

January 15, 2013

Dannel P. Malloy
Governor
State of Connecticut
210 Capital Avenue
Hartford, Connecticut 06106

RE: Issuance of Second-Tier Driver's Licenses Without
Proof of Legal Residence Under REAL ID Act

Dear Governor Malloy:

We write as law professors whose teaching and scholarship focus on immigration law. This letter offers our legal opinion on a current proposal to expand access to driver's licenses to residents of the state of Connecticut without proof of legal residence, and specifically on whether such a proposal falls afoul of the federal REAL ID Act. We offer no views on the policy dimensions of the proposal being considered in your state. We write, instead, only to explain that nothing in the federal REAL ID Act bars any state, whether it has come into compliance with the law or not, from issuing second-tier licenses to undocumented immigrants.¹ According to the plain text of the statute and the statements of federal officials tasked with implementing it, such a program is clearly permissible.

When Congress passed the REAL ID Act in 2005, it created minimum standards for a new category of compliant state driver's licenses and identification cards. After the effective date, which has just recently been, once again, indefinitely postponed,² "a Federal agency may not accept, for any official purpose, a driver's license or identification card issued by a State to any person unless the State is meeting the requirements of [the Act.]"³ In addition to barring undocumented immigrants from this new category of state driver's licenses that are valid for federal identification purposes, the REAL ID Act's requirements exclude some other categories of immigrants, including persons granted withholding of removal, persons paroled into the

¹ We do not address in this letter the issue of whether individuals who are approved for deferred action under the federal government's Deferred Action for Childhood Arrivals (DACA) program should receive driver's licenses. It is clear that those young people are included in the definition of persons with lawful status under the REAL ID Act and therefore should receive a state driver's license that can be used for federal purposes. *See* Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 315, § 202 (c)(2)(B)(viii); 6 C.F.R. § 37.3 (definition of lawful status under the Act). This letter instead addresses the question of whether Connecticut can issue second-tier licenses (i.e., not to be used for federal purposes) to undocumented immigrants who are unable to demonstrate lawful status under the Act.

² When REAL ID Act was passed in 2005, it had an effective date of May 11, 2008. Pub. L. No. 109-13, 119 Stat. 231 (2005) (codified at 49 U.S.C. § 30301 note). When DHS promulgated the final rule governing minimum standards for REAL ID compliance, DHS extended the date until May 11, 2011. 6 C.F.R. § 37 (2008). On March 7, 2011, DHS postponed implementation to January 15, 2013. 6 C.F.R. § 37 (2011). Recently, DHS deferred implementation again – indefinitely. Press Release, Dep't Homeland Security, DHS Determines 13 States Meet REAL ID Standards: Remaining States Provided Additional Time to Comply (Dec. 20, 2012), <http://www.dhs.gov/news/2012/12/20/dhs-determines-13-states-meet-real-id-standards>. *See also* 40 U.S.C. § 30301 note (granting Secretary of DHS authority to extend the deadline).

³ Pub. L. No 109-13, 119 Stat. 231 (2005) (codified at 49 U.S.C. § 30301 note).

United States, and persons with pending applications for nonimmigrant visas (for example, victims of trafficking).⁴

Many drivers will be unable to obtain licenses valid for federal identification purposes under this law, but the statutory text of REAL ID and the implementing regulation and rules explicitly recognize a state's ability to offer two tiers of driver's licenses, where one type of license is valid for federal purposes and the other is not. The statute recognizes the possibility for a two-tier system and allows the issuance of a noncompliant license, which "(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."⁵

The implementing regulation incorporates this language as well, requiring that "[s]tates that DHS determines are compliant with the REAL ID Act that choose to also issue driver's licenses and identification cards that are not acceptable by Federal agencies for official purposes must ensure that such driver's licenses and identification cards" meet the requirements of § 202(d)(11).⁶

Exercising the authority indisputably conferred by federal statute and regulation, Connecticut already offers two tiers of licenses. As of October 3, 2011, Connecticut offers the "Select ID," which is valid for federal identification purposes under REAL ID.⁷ Connecticut has also chosen to continue to offer noncompliant licenses as well, but only to those seeking to renew their licenses, not to new applicants.⁸

