

# THE REAL ID ACT: REAL CONSEQUENCES INVOLVING IMMIGRATION STATUS & ELIGIBILITY REQUIREMENT CONCERNS FOR IMMIGRANTS

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*“The REAL ID Act won’t make us safer, it will only divide us.”<sup>1</sup>*

## I. INTRODUCTION: THE REAL ID ACT’S DEVELOPMENT

Individual U.S. states issue drivers’ licenses under the Constitution’s 10th Amendment.<sup>2</sup> Under the 10th Amendment, the federal government has traditionally reserved certain regulatory powers to the states, including the issuance of licenses.<sup>3</sup> Since 1959, individuals have been required by states to obtain drivers’ licenses in order to operate any motor vehicle.<sup>4</sup>

In 2001, the U.S. experienced a horrific terrorist attack at the hands of hijackers who crashed aircrafts into the Twin Towers in New York City on September 11th.<sup>5</sup> This was a catastrophic event that continues to plague the

<sup>1</sup> David L. Ulin, *Real ID Will Divide Us All into Documented and Undocumented*, L.A. TIMES: OPINION (July 30, 2018), <https://www.latimes.com/opinion/op-ed/la-oe-ulin-real-id-20180730-story.html>.

<sup>2</sup> See Gilberto Mendoza & Chesterfield Polkey, *States Offering Driver’s Licenses to Immigrants*, NAT’L CONF. ST. LEGIS. (July 25, 2019), <https://www.ncsl.org/research/immigration/states-offering-driver-s-licenses-to-immigrants.aspx> (noting that there has been prior widespread history of providing licenses to unlawful immigrants in order to operate a motor vehicle. Thirteen states and the District of Columbia enacted laws to allow unlawful immigrants to obtain a driver’s licenses. These states—California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, New Mexico, New York, Nevada, Utah, Vermont and Washington—issue a license if an applicant meets certain documentation requirements, such as providing a foreign birth certificate, a foreign passport, or a consular card and evidence of current residency in the state. Eight of these states specifically extended driving privileges to unlawful immigrants in 2013. In 2019, New York enacted the “Driver’s License Access and Privacy Act.” Prior to the REAL ID Act, these states have issued licenses to immigrants without a required showing of U.S. documentation); see also News Release, N.Y. State Assembly, Assembly Passes Driver’s License Access and Privacy Act #GreenLightNY (June 12, 2019), <https://nyassembly.gov/Press/files/20190612.php> [hereinafter *June 12 News Release*] (describing NY’s “Drivers’ License Access and Privacy Act”, which provides that the Green Light Bill “aims to restore all New Yorkers’ access to driver’s licenses,” and “this legislation allows for undocumented immigrant New Yorkers, who contribute to our state economy in so many ways, to drive safely to and from school, work, and home.” Note that new federal regulations under the REAL ID Act are incompatible with such state licenses).

<sup>3</sup> See U.S. CONST. AMEND. X, available at [https://www.law.cornell.edu/constitution/tenth\\_amendment](https://www.law.cornell.edu/constitution/tenth_amendment) (stating “the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people”).

<sup>4</sup> See Elizabeth Nix, *When Was the First U.S. Drivers’ License Issued?*, HISTORY (updated Aug. 30, 2018), <https://www.history.com/news/when-was-the-first-u-s-drivers-license-issued> (noting the history of state’s abilities to issue licenses).

<sup>5</sup> See Elaine S. Povich, *Real ID, Real Problems: States Cope With Changing Rules, Late Rollouts*, PEW CHARITABLE TRUSTS: STATELINE (Aug. 6, 2019), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/08/06/real-id-real-problems-states-cope-with-changing-rules-late-rollouts> (noting that “The Real ID Act, passed in the wake of the Sept. 11, 2001, terrorist attacks, requires licenses to be marked with a special insignia or star, indicating that holders have gone through extra steps to prove their identity”).

U.S. government today regarding how to effectively handle terrorism threats, including surveying immigrants from countries deemed “security threats”, and curbing overall immigration from “unstable countries”, often referenced as countries in Central and South America, and countries in the Middle East.<sup>6</sup> In response, the federal government decided to present new policies for issuing licenses, in an effort to add another security layer to the federal government’s ability to monitor immigration activity.<sup>7</sup> The legislation to effectuate these concerns was not enacted for several years, until Congress enacted the REAL ID Act in 2005, effectively creating new federal documentation standards for state-issued driver’s licenses, including evidence of lawful status for all applications.<sup>8</sup> In order to prove evidence of lawful status, individuals will have to show specific documents to Department of Motor Vehicles’ (“DMV”) agents; for license renewal in California, for example, you must provide a passport or certified birth certificate, a social security card or an income tax return, and proof of

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<sup>6</sup> See *The History of Federal Requirements for State Issued Drivers’ Licenses and Identification Cards*, NAT’L CONF. ST. LEGIS., <http://www.ncsl.org/research/transportation/history-behind-the-real-id-act.aspx> (last visited Feb. 1, 2020) [hereinafter *History of Federal Requirements*] (“On September 11, 2001, America was attacked. The sheer horror of that day mobilized the nation. The resources and resolve of federal, state and local government, and the public at large, were now in service to secure our homeland. While prior to September 11th, states were already implementing numerous security measures to counter issues with counterfeit driver’s licenses (DLs) and identification cards (IDs) and dated licensing procedures, after September 11th states accelerated these efforts to ensure that their DLs/IDs were secure”).

<sup>7</sup> *Id.* (describing the relationship between the September 11, 2011 terrorist attacks and new federal legislation increasing requirements for license administration and renewal).

<sup>8</sup> See REAL ID Act of 2005, 49 U.S.C. § 30301, sec. 202, n.(c)(2)(B) (2020). The relevant section at issue regarding documentation for lawful status provides the following:

- (B) A State shall require, before issuing a driver’s license or identification card to a person, valid documentary evidence that the person-
- i. Is a citizen or national of the United States;
  - ii. Is an alien lawfully admitted for permanent or temporary residence in the United States;
  - iii. Has conditional permanent resident status in the United States;
  - iv. Has an approved application for asylum in the United States or has entered into the United States in refugee status;
  - v. Has a valid, unexpired nonimmigrant visa or nonimmigrant visa status for entry into the United States;
  - vi. Has pending application for asylum in the United States;
  - vii. Has a pending or approved application for temporary protected status in the United States;
  - viii. Has approved deferred action status; or
  - ix. 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.

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California residence.<sup>9</sup> In 2017, the Department of Homeland Security announced a 2020 deadline for compliance.<sup>10</sup>

These new federal laws have already begun to take full effect. The Department of Homeland Security has provided that, starting October 1, 2020, every state and territory resident will need to present a REAL ID compliant license or state identification card, or another acceptable form of identification, for accessing all federal facilities, entering nuclear power plants, and boarding any commercial aircraft.<sup>11</sup> This is what is called “card-based” enforcement.<sup>12</sup> The federal government argues the REAL ID Act’s implementation of new licensing regulations is necessary for evaluating potential homeland security concerns in aircrafts and federal buildings.<sup>13</sup> The U.S. government’s national security concern is crucial for understanding the Supreme Court’s potential treatment of this issue, as discussed in later sections below.

In essence, the REAL ID Act of 2005 allows DMV agents to inspect an individual’s documentation and make necessary determinations regarding eligibility for REAL ID license compliance.<sup>14</sup> In light of recent immigration restrictions under President Trump’s administration, immigrants in particular will be faced with difficulties complying with the REAL ID Act’s document requirements, and in addition, will face heightened government scrutiny for non-compliant licenses.<sup>15</sup>

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<sup>9</sup> See Ulin, *supra* note 1 (discussing the documentation requirements for REAL ID compliant licenses).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See U.S. DEPT. OF HOMELAND SECURITY, *Real ID Frequently Asked Questions* (2020), <https://www.dhs.gov/real-id-frequently-asked-questions> (noting the identification “stars” on compliant licenses; stating: “REAL ID-compliant cards will have one of the following markings on the upper top portion of the card. If the card does not have one of these markings, it is not REAL ID-compliant and won’t be accepted as proof of identity in order to board commercial aircraft”); see also U.S. DEPT. OF HOMELAND SECURITY, *Real ID Federal Enforcement* (2020), <https://www.dhs.gov/federal-enforcement> (discussing the REAL ID Act’s four phases of enforcement: for boarding a commercial aircraft, restrictions for passengers from noncompliant states without extensions (“state-based”) began on January 22, 2018, and enforcement for passengers from all states without compliant documents (“card-based”) is set to begin on October 1, 2021).

