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## Unlawfully Present Aliens, Driver's Licenses, and Other State-Issued ID: Select Legal Issues

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## Unlawfully Present Aliens, Driver's Licenses, and Other State-Issued ID: Select Legal Issues

### Abstract

[Excerpt] This report provides an overview of key legal issues raised by state laws regarding the denial or issuance of driver's licenses and other forms of ID to unlawfully present aliens. It also addresses the legal issues raised by local governments issuing ID cards to unlawfully present aliens, as well as by state and local approaches to recognizing foreign-issued ID documents.

### Keywords

unlawfully present aliens, drivers licenses, identification, equal protection

### Comments

#### Suggested Citation

Manuel, K. M., & Garcia, M. J. (2014). *Unlawfully present aliens, driver's licenses, and other state-issued ID: Select legal issues*. Washington, DC: Congressional Research Service.



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# Unlawfully Present Aliens, Driver's Licenses, and Other State-Issued ID: Select Legal Issues

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March 28, 2014

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7-5700

[www.crs.gov](http://www.crs.gov)

R43452

## Summary

One aspect of the broader debate over aliens who are present in the United States in violation of federal immigration law has been their eligibility for driver's licenses and other forms of state-issued identification documents (IDs). The issuance of driver's licenses has historically been considered a state matter, and states have taken a variety of approaches. Some have barred the issuance of driver's licenses and other state-issued ID to unlawfully present aliens; others permit their issuance; and yet others instead grant unlawfully present aliens Certificates for Driving (CFDs) or Driving Privilege Cards (DPCs). CFDs or DPCs expressly state, on their face, that they are valid for driving, but not for other purposes. The federal government has generally not intruded on state control over the issuance of driver's licenses, although the REAL ID Act of 2005 (P.L. 109-13, Div. B) will, when implemented, bar federal agencies from accepting, "for any official purpose," licenses or ID cards issued by states that do not meet specific requirements.

Regardless of whether they would deny or grant driver's licenses and other state-issued ID to unlawfully present aliens, such state measures have been challenged on various grounds. While these grounds can vary depending upon the specific statute or practice in question, the grounds most commonly asserted appear to be violations of the Equal Protection and Supremacy Clauses of the U.S. Constitution. The Equal Protection Clause bars states from "deny[ing] to any person within [their] jurisdiction the equal protection of the laws," and aliens have been found to be encompassed by the Clause's usage of "person." As a result, measures that would treat aliens differently than citizens may be subject to challenge on equal protection grounds. In particular, state measures that distinguish between aliens and citizens are generally subject to some type of heightened scrutiny, although the exact degree of scrutiny can vary depending upon the persons and rights affected. The Supremacy Clause, in turn, establishes that federal law is "the supreme Law of the Land," and may preempt any incompatible provisions of state law.

State measures that would *deny* driver's licenses and other state-issued ID to unlawfully present aliens have historically not been found to violate either the Equal Protection or the Supremacy Clause, as a general matter. The various courts that have reviewed such challenges, to date, have found that these measures do not infringe upon the fundamental right to travel because restrictions upon a single mode of travel (i.e., driving) are not tantamount to restrictions on the right to travel, and aliens' right to travel is more limited than citizens' right. The courts have similarly found that such measures do not impermissibly distinguish between unlawfully present aliens and other persons because unlawfully present aliens are not a "suspect classification," and the measures serve "legitimate" government interests. The courts have also found these measures are not, as a general matter, per se preempted on the grounds that they regulate immigration, or preempted by the REAL ID Act. However, state measures that distinguish, without a legitimate interest, between categories of unlawfully present aliens, or that rely upon state definitions or determinations of who is unlawfully present, may be found to be impermissible.

Although some commentators have suggested that they are preempted, state measures that *grant* driver's licenses and state-issued ID to unlawfully present aliens do not appear to have been subject to litigation. The argument that such measures are preempted could, however, be difficult to maintain, because the REAL ID Act arguably contemplates states issuing licenses and other IDs that federal agencies do not recognize for official purposes, and it seems unlikely that granting licenses to unlawfully present aliens would be seen to regulate immigration. Similarly, while federal law generally restricts the circumstances in which states may provide "public benefits" to unlawfully present aliens, driver's licenses are unlikely to be seen as public benefits.

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One facet of the broader debate over aliens who are present in the United States in violation of federal immigration law has been their eligibility for driver's licenses and other forms of government-issued identification documents (IDs). The issuance of driver's licenses has historically been considered a state matter,<sup>1</sup> and states have taken a variety of approaches here. Some states, responding to concerns about national security, the rule of law, or the presence of "illegal aliens" within their jurisdiction,<sup>2</sup> have adopted measures that directly or indirectly bar such aliens from obtaining driver's licenses and other state-issued ID.<sup>3</sup> In contrast, other states, motivated by concerns related to community policing or the welfare of immigrant communities,<sup>4</sup> have adopted measures that permit unlawfully present aliens to obtain driver's licenses and other ID.<sup>5</sup> While these licenses may—or may not—be visually distinct from the licenses issued to U.S. citizens and lawfully present aliens,<sup>6</sup> some states do not purport to restrict the license's use for ID purposes, a widely recognized function of driver's licenses.<sup>7</sup> Yet other states, seeking to promote traffic safety by screening drivers, but not wishing to issue driver's licenses to unlawfully present aliens,<sup>8</sup> have adopted measures that permit these aliens to obtain "Certificates for Driving" (CFDs) or "Driving Privilege Cards" (DPCs), but not driver's licenses.<sup>9</sup> These CFDs or DPCs note, on their face, that they are valid for driving, but not for purposes of identification.<sup>10</sup> There has been similar divergence in terms of whether local governments provide alternate forms of ID

<sup>1</sup> See, e.g., *United States v. Best*, 573 F.2d 1095, 1103 (9<sup>th</sup> Cir. 1978) ("[T]here is little question that licensing of drivers constitutes an integral portion of those governmental services which the States ... have traditionally afforded.")

<sup>2</sup> See, e.g., Federation for American Immigration Reform, *Illegal Alien Driver's Licenses: Talking Points*, available at <http://www.fairus.org/legislation/FAIR%20Illegal%20Alien%20Driver's%20Licenses.pdf> (last accessed: Mar. 18, 2014) (arguing that the issuance of driver's licenses to unlawfully present aliens endangers national security, compromises the rule of law, and encourages illegal immigration); Gregory A. Odegaard, *A Yes or No Answer: A Plea to End the Oversimplification of the Debate on Licensing Aliens*, 24 J.L. & POL. 435, 452 (2008) (discussing the role that concerns related to national security and the rule of law have played in debates over the issuance of driver's licenses to unlawfully present aliens); Paul L. Frantz, *Undocumented Workers: State Issuance of Driver Licenses Would Create a Constitutional Conundrum*, 18 GEO. IMMIGR. L.J. 505, 534 (2004) (discussing similar concerns about the issuance of driver's licenses to unlawfully present aliens voiced in conjunction with California S.B. 60 (2003)).

<sup>3</sup> See, e.g., ARIZ. REV. STAT. §28-3153(D) (2014); IND. CODE ANN. §9-24-9-2(a)(6) (2014).

<sup>4</sup> See, e.g., *A Yes or No Answer*, *supra* note 2, at 446-52 (discussing the role that concerns related to public safety and participation in society have played in debates over the issuance of driver's licenses to unlawfully present aliens); Spencer Garlick, *License to Drive: Pioneering a Compromise to Allow Undocumented Immigrants Access to the Roads*, 31 SETON HALL LEGIS. J. 191, 200-204 (2006) (rationales for issuing driver's licenses to unlawfully present aliens); Michelle L. Waslin, *Safe Roads, Safe Communities: Immigrants and State Driver's License Requirements*, May 29, 2002, available for download at [http://www.nclr.org/index.php/publications/issue\\_brief\\_6-safe\\_roads\\_safe\\_communities\\_immigrants\\_and\\_state\\_drivers\\_license\\_requirements/](http://www.nclr.org/index.php/publications/issue_brief_6-safe_roads_safe_communities_immigrants_and_state_drivers_license_requirements/) (similar).

<sup>5</sup> See, e.g., CAL. VEH. CODE §12801(c)(1) (2014); N.M. STAT. ANN. §66-5-9(B) (2014).

<sup>6</sup> See *infra* note 101 and accompanying text for further discussion of state practices here.

<sup>7</sup> See, e.g., *Fahy v. Comm'n'r, N.H. Dep't of Safety*, No. 05-CV-97-SM, 2006 U.S. Dist. LEXIS 18170, at \*43 (D. N.H., Mar. 29, 2006) ("These days, state-issued photographic identification cards serve as a common currency of personal identification and have become an increasingly essential part of day-to-day life."). Congress has generally barred federal agencies from accepting any licenses issued to unlawfully present aliens for "official purposes," as discussed below, but the states that issue licenses (as opposed to "Certificates for Driving") to such aliens generally do not purport to limit their use for identification purposes.

<sup>8</sup> Cf. *License to Drive*, *supra* note 4, at 205-06 (discussing the various interests promoted by such "compromises").

<sup>9</sup> See, e.g., UTAH CODE ANN. §53-3-207(7)(a) (2014); TENN. CODE ANN. §55-50-331(h) (2004).

<sup>10</sup> See, e.g., UTAH CODE ANN. §53-3-207(7)(b) (2014) ("The division shall distinguish a driving privilege card from a license ... by: (i) use of a format, color, font, or other means; and (ii) clearly displaying on the front of the ... card a phrase substantially similar to 'FOR DRIVING PRIVILEGES ONLY—NOT VALID FOR IDENTIFICATION'.")

to unlawfully present aliens, and in state and local approaches to recognizing consular IDs (e.g., Mexico's *matricula consular*).<sup>11</sup>

The federal government has generally not intruded on state control over the issuance of driver's licenses,<sup>12</sup> although the REAL ID Act of 2005 will, when fully implemented, bar federal agencies from accepting, "for any official purpose," licenses or ID cards issued by states that do not meet specific requirements.<sup>13</sup> Congress also regulates immigration, which some have claimed means that state measures regarding the issuance of driver's licenses to unlawfully present aliens are preempted.<sup>14</sup> Congress has also enacted legislation that generally restricts unlawfully present aliens' eligibility for *state and local public benefits*, a term that has been defined to include certain state-issued licenses, as well as "assistance" provided by state agencies or state funds.<sup>15</sup>

This report provides an overview of key legal issues raised by state laws regarding the denial or issuance of driver's licenses and other forms of ID to unlawfully present aliens. It also addresses the legal issues raised by local governments issuing ID cards to unlawfully present aliens, as well as by state and local approaches to recognizing foreign-issued ID documents.

## Basic Legal Principles

State measures that would deny *or* provide driver's licenses and other forms of government-issued ID to unlawfully present aliens have been challenged on various grounds. These grounds can vary depending upon the specific statute or practice in question.<sup>16</sup> However, the grounds most commonly asserted appear to be violations of the Equal Protection and Supremacy Clauses of the U.S. Constitution. Thus, these provisions are the focus of discussion in this report, and the following paragraphs provide an overview of the basic principles implicated in discussions of equal protection and preemption.

### Equal Protection

The Equal Protection Clause of the Fourteenth Amendment bars states from "deny[ing] to any person within [their] jurisdiction the equal protection of the laws."<sup>17</sup> Aliens have been found to be encompassed by the Fourteenth Amendment's usage of "person."<sup>18</sup> As a result, measures that

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<sup>11</sup> See "Recognition of Foreign Consular IDs."

<sup>12</sup> The federal government has, however, regulated the issuance of commercial driver's licenses. See 49 U.S.C. §31308 ("After consultation with the States, the Secretary of Transportation shall prescribe regulations on minimum uniform standards for the issuance of commercial driver's licenses and learner's permits by the States.").

