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**The Real ID Act: An Unprecedented Threat to Privacy and Constitutional
Rights**

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**U.S. Senate Committee on Homeland Security and Government Affairs
Subcommittee on Oversight of Government Management, the Federal
Workforce, and the District of Columbia**

OFFICERS AND DIRECTORS
NADINE STROSSEN
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**Hearing Regarding Understanding the Realities of REAL ID: A Review of
Efforts to Secure Driver's Licenses and Identification Cards**

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

**March 26, 2007
342 Dirksen Senate Office Building**

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Subcommittee Chairman Akaka, Ranking Member Voinovich, and Subcommittee Members, on behalf of the American Civil Liberties Union (“ACLU”), America’s oldest and largest civil liberties union, its 53 affiliates and hundreds of thousands of members, we recommend that this Subcommittee mark up legislation, such as S. 717, the Identification Security Enhancement Act of 2007, to replace Title II of the unworkable, Real ID Act of 2005, Pub. L. 109-13 (hereinafter “Real ID Act” or “Act”).

As we approach the two-year anniversary of the Act’s enactment on May 11, 2005, and rapidly approach the end of the statutorily mandated three-year-long period given to states to implement the Act, one thing has become clear – states and the public are moving en masse to reject the Real ID Act and calling for Congress to repeal it in toto. Diverse organizations such as the American Association of Retired Persons (“AARP”),¹ the National Network to End Domestic Violence, and firearms owners and enthusiasts, have called for a repeal of the unworkable Real ID Act. In response, state governments are rapidly moving to opt out of this unfunded mandate altogether.

The impending deadline and recent action by the Department of Homeland Security (“DHS”) have made three things abundantly clear.

- First, the minor delay offered to states is not sufficient; states will never be able to implement the Act within the timeline provided.
- Second, the entire Real ID Act scheme is collapsing as states recognize the unprecedented burdens on taxpayers’ privacy and civil liberties imposed by this unfunded mandate, and as states – such as Maine and Idaho – opt out of participation.
- Third, Congress cannot sit idly by. Rather, Congress must repeal this Act and, if need be, replace it with a workable, achievable statute to improve licensing security devoid of the privacy and civil liberties infirmities that hamstringing the Real ID Act, and which is agreed upon by all interested stakeholders.

This testimony will discuss each of these three realizations briefly. Further, it will elaborate on the four types of privacy concerns raised by the Act and the regulations promulgated by DHS to implement the Act, which are concerns regarding:

- (i) data on the face of the ID card;
- (ii) data in the machine readable zone on the back of the ID card;
- (iii) data in the interlinked national ID database supporting the cards; and,
- (iv) transmissions of data between users of the data.

Finally, this testimony will identify how the Real ID Act and the regulations promulgated to respond to it² suffer from Constitutional infirmities that are intrinsic to the poorly drafted Real ID Act. Specifically, this testimony will briefly discuss how the Real ID Act potentially implicates (i) four separate First Amendment rights; (ii) gun owners’ privacy rights, (iii) could cause derivative problems to citizens’ Sixth Amendment rights; and

¹ Letter from AARP to Sen. Richard Shelby Apr. 20, 2006, at pp. 4. “We believe that the implementation of the Real ID Act will – if left unmodified – generally make consumers more vulnerable to ID theft.”

² Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 72 Fed. Reg. 10821 (proposed Mar. 8, 2007).

(iv) threatens Due Process Clause rights in multiple ways. Any of these Constitutional infirmities could cause the Act and/or regulations to be struck down by a court in whole or in part.

For further information, attached to my written testimony is the ACLU's "Real ID Scorecard," in which we systematically analyze the regulations on an issue-by-issue basis. The Scorecard demonstrates that DHS has utterly failed to protect privacy and security. ACLU Real ID Scorecard, available at <http://www.realnightmare.org/images/File/Real%20ID%20Scorecard%20-%20Fed%20Reg%20page%20numbers.pdf>.