<sup>13</sup> See National Conferences of State Legislatures, *The History of the Federal Requirement for State Issued Drivers’ Licenses and Identification Cards*, NCSL, (last visited April 12, 2020), <https://www.ncsl.org/research/transportation/history-behind-the-real-id-act.aspx> (noting the U.S. homeland security interests in protecting aircrafts and federal buildings, particularly following the September 11, 2001 terrorist attacks).

<sup>14</sup> See N.Y. CIV. LIBERTIES UNION, *Real ID & Immigrant Rights* (2020), <https://www.nyclu.org/en/real-id-immigrants-rights> (identifying the concerns for undocumented and/or unlawful immigrants who depend on license renewal for employment, and describing the difficulties those individuals will face new with federal laws for essentially card-based enforcement of immigration status).

<sup>15</sup> *Id.*

Recently, the REAL ID Act of 2005 has gained unprecedented national attention given its revival by President Trump's administration, and its increasingly widespread immigration enforcement.<sup>16</sup> In 2017, President Trump's administration revived the REAL ID Act and currently, federal regulations for REAL ID compliant licenses' enforcement at U.S. airports will take place in 2020.<sup>17</sup> The issue of the REAL ID Act's implementation is multi-faceted from both a political and immigration perspective, including constitutional, social policy, and political underpinnings to the REAL ID Act's enforcement and resulting negative impact. A major role in the Real ID Act's enforcement is related to today's hostile political climate towards immigrants.<sup>18</sup> Under President Trump, the federal government in particular is plagued with legitimate issues surrounding immigration from Central and South America, and Middle Eastern countries, in particular, dealing with horrendous political climates, war, and overall instability.<sup>19</sup> However, the

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<sup>16</sup> See Linley Sanders, *What Is REAL ID? Trump Administration Enforces New Identification Cards To Combat Terrorism After 13 Year Delay*, NEWSWEEK, (Jan. 22, 2018), <https://www.newsweek.com/what-real-id-new-airport-security-cards-issued-california-and-states-787238> (stating that "President Donald Trump and his administration set the 2020 deadline for federally compliant ID cards after 13 years of delays. The Bush administration struggled to implement its own law and states forced delayed the program, calling it an unfunded mandate designed to create a national ID. The Obama administration did not push enforcement of the Bush-era law. Further, "Trump's former Homeland Security Secretary John Kelly said in July that the recommendation from the 9/11 Commission remained "critically important" and criticized other administrations for being "willing to ignore" the anti-terrorism efforts).

<sup>17</sup> *Id.*

<sup>18</sup> See Abigail Hauslohner, *During First Two Years of 'Muslim Ban,' Trump Administration Granted Few Waivers*, WASH. POST (Sept. 24, 2019), [https://www.washingtonpost.com/immigration/during-first-two-years-of-muslim-ban-trump-administration-granted-few-waivers/2019/09/24/44519d02-deec-11e9-8dc8-498eabc129a0\\_story.html](https://www.washingtonpost.com/immigration/during-first-two-years-of-muslim-ban-trump-administration-granted-few-waivers/2019/09/24/44519d02-deec-11e9-8dc8-498eabc129a0_story.html) (discussing the current political climate and "Muslim ban" that implemented by President Trump and noting that "The ban on U.S. entry by the citizens of several majority-Muslim countries hit repeated legal roadblocks during Trump's first year in office, as federal judges found that the ban, which followed his campaign pledge to enact a "total and complete shutdown of Muslims entering the United States" violated core principles of U.S. law").

<sup>19</sup> See e.g. Harsha Walia, *Undoing Border Imperialism (Anarchist Inventions Book 6)*, AK Press, (February 14, 2015) (providing a framework for understanding displacement and other movement-based practices, and offering insight for overcoming physical and social barriers to cultivate sustainable communities of resistance striving towards liberation); see also Dan Restrepo, *Getting Migration in the Americas Right*, CENTER FOR AMERICAN PROGRESS, (June 24, 2019) <https://www.americanprogress.org/issues/security/reports/2019/06/24/471322/getting-migration-americas-right/> (reasoning that within the past five years, "dramatic shifts in the scale and character of migration in the Americas have unsettled regional politics" . . . and that "violence, poverty, political dysfunction, and environmental degradation across the Western Hemisphere have led to an increase in refugees, asylum-seekers, and other vulnerable and displaced populations on a scale not seen in decades"). Further, President Trump's administration's treatment of migrants, notably Mexican and other Central American migrants, is "horrifying on its own terms, but it also represents a wrongheaded and myopic approach to addressing mass displacement of peoples in the Western Hemisphere". *Id.*

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response to those legitimate concerns has been document-based immigration enforcement, which is overwhelmingly burdensome on immigrants today.<sup>20</sup>

In addition to specific policies targeting immigrants, statements made by President Trump himself provide an alarming context for understanding the heightened scrutiny associated with being an immigrant living, working, or visiting the U.S. today.<sup>21</sup> For example, on August 12, 2019, the Trump administration set stricter standards for green card applicants.<sup>22</sup> The standards seek to weed out those who use or may need public benefits like Medicaid, food stamps, or housing aid.<sup>23</sup> It essentially rewards those with high incomes and private health insurance. The rule will take effect in October 2019.<sup>24</sup> This kind of social value placed on various immigrants only worsens their classification and status as a group already highly scrutinized by the federal government.<sup>25</sup> It continues to place a red flag on immigrants who reside in this county and rely on federal benefits, and further weakens the abilities of those individuals to seek any government assistance.<sup>26</sup> This is only exacerbated by the REAL ID Act, which now places additional hurdles on immigrants attempting to get licenses.

The Act's implementation, its consequences, and constitutional issues are further discussed in the sections below. Ultimately, the Act unnecessarily subjects immigrants to heightened scrutiny regarding their immigration status, and has significant constitutional challenges for its impact on travel

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<sup>20</sup> See American Civil Liberties Union, *5 Problems with National ID Cards*, ACLU, (last visited April 12, 2020), <https://www.aclu.org/other/5-problems-national-id-cards> (noting the overwhelming burdens placed on immigrants resulting from the use of national identity cards, including widespread discrimination towards Hispanic populations).

<sup>21</sup> See generally John Carlos Frey, *Sand and Blood: America's Stealth War on the Mexican Border*, Bold Type Books (June 25, 2019); see also Ted Mann and Laura Meckler, *Trump Pushes Bill to Cut Number of Green Cards Issued by Half*, THE WALL STREET JOURNAL, (Aug. 2, 2017), <https://www.wsj.com/articles/trump-pushes-senate-bill-to-curb-legal-immigration-1501694221> (recognizing this follows a May 2019 plan that curbed legal immigration. The new bill would effectively prioritize those who were financially self-sufficient, educated, highly skilled, and spoke English. Further, it would deny green cards to adult children and extended relatives of current green card holders – meaning that cards would only be available to spouses and children. That would reduce the number of green cards issued from 1 million to 638,000 in its first year. *Id.*

<sup>22</sup> See Kimberly Amadeo, *Donald Trump on Immigration: Pros and Cons of Donald Trump's Immigration Policies*, THE BALANCE (Dec. 16, 2019), <https://www.thebalance.com/donald-trump-immigration-impact-on-economy-4151107> (stating “the [Trump] Administration has “made it more difficult for applicants for employment-based visas and some green cards by requiring face-to-face interviews”),

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* (addressing other federal government restrictions on immigrants, including for individuals receiving government aid).

<sup>26</sup> *Id.* (describing the difficulties immigrants face with new documentation requirements and President Trump's attitude towards their residency in the U.S.).

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and migration within the U.S.<sup>27</sup> Therefore, the REAL ID Act is an unconstitutional vehicle for which the federal government can further scrutinize immigration status, and as a result of widespread access to DMV-related documentation, allows federal agents to strip immigrants' constitutional rights to accessible interstate travel.

## II. CONSEQUENCES FROM REAL ID'S IMMIGRATION ENFORCEMENT

Proponents of extending driver's licenses to immigrants argue that licensing undocumented residents will lead to fewer hit-and-runs, more trust between immigrants and police, and increased revenue for Departments of Motor Vehicles.<sup>28</sup> In contrast, opponents of expanding driving privileges assert that granting licenses to undocumented residents reduces the incentive to follow immigration laws, and would actually lead to increased voter, identification, and bank fraud.<sup>29</sup> As expressed by opponents of the legislation, the "REAL ID [Act] won't make us safer, it will only divide us."<sup>30</sup>

The constitutionality of the REAL ID Act's provisions and resulting immigration enforcement is discussed in *Arizona v. United States*.<sup>31</sup> In

<sup>27</sup> See Ulin, *supra* note 1 (describing how license renewal documentation requirements effectively now, through physical identifying features on drivers' licenses, separate individuals into "documented" and "undocumented").