<sup>13</sup> P.L. 109-13, Div. B, §202(a)(1), 119 Stat. 312 (May 11, 2005) (codified at 49 U.S.C. §30301 note). For further discussion of the implementation of the REAL ID Act, see CRS Legal Sidebar WSLG824, *The REAL ID Act: Enforcement at Last?*, by Alissa M. Dolan.

<sup>14</sup> See "Denying Driver's Licenses and Other State-Issued ID" and "Preemption."

<sup>15</sup> See Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), P.L. 104-193, tit. IV, §§401-435, 110 Stat. 2261-2276 (Aug. 22, 1996) (generally codified, as amended, in 8 U.S.C. §§1601-1646).

<sup>16</sup> Some measures have, for example, been challenged on grounds that are outside the scope of this report, such as alleged violations of state Administrative Procedure Acts. See, e.g., *Nowlin v. Dep't of Motor Vehicles*, 62 Cal. Rptr. 2d 409 (Cal. App. 1997); *Lauderbach v. Zolin*, 35 Cal. Rptr. 2d 434 (Cal. App. 1995).

<sup>17</sup> U.S. Const., amend. XIV, §1.

<sup>18</sup> See, e.g., *Plyler v. Doe*, 457 U.S. 202, 210 (1982) ("Whatever his status under the immigration laws, an alien is (continued...)

would treat aliens differently than citizens may be subject to challenge on equal protection grounds. The level of scrutiny applied by the courts in reviewing such measures frequently determines whether the measure is upheld or struck down. With “rational basis review,” the challenged measure will generally be upheld if it is a rational means of promoting a legitimate government objective. The measure is “presumed constitutional,” and those challenging the law have the burden of negating all possible rational justifications for the classification.<sup>19</sup> In contrast, with “strict scrutiny,” the challenged measure will be upheld only if the government can demonstrate that the measure is necessary to achieve a compelling interest and is narrowly tailored for that purpose.<sup>20</sup> Courts have also applied other tests, falling between rational basis review and strict scrutiny, in some cases due to the persons or rights affected by the measure.<sup>21</sup>

The level of scrutiny applied to measures that classify on the basis of alienage depends, in part, on whether the measure is a federal one, or a state or local one. Because Congress’s plenary power over immigration permits it to enact measures as to aliens that would be unconstitutional if applied to citizens,<sup>22</sup> federal classifications based on alienage are subject to rational basis review, and have generally been upheld. For example, in its 1976 decision in *Mathews v. Diaz*, the Supreme Court upheld a federal law that barred lawful permanent residents (LPRs) who had not resided in the United States for five years from enrolling in Medicare Part B, because it viewed the measure as a valid exercise of the federal government’s authority to regulate the entry and residence of aliens, not as “irrational.”<sup>23</sup> State and local measures, in contrast, have generally been subject to strict scrutiny,<sup>24</sup> unless (1) the restrictions involve “political and governmental functions,”<sup>25</sup> or (2) Congress has “by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass.”<sup>26</sup>

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(...continued)

surely a ‘person’ in any ordinary sense of that term.”) *But see Mathews v. Diaz*, 426 U.S. 67, 78 (1972) (“The fact that all persons, aliens and citizens alike, are protected by the [constitutional guarantee of equal protection] does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogenous legal classification.”).

<sup>19</sup> See, e.g., *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993) (“[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record, [and] courts are compelled under rational-basis review to accept a legislature’s generalizations even when there is an imperfect fit between means and ends.”) (internal citations omitted).

<sup>20</sup> See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (racial classifications must be shown to be necessary to some “legitimate overriding purpose”); *McLaughlin v. Florida*, 379 U.S. 184, 192, 194 (1964) (racial classifications “bear a far heavier burden of justification” than other classifications, and are invalid absent an “overriding statutory purpose”).

<sup>21</sup> See, e.g., *United States v. Virginia*, 518 U.S. 515 (1996) (requiring the state to provide an “exceedingly persuasive justification” for its policy of maintaining an all-male military academy).

<sup>22</sup> See, e.g., *Kleindienst v. Mandel*, 408 U.S. 753, 765-70 (1972).

<sup>23</sup> *Graham v. Richardson*, 403 U.S. 365 (1971).

<sup>24</sup> See, e.g., *Nyquist v. Mauclet*, 432 U.S. 1, 8 n.9 (1977) (“[C]lassifications based on alienage are inherently suspect, and are therefore subject to strict scrutiny whether or not a fundamental right is impaired.”) (internal quotations omitted).

<sup>25</sup> *Foley v. Connelie*, 435 U.S. 291, 295-96 (1978) (quoting *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973)) (applying rational basis review to a New York law that barred noncitizens from becoming police officers on the grounds that states must have the power to “preserve the basic conception of a political community” for a democracy to function).

<sup>26</sup> *Plyler*, 457 U.S. at 219 n.19. For further discussion of whether PRWORA provides such a “uniform rule” for states to follow in providing public benefits to noncitizens, see CRS Report R43221, *Noncitizen Eligibility for Public Benefits: Legal Issues*, by Kate M. Manuel, at pages 13-15.



However, it is important to note that the Supreme Court decisions applying strict scrutiny to state or local measures that treat aliens differently than citizens all involved LPRs,<sup>27</sup> and the Supreme Court has expressly noted that “undocumented status is not irrelevant to any proper legislative goal.”<sup>28</sup> In the 1982 decision in which it stated this, *Plyler v. Doe*, the Court applied what has since come to be characterized as “intermediate scrutiny” in striking down a Texas statute that prohibited the use of state funds to provide elementary and secondary education to children who were not “legally admitted” to the United States.<sup>29</sup> However, later courts and commentators have suggested the heightened level of scrutiny applied in *Plyler* reflects the facts and circumstances of the case—which involved a law that a majority of the Court viewed as depriving “minor children” of a “basic education”<sup>30</sup>—and is not generally applicable to classifications affecting unlawfully present aliens.<sup>31</sup>

The Supreme Court has recognized a fundamental right to interstate travel, the deprivation of which generally results in the application of strict scrutiny by the courts when assessing the permissibility of the measure.<sup>32</sup> However, courts have also taken the view that restrictions on a particular mode of travel (e.g., driving) do not necessarily constitute a deprivation of the right to travel.<sup>33</sup> The ability to obtain a driver’s license or other state-issued identification has not been recognized as a fundamental right.<sup>34</sup>

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<sup>27</sup> See, e.g., *League of United Latin American Citizens [LULAC] v. Bredesen*, 500 F.3d 523, 532-533 (6<sup>th</sup> Cir. 2007) (noting that the Supreme Court has never applied strict scrutiny to a state or local measure affecting aliens who are not LPRs); *LeClerc v. Webb*, 419 F.3d 405, 416 (5<sup>th</sup> Cir. 2005) (noting that the Supreme Court “ha[s] never applied strict scrutiny review to a state law affecting ... other alienage classifications [than LPRs]” and citing, as evidence of this, *Toll v. Moreno*, 458 U.S. 1 (1982) (foregoing equal protection analysis in a case involving lawful nonimmigrant aliens); *De Canas v. Bica*, 424 U.S. 351 (1976) (foregoing equal protection analysis in a case involving unauthorized aliens); and *Plyler v. Doe*, 457 U.S. 202 (1982) (applying modified rational basis review in a case involving unauthorized aliens)).

<sup>28</sup> *Plyler*, 457 U.S. at 220-21. See also *id.* at 223 (“Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a ‘constitutional irrelevancy.’”).

<sup>29</sup> *Id.* at 220.

<sup>30</sup> *Id.* at 220-23.

<sup>31</sup> See, e.g., *Kadmas v. Dickinson Public Schools*, 487 U.S. 450, 459 (1988) (stating of *Plyler*, “We have not extended this holding beyond the ‘unique circumstances,’ that provoked its ‘unique confluence of theories and rationales’”) (internal citations omitted); Laura S. Yates, *Plyler v. Doe and the Rights of Undocumented Immigrants to Higher Education: Should Undocumented Students Be Eligible for In-State Tuition Rates?*, 82 WASH. UNIV. L. REV. 585, 592 (2004) (“Since *Plyler*, the Supreme Court has posited that the intermediate scrutiny standard is only applicable when state legislation affects undocumented children in the area of public education, and even then only when the legislation enjoys neither implied nor express [federal] congressional approval.”) (internal quotations omitted).

<sup>32</sup> See, e.g., *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 901-02 (1986) (Brennan, J., plurality opinion) (“Freedom to travel throughout the United States has long been recognized as a basic right under the Constitution. And, it is clear that the freedom to travel includes the ‘freedom to enter and abide in any State in the Union.’”) (internal citations omitted); *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969) (“The constitutional right to travel from one State to another ... occupies a position fundamental to the concept of our Federal Union.”).

<sup>33</sup> See, e.g., *Duncan v. Cone*, No. 00-5705, 2000 U.S. App. LEXIS 33221, at \*6 (6<sup>th</sup> Cir., Dec. 7, 2000) (“While a fundamental right to travel exists, there is no fundamental right to drive a motor vehicle.”); *Miller v. Reed*, 176 F.3d 1202, 1205 (9<sup>th</sup> Cir. 1999) (no fundamental right to drive); *City of Houston v. Fed. Aviation Admin.*, 679 F.2d 1184, 1198 (5<sup>th</sup> Cir. 1982) (“At most, [the plaintiffs’] argument reduces to the feeble claim that passengers have a constitutional right to the most convenient form of travel.”).

<sup>34</sup> See, e.g., *John Doe No. 1 v. Ga. Dep’t of Public Safety*, 147 F. Supp. 2d 1369, 1375 (N.D. Ga. 2001); *Doe v. Edgar*, No. 88 C 579, 1989 U.S. Dist. LEXIS 9498, at \*11-\*12 (N.D. Ill., Aug. 2, 1989). However, denying a person access to identification documents might sometimes give rise to a cognizable constitutional claim, if possession of such documentation is necessary for the person to exercise a fundamental constitutional right. See *Worley v. Waddell*, 819 F. Supp. 2d 826 (S.D. Ind., 2011) (finding that the plaintiff, a U.S. citizen, alleged a substantial due process claim, when (continued...))

## Preemption

The doctrine of preemption, in turn, derives from the Supremacy Clause of the U.S. Constitution, which establishes that federal law, treaties, and the Constitution itself are “the supreme Law of the Land, ... any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.”<sup>35</sup> Thus, one essential aspect of the federal structure of government is that states can be precluded from taking actions that would otherwise be within their authority if federal law would be thwarted thereby.

Because the Constitution entrusts Congress with the power to regulate immigration,<sup>36</sup> state or local measures that purport to regulate immigration—by determining which aliens may enter or remain in the United States, or the terms of their continued presence—are, per se, preempted, regardless of whether Congress has legislated on the matter.<sup>37</sup> Other measures, which affect aliens, but do not constitute regulation of immigration, could also be found to be preempted, depending upon the scope of any congressional enactments. Specifically, federal statutes may preempt state and local measures in one of three ways:

- the statute expressly indicates its preemptive intent (*express preemption*);
- a court concludes that Congress intended to occupy the regulatory field, thereby implicitly precluding state or local action in that area (*field preemption*); or
- state or local action directly conflicts with or otherwise frustrates the purpose of the federal scheme (*conflict preemption*).<sup>38</sup>

However, state action in fields that have traditionally been subject to state regulation may be accorded a presumption against preemption whenever Congress legislates in the field.<sup>39</sup> States

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(...continued)

he alleged that the denial of his application for a driver's license or other photo ID prevented him from being able to vote, obtain a marriage license, change his name, or proceed with the adoption of his child).

