

MEMORANDUM

To: Letitia James, Attorney General
From: Kathryn Sheingold, ASG in Charge of Opinions
CC: Barbara Underwood, Solicitor General
Date: June 14, 2019
Re: Driver's License Access and Privacy Act, 2019 S.1747B/A.3675B ("Green Light Bill")

The Green Light Bill would allow an undocumented immigrant to obtain a driver's license by allowing the individual to submit, in lieu of a Social Security number, an affidavit stating that he or she has not been issued one and by expanding the types of foreign records the Department of Motor Vehicles will accept to prove the applicant's identity. The license provided to such an applicant would state on its face that it does not meet federal standards for identification. The bill also would prevent the disclosure of Department of Motor Vehicles' records relating to these licenses to an agency that primarily enforces immigration law (for example, U.S. Immigration and Customs Enforcement and U.S. Customs and Border Protection) in the absence of a lawful court order.

The Senate sponsor of the Green Light Bill has asked you for a statement on the legality and constitutionality of the bill. The sponsor raised no particular issues with respect to the bill's legality or constitutionality, nor are we aware of any challenges to the bill's legality or constitutionality. Instead, objections to the bill are based on policy: first, that the licensing system, dependent on the validity of foreign proofs of identity unfamiliar to those administering the system (i.e., county clerks), is subject to fraud; and second, that issuing a state license to a person illegally in the country validates their (unlawful) presence. *See* J. Mahoney, "County clerks voice opposition to immigrant license legislation," *Press Republican* (Jun. 3, 2019), *available at* https://www.pressrepublican.com/news/local_news/county-clerks-voice-opposition-to-immigrant-license-legislation; C. McKenna, "The fray: Assembly ready to Green Light driver's license bill," *Times Herald-Record* (Jun. 8., 2019), *available at* <https://www.recordonline.com/news/20190608/fray-assembly-ready-to-green-light-drivers-license-bill>.

Both concerns potentially implicate federal powers relating to immigration and national security, arguably raising the issue of federal preemption. But the Green Light Bill, by creating a license category designated as invalid for federal identification purposes, avoids encroaching on these areas of federal dominance.

With respect to immigration, New York, through the DMV, will not be making immigration decisions with respect to applicants for a driver's license or

classifying immigrants based on their documents (*cf. Arizona Dream Act Coalition v. Brewer*, 855 F.3d 957, (9th Cir., 2017) (state’s refusal to rely on federally-issued records showing DACA-eligible immigrant’s authority to work in U.S. as proof of “authorized presence” to obtain driver’s license impermissibly encroached on federal government’s authority to classify noncitizens)). It will be issuing a license to drive, the particular form of license based on what records the applicant supplies in support of his or her application: any applicant, citizen or noncitizen, able to provide a Social Security number will be eligible for one type of license; an applicant, citizen or not, who submits an affidavit that he or she was not issued a Social Security number, will be eligible for another type.¹

With respect to national security, while the federal REAL ID Act requires that state-issued driver’s licenses meet certain standards by October 2020 if they are going to be used for federal identification purposes (if a person wants to board an airplane or enter a military base, for example), it also recognizes that states may adopt a multi-tier licensing program and specifies what a non-compliant license must include. Pub. L. No. 109-13, tit. II, § 202(d)(11). The Green Light Bill complies with the requirements of the REAL ID Act by expressly providing that a license issued without an underlying Social Security number cannot be used for federal identification purposes and authorizing DMV to provide additional color or design distinctions if needed to comply with federal law.

In the absence of the sponsor raising specific concerns as to the bill’s constitutionality and legality, this analysis is not necessarily comprehensive. But after a review of the concerns expressed in the press and likely challenges following from them, we have identified no reason to doubt that the proposed legislation is constitutionally and legally sound.

¹ Although a Social Security number is required to receive certain benefits, applying for one is not mandatory; consequently, there may be U.S. citizens who do not have one. See U.S. Social Security Admin., Social Security Numbers for Children (Dec. 2017), available at <https://www.ssa.gov/pubs/EN-05-10023.pdf>.