<sup>28</sup> See Gilberto Mendoza and Chesterfield Polkey, *States Offering Driver's Licenses to Immigrants*, NAT'L CONF. ST. LEGIS. (July 16, 2019), [https://www.ncsl.org/documents/immig/Driver's\\_Licenses\\_to\\_Immigrants\\_July\\_2019.pdf](https://www.ncsl.org/documents/immig/Driver's_Licenses_to_Immigrants_July_2019.pdf) (noting the pros and cons of motor vehicle licensing for undocumented residents).

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

<sup>30</sup> See Ulin, *supra* note 1 (describing how license renewal documentation requirements are deeply rooted in immigration enforcement; stating "But what about those who can't put their hands on such documents? Passports are expensive: \$110 for the application and an additional \$35 "execution fee." And let's be honest, "identity documents" have everything to do with citizenship and immigration status. If you weren't born in the U.S., you have to provide a certificate of naturalization or a green card equivalent. As for proof of residence, that will be hard to produce for those who can't afford a stable living situation, who stay with friends or family, or pay weekly or monthly rates at a motel." Thus, there is an inherent relationship between the REAL ID Act's difficult-to-meet documentation requirements and the federal government's attempt to regulate immigration).

<sup>31</sup> *Arizona v. United States*, 567 U.S. 387 (2012) (addressing how "State law must give way to federal law in at least two circumstances." Where, (1) states are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance. The intent to displace state law altogether can be inferred from a framework of regulation so pervasive that Congress left no room for the States to supplement it, or where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Further, (2) state laws are preempted when they conflict with federal law. This includes cases where compliance with both federal and state regulations is a physical impossibility, and those instances where the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. In this preemption analysis, courts should assume that the historic police powers of the States are not superseded unless that was the clear and manifest purpose of Congress).

*Arizona*, the Supreme Court discussed how when the REAL ID Act of 2005 takes effect, the Federal Government will no longer accept state forms of identification that fail to meet certain federal requirements.<sup>32</sup> One requirement is that any identification be issued only on proof that the applicant is lawfully present in the United States under § 202(c)(2)(B).<sup>33</sup>

Thus, as reasoned by the Supreme Court's decision in *United States v. Arizona*, there is no denying that enforcement of § 2(B) will multiply the occasions on which sensitive Fourth Amendment issues will crop up.<sup>34</sup> These civil-liberty concerns are at the heart of most objections to § 2(B).<sup>35</sup> These Fourth Amendment and other constitutional concerns include issues related to invasion of privacy, federal meddling in states' rights, and violations of individuals' right to be secure.<sup>36</sup> These issues are examined in the following sections below.

### *A. Immigration Status Inquiries*

#### 1. DMV Agents Are Not Immigration Officers

Under the Real ID Act, DMV agents will be required to make complicated judgments about a person's lawful status in the United States, effectively charging state license-issuing agencies with enforcing federal immigration law.<sup>37</sup> Under the Act, DMV agents will step into a discretionary immigration enforcement role, based on their abilities to issue compliant or non-compliant licenses under the Sec. 202, note (c)(2)(B) proof of "lawful status."<sup>38</sup> Given the high degree of complexity of immigration laws, the inevitable result of this policy will be increased bureaucratic hurdles for all drivers' license applicants and immigrant applicants in particular.<sup>39</sup> One potential issue is that DMV agents may become reluctant to issue licenses for individuals from certain backgrounds, and in return subject such individuals

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* (describing the constitutional issues being addressed by the REAL ID Act's implementation).

<sup>36</sup> See *Repeal the Real ID Act Resolution*, CONSTITUTIONPARTY.COM, (Apr. 2007), <https://www.constitutionparty.com/repeal-the-real-id-act-resolution/> (examining Fourth Amendment-related concerns).

<sup>37</sup> See Lourdes Santos Tancinco, Esq., *What Undocumented Immigrants Face with the Real ID Act*, THE INQUIRER, (Jan. 9, 2018), <https://usa.inquirer.net/9301/undocumented-immigrants-face-real-id-act> (discussing how "it is apparent from the list that only applicants who have valid and lawful presence in the United States or who are not in violation of immigration laws are permitted to apply for state licenses that are REAL ID Act compliant." Those who are unauthorized immigrants or who have fallen out status may not be eligible to apply for the REAL ID compliant licenses).

<sup>38</sup> *Id.* (noting how DMV agents have a discretionary role to determine eligibility for license renewal under the Act).

<sup>39</sup> *Id.*

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to added scrutiny – in fear of violating the REAL ID Act’s documentation requirements.<sup>40</sup>

There are definite, unavoidable consequences for providing DMV agents with the ability to inquire into an individual’s immigration status. In particular, there are constitutional, humanitarian, and security concerns already present with REAL ID Act’s enactment, which include the possible inappropriate transfer of federal functions to state officials and vulnerability of REAL ID databases to exploitation by identity thieves and overzealous enforcement officials.<sup>41</sup>

The REAL ID Act is not making U.S. citizens safer. In fact, it puts personal information and national security at a significant risk for data breaches.<sup>42</sup> The REAL ID Act was signed into law without meaningful debate, and states that drivers licenses will only be accepted for ‘federal purposes’—like accessing planes and court houses—if they conform to certain uniform standards,” as noted by the Electronic Frontier Foundation (EFF).<sup>43</sup> The issue is, “the law also requires a vast national database linking all of the ID records together.”<sup>44</sup> Furthermore, the law requires states “provide electronic access to all other states to information contained in the motor vehicle database of the State” and specifies what is contained in each database.<sup>45</sup> By having all of this personal information easily accessible on various databases, the U.S. government risks significant exposure of this highly personal information.

Instead of one big database, the government has created a bunch of smaller databases linked together to act like one big database.<sup>46</sup> Those linked

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<sup>40</sup> N.Y. CIV. LIBERTIES UNION, *Why Oppose the REAL ID Act*, NYACLU.COM, (accessed on Oct. 6, 2019), <https://www.nyclu.org/en/why-oppose-real-id-act> (stating “Department of Motor Vehicles agents will become reluctant to authorize driver’s licenses for individuals from certain ethnic backgrounds, and subject such individuals to additional scrutiny, in fear of violation of the Real ID Act requirements. For example, following the passage of the Immigration Reform and Control Act of 1986, which mandated that employers verify the immigrants status of their employees, there was a substantial increase in discrimination by employers”).

<sup>41</sup> See Tancinco, *supra* note 37.

<sup>42</sup> See J.D. Tuccille, *Real ID Puts Personal and National Security at Risk*, REASON, (Jan. 15, 2018 at 8:26 AM), <https://reason.com/2019/01/15/america-where-you-need-internal-passport> (analyzing how “so much of what has changed about the laws and governance of the United States since the turn of the millennium, we have overwrought post-9/11 fears of terrorism to thank for REAL ID requirements passed in 2005.” More importantly, “all but one of the Sept. 11 hijackers carried government IDs that helped them board planes and remain in the country illegally,” huffed then-Homeland Security Secretary Michael Chertoff in a 2008 op-ed. He brushed off concerns that they could have purchased the new IDs from the same corrupt officials who sold them many of the old ones. Prior to passage of the law, any sort of discussion was brushed-off”).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

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databases contain the amassed, hacker-bait details of millions of identification documents necessary for air travel and access to government facilities.<sup>47</sup> Unfortunately for U.S. citizens, whose data and personal information will be stored in these databases – the EFF cautions “the IDs and database will simply create an irresistible target for identity thieves”.<sup>48</sup> These data privacy issues exist in conjunction with the inability of DMV agents and federal agencies to properly examine immigration paperwork, documentation, and other personal information for individuals already being targeted in their home countries.<sup>49</sup> It is unclear whether one large tightly monitored database could be safer, or whether adequate training could be implemented to better safeguard individuals’ personal information, but given the lack of current oversight overall – the Department of Homeland Security needs to address these concerns before the REAL ID Act goes into full effect in 2020.<sup>50</sup>

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<sup>47</sup> See Tuccille, *supra* note 22 (stating how “for years, amidst arguments over privacy and local control, many states remained defiant, with 32 states and territories hesitating to turn their driver’s licenses into glorified federal identification documents as recently as 2016. But federal pressure, including the prospect of many Americans being turned away from airports and office buildings, caused them to cave one after another. Some, like Arizona, made compliant documents voluntary, so that people willing to forego passage through TSA checkpoints or access to federal buildings and facilities could also skip the new ID standards. That was enough to satisfy the feds and keep existing documents acceptable until 2020”).