<sup>35</sup> U.S. Const., art. VI, cl. 2.

<sup>36</sup> Courts have located the source of federal immigration power in various provisions of the Constitution, and in the inherent power of sovereign nations to control the terms upon which noncitizens may enter and remain within their borders. *See, e.g.*, Nat'l Fed'n of Indep. Bus. v. Sebelius,—U.S.—, 132 S. Ct. 2566, 2600 (2012) (Congress's powers under the Commerce Clause); *Arizona v. United States*,—U.S.—132 S. Ct. 2492, 2498 (2012) (power to establish a uniform rule of naturalization); *Nishimara Ekiu v. United States*, 142 U.S. 651, 659 (1892) (“It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.”); *Henderson v. Mayor of New York*, 92 U.S. 259 (1876) (power to regulate interstate commerce); *Chy Lung v. Freeman*, 92 U.S. 275 (1875) (power to regulate the admission of noncitizens); *The Passenger Cases*, 48 U.S. 283 (1849) (power to regulate foreign commerce).

<sup>37</sup> *See De Canas v. Bica*, 424 U.S. 351, 355 (1976) (describing the regulation of immigration as “essentially a determination of who should or should not be admitted into the country, and the conditions under which a legal entrant may remain”).

<sup>38</sup> *See, e.g.*, *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000); *English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79 (1990); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248-49 (1984); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983). The delineation between these categories, particularly between field and conflict preemption, is not rigid. *See English*, 462 U.S. at 79 n.5 (“By referring to these three categories, we should not be taken to mean that they are rigidly distinct. Indeed, field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation.”); *Crosby*, 530 U.S. at 373 n.6 (similar).

<sup>39</sup> *See, e.g.*, *Meditronic, Inc. v. Lohr*, 518 U.S. 470 (1996).

have historically regulated the issuance of driver's licenses,<sup>40</sup> and at least one court has suggested that a presumption against preemption may apply in cases involving restrictions upon the issuance of driver's licenses to unlawfully present aliens.<sup>41</sup>

Two federal statutes are generally also noted, along with the federal government's power to regulate immigration, in discussions of whether state measures regarding unlawfully present aliens' eligibility for driver's licenses are preempted. The first of these statutes, the REAL ID Act of 2005, augmented standards for federal agencies' acceptance of certain state driver's licenses and other forms of identification,<sup>42</sup> including by establishing new minimum standards that states must satisfy if the driver's licenses or ID cards they issue are to be accepted by federal agencies for any "official purpose."<sup>43</sup> Notably, in order for a state-issued ID to be accepted by federal agencies for an official purpose, the state issuing the ID must require valid documentary evidence of an applicant's legal status. Specifically, evidence generally must be submitted that the applicant falls under one of the following nine categories:

- is a citizen or national of the United States;
- is an alien lawfully admitted for permanent or temporary residence in the United States;
- has conditional permanent resident status in the United States;
- has an approved application for asylum in the United States or has entered into the United States in refugee status;
- has a valid, unexpired nonimmigrant visa or nonimmigrant visa status for entry into the United States;
- has a pending application for asylum in the United States;

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<sup>40</sup> See *supra* note 1.

<sup>41</sup> *Saldana v. Lahm*, No. 4:13CV3108, 2013 U.S. Dist. LEXIS 148209, at \*10 (D. Neb., Oct. 11, 2013). *But see* *Martinez v. Regents of the University of California*, 241 P.3d 855 (Cal. 2010) ("The parties disagree as to whether a presumption against preemption exists. The point is unclear. In the past, the high court has indicated that a general presumption against preemption applies even in the context of immigration law. However, more recent high court authority suggests that no particular presumption applies. We need not resolve the question here because, as we explain, we find no preemption even without a presumption.") (internal citations omitted).

<sup>42</sup> P.L. 109-13, Div. B, §202, 119 Stat. 312-315 (May 11, 2005) (codified, as amended, at 49 U.S.C. §30301 note). Less than a year prior to the enactment of the REAL ID Act, the Intelligence Reform and Terrorist Prevention Act had required the promulgation of minimum standards for the acceptance of state driver's licenses and other forms of ID by federal agencies. P.L. 108-458, §7211, 118 Stat. 3825 (Dec. 17, 2004). These requirements were repealed and replaced by provisions of the REAL ID Act. P.L. 109-13, Div. B, §205. The Intelligence Reform and Terrorist Prevention Act had repealed and replaced earlier minimum standards requirements contained in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. P.L. 104-208, div. C, §656, 110 Stat. 3009-716 to 3009-719 (Sept. 30, 1996) (already partially repealed by the Department of Transportation and Related Agencies Appropriations Act, 2000, P.L. 106-69, §355, 113 Stat. 1027 (Oct. 9, 1999), discussed below).

<sup>43</sup> P.L. 109-13, Div. B, §202, 119 Stat. 312-315 (codified, as amended, at 49 U.S.C. §30301 note). For purposes of the act's requirements, an official purpose "includes but is not limited to accessing Federal facilities, boarding federally regulated commercial aircraft, entering nuclear power plants, and any other purposes that the Secretary [of the Department of Homeland Security] shall determine." *Id.* at §201(3).

For more extensive discussion of the REAL ID Act's requirements, see archived CRS Report RL34430, *The REAL ID Act of 2005: Legal, Regulatory, and Implementation Issues*, by former CRS attorney Todd B. Tatelman. Questions about its content can be directed to Alissa Dolan.

- has a pending or approved application for temporary protected status in the United States;
- has approved deferred action status; or
- has a pending application for adjustment of status to that of an alien lawfully admitted for permanent residence in the United States or conditional permanent resident status in the United States.<sup>44</sup>

In satisfying the REAL ID Act's standards, a state may only issue a temporary driver's license or ID card to an applicant who provides documentation that he or she falls under one of the latter five categories listed above. This license or ID must either (1) be valid only for the period of time that the alien is authorized to stay in the United States, or (2) expire within one year of its issuance, if the alien is authorized to stay within the United States for an indefinite period.<sup>45</sup>

The initial deadline for compliance with REAL ID Act requirements was May 11, 2008—three years after the act's date of enactment. However, the act permits the Secretary of the Department of Homeland Security (DHS) to extend the deadline for a state to comply with the act's minimum standard requirements, provided that the state has provided DHS with "an adequate justification for noncompliance."<sup>46</sup> The Secretary of DHS has extended this deadline on a few occasions, and has also deferred enforcement of the act with respect to federal recognition of non-compliant state IDs.<sup>47</sup> As of the date of this report, a majority of states and territories have either been deemed compliant with the act's requirements by DHS or have been granted an extension to achieve compliance.<sup>48</sup> A few states and territories do not currently have an extension in effect, and are not deemed to be in compliance with the act.<sup>49</sup> On December 20, 2013, DHS announced a timeline for the implementation of the act's requirements through a "phased enforcement plan," under which federal agencies shall begin restricting their acceptance of IDs for official purposes from noncompliant states and territories.<sup>50</sup>

The second statute, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996, as amended, generally bars state and local governments from providing "state and local public benefits" to unlawfully present aliens unless the state enacts legislation

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<sup>44</sup> P.L. 109-13, div. B, at §202(b)(2)(B).

<sup>45</sup> *Id.* at §202(b)(2)(C). *See also* 6 C.F.R. §37.21.

<sup>46</sup> *Id.* at §205(b).

<sup>47</sup> *See* Department of Homeland Security, Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5272-01 (Jan. 29, 2008) (providing process for states to seek extension of deadline for REAL ID Act compliance from May 11, 2008 until May 11, 2011); 76 Fed. Reg. 12269-01 (March 11, 2011) (extending deadline to January 15, 2013); Department of Homeland Security, Press Release, *DHS Determines 13 States Meet REAL ID Standards* (Dec. 20, 2012) (announcing "temporary deferment" allowing federal agencies to accept IDs issued from states that were not in compliance with the REAL ID Act), available at <https://www.dhs.gov/news/2012/12/20/dhs-determines-13-states-meet-real-id-standards>.

<sup>48</sup> Department of Homeland Security, *REAL ID Enforcement in Brief* (Dec. 20, 2013) (hereinafter "REAL ID Phased Enforcement Plan") available at <http://www.dhs.gov/sites/default/files/publications/real-id-enforcement-in-brief-20140205.pdf>. *See also* CRS Legal Sidebar WSLG824, *The REAL ID Act: Enforcement at Last?*, by Alissa M. Dolan.

<sup>49</sup> REAL ID Phased Enforcement Plan, *supra* footnote 48. Three of the 14 non-compliant states and territories issue "Enhanced Driver's Licenses," which federal agencies may continue to accept for official purposes. *Id.*

<sup>50</sup> *Id.*

that “affirmatively provides” for their eligibility,<sup>51</sup> and defines *state and local public benefit* to mean the following:

(A) any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government; and (B) any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.<sup>52</sup>

PRWORA also required, as part of its provisions to improve child support enforcement, that states record applicants’ Social Security numbers—which unlawfully present aliens generally cannot obtain<sup>53</sup>—on applications for commercial driver’s licenses.<sup>54</sup> The Balanced Budget Act of 1997 extended this requirement to all driver’s licenses.<sup>55</sup> However, this provision has reportedly been construed as mandating that states have procedures which require individuals to furnish “any Social Security Number [they] may have” when applying for driver’s licenses, not as “requiring that an individual have a social security number as a condition of receiving a license.”<sup>56</sup> Separate provisions in a companion measure to PRWORA, the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, would have barred federal agencies from accepting, for “any identification-related purpose,” driver’s licenses or other state-issued ID that did not contain a Social Security number that could be read visually or electronically, among other things.<sup>57</sup> However, these provisions of IIRIRA were repealed in 1999.<sup>58</sup>

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<sup>51</sup> For further discussion of what a state must do to “affirmatively provide” for unlawfully present aliens’ eligibility, see CRS Report R43221, *Noncitizen Eligibility for Public Benefits: Legal Issues*, by Kate M. Manuel, at page 26.

<sup>52</sup> 8 U.S.C. §1621. PRWORA expressly excludes certain things from these definitions (e.g., professional or commercial licenses for nonimmigrants whose visas are related to U.S. employment). See 8 U.S.C. §1621(c)(2)-(3).

<sup>53</sup> 20 C.F.R. §422.104(a) (“We can assign you a social security number if ... you are: (1) [a] United States citizen; or (2) [a]n alien lawfully admitted to the United States for permanent residence or under other authority of law permitting you to work in the United States ...; or (3) [a]n alien who cannot provide evidence of alien status showing lawful admission to the U.S., or an alien with evidence of lawful admission but without authority to work in the U.S., if the evidence described in §422.107(e) does not exist, but only for a valid nonwork reason.”). Currently, the need for a Social Security number to obtain a driver’s license does not constitute a “valid nonwork reason,” although Social Security numbers were once assigned for this reason. See *Iyengar v. Barnhart*, 281 F. Supp. 2d 38 (D.D.C. 2003) (change in policy).

<sup>54</sup> P.L. 104-193, §317, 110 Stat. 2220-21 (Aug. 22, 1996) (codified, as amended, at 42 U.S.C. §666(a)(13)).

<sup>55</sup> P.L. 105-33, §5536, 111 Stat. 629-30 (Aug. 5, 1997).

<sup>56</sup> Nat’l Council of La Raza, *Driver’s License Fact Sheet: Ensuring Immigrant Access to Driver’s Licenses: Alternatives to Social Security Number Requirements* (quoting David Gray Ross, U.S. Department of Health and Human Services), quoted in Alexander L. Mounts, *A Safer Nation?: How Driver’s License Restrictions Hurt Immigrants & Noncitizens, Not Terrorists*, 37 IND. L. REV. 247, 255 (2003). See Social Security Administration, *Social Security for Non-Citizens* (Aug. 2013) (noting that lawfully admitted noncitizens “can get many benefits and services without a Social Security Number. You do not need a number to get a driver’s license ...”), available at <http://www.ssa.gov/pubs/EN-05-10096.pdf>.