I. ACLU Recommendations: Replace Real ID by Enacting S. 717

Congress must take rapid action to respond to the outcry from the states and citizens. **The ACLU recommends that:**

- (i) **Congress repeal Title II of the Real ID Act, and, enact legislation, such as S. 717, authored by Senator Akaka (D-HI), and co-sponsored by Senators Sununu (R-NH), Leahy (D-VT), and Tester (D-MT), which reestablishes a more sensible and workable process for improving state issued drivers licenses.**
- (ii) **Members of Congress submit comments calling on the Department of Homeland Security ("DHS") to withdraw its Notice of Proposed Rulemaking, published at 72 Fed. Reg. 10819;**
- (iii) **Congress refrain from appropriating any additional funds that could be used to implement the Real ID Act as it is currently constituted.**

Following these recommendations would ensure that Congress leads the states to implement commonsense proposals to more rapidly produce counter- and tamper-resistant licenses. Further, following these recommendations would lead to improved security for the data maintained by departments of motor vehicle administration ("DMVs"). Additionally, these recommendations would allow DMVs to make improvements at a fraction of the DHS-estimated cost of implementing the Real ID Act. More importantly, this recommended course of action would eliminate the constitutional infirmities that will either delay or block implementation of Real ID in whole or in part.

II. The Deadline for Real ID Implementation Will Not be Met

Congress will need to revisit the Real ID Act during the 110th Congress if for no other reason than that no state will likely actually meet the Real ID's statutorily prescribed deadline for implementation. Further, it is likely that the vast majority of states will also be unable to meet even the December 31, 2009 delayed deadline contemplated by DHS. DHS' failures to issue proposed regulations in a timely fashion, coupled with state legislative and budgetary cycles, ensure that states cannot be compliant by these deadlines. Compounding this problem is the fact that several data verification systems contemplated in the Act and proposed regulations do not exist. Congress will need to – at the very least – push back the statutory compliance deadline well into the next decade.

DHS delayed promulgating the Notice of Proposed Rulemaking regulations for far too long, waiting nearly 22 months from the date of enactment. Comments are due by May 8, 2007, just three days short of the two-year anniversary of the Act's enactment. After comments are received, DHS will need time to review those comments, make modifications and finalize its proposed regulations. Thus, states will not receive final guidance on how to comply until well into the summer of 2007. DHS has told states they must confirm with DHS by October 2007 whether they will meet compliance deadlines or seek an extension. Yet, states will lack sufficient time to analyze the regulations once finalized to meet even this October deadline.

Further, some state legislatures meet only once every two years and many have short legislative sessions. The delays caused by DHS' tardy publication of the proposed regulations and the subsequent delays required to produce final regulations ensure that many states will not be able to propose and enact legislation to modify state statutory licensing laws in a timely fashion. Once state laws are modified, states will also need to draft and modify regulatory structures as well before they can begin implementation. In short, even a December 31, 2009 deadline for compliance will never be met and Congress needs to revisit the Real ID Act.

III. The Public and States are Rebelling Against the Real ID Act and Calling for its Repeal

Driven equally by the extraordinary threat the Act poses to personal privacy and civil liberties and its prohibitively expensive cost, now anticipated to be at least \$23.1 billion according to DHS' own estimate,³ states are telling Congress that, no matter the consequences they will not participate.⁴ Already two states, Maine and Idaho have

³ 72 Fed. Reg. 10845.

⁴ See, e.g., the Model Resolution in Opposition to the REAL ID Act adopted by the conservative American Legislative Exchange Council and circulated to hundreds of State Legislators who are Members, which provides that:

WHEREAS, the implementation of the REAL ID Act intrudes upon the states' sovereign power to determine their own policies for identification, licensure and credentialing of individuals residing therein; and

WHEREAS, one page of the 400-page 9/11 Commission report, that did not give consideration to identification issues, prompted Congress to pass the legislation which created the Real ID Act, ignoring states' sovereignty and their right to self governance; and

WHEREAS, the REAL ID Act converts the state driver licensing function into federal law enforcement and national security functions that are outside the purpose and core competency of driver licensing bureaus; and

WHEREAS, the REAL ID Act thus constitutes an unfunded mandate by the federal government to the states; and

WHEREAS, the REAL ID Act requires states to conform their processes of issuing drivers licenses and identification cards to federal standards by May 2008; and