<sup>48</sup> *Id.*

<sup>49</sup> See e.g. Silva Mathema, *They Are (Still) Refugees: People Continue to Flee Violence in Latin American Countries*, CENTER FOR AMERICAN PROGRESS, (June 1, 2018), <https://www.americanprogress.org/issues/immigration/reports/2018/06/01/451474/still-refugees-people-continue-flee-violence-latin-american-countries/> (recognizing the safety issues and persistent danger many immigrant families face back in their home countries); see also National Immigration Law Center, *Documents Obtained under Freedom of Information Act: How U.S. Immigration & Customs Enforcement and State Motor Vehicle Departments Share Information*, NILC, (May 2016), <https://www.nilc.org/issues/drivers-licenses/ice-dmvs-share-information/> (indicating that “no federal policies appear to govern ICE access to or use of DMV data”); see also Patrick McGreevy, *California DMV Data Breach Exposes Thousands of Drivers’ Social Security Information*, LA TIMES, (Nov. 5, 2019) <https://www.latimes.com/california/story/2019-11-05/california-dmv-security-breach-immigration-federal-county-agencies> (stating how California’s DMV, which contained records and other identifying information for illegal immigrants, was recently the target of a data breach). The data breach was particularly problematic because “California lawmakers decided in 2013 to issue drivers’ licenses to illegal immigrants in the country who can provide proof of identity and California residency”. . . and California state officials had promised residents that “information on those license holders would not be shared with federal immigration officials”. *Id.* However, there were over 3,000 cases of affected individuals whose information was leaked to unknown sources as a result of the breach. *Id.*

<sup>50</sup> See *Real Problems with the REAL ID*, CENTER FOR AMERICAN PROGRESS, (Apr. 2, 2008), <https://www.americanprogress.org/issues/courts/news/2008/04/02/4213/real-problems-with-the-real-id/> (explaining data privacy concerns related to multiple federal databases storing highly personal information without significant oversight, providing that: “the legal framework to handle these issues is weak at best . . . Existing federal privacy and security laws would place some limitations on the federal government if the system were run by DHS or otherwise deemed a “federal” system. However, the REAL ID system is likely to be run by a private organization, in which case federal privacy and security laws may not apply. Allegedly, the Department of Transportation and other federal agencies already regularly access the

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In addition, there are potential conflicts between data-sharing provisions and state privacy laws, lack of additional practical benefits for worksite enforcement, and special hurdles for refugees, U.S. citizens born outside the United States, and U.S. nationals born in U.S. territories.<sup>51</sup> DMV agents are not Immigration and Customs Enforcement Officers (“ICE”). Therefore, documents associated with refugee, green card, and asylum status will be challenging for untrained immigration enforcement agents to evaluate.<sup>52</sup>

The issue is: providing DMV agents with the ability to disclose the identity of individuals whom they believe are unlawfully residing within the U.S. places unique power in the hands of people who are not trained immigration or customs officers.<sup>53</sup> Immigration policies are constantly changing. In addition, the legal definition surrounding the Department of Homeland Security’s ability to classify individuals as “lawful” is convoluted and can be, in many circumstances, determined on a case-by-case basis.<sup>54</sup> Many immigrants do not even understand their own status under federal legislation.<sup>55</sup> Those who are unable to understand their status, and fail to have the proper paperwork to prove their lawful status, are ultimately left representing their positions to DMV agents without an attorney present.<sup>56</sup> The same issues are present when presenting a non-compliant license to

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privately managed commercial driver’s license database with virtually no oversight, a frightening model for a national driver’s license database”).

<sup>51</sup> See Kevin Jernegan, *Document Provision of the Real ID Act*, MIGRATION POLICY INSTITUTE, (Nov. 2005), <https://www.migrationpolicy.org/research/documentation-provisions-real-id-act> (noting how “estimates of REAL ID Act implementation costs to states seem to be a matter of dispute, ranging from \$100 million to \$13 billion, the report suggests that state officials are more or less in accord with regard to concerns over the lack of financial support and technical guidance from the federal government.” Further, “the report also details additional legal, humanitarian, and security concerns, which include: possible inappropriate transfer of federal functions to state officials; vulnerability of REAL ID databases to exploitation by identity thieves and overzealous enforcement officials; the potential conflict between data-sharing provisions and state privacy laws; lack of additional practical benefits for worksite enforcement; and special burdens for refugees, U.S. citizens born outside the United States, and U.S. nationals born in U.S. territories”).

<sup>52</sup> See 49 U.S.C 30301, *supra* note 8.

<sup>53</sup> See *Real ID and Immigrants’ Rights*, *supra* note 14; see also *Why Oppose the REAL ID Act*, *supra* note 40 (stating that “the use of a Real ID driver’s license will not be limited to boarding an airplane or entering federal buildings. The Bush administration has already stated that Real IDs will become necessary for “everyday transactions,” such as receiving government benefits, voting, or applying for a job. The private sector will also begin mandating a Real ID card for everyday purposes. Despite what the DHS claims, Real ID is a real national ID card.”).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* (examining the complexity of understanding immigration status, specifically from a legal perspective).

<sup>56</sup> *Id.*

police officers and other government officials.<sup>57</sup> There is now an inherent risk associated with presenting obviously non-compliant licenses, and any individual who is unable to explain their status risks being reported to Immigration and Customs Enforcement (ICE) Agents.<sup>58</sup> Because DMV agents are not equipped to handle the complexities of reviewing immigration documentation, their ability to notify federal agents of individuals whom spark any type of concern will likely result in the constitutional, humanitarian, and security concerns discussed above.<sup>59</sup>

The REAL ID Act ultimately gives DMV agents unprecedented power to review documentation and make eligibility determinations for license renewal, for which they are not equipped to handle given the complexity of U.S. immigration laws.<sup>60</sup> The issue of heightened government scrutiny for non-compliant licenses and the eligibility burden places on immigrants who don't meet the federal requirements is further addressed in the following section.

## 2. Heightened U.S. Government Scrutiny for Non-Compliant Immigrant Drivers' Licenses

The purpose of the REAL ID Act is to prevent the fraudulent issuance and use of drivers' licenses and identification cards.<sup>61</sup> Those who are unauthorized immigrants or who have fallen out of status may not be eligible to apply for REAL ID compliant licenses, and only REAL ID cards will be accepted for all air travel in 2020.<sup>62</sup>

Prior to the Act, thirteen states provided drivers' licenses to unauthorized immigrants.<sup>63</sup> However, the REAL ID Act now wholly restricts immigrants' abilities to drive, travel, and show documentation that doesn't imply lawful or unlawful status.<sup>64</sup> Generally, traveling with a passport with

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<sup>57</sup> See *Why Oppose the REAL ID Act*, *supra* note 40, (describing the relationship between heightened government scrutiny for immigrants and the new license requirements' enforcement of their lawful status).

<sup>58</sup> *Id.* (noting the complexities associated with DMV officers' abilities to make eligibility determinations, and thus immigration enforcement decisions).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See Tancinco, *supra* note 37 (discussing that the DHS has explicitly cautioned federal agents from assuming that non-possession of REAL ID-compliant identification cards indicate that the traveler is an undocumented immigrant). However, given the current political climate, the restrictive immigration policies and the heightened immigration enforcement rules, it may be a trigger for further inquiry if the TSA or any federal agent exercises discretion of the need to determine lawful presence.

<sup>62</sup> *Id.*

<sup>63</sup> See Mendoza, *supra* note 2 (providing an overview for enacted legislation across individual U.S. states).

<sup>64</sup> *Id.*

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no valid U.S. visa stamp on it does not imply unlawful status.<sup>65</sup> However, given the current political climate, the restrictive immigration policies and heightened immigration enforcement rules, the REAL ID process may trigger further inquiry into immigration status by DMV agents.<sup>66</sup>

Donald Trump's presidency has ultimately worsened the political and social climate in which immigrants, both lawful and unlawful, are now subjected to a heightened and unparalleled level of criticism, abuse, and scrutiny by the U.S. government.<sup>67</sup> In a recent case, *Trump v. Hawaii*, the U.S. Supreme Court discussed implications of President Trump's "Muslim Ban" that took effect when the President signed an executive order suspending the entry of foreign nationals from seven countries for 90 days.<sup>68</sup> Each country had been previously identified by Congress or prior administrations as posing heightened terrorism risks.<sup>69</sup> President Trump then ordered federal agencies to conduct comprehensive evaluations of every country's compliance with the United States' risk-assessment baseline.<sup>70</sup> Based on this evaluation, the President issued a proclamation seeking to improve vetting procedures by addressing deficiencies in the information needed to assess whether nationals from particular countries presented public safety threats.<sup>71</sup> Ultimately, this proclamation placed entry restrictions on the nationals of eight foreign countries.<sup>72</sup>

This is important to understanding today's political climate and treatment of foreigners by both President Trump, the federal government, and U.S. courts. The Supreme Court in *Trump v. Hawaii* determined that the President's proclamation placing entry restrictions on foreign nationals of particular countries was justified by national security concerns, and ultimately received and survived rational basis review – the court's lowest level of scrutiny for evaluating constitutional issues under the Equal

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<sup>65</sup> See Tancinco, *supra* note 37 (discussing that the current political climate is indicative of heightened inquiry into individual's immigration statuses).

