



January 28, 2013

**AMERICAN CIVIL
LIBERTIES UNION OF
ALASKA**

1057 W. Fireweed, Suite 207
Anchorage, AK 99503
(907) 258-0044
(907) 258-0288 (fax)
WWW.AKCLU.ORG

OFFICERS AND DIRECTORS

DONNA J. GOLDSMITH, Anchorage
PRESIDENT

RICH CURTNER, Anchorage
VICE PRESIDENT

LLOYD EGGAN, Anchorage
TREASURER

JOSHUA HEMSATH, Eagle River
SECRETARY

WILLIE ANDERSON, Juneau
AFFIRMATIVE ACTION OFFICER

PAUL GRANT, Juneau
SCOTT HENDERSON, Anchorage
KATIE HURLEY, Wasilla
MARJORIE KAISER, Anchorage
MICHAEL KING, Anchorage
RACHEL MUIR, Dillingham
CONNIE OZER, Anchorage
GALEN PAINE, Sitka
STEPHANIE PAWLOWSKI, Anchorage
BRIAN SPARKS, Sitka
JUNE PINNELL-STEPHENS, Fairbanks
TONY STRONG, Douglas

EMMA HILL, Anchorage
STUDENT ADVISOR

The Honorable Bob Lynn, Chair
The Honorable Wes Keller, Vice-Chair
House State Affairs Committee
Alaska State House of Representatives
State Capitol, Room 106
Juneau, AK 99801

via email:

Rep.Bob.Lynn@akleg.gov

Rep.Wes.Keller@akleg.gov

Re: House Bill 1 - Relating to Issuance of Driver's Licenses
Constitutional Infirmities

Chair Lynn, Vice-Chair Keller:

Thank you for the opportunity to submit written testimony regarding House Bill 1, Relating to Issuance of Driver's Licenses.

The American Civil Liberties Union of Alaska represents thousands of members and activists throughout the State of Alaska who seek to preserve and expand individual freedoms and civil liberties guaranteed under the United States and Alaska Constitutions. In that regard, we appreciate the opportunity to provide the Committee with information highlighting constitutional infirmities with the proposed legislation.

We would be happy to work with you or the Committee to answer any questions you might have.

Purpose of Driver's License, and Federal Pre-Emption

A driver's license's "primary purpose is to allow its bearer lawfully to drive a car." *U.S. v. Campos-Serrano*, 404 U.S. 293, 299 (1971). **It is not intended as a document to relate to one's immigration status.**

HB 1 would require the State of Alaska both to determine *whether* someone is legally present in the country and to speculate on *how long* that individual may stay. This determination implicates the Supremacy Clause of the United States Constitution, which guarantees that **federal law will supersede state law in the areas of immigration.** "The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization. Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states. *State laws which impose discriminatory burdens upon the entrance or residence of aliens lawfully within the United States conflict with this constitutionally derived federal power to regulate immigration, and have accordingly been held invalid.*" *DeCanas v. Bica*, 424 U.S. 351, 358 n.6 (1976) (citations omitted) (emphasis added).

The once-a-year requirement to renew a driver's license for those present for an indefinite period of time bears a striking similarity to the annual registration requirement for legal immigrants overturned in *Hines v. Davidowitz*, 312 U.S. 52, 59-60 (1941). In *Hines*, legal aliens were required to obtain a Pennsylvania identification card, renewed every year, which had to be shown, among other purposes, "as a condition precedent to registering a motor vehicle in his name or obtaining a license to operate one." *Id.* at 59. ***The Pennsylvania identification requirement was invalidated, as Congress had reserved entirely to itself, or "occupied the field" of, the management of aliens within the borders of the United States.*** *Id.*, (emphasis added).

Last year, the United States Supreme Court reaffirmed the logic of the *Hines* decision by rejecting an Arizona law which punished as a misdemeanor the failure of any legal immigrant to carry an "alien registration document," as the Court found that the federal government had the exclusive authority to register non-citizens. *Arizona v. United States*, 132 S. Ct. 2492, 2502 (2012). ***HB 1 would essentially make state driver's licenses into "alien registration documents" used in tracking the legal status of non-citizens by the state government, which is not a proper role for the state of Alaska, nor among the traditional "police powers" of state governments.***

The United States Supreme Court has even held that some state laws relating exclusively to *undocumented immigrants* may violate the Supremacy Clause, where the regulation does not clearly serve legitimate state interests. *Plyler v. Doe*, 457 U.S. 202, 226-30 (1982) (overturning a Texas policy of not reimbursing public school districts for the costs associated with teaching

undocumented students). Further, various federal statutes manifest intent to prohibit discrimination against people on the basis of immigration status. *See, e.g.*, 8 U.S.C.A. § 1324b.

