LEGAL SERVICES

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MEMORANDUM March 6, 2013

SUBJECT: HB1 - Drivers' Licenses of Less than Five Years Duration
(Work Order No. 28-LS0008\O)

TO: Representative Bob Lynn
Attn: Forrest Wolfe

FROM: Kathleen Strasbaugh
Legislative Counsel

You have asked me to review and comment on correspondence from Margaret Stock to Mr. Prax of Representative Keller's staff. I spoke with Mr. Wolfe a couple of days after the bill's first hearing on February 18, and advised that I could not provide assistance with regard to Ms. Stock's assertions about the practical difficulties the bill may cause for the division of motor vehicles, or the difficulties that might be encountered with respect to interaction with federal immigration officials and regulations. We agreed that the best sources of such information are the DMV and federal immigration officials. I believe Mr. Wolfe has already communicated with these agencies. We also discussed the fact that some of the legal issues require an analysis of the rationale for the legislation, which might involve the presentation of factual information, to the extent that it has not already been provided.

While I am not an expert in immigration, I can address, at least briefly, three legal issues set out in Ms. Stock's correspondence.

The bill provides that the Department of Administration may issue a driver's license to a person who has permission to be in the United States for less than five years, for the period of time the permission has been granted. It also provides that a person with permission to stay in the United States for an indefinite period may receive a license annually.

1. **Equal Protection.** The first question is whether a driver's license applicant who has permission to be in the United States for an indefinite period and receives a license that requires an annual renewal, is being treated less favorably than a person whose permission to be in the country is for a definite period, who receives a license that is for that definite period, to such a degree that the first applicant's right to equal protection of the laws is affected.

Challenges to government practices that draw distinctions between persons with differing legal statuses under federal immigration laws are usually reviewed by courts under the rationale basis standard. The Alaska Supreme Court has permitted the permanent fund dividend program to distinguish between immigrants in the U.S. with permission and those in the U.S. without permission, as rationally related to the program's aims under the Alaska and U.S. equal protection standards. *Cosio v. State*, 858 P.2d 621, 627 and 629 (Alaska 1993). *See also State v. Andrade*, 23 P.3d 58, 78 (Alaska 2001)(upholding the permanent fund statute's distinction between those who are admitted for permanent residence and those who are not, but noting the unconstitutionality of an expired regulation that appeared to improperly exclude persons who were not precluded by federal law from forming the intention to remain in the state); *accord, Carlson v. Reed*, 249 F. 3d 876, 882 - 83 (9th Cir. 2011) (upholding the distinction between legal permanent residents and those who are not eligible for permanent residence for the purpose of in-state college tuition).

However, in my opinion HB 1 does not actually attempt to draw distinctions among persons with differing statuses. A person with uncertain time limits could be a refugee seeking permanent residence, or a student who is not. Persons with specified periods of admission may have differing statuses as well. Each group is entitled to apply for and to receive a driver's license. The differing durations of licensing periods are not based on drawing improper distinctions among persons with differing immigration statuses, and thus it does not appear that there is an equal protection problem of the type identified in pages 1-2 of the correspondence.

2. **Litigation in Other States.** The correspondence also suggests that "the bill will lead to expensive litigation." I did not find any source of statistics on the amount of litigation, or its expense, nor of unreported activity in trial courts around the nation. In addition, I could not find any reported cases in which similar legislation has been overturned. The correspondence refers to an unreported case in a federal district court in New Hampshire as an example of such litigation. In that case, driver's license holders whose permission to be in the country was for an indeterminate period or for less than five years, sued because they were (1) required to travel to the state capital to renew their licenses and to stand in special lines, (2) issued temporary documents without photos, (3) treated as having requested duplicate licenses, (4) issued final licenses that had a special mark that might have indicated their immigration status, (5) required to meet more onerous standards with respect to residency and, (6) issued licenses for less than five years. *Fahy v. Commissioner*, 2006 WL 82705, at 1 - 4 (D. N.H. March 29, 2006). Some of the plaintiffs received licenses that were valid for less than one year. *Id.* The court enjoined the practice of issuing shorter temporary permits to noncitizens, but upheld the balance of the requirements, finding them in compliance with federal mandates, particularly with respect to identity verification under the federal REAL ID Act.[1] *Id.* at 16 - 17. In

[1] Under AS 44.99.040, Alaska state agencies are not permitted to expend funds for compliance with the REAL ID Act, but DMV's identification requirements are largely consistent with its documentation requirements.

