. *See supra* Part III.B.5.