<sup>57</sup> P.L. 104-208, Div. C., §656(b), 110 Stat. 3009-716 to 3009-719 (Sept. 30, 1996).

<sup>58</sup> Department of Transportation and Related Agencies Appropriations Act, 2000, P.L. 106-69, §355, 113 Stat. 1027 (Oct. 9, 1999).



## Denying Driver's Licenses and Other State-Issued ID

Several states have adopted measures that bar unlawfully present aliens from obtaining driver's licenses and other state-issued ID. Sometimes, the prohibition is explicit, as is the case with Arizona, which has enacted legislation barring the state Motor Vehicle Division from issuing or renewing a license or ID to a "person who does not submit proof satisfactory to the department that the applicant's presence in the United States is authorized under federal law."<sup>59</sup> In other cases, the denial may be effectuated by requiring that applicants for driver's licenses provide Social Security numbers,<sup>60</sup> which generally cannot be issued to unlawfully present aliens.<sup>61</sup> Legal challenges have been brought against both types of measures on the grounds that they violate the Equal Protection Clause by abridging the fundamental right to interstate travel and impermissibly distinguishing between aliens and citizens. Challenges have also been brought claiming that these measures are per se preempted because they regulate immigration and impliedly preempted by the REAL ID Act. To date, these legal challenges have generally failed.<sup>62</sup> The one apparent exception involves challenges to recent state practices of issuing driver's licenses to some, but not all, aliens granted deferred action or employment authorization documents (EADs) by the federal government.<sup>63</sup>

### Equal Protection

In the decisions published to date, courts have generally rejected the argument that denying driver's licenses to unlawfully present aliens runs afoul of the Equal Protection Clause.<sup>64</sup>

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<sup>59</sup> ARIZ. REV. STAT. §28-3153(D).

<sup>60</sup> See, e.g., IND. CODE ANN. §9-24-9-2(a)(6) (generally requiring applicant's for driver's licenses to provide either (1) a valid Social Security number, or (2) verification of the applicant's ineligibility to be issued a Social Security number, and identity and lawful status).

<sup>61</sup> See *supra* note 53.

<sup>62</sup> See, e.g., National Coalition of Latino Clergy, Inc. v. Henry, No. 07-CV-613-JHP, 2007 U.S. Dist. LEXIS 91487 (Dec. 12, 2007) (court noting, but not discussing, plaintiffs' constitutional challenges); John Doe No. 1 v. Georgia Dep't of Public Safety, 147 F. Supp. 2d 1369 (N.D. Ga. 2001); Doe v. Edgar, No. 88 C 579, 1989 U.S. Dist. LEXIS 9498 (N.D. Ill., Aug. 2, 1989); Lopez v. U.S. INS, No. 80-JM-375, 1983 U.S. Dist. LEXIS 13250 (D. Colo., Sept. 29, 1983) (noting, but not addressing, plaintiff's constitutional challenges to a Colorado law restricting the issuance of driver's licenses to unlawfully present aliens); Castillo-Solis v. Georgia, 740 S.E.2d 583 (Ga. 2013); People v. Quiroga-Puma, 884 N.Y.S.2d 567 (2009), *rev'g*, 848 N.Y.S.2d 853 (Justice Court of New York, Village of Westbury, Nassau County, 2007); Cubas v. Martinez, 838 N.Y.S.2d 815 (N.Y. 2007), *rev'g*, 233 N.Y.L.J. 93 (Supreme Court of New York, New York County, 2005); Villegas v. Silverman, 832 N.E.2d 598, 601 (Ind. App. 2005) (noting that the trial court, in an unpublished opinion, had rejected the plaintiffs' constitutional challenges); Sanchez v. Iowa, 692 N.W.2d 812 (Iowa Sup. 2005).

<sup>63</sup> See, e.g., Az. Dream Act Coalition v. Brewer, 945 F. Supp. 2d 1049 (D. Az. 2013); Saldana v. Lahm, No. 4:13CV3108, 2013 U.S. Dist. LEXIS 148209 (D. Neb., Oct. 11, 2013). Although a somewhat distinct issue from the permissibility of states restricting unlawfully present aliens' access to driver's licenses, one court has held that federal immigration law preempts state criminal laws which target unlawfully present aliens who operate a motor vehicle without possessing documentation demonstrating lawful presence in the United States. State v. Sarrabea, 126 So.3d 453 (La. 2013). *But see* United States v. Alabama, 691 F.3d 1269, 1299 (11<sup>th</sup> Cir. 2012) (upholding state criminal sanction against unlawfully present aliens who unlawfully apply for a driver's license against challenge that law was preempted by federal law, including provisions of PRWORA and the REAL ID Act), *cert. denied*, Alabama v. United States, 133 S. Ct. 2022 (2013).

<sup>64</sup> In what is perhaps the most notable exception to this general rule, a county court in New York found, *sua sponte*, (continued...)

Arguably key to the courts' findings here has been their determination that measures denying driver's licenses to unlawfully present aliens are subject to rational basis review, not some type of heightened scrutiny. In reaching this conclusion, courts have taken the view that the fundamental right to interstate travel is not implicated by such measures because restrictions on one mode of travel do not constitute deprivations of the right to travel, and aliens' right to travel is less extensive than citizens' right.<sup>65</sup> Indeed, one court even questioned whether unlawfully present aliens have a "fundamental right to travel about this country when their mere presence here is a violation of federal law,"<sup>66</sup> and it is a federal crime to knowingly transport such aliens.<sup>67</sup>

Courts have also expressly declined to extend the same type of heightened scrutiny applied in *Plyler* to state measures denying driver's licenses to unlawfully present aliens. Those advocating for such an extension have noted that the "minor children," whose wellbeing the Court was concerned with in *Plyler*, are now adults,<sup>68</sup> and argue that denying them a driver's license marginalizes them socioeconomically, just like denying them a "basic education" would have done.<sup>69</sup> Courts, however, have rejected these arguments on the grounds that "the harm caused by the deprivation of a drivers [sic] license, while not insubstantial, pales in comparison with the harm caused by the denial of a basic education."<sup>70</sup> Several courts have also distinguished the plaintiffs, as adults, from the unlawfully present minor children denied access to primary and secondary education in *Plyler*.<sup>71</sup> Courts have further noted a range of "legitimate" government

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when dismissing the charge of unlicensed operation of a motor vehicle brought against a defendant, that the state's restrictions upon the issuance of driver's licenses to unlawfully present aliens violates the Equal Protection clause. *See* *People v. Quiroga-Puma*, 848 N.Y.S.2d 853 (2005). However, this decision was reversed on appeal. *See* 884 N.Y.S.2d 567 (2007).

<sup>65</sup> *John Doe No. 1*, 147 F. Supp. 2d at 1375 ("[D]enial of a single mode of transportation does not rise to the level of a violation of the fundamental right to interstate travel."); *LULAC v. Bredesen*, No. 3:04-0613, 2004 U.S. Dist. LEXIS 26507, at \*12, *aff'd*, *LULAC*, 500 F.3d at 535.

<sup>66</sup> *See, e.g., John Doe No. 1*, 147 F. Supp. 2d at 1373 (construing *Edwards v. California*, 314 U.S. 160 (1941), to have derived the right to travel from citizenship, and thus finding that "[i]t would be curious indeed if the law gave illegal aliens a fundamental right to travel about this country"). In a few cases, courts also found that the plaintiffs lacked standing to challenge state measures denying them driver's licenses because of their unlawful status. *See National Coalition of Latino Clergy*, 2007 U.S. Dist. LEXIS 91487, at \*28 (characterizing this as a "narrow, prudential limitation on standing"); *Villegas*, 832 N.E.2d at 607 (noting that the district court had found that the plaintiff could not challenge a measure that generally required license applicants to provide Social Security numbers because he had previously supplied a false number and thus had "unclean hands").

<sup>67</sup> *John Doe No. 1*, 147 F. Supp. 2d at 1374 (citing 8 U.S.C. §1324(a)(1)(A)(ii)).

<sup>68</sup> *See, e.g., A Yes or No Answer*, *supra* note 2, at 465 ("[T]he children in *Plyler* are inevitably middle-aged adults by now and, although they were afforded an education and most likely 'Americanized' in the process, are now unable to function as normal adults because of their lack of a driver's license."); Kari E. D'Ottavio, *Deferred Action for Childhood Arrivals: Why Granting Driver's Licenses to DACA Beneficiaries Makes Constitutional and Political Sense*, 72 MD. L. REV. 931, 954 (2013) (advocating the application of intermediate scrutiny to such measures).

<sup>69</sup> *See, e.g., María Pabón López, More Than a License to Drive: State Restrictions on the Use of Driver's Licenses by Noncitizens*, 29 S. ILL. U. L.J. 91, 123-24 (2004) ("The concern with the creation of an 'underclass' still holds true in the case of driver's license denials, because it is very difficult for an employee to obtain any special responsibility at his or her place of employment without reliable transportation."); *Az. Dream Act Coalition v. Brewer*, No. 02:12-cv-02546-DGC-PHX, Memorandum in Support of Motion for Preliminary Injunction, at 16 (D. Az., filed Dec. 12, 2012) (copy on file with the authors) (noting that "the ability to work is often dependent on the ability to drive").

<sup>70</sup> *See, e.g., Doe*, 1989 U.S. Dist. LEXIS 9498, at \*11. The court here also took the view that distinctions involving unlawfully present aliens do not involve a suspect classification because unlawful status is not "immutable." *Id.* *See also LULAC*, 2004 U.S. Dist. LEXIS 26507, at \*11 ("Membership in this class [i.e., unlawfully present aliens and lawful nonimmigrants] is voluntary.").

<sup>71</sup> *Doe*, 1989 U.S. Dist. LEXIS, at \*11; *Cubas v. Martinez*, 819 N.Y.S.2d 10, 35 (N.Y. App. Div. 2006). This is (continued...)

interests served by barring the issuance of driver's licenses and other forms of ID to unlawfully present aliens, including the state (1) not allowing itself to be used to "facilitat[e] the concealment of illegal aliens";<sup>72</sup> (2) preserving scarce resources by not issuing licenses to persons who may be deported;<sup>73</sup> and (3) assuring the integrity of identity documents.<sup>74</sup>

However, while state measures denying driver's licenses to unlawfully present aliens have thus far been found to be generally permissible, there have been circumstances wherein the denial of licenses to particular aliens who entered or remained in the United States in violation of federal immigration law have been found to violate the Equal Protection Clause. For example, a federal district court in Arizona recently found that the State of Arizona's practice of denying driver's licenses to aliens granted deferred action and employment authorization documents (EADs) through the Obama Administration's Deferred Action through Childhood Arrivals (DACA) initiative, but issuing them to other aliens granted deferred action and EADs by the executive branch, cannot withstand rational basis review.<sup>75</sup> The executive branch has long had a practice of granting deferred action—a type of relief from removal—to unlawfully present aliens who are not a priority for removal.<sup>76</sup> Aliens granted deferred action lack legal immigration status, but generally do not accrue additional unlawful presence while covered by a grant of deferred action,<sup>77</sup> and they may be granted EADs if they establish an "economic necessity" for employment.<sup>78</sup>

The DACA initiative has prompted resistance from some who are concerned about the apparent granting of deferred action to a group of people, rather than on an individual basis, among other things.<sup>79</sup> In 2012, the governor of Arizona issued an executive order tasking state agencies with

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potentially significant because the *Plyler* Court distinguished the unlawfully present alien children from their parents, in part, on the grounds that children "can affect neither their parents' conduct nor their own status," while their parents, as adults, have "the ability to conform their conduct to societal norms, and presumably the ability to remove themselves from the State's jurisdiction." *Plyler*, 457 U.S. at 220.