These cases and statutes indicate that – if enacted – a court could determine that HB 1 violates the Supremacy Clause.

Legislation Directed at Immigrants: Suspect Classification

Generally, regulations explicitly directed at legal immigrants are considered suspect classifications, like distinctions based on race and nationality. *Graham v. Richardson*, 403 U.S. 365, 372 (1971). *The State of Alaska may not impose a special condition of driver's license renewal on legal immigrants, for similar reasons as it could not impose such conditions on drivers of a certain race, sex, or religion.*

HB 1, if enacted as drafted, would regulate the issuance of essential identification to legal immigrants, in a manner discriminatory towards those legal immigrants and potentially quite burdensome. Some immigrants may have short-term visas which are periodically renewed. The State of Alaska would impose unreasonable burdens on those immigrants by mandating that they also renew their driver's licenses each time they obtain a new visa, *for reasons having nothing to do with the fitness of the individual to drive a car.*

In an earlier case, the United States Supreme Court rejected state efforts to limit the issuance of a fishing license only to those eligible for citizenship. “[T]he power of a state to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits.” *Torao Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 420 (1948). The Court rejected the notion that a “state can adopt one or more of the same [federal immigration] classifications to prevent lawfully admitted aliens within its borders from earning a living in the same way that other state inhabitants earn their living.” *Id.* at 418-19.

In a recent case, the federal appeals court for the Second Circuit struck down a law prohibiting non-immigrant aliens from obtaining licenses to work as pharmacists. *Dandamudi v. Tisch*, 686 F.3d 66, 80 (2d Cir. 2012). **The state, in its role as regulator, was entitled to ensure that pharmacists were “professionally qualified to engage in the particular specialty occupation,”** but states could not determine that a “certain subclass of immigrants is not qualified for licensure merely because of their immigration status.” *Id.*, (emphasis added). *The failure to tailor the licensing scheme to a legitimate state interest was fatal to the law.*

HB 1 would likely suffer a similar fate to the statutes challenged in *Torao Takahashi* and *Dandamudi*. No one would seriously suggest that one's immigration status closely relates to a driver's fitness to drive safely on the roads of Alaska.

One might also note the emphasis in both *Torao Takahashi* and *Dandamudi* on the right of individuals, **including non-citizens**, to earn a living. If the state denies driver's licenses or makes maintaining a driver's license procedurally cumbersome to legal immigrants, such a policy impairs the ability of those parties to maintain work. Many occupations directly require that a person maintain a driver's license, while in other cases driving is a practical necessity, as the commute to work would otherwise become difficult or expensive.

Among the unique provisions of the Alaska Equal Protection clause is the declaration that all people have a "natural right to life, liberty, the pursuit of happiness, and the *enjoyment of the rewards of their own industry*." Alaska Const., Art. I, Sec. 1 (emphasis added). To the extent denial of or limitations on a driver's license tends to thwart legal immigrants in finding or maintaining employment, the courts will question whether HB 1 unreasonably and inequitably restricts the right to the rewards of one's own industry. *See Alaska Civil Liberties Union v. State*, 122 P.3d 781, 794 (Alaska 2005).

Equal Protection and Due Process Issues

HB 1 additionally raises issues regarding violation of both federal and Alaska standards for equal protection. *See, e.g., State, Dep't of Revenue v. Andrade*, 23 P.3d 58, 78 (Alaska 2001) (noting that both sides conceded, and the court held, that an earlier regulation barring *all* legal aliens from obtaining money from the permanent fund violated equal protection). That driving may be considered a privilege and not a right is immaterial; **the denial to non-citizens of certain state benefits, including financial assistance for education and certain welfare benefits, has been ruled unconstitutional**. *Richardson*, 403 U.S. at 375-76; *Nyquist v. Mauclet*, 432 U.S. 1, 11-12 (1973).

Assuming that the statute's intended meaning is that some categories of non-citizens should be forced to renew their licenses more frequently than citizens, the use of immigration status, or alienage, as a classification violates equal protection.