WHEREAS, the study cited below predicts state compliance with the REAL ID Act's provisions will require all of the estimated 245 million current cardholders in the United States to renew their current identity documents in person by producing three or four identity documents, thereby increasing processing time and doubling wait time at licensing centers; and

enacted legislation expressly stating that they will not implement the Real ID Act's mandates. The legislation Maine adopted states in part that the "Maine State Legislature refuses to implement the REAL ID Act and thereby protests the treatment by Congress and the President of the states as agents of the federal government." S.P. 113, 123 Leg. (Me. 2007)] More significantly, just 7 days after DHS issued its Notice of Proposed Rulemaking that begins to set the contours for how states must implement the Act, the Idaho legislature voted to opt out of the Act with legislation stating that "the Idaho Legislature shall enact no legislation nor authorize an appropriation to implement the

WHEREAS, identification-based security provides only limited security benefits because it can be avoided by defrauding or corrupting card issuers, and because it gives no protection against people not already known to be planning or committing wrongful acts; and

WHEREAS, the REAL ID Act will cost the states over \$11 billion to implement according to a recent survey of 47 state licensing authorities conducted by the National Governor's Association, the National Conference of State Legislatures, and the American Association of Motor Vehicle Administrators; and

WHEREAS, the use of identification-based security can not be justified as part of a "layered" security system if the costs of the identification "layer" – in dollars, lost privacy, and lost liberty – is greater than the security identification provides; and

WHEREAS, the "common machine-readable technology" required by the REAL ID Act would convert state-issued drivers' licenses and identification cards into tracking devices, allowing computers to note and record people's whereabouts each time they are identified; and

WHEREAS, a more secure and flexible system of verifying identity may be achieved by less-intrusive means to the individual and to states by employing the free market and private-sector ingenuity; and

WHEREAS, the requirement that states maintain databases of information about their citizens and residents and then share this personal information with all other states will expose every state to the information security weaknesses of every other state and threaten the privacy of every American; and

WHEREAS, the REAL ID Act wrongly coerces states into doing the federal government's bidding by threatening to refuse non-complying states' citizens the privileges and immunities enjoyed by other states' citizens; and

WHEREAS, the REAL ID Act threatens the privacy and liberty of those individuals belonging to unpopular or minority groups, including racial and cultural organizations, firearm owners and collectors, faith-based and religious affiliates, political parties, and social movements; and

WHEREAS, the REAL ID Act thus imposes a national identification system through the states premised upon the threat to national security, but without the benefit of public debate and discourse;

THEREFORE, BE IT RESOLVED that the REAL ID Act is determined by the American Legislative Exchange Council (ALEC) to be in opposition to the Jeffersonian principles of individual liberty, free markets and limited government; and

THEREFORE, BE IT FURTHER RESOLVED that ALEC implores the United States Congress and the U.S. Department of Homeland Security to suspend implementation of the REAL ID Act; and

THEREFORE, BE IT FURTHER RESOLVED that the REAL ID Act should be repealed outright by the United States Congress to avoid the significant problems it currently poses to state sovereignty, individual liberty and limited government.

Adopted by the Homeland Security Task Force at the States and Nation Policy Summit on December 9, 2006. Approved by the ALEC Board of Directors January 8, 2007.

provisions of the REAL ID Act in Idaho, unless such appropriation is used exclusively for the purpose of undertaking a comprehensive analysis of the costs of implementing the REAL ID Act or to mount a constitutional challenge to the act by the state Attorney General.” H.J.M. 3, 59th Leg. (Idaho 2007).

The Real ID rebellion in the states is spreading rapidly, and its pace is accelerating. Thirty states have introduced legislation opposing the Real ID Act,⁵ and 13 states – Arizona, Arkansas, Georgia, Hawaii, Missouri, Montana, New Mexico, Oklahoma, Utah, Vermont, Washington, West Virginia and Wyoming – have had legislation passed by at least one of their legislative bodies. More significantly, many of these states have taken significant legislative action since DHS made public its draft Notice of Proposed Rulemaking on March 1, 2007. **Thus, after reviewing DHS’ proposed regulations states immediately moved to reject them.** Since publication of the proposed regulations, legislators in Arkansas, Nevada, Pennsylvania and Texas have introduced anti-Real ID legislation, legislative bodies in Arizona, Arkansas (a different bill from the one introduced the same week), Hawaii, Missouri, Oklahoma, and Washington have passed bills rejecting the Real ID Act, and, as mentioned above, the State of Idaho formally opted out of the Real ID scheme altogether and called on Congress to repeal the Act.