<sup>72</sup> *John Doe No. 1*, 147 F. Supp. 2d at 1376 ("The State of Georgia has a legitimate interest in not allowing its governmental machinery to be a facilitator for the concealment of illegal aliens."); *Sanchez*, 692 N.W.2d at 818 (similar). The interest recognized here would appear to be related to concerns that possession of driver's licenses can "creat[e] an appearance of lawful presence." *Lopez*, 758 F.2d at 1393. The court in *Sanchez* noted other interests cited by the state—namely, limiting its services to citizens and legal residents; restricting licenses to citizens and LPRs because of concerns that those subject to immediate deportation will not be financially responsible for accidents; and discouraging "illegal immigration"—but the court did not address whether these constitute "legitimate" interests, since it found that the first interest (i.e., not allowing "governmental machinery" to facilitate concealment) sufficed.

<sup>73</sup> *John Doe No. 1*, 147 F. Supp. 2d at 1376 (also noting that the restrictions promote the "safety of the economy" in Georgia by restricting the issuance of licenses to those who are not subject to immediate deportation and thus will be financially responsible for property damage or personal injury due to automobile accidents).

<sup>74</sup> *Doe*, 1989 U.S. Dist. LEXIS, at \*12-\*13 (state argued that the measure promotes supervision and safety on the highways); *Cubas*, 870 N.E.2d at 136, *aff'g*, *Cubas*, 819 N.Y.S.2d at 39. *See also LULAC*, 500 F.3d at 536 (noting that issuing CFDs, instead of driver's licenses, to unlawfully present aliens promotes homeland security by indicating to third-parties that state does not vouch for the card holders' identity).

<sup>75</sup> *Az. Dream Act Coalition v. Brewer*, 945 F. Supp. 2d 1049 (D. Az. 2013).

<sup>76</sup> *See, e.g., Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 483-84 (1999) (noting this practice).

<sup>77</sup> *See, e.g., U.S. Citizenship & Immigr. Servs., Frequently Asked Questions*, updated Jan. 18, 2013, *available at* <http://www.uscis.gov/humanitarian/consideration-deferred-action-childhood-arrivals-process/frequently-asked-questions> ("Although action on your case has been deferred and you do not accrue unlawful presence (for admissibility purposes) during the period of deferred action, deferred action does not confer any lawful status.").

<sup>78</sup> 8 C.F.R. §274a.12(c)(14).

<sup>79</sup> *See, e.g., Peter Margulies, Taking Care of Immigration Law: Presidential Stewardship, Prosecutorial Discretion*, (continued...)



making any changes “necessary to prevent [DACA beneficiaries] from obtaining eligibility, beyond [that] available to any person regardless of lawful status, for any taxpayer-funded public benefits and state identification, including a driver’s license.”<sup>80</sup> This order, in turn, prompted the Arizona Motor Vehicle Division to distinguish between those granted EADs as a result of DACA, and other aliens without legal immigration status who were granted EADs, in the issuance of driver’s licenses.<sup>81</sup> The state attempted to justify this distinction, in part, on the grounds that issuing licenses to DACA beneficiaries could lead to “improper access” to federal and state public benefits, and that the state would have to cancel their licenses if the DACA initiative were ended.<sup>82</sup> However, the reviewing district court found that none of the justifications put forth by the state constituted a legitimate basis for the distinction between DACA beneficiaries and other unlawfully present aliens granted EADs.<sup>83</sup> A state court in Nebraska has suggested that it is similarly skeptical as to whether that state’s practice of denying licenses to those granted deferred action through DACA, while issuing licenses to other aliens with deferred action status, has a “rational basis.”<sup>84</sup>

The federal court decisions concerning the Arizona and Nebraska restrictions appear to be limited to the facts and circumstances of the cases, and should not be taken to mean that every state measure that bars the issuance of driver’s licenses to unlawfully present aliens necessarily violates the Equal Protection Clause. Indeed, Arizona responded to the district court’s decision by modifying its practices so as to deny licenses to *all* aliens granted deferred action, not just DACA beneficiaries.<sup>85</sup> This modified practice could potentially play a role in the plaintiffs’ appeal of the district court’s decision not to preliminarily enjoin Arizona’s practice of denying licenses to DACA beneficiaries.<sup>86</sup>

## Preemption

The courts have also generally rejected the view that state measures denying driver’s licenses to unlawfully present aliens constitute an impermissible regulation of immigration that is per se preempted. In challenges to state restrictions on the issuance of driver’s licenses to unlawfully

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*and the Separation of Powers*, 94 B.U. L. REV. 105 (2014); Robert J. Delahunty & John C. Yoo, The Obama Administration, the DREAM Act, and the Take Care Clause, at 3, *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2144031](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2144031); Testimony of Senator Michael S. Lee Before the House Committee on the Judiciary, “The Obama Administration’s Abuse of Power,” Sept. 12, 2012, *available at* <http://judiciary.house.gov/hearings/Hearings%202012/Lee%2009122012.pdf>.

<sup>80</sup> *Az. Dream Act Coalition*, 945 F. Supp. 2d at 1055 (quoting Arizona Executive Order 2012-06 (Aug. 15, 2012)).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 1071-72.

<sup>83</sup> *Id.* at 1072.

<sup>84</sup> *Saldana*, 2013 U.S. Dist. LEXIS 148209, at \*18 (“If [the plaintiff’s] allegation [that the state issued driver’s licenses to other persons with deferred action status, but not DACA beneficiaries] is true, it is not clear what, if any, rational basis supports this different treatment.”). Nebraska’s denial of driver’s licenses to DACA beneficiaries has also been challenged on the grounds that it violates the state’s Administrative Procedure Act and the Nebraska Constitution. *See Hernandez v. Heineman*, No. CI 13-2124, Order (Lancaster County, Nebraska, District Court, Jan. 22, 2014) (copy on file with the authors).

<sup>85</sup> *See* Defendants’ Notice of Revision to Policy 16.1.4 Concerning Acceptance of Employment Authorization Cards (filed, D. Az., Sept. 17, 2013) (copy on file with the authors).

<sup>86</sup> *See Az. Dream Act Coalition v. Brewer*, No. 13-16248, Appellants’ Opening Brief (9<sup>th</sup> Cir., filed July 15, 2013) (copy on file with the authors).

present aliens, plaintiffs have sometimes argued that these restrictions are regulations of immigration because they purportedly seek to exclude aliens from the community and thus attempt to determine “who should or should not be admitted into the country, and the conditions under which ... entrant[s] may remain.”<sup>87</sup>

For example, in 2011, the U.S. Department of Justice (DOJ) challenged provisions of Alabama’s H.B. 56 that barred unlawfully present aliens from obtaining or renewing driver’s licenses. The DOJ initially asserted that Alabama had “essentially given unlawful aliens the choice” between not obtaining licenses or other services from the state; obtaining such licenses and services and, thereby, committing a felony; or “leaving Alabama.”<sup>88</sup> Other plaintiffs and commentators have made similar arguments against the Alabama law and comparable enactments in other states, suggesting that restricting the issuance of driver’s licenses to unlawfully present aliens reflects the intent to exclude them from the United States.<sup>89</sup>

This line of argument has generally been rejected. Several courts have indicated that they view such restrictions as affecting purely local matters, rather than constituting an attempt to regulate who may enter or remain in the United States.<sup>90</sup> One court took the view that, in addition to furthering legitimate state interests, a challenged state measure mirrored and complimented “federal objectives by denying ... driver’s licenses to those who are in this country illegally according to federal law.”<sup>91</sup>

Nonetheless, an argument could be made that particular state measures denying driver’s licenses to unlawfully present aliens are per se preempted as regulations of immigration, if those measures rely upon state rather than federal definitions of who is unlawfully present, or task state officials with determining aliens’ status. State or local measures that do either of these two things (i.e., establish their own classifications for aliens, or have state officials determine aliens’ status independently from federal authorities) have been found to constitute impermissible regulations of immigration in other contexts.<sup>92</sup>

In addition to per se challenges, some plaintiffs and commentators have also alleged that state measures denying driver’s licenses to unlawfully present aliens are preempted by federal statutes,

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<sup>87</sup> *Cf. De Canas*, 424 U.S. at 355.

<sup>88</sup> *United States v. Alabama*, No. 11-J-2746-S, Plaintiff’s Motion for Preliminary Injunction (N.D. Ala., filed Aug. 1, 2011) (copy on file with the authors).

<sup>89</sup> *See, e.g.*, Appellants’ Opening Brief, *supra* 86, at 14-19; *A Yes or No Answer*, *supra* note 4, at 458-59.

<sup>90</sup> *United States v. Rivera*, 516 F.3d 500, 503 (6<sup>th</sup> Cir. 2008) (expressing the view that CFDs are “not related to naturalization, citizenship, or legal status”); *LULAC*, 2004 U.S. Dist. LEXIS 26507, at \*21 (similar); *Castillo-Solis*, 740 S.E.2d at 763 (similar); *Louisiana v. Gonzalez-Perez*, 2008 La. App. LEXIS 272, at \*16 (La. Ct. App., Feb. 27, 2008) (“[T]he statute in question is not a constitutionally impermissible regulation of immigration, because it does not involve a state determination of who should or should not be admitted into the country or the conditions under which a legal entrant may remain.”).

<sup>91</sup> *Doe No. 1*, 147 F. Supp. 2d at 1376. *See also LULAC*, 2004 U.S. Dist. LEXIS 26507, at \*21.

<sup>92</sup> *See, e.g.*, *Lozano v. City of Hazleton*, 724 F.3d 297 (3d Cir. 2013), *cert. denied*, *City of Hazleton v. Lozano*, 2014 U.S. LEXIS 1740 (Mar. 3, 2014) (restrictions on renting to unlawfully present aliens preempted, in part, because “[d]eciding which aliens may live in the United States has always been the prerogative of the federal government”); *LULAC v. Wilson*, 908 F. Supp. 755, 771 (C.D. Cal. 1995) (finding that provisions of California’s Proposition 187 that required state officials to determine aliens’ immigration status were per se preempted); *Montana Immigrant Justice Alliance v. Bullock*, No. BDV-2012-1042, Order on Petition for Preliminary Injunction (Mt. First Judicial Dist. Ct., filed Mar. 26, 2013) (copy on file with the authors) (requiring the state to rely on federal determinations as to whether individual are lawfully present in the United States in determining eligibility for “state services”).

including the REAL ID Act.<sup>93</sup> Thus far, however, the few courts that have considered this argument have not been persuaded. Notably, in its 2012 decision in *United States v. Alabama*, the U.S. Court of Appeals for the Eleventh Circuit (“Eleventh Circuit”) rejected the DOJ’s preemption arguments against provisions of Alabama’s H.B. 56, which barred aliens “not lawfully present in the United States” from obtaining driver’s licenses and made it a criminal offense for such aliens to apply for licenses.<sup>94</sup> The appellate court held that these provisions were not facially preempted by federal law, including the REAL ID Act.<sup>95</sup> In particular, the Eleventh Circuit emphasized that the REAL ID Act “encouraged individual states to require evidence of lawful status as a prerequisite to issuing a driver’s license or identification card to an applicant.”<sup>96</sup>

The Eleventh Circuit did raise the possibility of tension between the state law and applicable federal statutes. It noted, for example, a possible incongruence between the category of aliens ineligible to receive a license under Alabama law and the standards for federal acceptance of driver’s licenses provided in the REAL ID Act. However, the court believed the Alabama law “could be construed to avoid this problem, and if this issue does arise, it may be more appropriately addressed in the context of an as-applied challenge.”<sup>97</sup>