Moreover, the Alaska Supreme Court has emphasized the status of driver's licenses as "an important property interest." *Champion v. Department of Public Safety*, 721 P.2d 131, 133 (Alaska 1986). A driver must receive meaningful due process before a "driver's license[] may be revoked or suspended." *Javed v. Department of Public Safety*, 921 P.2d 620, 622 (Alaska 1996) (citations omitted). While most due process cases relate to revocation or suspension of a driver's license, rather than issuance, given the technical legal nature of the terms by which the license is revoked, a court might look at this rule as requiring a substantial and meaningful hearing, including a court hearing, to determine the immigration status of the individual. ***Designating a license for early and automatic expiration is not functionally different from suspending or revoking the license.***

Thus, requiring or allowing employees of the Division of Motor Vehicles to attempt to assess someone's immigration status would likely not comport with due process. Moreover, the implications of a due process challenge on this issue would merely heighten the pre-emption argument that the bill as a whole is invalid, as **the statute essentially requires state officials to assess independently a licensee's federal immigration status. *That function is neither one that DMV employees are well-equipped to do, nor one that Congress has delegated to them.***

Given the lack of expertise of state officials in the federal immigration arena, the "risk of error" in assessing whether someone is a legal immigrant and how long they may legally stay in the United States would seem to be high. Such "risk of error" would invalidate an automatic scheme of license revocation. *City of Redmond v. Moore*, 91 P.3d 875, 881 (Wash. 2004).

Additionally, the Committee may wish to consider the potential language proficiency issues of some legal immigrants and their lack of familiarity with the legal system. ***An immigrant who innocently misses a re-registration deadline, and is then found guilty of driving on an expired license, could have that conviction hamper their continued efforts to remain in the country or to become a citizen or permanent resident.***

Procedural Issues: Departmental Regulations, Scope of "Indefinite"

A further problem with HB 1 is that it dictates an outcome, without explaining a method. The bill leaves up to regulation by the Department *how* the duration of the individual's stay is determined. However, Alaska state administrative agencies have no identified expertise in determining immigration status, and the **courts have noted the inability of the states to do so, as "the structure of the immigration statutes makes it impossible for the State to determine which aliens are entitled to residence, and which eventually will be deported."** *Plyler*, 457 U.S. at 236 (Blackmun J., concurring); *id.* at 226.

The duration of permitted stay is, in some cases, hard for a lay person unfamiliar with immigration law to determine. **For instance, a non-citizen in Alaska for educational reasons may not be limited in the terms of her stay to the date listed on her visa, but until her educational program is complete.** U.S. Dep't of State, Student Visas (A student "may stay [in the United States] as long as [she is] a full time student, even if the F-1 visa in [her] passport expires while [she is] in the United States.") at http://travel.state.gov/visa/temp/types/types_1268.html#14. A DMV employee unfamiliar with immigration law may incorrectly assume that the length of permitted stay is simply until whatever date is on the individual's visa. A hearing officer will not have sufficient knowledge of immigration law to correct such errors on review, ***resulting in simple licensing matters turning into lengthy litigation.*** Some non-citizens legally present in the United States may lose their licenses because they cannot afford legal representation to demonstrate the permitted duration of their stay and because they cannot explain the intricacies of immigration law to DMV employees.

Without a fixed system for determining the immigration status of driver's license applicants, the uncertainty of the administrative determination could impose unreasonable suspicion on those who "look" or speak "differently." A better course is for the state to leave determination of immigration status to the unified federal system, **rather than enacting legislation and eventual regulations that put admittedly legal immigrants under a pall of suspicion.**

Conclusion

We hope that the State Affairs Committee will note the multiple constitutional infirmities with the proposed language in HB 1.

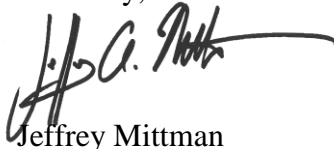
While the ACLU of Alaska **does not contest the State's ability and duty to regulate the safety of our roads**, as drafted, **HB 1 goes far outside this permissible sphere.**

The issues raised above present substantial Constitutional problems and would entangle the state in lengthy, costly, and needless litigation, should HB 1 pass as currently written.

Please feel free to contact the undersigned should you require any additional information. Again, we are happy to reply to any questions that may arise either through written or verbal testimony, or to answer informally any questions which Members of the Committee may have.

Thank you again for the opportunity to share our concerns.

Sincerely,



Jeffrey Mittman
Executive Director
ACLU of Alaska

cc: Representative Lynn Gattis, Rep.Lynn.Gattis@akleg.gov
Representative Shelley Hughes, Rep.Shelley.Hughes@akleg.gov
Representative Doug Isaacson, Rep.Doug.Isaacson@akleg.gov
Representative Charisse Millett, Rep.Charisse.Millett@akleg.gov
Representative Jonathan Kreiss-Tompkins, Rep.Jonathan.Kreiss-Tompkins@akleg.gov