<sup>66</sup> See *Trump v. Hawaii*, 585 U.S. \_\_ (2018).

<sup>67</sup> Abigail Hauslohner, *During First Two Year of 'Muslim Ban,' Trump Admin. Granted Few Waivers*, WASHINGTON POST, (Sept. 24, 2019), [https://www.washingtonpost.com/immigration/during-first-two-years-of-muslim-ban-trump-administration-granted-few-waivers/2019/09/24/44519d02-deec-11e9-8dc8-498eabc129a0\\_story.html](https://www.washingtonpost.com/immigration/during-first-two-years-of-muslim-ban-trump-administration-granted-few-waivers/2019/09/24/44519d02-deec-11e9-8dc8-498eabc129a0_story.html) (discussing the current political climate and President Trump's hostile remarks on immigration).

<sup>68</sup> See *Trump*, *supra* note 66 (upholding President Trump's Executive Order on the government's legitimate national security concerns, providing for a rational basis review and the lowest level of scrutiny).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* (providing context for discussing the current political climate and the Supreme Court's treatment of some of President Trump's immigration-related policies, specifically the Executive Order or "Muslim Ban" at issue in this case).

Protection Clause.<sup>73</sup> What is concerning about this case and President Trump's treatment of immigrants is the relationship between federal legislation targeted at all citizens, and the resulting heightened scrutiny that exists today with immigrants who are now subjected to a new federal standard with significant consequences.<sup>74</sup>

Thus, the issues associated with the REAL ID Act are an undue burden placed on immigrants during license renewal and application process are further discussed below.

### *B. Difficult-to-Meet Documentation Requirements*

#### 1. Requirements for License Renewal Changes in California & New York

At the federal level, the U.S. Department of Homeland Security requires applicants provide documentations showing their full legal name, their date of birth, their Social Security Number, and two proofs of address for their principle residence and lawful status. However, states may choose to impose even more stringent requirements for individual state licenses.<sup>75</sup>

To receive a license compliant with current regulations, you must meet a new federal standard proving you are who you are, and you live where you say you do.<sup>76</sup> Various states, including New York and California, have various documentation requirements for determining this licensing eligibility.<sup>77</sup> For license renewal in California, for example, you must provide a passport or certified birth certificate, verification of SSN through a social security card or an income tax return, and proof of California residence – a utility bill, for example, with a name and address.<sup>78</sup> This will be challenging for many immigrants who lack specific documents or, more

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<sup>73</sup> *Id.* at 46.

<sup>74</sup> *Id.*

<sup>75</sup> See Katia Hetter, *Is Your ID Good Enough to Travel? It May Not Be Next Year*, CNN (Oct. 2, 2019), <https://www.cnn.com/travel/article/real-id-us-travel-requirements/index.html> (discussing how “we have real concerns, based on some recent surveys we did, that 99 million Americans do not have any form of REAL ID-compliant identification,” said Tori Emerson Barnes, executive vice president of public affairs and policy at the U.S. Travel Association, a national, non-profit industry organization.”).

<sup>76</sup> See Ulin, *supra* note 6.

<sup>77</sup> *Id.* (noting that individuals can “get an *un*-enhanced license. California, along with many other states, still offers licenses that are ‘non-compliant,’ although after October 2020, they won’t be accepted at airports or get you into many federal buildings — courthouses, for example. Over time, who knows who else will demand Real ID. Employers? States that pass voter ID laws?”) (emphasis in original). An interesting question is what happens to individuals who have court-appointments but no REAL ID-compliant licenses, or other types of acceptable identity documents, passports, etc.?

<sup>78</sup> *Id.* (cautioning how the identification of “Federal Limits Appl[ies]” causes additional concerns for immigrants. “[C]an there be a redder flag in these dark and distrustful times?”).

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importantly, access to those documents.<sup>79</sup> New York and California are two states specifically impacted by these changing license renewal policies, as both states are home to large immigrant communities.<sup>80</sup> Thus, the impact on these two states is critically examined in this section.

There are policy-issues related to the difficult-to-meet documentation requirements.<sup>81</sup> In New York, undocumented immigrants account for a significant number of unlicensed drivers.<sup>82</sup> Additionally, limited public transportation outside of New York City makes driving a daily necessity to access work, school, medical facilities, and other services.<sup>83</sup> In rural upstate New York, farms and other agribusinesses rely on undocumented workers who often travel long distances to work.<sup>84</sup> Further, the issues above are not New York state-specific; however, the new policies will have a greater effect on immigrants who could previously obtain licenses and more easily travel across state lines.<sup>85</sup> The result of the REAL ID Act is a significant number of drivers across the United States who are unlicensed and uninsured.<sup>86</sup> This

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<sup>79</sup> *Id.* (describing specific hurdles for immigrants resulting from the REAL ID Act's difficult-to-meet documentation requirements).

<sup>80</sup> See Kendra Sena, *Driver's Licenses & Undocumented Immigrants*, ALB. L. SCH., (July 15, 2019), <https://www.albanylaw.edu/centers/government-law-center/Immigration/explainers/Documents/DriversLicensesExplainer.pdf> (examining the impact on New York and California's immigrant communities); see also *Why Oppose the REAL ID Act*, *supra* note 40 (stating that "the use of a Real ID driver's license will not be limited to boarding an airplane or entering federal buildings. Real IDs will become necessary for "everyday transactions," such as receiving government benefits, voting, or applying for a job" – critical functions that immigrant families in New York rely on to fully participate in American life); see also Charles Hirschman, *Immigration to the United States: Recent Trends and Future Prospects*, MALAYS J. ECON STUDIES, 2014; 1(1): 69-85, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4302270/> (noting recent immigrant trends, and recognizing that "the majority of immigrants still live in California, New York, and other traditional destinations"); see further Omar Martinez, *Evaluating the Impact of Immigration Policies on Health Status Among Undocumented Immigrants: A Systematic Review*, J. IMMIGR. MINOR HEALTH, 2015 Jun; 17(3): 947-970, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4074451/> (recognizing how California has seen a long-established migration pattern from China, Mexico, and Central America).

<sup>81</sup> See Sena, *supra* note 80 (noting that the "Department of Motor Vehicles to require that applicants for driver's licenses present either a valid social security number or federally issued documents establishing legal presence. Undocumented immigrants cannot provide either, and thus cannot obtain driver's licenses. The state will issue licenses to New York residents who have social security numbers, including legal permanent residents [i.e., 'green card' holders] and those with temporary visitor or work visas").

<sup>82</sup> *Id.*

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

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* (recognizing how the REAL ID Act's documentation requirements for New York-based immigrants places a visual burden on immigrants who do not obtain to REAL-ID compliant licenses, that visual burden being the "standard" license, which is used for identification purposes and for driving, but is not REAL ID-compliant. Displayed on its face are the words, "NOT FOR FEDERAL PURPOSES"). The distinguishing factor is that, previously, all licenses were "standard" licenses with *no visual distinguishing factors*. *Id.*

<sup>86</sup> *Id.*

will especially hold true if individual states enact greater restrictions on documentation requirements, since the REAL ID Act only sets the minimum standards for federal compliance. The REAL ID Act's minimum standard for enforcement is further discussed a later section.

## 2. State Requirements for License Renewal in Conjunction with REAL ID Act

As further discussed in the caselaw analysis below, the REAL ID Act only provides the standards for minimum federal guidelines necessary for license renewal. As discussed in *Saldana v. Lahm* and *State ex. rel. Sagallah v. Born*, individual U.S. states may provide stricter guidelines for license renewal, in conjunction with existing federal guidelines under the REAL ID Act.<sup>87</sup> Specifically, 13 states introduced legislation within the last five years addressing license renewal documentation requirements. The documentation requirements for these states are outlined and summarized below.<sup>88</sup> If the state licensing standards do not meet the minimum guidelines set forth by the REAL ID Act, it does not provide immigrants with a federally compliant licenses, only access to drive; thereby only addressing one part of this complex issue, the ability to drive across state lines, and not the visual impact of non-compliant licenses.