The appellate court also rejected the argument that the Alabama statute is inconsistent with federal law because it criminalizes conduct that is not subject to criminal penalty under federal statute. The Eleventh Circuit viewed this alleged conflict as a “hypothetical or potential” one, since H.B. 56 criminalizes conduct “that appears highly unlikely to occur, given that Alabama has chosen not to make [driver’s licenses and certain benefits] available [to unlawfully present aliens] in the first place.”<sup>98</sup> More broadly, the Eleventh Circuit interpreted the REAL ID Act as not purporting to regulate “driver’s licenses, identification cards, and unlawfully present aliens,” and leaving the field open “for the states to adopt different policies concerning this subject.”<sup>99</sup>

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<sup>93</sup> See, e.g., *Saldana*, 2013 U.S. Dist. LEXIS 148209, at \*15 (rejecting plaintiff’s argument that the REAL ID Act preempts Nebraska’s policy of denying licenses to DACA beneficiaries by noting that the act expressly establishes “minimum standards” that state IDs must comply with in order to be recognized by federal agencies, and declaring that “[n]othing in the Act prevents states from imposing standards or requirements that exceed those set out in the Act”); *Deferred Action for Childhood Arrivals*, *supra* note 68, at 958 (“The REAL ID Act ... provides a promising foundation for a pre-emption argument in the case of state driver’s license restrictions on DACA beneficiaries.”); John K. Blake, Jr., *Examining Louisiana’s Prevention of Terrorism on the Highways Act*, 35 S.U. L. REV. 223, 256-58 (2007) (discussing a construction of the REAL ID Act as preempting certain state restrictions on aliens driving without proof of lawful immigration status). On the other hand, at least one commentator has suggested that courts may be more likely to defer to states’ determinations regarding the issuance of driver’s licenses to unlawfully present aliens given the enactment of the REAL ID Act. See *A Yes or No Answer*, *supra* note 4, at 471.

<sup>94</sup> 691 F.3d 1269 (11<sup>th</sup> Cir. 2012), *cert. denied*, 133 S. Ct. 2022 (2013).

<sup>95</sup> The Eleventh Circuit also addressed whether these provisions of H.B. 56 are preempted by PRWORA, but its discussion of PRWORA seems to have centered upon professional licenses, not driver’s licenses. *Id.* at 1298.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* But see *Saldana*, 2013 U.S. Dist. LEXIS 148209, at \*15 (finding that Nebraska’s practice of denying driver’s licenses to DACA beneficiaries is not preempted by the REAL ID Act, even though the act permits the issuance of licenses to those granted deferred action, on the grounds that “nothing in the Act requires states to issue driver’s licenses to anyone”).

<sup>98</sup> *Alabama*, 691 F.3d at 1301 n. 27.

<sup>99</sup> *Id.* at 1299.

## Granting Driver's Licenses and Other State-Issued ID

In contrast to states seeking to deny unlawfully present aliens driver's licenses (see "Denying Driver's Licenses and Other State-Issued ID"), several states have adopted measures that would permit unlawfully present aliens to obtain driver's licenses. Sometimes, the state permits such aliens to obtain a license that looks like those issued to citizens, LPRs, and eligible lawful nonimmigrants, as New Mexico does.<sup>100</sup> At other times, the state issues licenses to unlawfully present aliens that are visually distinguishable from the licenses issued to U.S. citizens and foreign nationals with lawful immigration status, although the state does not purport to restrict their usage for identification purposes.<sup>101</sup>

Some have suggested that such measures are per se preempted by federal law because they regulate immigration, or are impliedly preempted by the REAL ID Act or PRWORA.<sup>102</sup> However, such claims do not appear to have resulted in any judicial holdings or findings on the issue, perhaps because of limitations on who has standing to challenge such measures.<sup>103</sup> Moreover, even if a plaintiff were found to have standing to challenge these measures, the argument that they are preempted by federal law could be difficult to maintain given that (1) state measures *denying* driver's licenses to unlawfully present aliens have generally not been viewed as regulations of immigration;<sup>104</sup> (2) the REAL ID Act contemplates states issuing driver's licenses and other ID that are not recognized by federal agencies;<sup>105</sup> and (3) PROWRA expressly permits states to provide public benefits to unlawfully present aliens by enacting legislation that affirmatively provides for their eligibility.<sup>106</sup>

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<sup>100</sup> N.M. STAT. ANN. §66-5-9(B) (2014).

<sup>101</sup> See, e.g., Illinois Sec'y of State, Driver Services: New Temporary Visitor Driver's License (TVDL) for Undocumented (Non-Visa Status) Individuals, *available at* <http://www.cyberdriveillinois.com/departments/drivers/TVDL/home.html> (last accessed: Mar. 22, 2014). Congress has generally barred federal agencies from accepting any licenses issued to unlawfully present aliens for "official purposes," as previously noted, but the states that issue licenses (as opposed to certificates for driving or driving privileges cards) to such aliens do not necessarily do so.

<sup>102</sup> See sources cited, *infra* note 107.

<sup>103</sup> Standing requirements, which are concerned with who is a proper party to raise a particular issue in the federal courts, derive from Article III of the Constitution, which confines the jurisdiction of federal courts to actual "Cases" and "Controversies." U.S. Const., art. III, §2, cl. 1. The case-or-controversy requirement has long been construed to restrict Article III courts to the adjudication of real, live disputes involving plaintiffs who have "a personal stake in the outcome of the controversy." *Baker v. Carr*, 369 U.S. 186, 204 (1962). Plaintiffs appearing before an Article III court must generally show three things in order to demonstrate standing: (1) they have suffered an "injury in fact" that is concrete and particularized; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) the injury is likely to be redressed by a favorable decision. See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

<sup>104</sup> See *supra* notes 87-91 and accompanying text.

<sup>105</sup> 49 U.S.C. §30301 note; *Louisiana v. Lopez*, 948 So. 2d 1121, 1125 (La. App. 2006) ("[I]mplicit in the REAL ID act is the federal recognition that states can legally issue driver's licenses without a person being in a position to establish his legal presence in the United States.").

<sup>106</sup> See *supra* note 51 and accompanying text.

## Preempted as a Regulation of Immigration

Several commentators and at least one court (in non-binding dicta) have suggested that state measures granting driver's licenses to unlawfully present aliens are per se preempted because such measures regulate immigration by legitimizing the presence of aliens whom the federal government has not authorized to be present in the United States.<sup>107</sup> Those making this argument appear to be particularly concerned that driver's licenses can be used in various everyday transactions, from opening a bank account to obtaining employment, the successful performance of which further integrates the unlawfully present alien into the community—and helps create an appearance of lawful presence.<sup>108</sup>

However, the view that the issuance of driver's licenses to unlawfully present aliens constitutes a regulation of immigration does not appear to have been adopted in the holdings or findings of any federal or state court. The only court to have espoused this characterization did so in dicta, in the course of rejecting a challenge to a state measure that *barred* unlawfully present aliens from obtaining driver's licenses.<sup>109</sup> Arguably, a court could reject a challenge to measures *granting* driver's licenses to unlawfully present aliens on the grounds that such a measure does not regulate immigration (for example, by reasoning that state measures granting driver's licenses to unlawfully present aliens address purely local matters, not national ones).<sup>110</sup>

## Preemption by the REAL ID Act

As previously discussed,<sup>111</sup> the REAL ID Act, when fully implemented, will prohibit federal agencies from recognizing a state driver's license or other forms of state-issued ID for official purposes unless unlawfully present aliens are ineligible to receive such documents.<sup>112</sup> While some might argue that the act broadly preempts states from issuing IDs to unlawfully present aliens, these arguments seem difficult to maintain. To date, no court has held that the REAL ID Act

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<sup>107</sup> See, e.g., *LULAC*, 2004 U.S. Dist. LEXIS 26507, at \*21 (rejecting plaintiffs' preemption challenge to state restriction on the issuance of driver's licenses to unlawfully present aliens, and stating that "it is Plaintiffs who are attempting to have the State regulate immigration by seeking to have the State issue an identification card that makes illegal aliens and restricted or temporary aliens appear to have a status indistinguishable from citizens and lawful permanent residents—a status that they have not sought, or are unable to obtain, from the federal government."); Paul *Undocumented Workers*, *supra* note 2, at 537 (2004) ("The driver license law [enacted by California in 2003, and then repealed] attempted to set immigration policy by legitimizing state action (acquiring a driver license) by individuals who by federal law were unlawfully in the nation (illegal immigrants)."); Moore Opposes Granting Licenses to Undocumented Immigrants, available at <http://www.wmrcdailynews.com/news-det.php?i=107&d=Moore-Opposes-Granting-Licenses-to-Undocumented-Immigrants> (last accessed: Mar. 22, 2014) (quoting a state senator as expressing the view that "[g]ranting such a privilege to those who have not yet obtained immigration status would legitimize unlawful presence").

<sup>108</sup> *Undocumented Workers*, *supra* note 2, at 538. Cf. *Lopez*, 758 F.3d at 1393 (characterizing a driver's license as "one of the most useful single items of identification for creating the appearance of lawful presence"); *Jewish Community Action v. Comm'r of Public Safety*, 657 N.W.2d 604, 607 (Minn. App. 2003) (state Department of Public Safety characterizing driver's licenses as "'gateway documents,' which enable holders to establish ostensibly accurate and legitimate identities and to gain privileges available only to people who can identify themselves through widely accepted official documentation").

<sup>109</sup> *LULAC*, 2004 U.S. Dist. LEXIS 26507, at \*21.

<sup>110</sup> See *supra* note 90 and accompanying text.

<sup>111</sup> See *supra* discussion at "Preemption."

<sup>112</sup> P.L. 109-13, Div. B., §202(b)(2)(C).

preempts states from issuing driver's licenses and other IDs to unlawfully present aliens.<sup>113</sup> The express language of the REAL ID Act does not purport to bar states from issuing driver's licenses to unlawfully present aliens. The legislative history of the act supports the view that the statute was not intended to prohibit states from issuing IDs that do not comply with REAL Act standards.<sup>114</sup> Indeed, the act is directed primarily at federal agencies, and bars them from accepting, "for any official purpose," a state driver's license or other ID card that does not satisfy the act's minimum standard requirements. Arguments that the REAL ID Act generally preempts states from issuing driver's licenses and other IDs that do not comply with the act's minimum standard requirements also seem undercut by the language of Section 202(d)(11) of the act, which states the following:

In any case in which the State issues a driver's license or identification card that does not satisfy the requirements of this section, [States shall adopt practices which] ensure that such license or identification card—

(A) clearly states on its face that it may not be accepted by any Federal agency for federal identification or any other official purpose; and

(B) uses a unique design or color indicator to alert Federal agency and other law enforcement personnel that it may not be accepted for any such purpose.<sup>115</sup>

The nature of this requirement seems to indicate that states are not preempted from issuing forms of identification that do not comply with the minimum standards established pursuant to the REAL ID Act. Moreover, while the act requires that non-conforming IDs use a unique identifier to alert federal officials that the document is not to be accepted for official purposes, the apparent consequence of a state failing to comply with this requirement is not that the state will be preempted from issuing IDs; rather, the consequence appears to be simply that the IDs that state issues will not be recognized by federal agencies for official purposes

## Preemption by PRWORA

At least one commentator has suggested that measures granting driver's licenses to unlawfully present aliens are preempted by PRWORA,<sup>116</sup> but this appears unlikely given PRWORA's definition of *state and local public benefits* and its provisions expressly permitting states to enact legislation that affirmatively provides for unlawfully present aliens' eligibility for such benefits.