So long as noncompliant licenses are appropriately marked, states are free under federal law to require as much or as little documentation as they wish from applicants for these licenses. Three states – New Mexico, Utah, and Washington – make driver's licenses or something similar available to undocumented immigrants.⁹ The Illinois Senate passed a measure to expand access to driver's licenses for undocumented residents in December, and legislation is pending in the Illinois House.¹⁰

⁴ Joan Friedland, *Final REAL ID Regulations Fail to Ease New Burdens on Immigrants*, NAT'L IMMIGRATION LAW CTR. (Feb. 27, 2008), <http://www.nilc.org/immspbs/DLs/DL039.htm>. Further, some lawful immigrants may have difficulty obtaining these federally valid licenses because their status must be verified by the Systematic Alien Verification for Entitlements (SAVE) system, a Department of Homeland Security (DHS) database with documented deficiencies. *Id.*

⁵ Real ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 315, § 202 (d) (codified at 49 U.S.C. § 30301 note).

⁶ 6 C.F.R. § 37.71 (2008); *see also* 73 Fed. Reg. 5273-74 (Jan. 29, 2008) ("The Act also permits a State otherwise in compliance with the Act to issue driver's licenses and identification cards that do not conform to the Act's requirements. See Sec. 202(d)(11)."); 73 Fed. Reg. 5323 (Jan. 29, 2008) ("This Regulatory Evaluation assumes that States will deploy a two-tier or multi-tier licensing system.").

⁷ *Select CT ID Overview*, CT DEP'T MOTOR VEHICLES, <http://www.ct.gov/dmv/cwp/view.asp?a=4078&q=477742>.

⁸ *DMV to Change License and ID Renewal Process for All Customers*, CT DEP'T MOTOR VEHICLES, <http://www.ct.gov/dmv/cwp/view.asp?a=4078&q=477750>.

⁹ Julia Preston & Robert Gebeloff, *Some Unlicensed Drivers Risk More Than a Fine*, N.Y. TIMES, Dec. 9, 2010, <http://www.nytimes.com/2010/12/10/us/10license.html>.

¹⁰ Ray Long, *Illegal Immigration Driver's License Measure Sails Through Illinois Senate*, CHI. TRIB., Dec. 4, 2012, http://articles.chicagotribune.com/2012-12-04/news/chi-illegal-immigrant-drivers-license-measure-sails-through-illinois-senate-20121204_1_lawrence-benito-illegal-immigrant-immigration-debate.

While these states are not yet fully compliant with the REAL ID Act, this is *not* because they offer licenses to undocumented residents, but rather because they do not *also* offer licenses that meet the statutory requirements for federally valid identification. Utah already utilizes a two-tier system; if and when REAL ID is implemented, Washington and New Mexico may also implement a two-tier system so that their first-tier driver's licenses are accepted as federal identification.

Official statements by the federal official responsible for implementing the REAL ID Act reiterate explicitly that the two-tier option allows states to issue noncompliant licenses to undocumented immigrants. DHS Secretary Michael Chertoff spoke directly to the issue in 2007: "To the extent that [a state] issues a class of license that is not based on lawful presence in the United States, those licenses will not comply with REAL ID ... requirements," he explained, "[b]ut federal law does allow states to make that choice Congress has spoken to the issue; the option is open to the states."¹¹

Connecticut would clearly be acting in compliance with the REAL ID Act and other federal law if it were to allow residents without proof of immigration status to obtain second-tier driver's licenses. Connecticut could still accept these licenses for state identification purposes, although they would not be valid for federal purposes. In this letter, we do not advocate the wisdom of such a legislative policy. Our purpose in writing is more limited and straightforward: to explain that federal law in general, and the REAL ID Act in particular, presents no obstacle to the passage and implementation of this policy; in fact, the statute and DHS policy explicitly permit states to offer second-tier driver's licenses to all their residents, irrespective of immigration status.

Respectfully yours,

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¹¹ Press Release, Dep't Homeland Security, Remarks by Homeland Security Secretary Michael Chertoff and New York Governor Eliot Spitzer on Secure IDs (Oct. 27, 2007).

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