The Real ID Act arguably violates the constitutional principles of federalism by usurping state authority. This usurpation, coupled with federal mandates requiring state employees to effectively serve as federal immigration officers, is compounded by the fact Congress has, to date, only appropriated \$6 million of the estimated \$23.1 billion cost of compliance. States are refusing to be required to raise the \$22,994,000,000 for an Act that imposes substantial, rigid mandates on their licensing systems and their licensees.

Attached is a map showing the tidal wave of activity from coast-to-coast. Status of Anti-Real ID Legislation in the States, available at: <http://www.realnightmare.org/news/105/>.

IV. Senators Never Voted to Support the Real ID Act and Should Repeal the Act

Today is a noteworthy day. One year, 10 months and 15 days after its enactment into law, the Real ID Act of 2005 is receiving its very first actual consideration by the U.S. Senate. Attached to H.R. 1268, in an extra-procedural manner by its House of Representative sponsor, Rep. James Sensenbrenner (R-WI), the Real ID Act never received a single hearing or any floor debate in the U.S. Senate. Rather than being considered by a Senate Committee or moved for consideration on the Senate Floor as a stand-alone measure, or even as an amendment to an authorizing bill, the Act was attached to the “Emergency Supplemental” appropriations bill providing funding for the

⁵ States with pending anti-Real ID legislation (does not include states that have already passed legislation): Arizona, Arkansas, Georgia, Hawaii, Illinois, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, and Washington.

war effort in Afghanistan and Iraq and humanitarian flood aid for the tsunami victims of southeast Asia. As a consequence, Senators were left with an impossible choice of either opposing emergency funding for troops in an active combat theatre and desperately needed humanitarian assistance, or pass H.R. 1268 with the unrelated Real ID Act attached. Because Senators never considered the Real ID Act, they should be free to vote to repeal it and replace it with a statutory licensing scheme that is both achievable and free of privacy and civil liberties concerns.

V. The Act Raises Unprecedented Privacy and Constitutional Threats and DHS' Proposed Regulations Do Not Resolve these Threats

Even if DHS proposed more complete regulations, which answered all the questions, raised by the Real ID Act that DHS was empowered to consider under the Real ID Act, Congress would still need to revisit Title II of that Act because it is a fatally flawed statute and its flaws cannot be addressed through regulations. Compounding this problem is the substantial failure of DHS to either answer central implementation questions or to mitigate some of the privacy and constitutional concerns. Thus, the regulations fail to resolve the glaring privacy and civil liberties problems created by the Real ID Act.

A) Regulations Proposed by DHS Ignore Substantial Threats to Personal Privacy Posed by Real ID

1) The Act and Regulations Establish the First National ID Card System Eroding Personal Privacy

By enacting the REAL ID Act, Congress set in place the first true National ID Card System. The Act mandates a National ID System by requiring the standardization of state license design and minimum data elements to be collected and stored about each licensee. Thus, although we will continue to have 56 state license issuers with 56 cosmetically different designs, the IDs will essentially be the same. More importantly, the National ID System is created by the mandate that all states make their databases of licensee information interoperable and that they engage in unprecedented data sharing about licensees. Finally, and most importantly, the Real ID licenses will become the de facto National ID as the federal, state and local governments and private sector entities begin to require a Real ID license to exercise rights and privileges and obtain goods and services.

Already, since the Act's passage, Members of Congress have proposed legislation requiring that every adult in America present a Real ID-compliant license to vote, receive authorization to obtain every new job, obtain benefits such as Medicaid, and travel on interstate buses, trains and planes. Thus, if the Act and the regulations are implemented, Senators should expect that no person would be able to function in our society without providing a Real ID-compliant license.

In addition to these burdens from ubiquitous future demands, the machine readable zone on each Real ID license will provide a digital trail everywhere it is read.

The Act, therefore, makes possible the mapping of a person's movements throughout our society and eliminates the anonymity that has protected our privacy since the founding of our country.

2) Privacy Concerns Arising from Data on the ID Card's Face

In addition to the fact that the Act and the Regulations establish the first true National ID Card System, threats to personal privacy caused by the Act and the Regulations arise from four areas:

- (i) data on the face of the ID card;
- (ii) data in the machine readable zone on the back of the ID card;
- (iii) data in the interlinked national ID database supporting the cards; and,
- (iv) transmissions of data between users of the data.