<sup>113</sup> Cf. *Alabama*, 691 F.3d at 1299 (upholding against a preemption challenge to a state statute penalizing unlawfully present aliens who apply for driver's licenses, and broadly stating that "[t]he REAL ID Act ... does not purport to comprehensively regulate driver's licenses, identification cards, and unlawfully present aliens. Rather, it leaves the field essentially open, giving room for the states to adopt different policies concerning this subject."); *Lopez*, 948 So. 2d at 1125 ("[I]mplicit in the REAL ID act is the federal recognition that states can legally issue driver's licenses without a person being in a position to establish his legal presence in the United States.").

<sup>114</sup> Conference Report for Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005, H.REPT. 109-72, at 177 ("[The REAL ID Act] states that the law is binding on Federal agencies—not the states. Consequently, this Act does not directly impose federal standards with respect to states' issuance of driver's licenses and personal identification cards. The application of the law is indirect, and hence states need not comply with the listed standards. However, states would nevertheless need to adopt such standards and modify any conflicting laws or regulations in order for such documents to be recognized by federal agencies for official purposes.").

<sup>115</sup> P.L. 109-13, Div. B, §202(d)(11).

<sup>116</sup> *Undocumented Workers*, *supra* note 2, at 538-39.



As an initial matter, it is unclear that PRWORA's definition of *state and local public benefit* encompasses the issuance of driver's licenses to unlawfully present aliens. This definition has two prongs, one of which includes "any grant, contract, loan, professional license, or commercial license provided by an agency of a State or local government or by appropriated funds of a State or local government."<sup>117</sup> The other includes

any retirement, welfare, health, disability, public or assisted housing, postsecondary education, food assistance, unemployment benefit, or any other similar benefit for which payments or assistance are provided to an individual, household, or family eligibility unit by an agency of a State or local government or by appropriated funds of a State or local government.<sup>118</sup>

Driver's licenses would not appear to be public benefits under the first prong, insofar as that prong applies only to professional and commercial licenses, and "ordinary" (i.e., noncommercial) driver's licenses would not appear to be encompassed by the everyday meaning of either "professional license" or "commercial license."<sup>119</sup>

An argument could also be made that driver's licenses are not state and local public benefits under the second prong of PRWORA's definition because they do not entail "payments" or "assistance"—as that term has generally been construed—to individuals or households.<sup>120</sup> Driver's licenses are issued by state agencies using appropriated funds, and an argument could be made that their issuance "assists" unlawfully present aliens by making it easier for them to engage in everyday transactions.<sup>121</sup> However, courts have generally declined to view "assistance" as encompassing everything that could benefit unlawfully present aliens in any way, instead construing it to refer only to services that "assist people with economic hardship,"<sup>122</sup> and could "create [an] incentive for illegal immigration."<sup>123</sup> Moreover, even if driver's licenses were viewed as public benefits for purposes of PRWORA, PRWORA expressly authorizes states to grant public benefits to unlawfully present aliens by subsequently enacting legislation that affirmatively provides for their eligibility.<sup>124</sup> Thus, the only state actions that would potentially be barred by PRWORA would seem to be those that are not pursuant to state legislation enacted subsequent to PRWORA.<sup>125</sup>

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<sup>117</sup> 8 U.S.C. §1621(c)(1)(A).

<sup>118</sup> 8 U.S.C. §1621(c)(1)(B).

<sup>119</sup> *Cf.* *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (In the absence of a statutory definition, "we construe a statutory term in accordance with its ordinary or natural meaning.").

<sup>120</sup> State of Colorado, Dep't of Law, Opinion No. 12-04, June 19, 2012, at 5 (copy on file with the authors) ("Assistance is defined as 'aid' or 'help.' It is quite clear that Metro State's new discounted tuition would be a significant aid or help to students who qualify. After all, the very purpose of Metro State's plan [to provide discounted tuition to unlawfully present aliens] ... is to make attending college easier for certain students (that is, to "help" them attend college).").

<sup>121</sup> *See supra* note 108.

<sup>122</sup> *Rajeh v. Steel City Corp.*, 813 N.E.2d 697, 707 (Ohio App. 2004) (workers' compensation not a public benefit for purposes of PRWORA because it is a "substitutionary remedy" for a negligence suit).

<sup>123</sup> *County of Alameda v. Agustin*, 2007 Cal. App. LEXIS 7665, at \*10 (1<sup>st</sup> App. Dist., Div. One, Sept. 24, 2007) (rejecting the argument that "child collection support services" and the issuance of a court order requiring child support payments constituted state public benefits and thus cannot be provided to an unlawfully present alien in the absence of a state law that expressly provided for unlawfully present aliens' eligibility).

<sup>124</sup> *See* 8 U.S.C. §1621(c)(1).

<sup>125</sup> It should also be noted that at least one court has found that PRWORA does not bar states from delegating to administrative agencies or local governments the authority to determine whether unauthorized aliens may be granted (continued...)

## Granting Driver's Certificates, But Not Licenses

A few states, seeking to promote traffic safety by screening drivers, but not wishing to issue driver's licenses to unlawfully present aliens, have adopted measures that permit such aliens to obtain "Certificates for Driving" (CFDs) or "Driving Privilege Cards" (DPCs), but not driver's licenses. Utah is one such state, issuing DPCs to persons who cannot "provid[e] evidence of lawful presence in the United States."<sup>126</sup> Tennessee formerly had a similar provision that permitted "[p]ersons whose presence in the United States has [not] been authorized by the federal government" to obtain CFDs.<sup>127</sup> In both cases, the documents issued by the state expressly note, on their face, that they are for driving purposes only, but not for ID purposes.<sup>128</sup> This restriction is arguably significant, in that driver's licenses and other state-issued ID have been widely recognized to play an important role in establishing identity for purposes of various everyday transactions (e.g., opening bank accounts, obtaining employment).<sup>129</sup> Partly because CFDs and DPCs would not necessarily be recognized for such purposes, and partly because of the perceived "stigma" associated with having a CFD or a DPC instead of a driver's license,<sup>130</sup> some have alleged that these measures are impermissible, and that states must grant unlawfully present aliens' driver's licenses like those that issued to citizens and LPRs.

These arguments were rejected by a federal district court in the case of *League of United Latin American Citizens [LULAC] v. Bredesen*,<sup>131</sup> in a ruling that was upheld by the U.S. Court of Appeals for the Sixth Circuit ("Sixth Circuit").<sup>132</sup> In this case, the district court's found that a Tennessee measure, permitting unlawfully present aliens to obtain CFDs but not driver's licenses, did not run afoul of the Equal Protection and Supremacy Clauses.<sup>133</sup> In so finding, the district court held that (1) "illegal aliens" are not a "suspect class"; (2) heightened scrutiny, like that applied in *Plyler*, is unwarranted because the aliens denied driver's licenses "do[] not resemble the class of children described in *Plyler*"; and (3) aliens' right to travel is more limited than citizens' right.<sup>134</sup>

However, due in part to the unique nature of the state document at issue in the case, which granted aliens documents that were valid for driving, but not for ID, the reviewing district court touched upon issues not addressed in other decisions. For example, the district court expressly rejected the argument that there is a "constitutional right to a state-issued identification card acceptable to third-parties."<sup>135</sup> It also rejected the plaintiffs' due process claim that the Tennessee

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particular benefits. See *Kaider v. Hamos*, 975 N.E.2d 667, 678 (Ill. App. 2012).

<sup>126</sup> UTAH CODE ANN. §53-3-207(7)(a) (2014).

<sup>127</sup> TENN. CODE ANN. §55-50-331(h) (2004). The Tennessee program was reportedly ended in 2007. See *A Yes or No Answer*, *supra* note 4.

<sup>128</sup> UTAH CODE ANN. §53-3-207(7)(b) (2014); TENN. CODE ANN. §55-50-102(6) (2004).

<sup>129</sup> See *supra* note 7.

<sup>130</sup> See *License to Drive*, *supra* note 4, at 212-13 (noting various commentators who have expressed such concerns); *More Than a License to Drive*, *supra* note 69, at 103-04.

<sup>131</sup> *LULAC v. Bredesen*, 2004 U.S. Dist. LEXIS 26507 (M.D. Tenn., Sept. 28, 2004).

<sup>132</sup> *LULAC v. Bredesen*, 500 F.3d 523 (6<sup>th</sup> Cir. 2007).

<sup>133</sup> See *LULAC*, 2004 U.S. Dist. LEXIS 26507 at \*15, \*22.

<sup>134</sup> *Id.* at \*10-\*12.

<sup>135</sup> *Id.* at \*15. While the reviewing federal district court in another case, *Fahy v. Commissioner, New Hampshire Dep't* (continued...)



measure created an unconstitutional irrebuttable presumption that aliens holding CFDs are “threats to homeland security” because the plaintiffs’ failed to show that the state’s distinctions between documents issued to unlawfully present aliens and other persons were not rationally related to the state’s legitimate interest in promoting homeland security.<sup>136</sup>

The issuance of CFDs and DPCs to unlawfully present aliens has also been criticized by those who would also deny driver’s licenses to unlawfully present aliens.<sup>137</sup> However, such criticisms do not appear to have resulted in legal challenges, and any such challenges to the granting of CFDs and DPCs to unlawfully present aliens would likely be subject to the same analysis given to measures granting driver’s licenses to such persons.<sup>138</sup>

## Municipal ID Cards

Some cities have also adopted measures that provide unlawfully present aliens with municipal ID cards for use in their dealings with the city.<sup>139</sup> For example, the San Francisco Board of Supervisors passed an ordinance on November 20, 2007, authorizing the County Clerk’s Office to issue “SF City ID Cards” to all San Francisco residents, regardless of their immigration status.<sup>140</sup> All city agencies and “other entities receiving [c]ity funds” are required to accept the cards as proof of identity and residence, unless state or federal law requires otherwise.<sup>141</sup> This includes the Police Department, Department of Public Health, Public Utilities Commission, and Child Support Services, among others.<sup>142</sup> The card can also be used as a library card at the city’s public libraries; a form of identification to open a checking account at participating banks; or to open a “Family Account” with the Recreation and Parks Department.<sup>143</sup> Some commentators have expressed concerns about such practices that are akin to those raised about state measures granting driver’s licenses to unlawfully present aliens.<sup>144</sup> However, for the reasons previously discussed, this

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*of Safety*, found that that state’s practice of issuing non-citizens paper 45-day temporary licenses, and citizens a laminated photo-ID permit good for 6 months, violated equal protection, it applied rational basis review in scrutinizing this practice. 2006 U.S. Dist. LEXIS 18170, at \*\*40-\*43.

<sup>136</sup> *LULAC*, 2004 U.S. Dist. LEXIS 26507, at \*19. As to the state’s homeland security concerns, the court had previously accepted the state’s argument that the “drivers’ certificate legislation represents a balancing of interests—on the one hand, allowing holders of the drivers’ certificate to validly operate motor vehicles in the state, while on the other hand, indicating to third parties that the State of Tennessee does not vouch for the identity of the person holding the drivers’ certificate.” *Id.* at \*16-\*17.

<sup>137</sup> *Cf. A Yes or No Answer*, *supra* note 4, at 442-57 (discussing opposition to the Utah and Tennessee measures).

<sup>138</sup> *See supra* notes 108-125.

<sup>139</sup> *See, e.g.*, Catherine Saillant, *L.A. Council Approves ID Cards for City Residents*, LOS ANGELES TIMES, Nov. 7, 2012, available at <http://articles.latimes.com/2012/nov/07/local/la-me-city-id-card-20121108>; About DC One Card, available at <http://dconecard.dc.gov/dconecard/cwp/view,a,1241,q,461156,dconecardNav,%7C.asp> (last accessed: Mar. 23, 2014); City of New Haven, Community Servs. Admin., *New Haven’s Elm City Resident Card: My City, My Card*, available at <http://www.cityofnewhaven.com/csa/newhavenresidents/> (last accessed: Mar. 23, 2014).