The State of California requires the Department of Motor Vehicles to issue driver's licenses to individuals who are ineligible for a Social Security number, if the required documentation is provided.<sup>89</sup> Colorado's recent legislation in 2014, Senate Bill S-251, allows individuals to qualify for a driver's license, instruction permit or identification card, despite the individual not being lawfully present or being only temporarily lawfully present in the United States if certain conditions are met, such as providing state tax returns.<sup>90</sup> Delaware legislation has created a similar means for undocumented immigrants to obtain licenses. Senate Bill S-59 requires a driving card or permit applicant must provide the state with satisfactory documentary evidence that the applicant has filed a Delaware income tax return, resided in Delaware, and been claimed as a dependent by an individual who has filed a state income tax return for the preceding two years.<sup>91</sup>

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<sup>87</sup> See *Saldana v. Lahm*, No. 4:13CV3108, 2013 U.S. Dist. LEXIS 148209, 15 (D. Neb. Oct. 11, 2013) (examining state guidelines for license renewal); see also *State ex. rel. Sagallah v. Born*, 2014 Ohio App. LEXIS 3035, 22 (Ct. App.) (recognizing that federal law is preemptive in the field of "alien registration").

<sup>88</sup> See *Mendoza*, *supra* note 2 (discussing state-level documentation requirements).

<sup>89</sup> *Mendoza*, *supra* note 2.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

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However, “the card is not considered a valid form of identification due to the applicant’s inability to prove legal presence in the U.S.”<sup>92</sup> Therefore, it essentially operates as a means to drive, but not as a means to alleviate issues regarding the documentation’s scrutiny.

Recent legislation in Maryland has addressed the Social Security card requirement that is a challenging to meet for many immigrants. This was further addressed in *Cubas v. Martinez* below. Maryland Senate Bill S-715 from 2014 authorizes the issuance of driver’s licenses to those who do not have lawful status or a valid Social Security number.<sup>93</sup> New applicants must provide evidence that the applicant has filed two years of Maryland income tax returns or proof of residency or have been claimed as a dependent by an individual who has filed Maryland income tax returns.<sup>94</sup> These licenses are also not valid for federal identification purposes.<sup>95</sup>

Notable state legislation from California, Colorado, Delaware and Maryland, referenced above, provides examples of various state efforts to alleviate some of the challenging documentation requirements for immigrants. The problem today with the legislation above is that immigrants must have a REAL ID license for any aircraft travel and entrance into federal buildings. While the legislation by California, Colorado, and Maryland in particular assists immigrants in alleviating concerns regarding physical driving abilities, it does not address the other important issue of how those state licenses will be inspected by the federal government.<sup>96</sup> Thus, the REAL ID Act has shifted the way individual states are addressing the Act’s documentation requirements.<sup>97</sup> Either, states have documentation requirements, similar to the Act, that have some leeway regarding social security cards or proof of residence, or they still allow license renewal of non-compliant licenses with easier-to-meet documentation requirements.<sup>98</sup>

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<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *See Sena, supra* note 80 (noting the state-level issuance of licenses for driving purposes). As federal law begins to rollout, lenient state policies for license renewal may result in disparate treatment of those licenses at the federal level. *Id.*

<sup>97</sup> *See Sena, supra* note 80 (recognizing changing policies and procedures as a result of the REAL ID Act’s implementation); *see also* U.S. DEPT. OF HOMELAND SECURITY, *Real ID Federal Enforcement* (2020), <https://www.dhs.gov/federal-enforcement> (discussing how the REAL ID Act’s restrictions for airplane passengers from noncompliant states without extensions (“state-based”) began on January 22, 2018, and enforcement for passengers from all states without compliant documents (“card-based”) is set to begin on October 1, 2021).

<sup>98</sup> *Id.* (mentioning that state level licenses only address driving-related issues); *see also see also See Mendoza, supra* note 2 (describing how legislation across U.S. states is aimed at addressing the driving issue alone).

Going forward, there may be a separate shift from states on the federal level of compliance into stricter regulations compared to the REAL ID Act, since courts have established that licenses compliant with federal regulation only need to meet the minimum requirements provided by the REAL ID Act. States have yet to create specifically higher documentation standards to date; however, without constitutional interpretation providing otherwise – the Real ID Act does not prevent states from implementing their own stricter documentation requirements for license renewal.<sup>99</sup> In California and Maryland, for example, miscommunication between the state motor vehicle departments and the Department of Homeland Security (“DHS”) about which documents are required to prove residency have forced agents to recertify REAL ID’s that were already issued and are no longer valid.<sup>100</sup> Therefore, states may be inclined to set stricter standards in order to alleviate compliance concerns.<sup>101</sup>

### 3. President Trump’s Political Climate Is the REAL ID Act’s Backbone

Donald Trump’s presidency has created problematic immigration policies, resulting in social attitudes that have significant implications for immigrants, especially in light of the REAL ID’s noticeable marking on state licenses. For example, the Federation for American Immigration Reform, a conservative political organization, has stated that, while “proponents of issuing drivers’ licenses to illegal aliens have argued that it would improve national security and road safety”, arguing that “this argument is spurious, because illegal aliens often use aliases and phony documents, so the alien’s identity and residence is not established as a result of the drivers’ license process.”<sup>102</sup> Further, the Federation for American Immigration Reform openly discusses links between the 9/11 hijackings and immigration reform; reasoning that the safety concerns associated with federal regulations and resulting license requirements are necessary under the REAL ID Act.<sup>103</sup>

This position has been used to discredit further legislation introduced to alter the REAL ID Act’s requirements. On July 15, 2009, Senator Daniel

<sup>99</sup> See Sena, *supra* note 80.

<sup>100</sup> See Povich, *supra* note 5 (noting that some states have already experienced issues complying with federal document requirements).

<sup>101</sup> See *id.* (stating “Maryland began complying with the Real ID law in 2009, requiring new residents or those getting licenses for the first time to provide *extra documentation* under a process that the U.S. Department of Homeland Security deemed compliant” ... “that process required proof of residency and proof of identity, such as Social Security cards, birth certificates, marriage certificates or other identification”).

<sup>102</sup> See *Comparing Real ID & Pass ID*, FED’N FOR AM. IMMIGR. REFORM, (July 10, 2009), <https://www.fairus.org/issue/national-security/real-id>.

<sup>103</sup> *Id.*

Akaka (D-Hawaii), introduced legislation labeled as a security bill, which was targeted by conservative groups as “gutting” important provisions of the REAL ID Act, further solidified many individuals’ perceptions that federal licensing requirements are somehow necessary to prevent further terrorist attacks.<sup>104</sup> Specifically, The Federation for American Immigration Reform attacked S.B. 1261 of the 111th Congress entitled “Providing for Additional Security in States’ Identification Act of 2009” (Pass ID), stating that “Pass ID will gut the security provisions of REAL ID and re-establish many of the loopholes that allowed 9/11 hijackers to carry out the attack on the Pentagon and The World Trade Center.”<sup>105</sup> Donald Trump’s remarks may have the effect of re-affirming and targeting the perception that the REAL ID Act is necessary to mitigate security concerns, many of which stem from the presence of unlawful immigrants present in the U.S.<sup>106</sup>

Since Donald Trump’s presidential campaign in 2015-2016, President Trump’s remarks about immigrants and immigration reform have raised eyebrows and been broadcasted to the public, often with the undertone of such remarks being labeled as outlandish.<sup>107</sup> The result is that the documentation requirements immigrants must meet are now met with greater scrutiny. Those that cannot provide such documentation may risk investigation into their status – even if they are lawful permanent residents or have other legal status.<sup>108</sup> Additionally, the difficult-to-meet documentation requirements shows, based on the current political climate, that it is a direct targeting of minority individuals in order to assess immigration status.

### C. Fundamental Right to Travel and Interstate Migration

The Supreme Court has held there is a fundamental right to travel and to interstate migration within the United States. Therefore, laws that prohibit

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<sup>104</sup> See National Conferences of State Legislatures, *The History of the Federal Requirement for State Issued Drivers’ Licenses and Identification Cards*, NCSL, (last visited April 12, 2020), <https://www.ncsl.org/research/transportation/history-behind-the-real-id-act.aspx> (noting how the REAL ID Act’s creation was rooted in President George W. Bush’s recognition of the state’s role in homeland security, including with its issuance of drivers licenses). This legislation was also promulgated in response to the September 11, 2001 terrorist attacks, which prompted the need for increased homeland security initiatives. *Id.*

<sup>105</sup> *Comparing Real ID & Pass ID*, *supra* note 102.

<sup>106</sup> See Eugene Scott, *Trump’s Most Insulting — & violent — Language is Often Reserved for Immigrants*, WASH. POST, (Oct. 2, 2019), <https://www.washingtonpost.com/politics/2019/10/02/trumps-most-insulting-violent-language-is-often-reserved-immigrants/>.

<sup>107</sup> *Id.* (reasoning that by associating particular hostile language with immigrants ultimately impacts the government’s treatment of those individuals in everyday aspects of life, including attitudes reflected by those who actually enforce such legislation).