subsequent litigation of the case, the court determined that those persons with permanent status or federal identification indicating refugee or asylee status could not have the duration of their licenses tied to their status because neither the state's regulations nor the REAL ID law required it. *Fahy v. Commissioner*, 2006 WL 1764346, at 2 - 3 (D.N.H. June 26, 2006).[2]

One could argue that the *Fahy* case might stand for the proposition than treating citizens differently that noncitizens is a violation of federal equal protection standards. However, a reported circuit court decision upheld such a time limitation for certain driver's licenses. In *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523 (6th Cir. 2007), the Sixth Circuit Court of Appeals upheld a Tennessee law that issued driving certificates, but not licenses or identification cards to persons whose status would not lead to permanent residence (immigrant status), finding that the different document imposed no real burden. *Id.* at 532. *Carlson v. Reed*, decided by the Ninth Circuit, which covers Alaska, also permits distinctions among persons with immigrant status and persons with temporary (nonimmigrant) status. These reported circuit court cases are probably more useful guidance than the New Hampshire case, which it must be said, approved harsh differential treatment in comparison to the conditions imposed by HB 1.

A higher standard of review applies when a government practice burdens a fundamental right based on alienage. However, if we examine the major cases in which a state government imposes a burden based on alien status, each one involves the deprivation of a significant right solely on the basis that the individual is not a citizen. *Toll v. Moreno*, 458 U.S. 1 (1982) (denial of in-state tuition for persons with long term status); *Plyler v. Doe*, 457 U.S. 202 (1982) (denial of right to an education for the children of persons unlawfully in the country); *Graham v. Richardson*, 403 U.S. 365 (1971) (denial of welfare benefits) *Takahashi v. Fish and Game Commission*, 334 U.S. 410 (1948) (deprivation of commercial fishing license); *Dandamudi v. Tisch*, 686 F. 3d 66 (2nd Cir. 2012) (deprivation of pharmacist licenses to persons with employment visas).[3]

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[2] In a third decision, the court noted, in granting the plaintiffs substantially less of the attorneys' fees than they requested, that the court's second ruling had not actually determined whether New Hampshire had engaged in unlawful practices. *Fahy v. Commissioner*, 2006 WL 3051774 at 2 (D.N.H. October 26, 2006).

[3] The Second Circuit applies a strict scrutiny standard of review for drawing distinctions among persons with varying immigration statuses, the Fifth and Sixth do not. *League of United Latin Am. Citizens v. Bredesen*, *id.* at 531 -32 (rationale basis test applied); *LeClerc v. Webb*, 419 F.3d 405, 422 (5th Cir. 2005) (persons with non-immigrant status could not sit for bar examination; rational basis test applied). In *Carlson*, the Ninth Circuit case, the court does not discuss the standard of review.

In my opinion, HB 1 does not deprive a person of a license or livelihood. The bill does not mandate special marks, separate locations, separate lines, nor temporary documents. The burden the bill imposes, a different licensing period, is less than that imposed in the cases discussed above. It is difficult to predict the outcome of litigation. Another court could handle the case in the manner that the *Fahy* court did, but it seems more likely that a federal court would review the bill in the manner of *League of United Latin Am. Citizens v. Bredesen, supra,* or *Carlson v. Reed, supra.* And while, Alaska's equal protection standards are more exacting than those imposed by the federal courts, the Alaska Supreme Court may find the bill similar to the law it upheld in *Andrade.*

3. **Administration of Federal Law.** The correspondence suggests that the bill would require the state to administer federal law. A state that attempts to do so can run afoul of the Supremacy Clause. *Arizona v. U.S.*, ___ U.S. __, 132 S.Ct. 2492 (2012) (overturning state effort to conduct its own scheme of immigration enforcement); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (striking down a state alien registration scheme); *compare Andrade*, 23 P.3d at 74. As I understand it, the Division of Motor Vehicles would not be determining the immigration status of driver's license applicants. The DMV would merely review the documents presented by the applicant to prove identity or residency, and, if the documents revealed an approved stay that was indeterminate or less than five years, it would issue the license for the duration of the approved stay or one year. I cannot speak to the relative difficulty of this review, but it does not appear to involve more effort than that required of all employers in the United States under the Immigration Reform and Control Act of 1986, 8 USC 1324a, which requires employers to determine the veracity of immigration documents and whether the documents authorize a person to work, facing the possibility of federal civil and criminal penalties if they fail.[4]

Please let me know if I can be of further assistance in this matter.

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[4] See http://www.uscis.gov/files/form/m-274.pdf, which describes an employer's duties.