<sup>140</sup> *See* City & County of San Francisco, Office of the County Clerk, SF City ID Card, available at <http://www.sfgov2.org/index.aspx?page=110> (last accessed: Mar. 23, 2014).

<sup>141</sup> City & County of San Francisco, Office of the County Clerk, SF City ID Card: Using Your Card, available at <http://www.sfgov2.org/index.aspx?page=114> (last accessed: Mar. 23, 2014).

<sup>142</sup> City & County of San Francisco, Department and Agencies, available at <http://www6.sfgov.org/index.aspx?page=40> (last accessed: Mar. 23, 2014).

<sup>143</sup> SF City ID Card, *supra* note 140.

<sup>144</sup> *See, e.g.*, Michael D. Bonanno, *Municipal Identity (Card) Crisis: U.S. Citizenship and the San Francisco Municipal* (continued...)

practice may be unlikely to be found to be barred by federal law (see “Granting Driver’s Licenses and Other State-Issued ID”).

It is also important to note that municipal ID card measures would arguably not override existing federal restrictions upon the receipt of federal, state, or local public benefits by unlawfully present aliens.<sup>145</sup> Federal law bars unlawfully present aliens from receiving *federal public benefits*—a term that encompasses any benefit provided using federal funds, even if the program is administered by a state or local government.<sup>146</sup> This general prohibition upon the provision of federal public benefits to unlawfully present aliens would continue to apply, even if a local agency were otherwise “required” to accept municipal ID cards, because federal law preempts inconsistent provisions of state and local law.<sup>147</sup> Similarly, where state and local public benefits are concerned, the state would arguably need to have enacted legislation that “affirmatively provides” for unlawfully present aliens’ eligibility in order for the local agency to provide such benefits to such aliens.

## Recognition of Foreign Consular IDs

A foreign consulate’s issuance of consular IDs to its country’s nationals has been a long-standing practice. However, the number of IDs issued to foreign nationals residing in the United States, and the recognition of these IDs as a legitimate form of identification by government and private institutions, has grown significantly in recent decades.<sup>148</sup> Some states and localities have adopted measures that recognize consular IDs, including as a form of identification to obtain a driver’s license, while others have limited or prohibited their acceptance by government and private entities.<sup>149</sup>

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*I.D. Program*, 7 GEO. J. & PUB. POL’Y 545, 561-69 (noting concerns expressed about such card programs). One specific concern is that these measures “upset the traditional notion of U.S. citizenship” by recognizing the local citizenship of persons who are not U.S. citizens. *Id.* at 549, 555, 561.

<sup>145</sup> Commentators have noted that such measures would provide unlawfully present aliens with access to “publicly-funded municipal programs.” *See id.* at 547, 562. However, not all public programs would constitute public benefits under PRWORA. *See supra* notes 116 to 125.

<sup>146</sup> *See, e.g.,* *Pimentel v. Dreyfus*, 670 F.3d 1096, 1099 n.4 (9<sup>th</sup> Cir. 2012) (Supplemental Nutrition Assistance Program (SNAP) a federal public benefit, even though it is provided through the states, because it relies on federal funds).

<sup>147</sup> PRWORA expressly provides that its restrictions apply “[n]otwithstanding any other provision of law,” 8 U.S.C. §1621(a), and its provisions have generally been construed as “invalidating” other federal, state, or local measures regarding noncitizens’ eligibility for public benefits to the degree that these measures conflict with PRWORA. *See, e.g.,* *Kaider*, 975 N.E.2d at 673; *Pimentel*, 670 F.3d at 1101; *Doe v. Wilson*, 67 Cal. Rptr. 2d 187, 190 (Cal. App. 1997); *Dep’t of Health v. Rodriguez*, 5 So. 3d 22 (Fla. App. 2009).

<sup>148</sup> *See generally* archived CRS Report RL32094, *Consular Identification Cards: Domestic and Foreign Policy Implications, the Mexican Case, and Related Legislation*, by Andorra Bruno and K. Larry Storrs; Government Accountability Office, GAO-04-881, *Consular Identification Cards Accepted within United States, but Consistent Federal Guidance Needed* (2004).

<sup>149</sup> *Compare, e.g.,* CAL. VEH. CODE §12801.9 (accepting valid consular ID for applicant’s applying for driver’s license); 5 Ill. Comp. Stat. 230/10 (generally permitting acceptance of consular IDs for government purposes) *with* Ariz. Rev. Stat. §41-5001 (barring acceptance of consular IDs as form of identification by state and political subdivisions); GA. CODE ANN. §50-36-2 (generally barring state and local government acceptance of consular ID except as required by federal law).

Measures restricting or permitting the acceptance of consular IDs by government entities generally seem unlikely to give rise to preemption concerns.<sup>150</sup> Restrictions on the acceptance of consular IDs by government authorities, particularly in relation to applications for a state-issued driver's license or ID, appear to be consistent with federal law, and the adoption of such restrictions seems to be encouraged by the REAL ID Act. The act effectively prohibits states, when issuing driver's licenses or state ID cards, from accepting for purposes of personal identification foreign documents other than valid passports, if such driver's licenses or ID cards are to be accepted for federal purposes.<sup>151</sup> Accordingly, a state ID would not comport with REAL ID Act standards if an applicant for the state ID document were allowed to submit a consular ID as verification of his or her identity.

On the other hand, it also does not appear that the REAL ID Act bars states from recognizing consular IDs, including for purposes of verifying the identity of an applicant for a state-issued ID. As previously discussed, the REAL ID Act appears to still permit states to issue driver's licenses and other IDs that do not comply with the act's issuance standards,<sup>152</sup> though non-compliant IDs may not be accepted by federal agencies for official purposes. Accordingly, a state that opts to accept consular IDs as a form of identification, including as part of an application for a state-issued form of ID, would not appear to be preempted from doing so.

While it might generally be permissible for state or local governments to deny recognition of consular IDs without coming into conflict with federal law, a limited exception might exist in the context of law enforcement. The United States is a party to the Vienna Convention on Consular Relations (VCCR), a multilateral agreement codifying consular practices originally governed by customary practice and bilateral agreements.<sup>153</sup> Pursuant to Article 36 of the VCCR, when a national of a signatory State (i.e., country) is arrested or otherwise detained in another signatory State, appropriate authorities within the receiving State must inform him "without delay" of his right to have his consulate notified.<sup>154</sup> Arguably, possession of a consular ID by an arrested person may assist law enforcement in verifying that the person is a foreign national and assist police in identifying the appropriate foreign consulate to contact on the foreign national's behalf.<sup>155</sup> A state or local restriction on police acceptance of such documents could be subject to a preemption challenge on the grounds that the policy conflicts with or frustrates the purposes of the VCCR's consular notification requirements.

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<sup>150</sup> There has been little judicial activity concerning challenges to either state acceptance or non-recognition of consular IDs. In a legal challenge brought against an Indiana measure that barred acceptance of consular IDs by both government and private actors, the parties stipulated that "limitations or restrictions on the use of these documents in connection with official state matters is a permissible exercise of state governmental authority." *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905, 913 (S.D. Ind. 2011).

<sup>151</sup> P.L. 109-13, Div. B, §202(c)(3)(B).

<sup>152</sup> See *supra* at "Preemption by the REAL ID Act."

<sup>153</sup> Vienna Convention on Consular Relations, done April 24, 1963, 21 U.S.T. 77.

<sup>154</sup> For further discussion of U.S. interpretation of the VCCR's consular notification requirements, see archived CRS Report RL34450, *Can the President Compel Domestic Enforcement of an International Tribunal's Judgment? Overview of Supreme Court Decision in Medellín v. Texas*, by Michael John Garcia, and archived CRS Report RL32390, *Vienna Convention on Consular Relations: Overview of U.S. Implementation and International Court of Justice (ICJ) Interpretation of Consular Notification Requirements*, by Michael John Garcia.

<sup>155</sup> See State Department, *Consular Notification and Access Manual* (2014), at 13 (providing guidance to federal, state, and local law enforcement regarding consular notification under the VCCR and other agreements, and noting that possession of a consular ID card may be a means for law enforcement to conclude that an arrested individual is a foreign national).

State or local restrictions on private entities' acceptance of consular IDs have been subject to legal challenge, and the single reviewing federal court that considered such a challenge found that the restriction raised preemption and other concerns. In 2011, a federal district court in *Buquer v. City of Indianapolis* preliminarily enjoined enforcement of an Indiana statute that made the offering or acceptance of a consular ID as a form of identification (other than for law enforcement purposes) a civil infraction.<sup>156</sup> While the parties stipulated that a state could decline to recognize consular IDs as a legitimate form of identification,<sup>157</sup> the district court agreed with plaintiffs' argument that the Indiana statute's "sweeping prohibition" conflicted with the rights afforded to foreign consulates under the VCCR, and also had the potential to directly interfere with the Executive's conduct of foreign affairs.<sup>158</sup> While the district court noted that the state law did not bar foreign consulates from issuing consular IDs (which the court opined would have been a direct violation of the VCCR<sup>159</sup>), it characterized the Indiana statute as making the issuance of consular IDs "meaningless as [the restriction] prohibits almost every use for which the documents are ordinarily issued, including for identification purposes in private commercial transactions that are conducted between private parties."<sup>160</sup> The court also deemed it important that the State Department had cautioned against action from being taken against consular IDs that might lead other countries to establish similar limitations on U.S. citizens' usage of consular IDs within their territories.<sup>161</sup> Finally, the court noted U.S. Treasury Department regulations which permit (but do not require) financial institutions to accept consular IDs as a legitimate form of identification.<sup>162</sup> While the court did not believe the Indiana measure directly conflicted with this regulation, it stated that the regulation provided "further evidence of the federal government's overarching and legitimate interest in proceeding with caution with regard to regulating the use" of consular IDs.<sup>163</sup>

The *Buquer* court also found that the plaintiffs were likely to succeed on their due process and equal protection challenges to the statute, as Indiana had failed to establish a rational relation between the statute's prohibition and a legitimate governmental interest. While Indiana had argued that the statute helped to ensure the prevention of fraud and the reliability of identification of individuals within the state, the court concluded that, after "examination of the admittedly limited evidence before it," consular IDs were at least as reliable forms of documentation as other types of ID that were not singled out for sanction by Indiana.<sup>164</sup> Litigation in the case remains ongoing.

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<sup>156</sup> *Buquer v. City of Indianapolis*, 797 F. Supp. 2d 905 (S.D. Ind., 2011) (concerning consular identification provision found at BURNS IND. CODE ANN. §34-28-8.2-2).

<sup>157</sup> *Id.* at 913.

<sup>158</sup> *Id.* at 922-923.

<sup>159</sup> *Id.* at 922. The VCCR does not specifically mention consular IDs. However, Article 5 of the treaty lists legitimate consular functions as including, *inter alia*, (1) issuing passports and travel documents to nationals of the sending State, and visas or appropriate documents to persons wishing to travel to the sending State, (2) protecting in the receiving State the interests of the sending State within the limits permitted by international law, and (3) helping and assisting nationals of the sending State.

<sup>160</sup> *Id.* at 922.

<sup>161</sup> *Id.* at 923.

<sup>162</sup> *Id.* (citing 31 C.F.R. §1020.220, which, though not mentioning consular IDs, discusses identification verification through government-issued documentation).

<sup>163</sup> *Buquer*, 797 F. Supp. 2d at 923.

<sup>164</sup> *Id.* at 924.

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