<sup>108</sup> *Id.* (discussing the hostile treatment of immigrants in today’s political climate under President Trump).

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or burden travel within the United States must meet strict scrutiny.<sup>109</sup> A direct relationship exists between the restrictions on drivers' licenses and the inhibition of individuals with non-compliant licenses to travel within the United States. While individuals with non-compliant licenses are not prevented from driving across state lines, two issues arise: the visual markings associated with non-compliant licenses, such as "FEDERAL LIMITS APPLY", easily identifies individuals with immigrant status, and by limiting air travel, immigrants' constitutional rights to accessible interstate migration are significantly limited.<sup>110</sup>

There is a constitutional right to travel under *Saenz v. Roe*, where the Supreme Court determined that there is an inherent right to travel.<sup>111</sup> Under *Saenz*, the right to travel embraces at least three different components.<sup>112</sup> It protects the right of a citizen of one state to enter and to leave another state, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second state, and, for those travelers that elect to become permanent residents, the right to be treated like other citizens of that state.<sup>113</sup> As discussed earlier, individuals travel within the United States for several important reasons, whether to obtain employment, procure medical services, or even engage in commercial enterprises. Additionally, individuals frequently travel to various U.S. states for their own personal travel and enjoyment.<sup>114</sup> Therefore, the restriction on an individual's right to travel has serious implications, and the REAL ID Act's enforcement of

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<sup>109</sup> See *Saenz v. Roe*, 526 U.S. 489 (1999) (holding the Privileges and Immunities Clause of Article IV protects the right to travel in three different ways, (1) allowing citizens to move freely between states, (2) securing the right to equal treatment in all states while visiting, and (3) securing the rights of new citizens to be treated the same as long-term citizens living within the state). In *Saenz*, the state of California passed a statute in 1992 which limited the maximum amount of welfare benefits available to a family residing in the state for less than twelve months to the amount payable by the state of the family's prior residence).

<sup>110</sup> See Tancinco, *supra* note 37 (stating "Generally, traveling with a passport with no valid U.S. visa stamp on it does not imply unlawful status. The DHS explicitly cautioned federal agents from assuming that non-possession of REAL ID-compliant identification cards indicate that the traveler is an undocumented immigrant. However, given the current political climate, the restrictive immigration policies and the heightened immigration enforcement rules, it may be a trigger for further inquiry if the TSA or any federal agent exercises discretion of the need to determine lawful presence."); see also *See Sena*, *supra* note 80 (recognizing the visual burden on non-compliant licenses, which are used for identification purposes and for driving, but are not REAL ID-compliant. "Displayed on its face are the words, 'NOT FOR FEDERAL PURPOSES.'"); see also Ulin, *supra* note 1 (cautioning how the identification of "Federal Limits Apply" causes additional concerns for immigrants. Essentially – "can there be a redder flag in these dark and distrustful times?").

<sup>111</sup> See *Saenz*, *supra* note 108 (discussing how there is a fundamental right to travel within the United States).

<sup>112</sup> *Id.* at 500.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 502.

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federal licensing laws unconstitutionally burdens non-compliant, and non-passport holding individuals from their right to travel within the U.S.

### III. CASELAW INTERPRETING THE REAL ID ACT OF 2005

#### *A. Ability for Even Stricter Implementation by States*

The REAL ID Act only sets forth minimum standards for document compliance; therefore, states may choose to mandate stricter requirements for showing lawful status or residency. In California and Maryland, for example, miscommunication between the state motor vehicle departments and DHS about which documents are required to prove evidence of state residency have forced agents to recertify REAL ID's that were already issued and are no longer valid.<sup>115</sup> Therefore, given that the REAL ID Act only sets forth minimum documentation standards for compliance, states may be inclined to set stricter standards in order to alleviate compliance concerns.

In *Saldana v. Lahm*, the U.S. District Court for the District of Nebraska concluded that nothing within the REAL ID Act, Sec. 202(c)(1) and (2), prevents states from imposing licensing standards that or requirements that exceed those set out in the REAL ID Act.<sup>116</sup> The REAL ID Act itself sets *minimum* standards that states must meet in the issuance of drivers' licenses and identification cards in order for the licenses or cards to be accepted for official purposes of the federal government, such as boarding federally regulated commercial aircraft and accessing federal facilities.<sup>117</sup> These are, in effect, *minimum* content requirements for licenses, including specific information and security features.<sup>118</sup>

<sup>115</sup> See Povich, *supra* note 5 (noting that some states have already experienced issues complying with federal document requirements).

<sup>116</sup> See *Saldana v. Lahm*, No. 4:13CV3108, 2013 U.S. Dist. LEXIS 148209, 15 (D. Neb. Oct. 11, 2013).

<sup>117</sup> *Id.* at 12.

<sup>118</sup> *Id.* at 12-15 (interpreting Sec. 202(c)(1) and (2) of the REAL ID Act; where the relevant portions for minimum issuance standards under Sec. (c)(1) provide:

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

(A) **A photo identity document, except that a non-photo identity document is acceptable if it includes both the persons' full legal name and date of birth. . .**

Under Sec.(c)(2), the relevant portions for the Act's "special requirements" for driver's license renewal include:

(B) **Evidence of lawful status.** —A State shall require, before issuing a driver's license of identification card to a person, valid documentary evidence that the person—

(i) is a citizen or national of the United States;

(ii) is an alien lawfully admitted for permanent or temporary residence in the United States;

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Further, the defendant in *Saldana* asserted that Saldana did not have “lawful status” in the United States, though she may have “lawful presence” for purposes of the Act. Saldana agreed that she lacked “lawful status” for purposes of the federal immigration laws, but asserted that she had “lawful status” nonetheless for purposes of obtaining a state issued driver’s license.<sup>119</sup> Ultimately, this court found it unnecessary to determine whether Saldana had “lawful status” for purposes of the Act, because nothing in the Act required states to issue driver’s licenses to anyone.<sup>120</sup> However, this disagreement over the REAL ID Act’s language within the policy itself shows how states are grappling with how to interpret the Act’s documentation requirements.<sup>121</sup> The Act simply sets minimum standards for the issuance of state driver’s licenses and state identification cards, if such licenses and cards are to be accepted for federal use.<sup>122</sup>

This is highly problematic for individual states’ applications of the REAL ID Act. Not only are federal document requirements difficult-to-meet for immigrants required to present various identification documents, birth certificates and two forms of residence, but also states can implement their own additional stringent documentations for issuing licenses beyond that required by the REAL ID Act and federal law.<sup>123</sup>

In *State ex. rel. Sagallah v. Born*, the Ohio state court indicated that with the REAL ID Act, Congress set out to establish certain minimum standards for the issuance of a driver’s license and directed the states to comply.<sup>124</sup> In *Sagallah*, Eihab Sagallah commenced this action ordering

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(iii) has conditional permanent resident status in the United States;

**(C) Temporary drivers’ licenses and identification cards. —**

**(iv) Renewal. —** A temporary driver’s license or temporary identification card issued pursuant to this subparagraph may be renewed **only upon presentation of valid documentary evidence that the status by which the applicant qualified for the temporary driver’s license or temporary identification card has been extended by the Secretary of Homeland Security.**

*See also* 49 U.S.C. § 30301, note, Sec. 202(c)(1) and (2) (bracketed material in original) (emphasis added).

<sup>119</sup> *See Saldana, supra* note 115, at 15 (D. Neb. 2013) (holding that “while it might appear to inflict little harm on the Defendant or the public if this Court were to order the Defendant to issue a driver’s license to Saldana, the very act of federal interference in the domain of state government, without strong legal justification, is an intrusive harm.” Ultimately it was “not apparent that Saldana has a likelihood of success on the merits of her remaining claim”).

<sup>120</sup> *Id.* at 15.

<sup>121</sup> *Id.* at 11, 15. (highlighting the disagreement over evidence of “lawful status” versus “lawful presence,” and providing that immigration related legal decision-making is difficult to interpret at the state level when issuing licenses).

<sup>122</sup> *Id.* at 15.

<sup>123</sup> *Id.*

<sup>124</sup> *See State ex rel. Sagallah v. Born*, 13AP-787, 2014 Ohio App. LEXIS 3035 app. at 39-40 (July 15, 2014) (analyzing *Arizona v. United States*, 567 U.S. 387 (2012), which the court found misplaced, stating: “The United States Supreme Court found that certain provisions of Arizona law were preempted

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respondents John Born, director of the Ohio Department of Public Safety, and Mike Rankin, registrar of the Bureau of Motor Vehicles (“BMV”), to renew relator’s Ohio driver’s license without requiring him to submit additional documentation concerning his immigration status in the United States.<sup>125</sup> While Congress established these minimum standards, Congress left it to the states to implement the law, meaning that Ohio’s BMV office had additional, or entirely different, documentation requirements in place for license renewal. In other words, Congress did not completely usurp the authority the states have always had concerning the issuance of a driver’s license.<sup>126</sup> As relevant here, the REAL ID Act requires states verify an applicant’s lawful status in the United States. States must require an applicant to submit “valid documentary evidence” of their lawful status; however, “valid documentary evidence” is not defined and, pursuant to Section 202(d)(4), states are required to adopt practices to “[e]stablish an effective procedure to confirm or verify a renewing applicant’s information.”<sup>127</sup> The federal government did not tell the states how to apply the Act. As also discussed by *Saldana v. Lahm*, the Act established minimum standards and left the manner of implementation to the states.

Lastly, *Cnty. Refugee & Immigration Serv. v. Petit* discusses how Plaintiffs pursued a class action regarding their fundamental right to travel to places of employment.<sup>128</sup> Specifically, this case discussed that refugees are a class of non-citizens authorized to work and reside in the United States, and are entitled under Ohio law and the REAL ID Act of 2005 to obtain driver’s licenses.<sup>129</sup> The issue presented in this case was regarding the BMV’s enactment of discriminatory policies that deny or delay the issuance of driver’s licenses to these individuals.<sup>130</sup> The Plaintiffs claimed the BMV’s

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by federal law. Specifically, the provisions which (1) required legal immigrants to carry registration documents at all times; (2) made it a crime for an illegal immigrant to search for or hold a job in the state; and (3) allowed state police to arrest any individual for suspicion of being an illegal immigrant. The U.S. [Supreme Court] held that ‘the Federal government has occupied the field of alien registration,’ meaning that all state action, ‘even complementary state regulation[] is impermissible.’”).

<sup>125</sup> *Id.* at 1-2 (noting how plaintiff “present[ed] along with his application his then-current driver’s license that was about to expire, his Social Security card, and a court order from an immigration judge with the United States Department of Justice, Executive Office for Immigration Review [] granting relator asylum in the United States. Although [plaintiff] had successfully obtained an Ohio driver’s license seven times since 1997, the deputy registrar of the BMV denied relator’s August 2013 application for relator’s failure to comply with Ohio Adm. Code 4501:1-1-21(G). More specifically, the deputy registrar determined relator’s court order signed by the immigration judge was not an acceptable form of documentation provided in the rule as proof of relator’s legal presence in the United States”).

<sup>126</sup> See *Sagallah*, *supra* note 123.

<sup>127</sup> *Id.*

<sup>128</sup> See *Cnty. Refugee & Immigration Serv. v. Petit*, 2019 U.S. Dist. LEXIS 97114, 4-7 (Dist. Ct. S. Ohio 2019).

<sup>129</sup> *Id.* at 4-5.

<sup>130</sup> *Id.*

actions are preempted by the Supremacy Clause of the United States Constitution, which forbids states from making immigration classifications distinct from those of the federal government.<sup>131</sup> In effect, because they are unable to procure driver's licenses in a timely fashion, thus hindering their fundamental right to travel to their places of employment, transport their children and family members, and otherwise participate fully in civic life, Plaintiffs and putative class members sought injunctive and declaratory relief against these policies.<sup>132</sup> At the pleading stage, the court denied the defendant's motion to dismiss on the grounds discussed above.<sup>133</sup> The reasoning for this denial was because the BMV policy had created a sub-classification of immigration status that was preempted by federal law; in doing so, the BMV's immigration classifications were independent of current federal immigration law and directed state officials to act as *de facto* immigration agents and judges.<sup>134</sup>

The cases discussed above analyze the problematic interpretations of The REAL ID Act, specifically regarding Sec. 202(b) and (c), that U.S. District Courts are facing in determining the ability of DMV officers and their discretionary ability in issuing licenses, and whether such federal legislation is constitutional given the fundamental rights to travel and work. These issues have not yet been addressed by the U.S. Supreme Court, but given the political makeup of the court and its recent decision in *Trump v. Hawaii*, it is unlikely that court would find the REAL ID Act unconstitutional given its origins in national security.<sup>135</sup>

### *B. Continued Issues Regarding DMV Discretionary Power*

*Cubas v. Martinez* is an important case discussed the REAL ID Act's proof-of-identity requirements and the Commissioner of the New York Department of Motor Vehicles' discretion and ability to make documentary decisions regarding the issuance of licenses.<sup>136</sup> In *Cubas*, a class action

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 4-7.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 15 (discussing how "The [BMV] Registrar creates a new category for determining whether a refugee is lawfully present, that is independent of and has no analogue in federal law. Specifically, the policy creates a category of lawful immigration status that requires a valid I-94 that was issued more than two years ago and additional documentary evidence in the form of an I-797 approval notice. Thus, those lawfully present refugees are stripped of the status of lawfully present refugees for purposes of obtaining a REAL ID Act-compliant driver's license. Federal immigration law, however, does not strip refugees of refugee status nor render them unlawfully present in the United States if they do not apply for or receive approval of an adjustment of status").

<sup>135</sup> See *Trump*, *supra* note 66 (upholding President Trump's Executive Order on the government's legitimate national security concerns); see also *Saenz*, *supra* note 108 (discussing the fundamental right to travel within the United States).

<sup>136</sup> See *Cubas v. Martinez*, 33 A.D.3d 96, 98-99 (N.Y. App. Div. 2006).

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alleged that defendant failed to comply with the State Administrative Procedure Act in implementing the identification procedures, and that the identity requirements were adopted in violation of plaintiffs' constitutional right to equal protection of the law and procedural due process.<sup>137</sup> Specifically disputed by the plaintiffs was the Commissioner's authority to require that any alien claiming to be ineligible for a Social Security number supply current documentation of proof of ineligibility from the Department of Homeland Security.<sup>138</sup> Plaintiffs further asserted that the practice of issuing suspension notices to any person whose SSN cannot be verified through Social Security Administration records violated their right to procedural due process by failing to provide an opportunity to be heard.<sup>139</sup>

The court in *Cubas* determined that the broad discretionary powers granted to the Commissioner of the New York State Department of Motor Vehicles by the legislature obviated the need to resort to the State Administrative Procedure Act to implement internal administrative procedures, such as the designation of documents acceptable to prove ineligibility for a Social Security number.<sup>140</sup> As a general principle, the agency that administers a statute is accorded considerable discretion in formulating operational procedures to carry out the intention of the Legislature.<sup>141</sup> Therefore, the REAL ID Act is an unconstitutional vehicle for the federal government to further scrutinize immigration status, and as a result of widespread access to DMV-related documentation, allows federal agents to strip immigrants' constitutional rights to accessible interstate travel.

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<sup>137</sup> *Id.* at 98.

<sup>138</sup> *Id.*

<sup>139</sup> *See Cubas v. Martinez*, 33 A.D.3d 96, 3-5 (N.Y. App. Div. 2006) (noting the standard for issuing and/or renewing licenses, specifically how "every applicant for issuance or renewal of a license is required to provide a valid SSN, and pursuant to 15 NYCRR 3.9 (a) and (b), persons whom SSA finds ineligible to be issued Social Security identification numbers may obtain or renew licenses upon providing proof of their ineligibility. The regulation states:

(a) An applicant for a license or a non-driver identification card or an applicant renewing such a license or such identification card must submit his or her social security number or provide proof that he/she is not eligible for a social security number.

(b) The failure of a person to submit his or her social security number or to provide proof that he/she is not eligible for a social security number ... will disqualify such person from renewing such license or identification card or obtaining such a license or identification card.

To indicate that a person is currently ineligible, SSA issues Form SSA-L676 SSN Card Denial Notice. However, DMV procedures [also] require submission of current supporting DHS documents that SSA [has] examined to reach a determination of ineligibility.)

<sup>140</sup> *See Cubas*, *supra* note 105.

<sup>141</sup> *Id.* at 106.

#### IV. CONCLUSION

The REAL ID Act has significant consequences for immigrants amidst the United States' aggressive immigration enforcement under the Trump Administration. While immigrants already face obstacles in obtaining lawful status, they will now face burdens in their access to driving, entering federal facilities, and airport travel. Even lawful residents and green-card holders will face obstacles in presenting documents to DMV agents, who may or may not understand their legal implications. For one, the REAL ID Act itself requires that immigrants produce evidence of "lawful status," requiring that DMV agents review various types of complicated paperwork associated with determining an individual's evidence of lawful status under the Sec. 202, note (c)(2)(B) of the Act. These specific concerns have yet to be fully examined because the REAL ID Act has yet to be implemented; however, these issues will likely come to fruition once the Act goes into effect in 2020. Thus, the REAL ID Act's constitutionality should be scrutinized under its undue influence and unnecessary burden on immigration law.