Data on the face of the ID card raises substantial privacy concerns. First, it threatens the personal security of numerous classes of licensees by requiring that an individual's principal address be stated on the face of the license. Consequently, police officers, elected officials, and judges will have their home address readily available to all who view their licenses. Address confidentiality laws in dozens of states to protect these government employees are completely overridden by this mandate putting these individuals at risk. Perhaps more importantly, victims of domestic violence and sexual assault who flee their abusers will be stripped of the power to list a Post Office Box as their address on the face of the license. They too will be easier to find by stalkers and abusers.

DHS's proposed solution in its regulations does not resolve this concern adequately. It is unclear how people without such an address or who live in different places – such as students, those who live in recreational vehicles (“RVs”) and other mobile homes, and the homeless – will solve this issue. The regulations attempt to address this issue by defining principal address as the place where an individual has his “true, fixed and principal home” (72 Fed. Reg. at 10,851), and stating that DMVs can make exemptions for the homeless (72 Fed. Reg. at 10,803 and 10,836). There is still some concern regarding whether all states will be able and willing to create workable methods for utilizing these exemptions.

Second, Congress failed to prohibit states from noting a licensee's citizenship status on the license. Some have suggested pilot projects to denote citizenship on the face of a license. The ACLU believes that such a “reverse scarlet letter” provision could lead to innumerable discriminatory interactions between police and/or bigoted private citizens and individuals who appear or sound foreign and who do not have such a citizenship sticker on their license every time that license is demanded for presentation. Congress should expressly prohibit any such proposal.

3) Privacy Concerns Arising from Data Contained in the Machine Readable Zone

The Real ID Act created an enormous threat of private sector, third-party skimming and resale of data contained in the “machine readable” zone (“MRZ”) on each card. DHS’s proposed regulations failed to close the loophole because they do not require encryption of the data in the MRZ.

Because both the type of MRZ and the minimum data elements it must contain are standardized under the Real ID Act, it will become increasingly profitable for private sector retailers to skim a copy of that data from each customer. As states add additional data elements to the machine readable zone, such skimming will become even more valuable. Because the Act does not prohibit skimming, in the near future we can expect retailers to demand that customers produce their licenses for “anti-fraud” or “customer loyalty card” purposes and retailers will routinely retain all the data from the MRZ, combined with a record of each licensee’s purchases. The retailers will have two ready markets to profit off such skimming:

- (i) using the data to engage in highly-targeted direct marketing back to their customers thereby producing significant amounts of unwanted solicitations, and
- (ii) reselling the data to data brokers such as Axcion, ChoicePoint and Lexis-Nexis who will share the information with other companies and federal, state and local governments. The result will be that data brokers and the government will know when and what each customer purchased including items such as the books and magazines we read, what types of birth control we use, and the prescriptions we obtain.

The result will be a substantial erosion of personal privacy.

DHS’s proposed regulations failed to close this loophole because they refused to mandate encryption for this data and to place meaningful limits on what data can be harvested from the card and how it can be used. While DHS acknowledges the danger of license data being scanned by third parties, it fails to take action to stop the problem, and merely encourages the states to come up with a solution. DHS says it “leans toward” requiring that data be encrypted but opts not to mandate encryption due to “practical concerns.” 72 Fed. Reg. 10819, at 10838. This proposed regulation flies in the face of DHS’s own Privacy Office, which believes “there is a strong privacy rationale for cryptographic protections to safeguard the personal information stored digitally in the machine-readable zone (MRZ) on the credentials.” Privacy Impact Assessment for the Real ID Act, March 1, 2007, pg. 3. Congress must revisit the Act, if for no other reason, than to expressly mandate encryption of the data provided.⁶

This provision undercuts the Congress’ earlier effort to protect driver’s information, which considered by many to be of higher quality than commercial data amassed from warranty cards and the like. In 1994 the Congress in response to the

⁶ The ACLU believes that any concerns from law enforcement regarding the encryption of data in the MRZ can be overcome by technical means that enable only authorized person to gain access to the encrypted information.

murder of Amy Boyer, by a man who obtained her address from the NH DMV, passed the Drivers' Personal Privacy Act ("DPPA"), Pub. L. 103-322, 18 U.S.C. § 2721, *et seq.*, which requires the data to be kept confidentially. Every state has passed legislation to implement the DPPA. Many of these state statutes, like California's go beyond the original act.

The DPPA would be completely undercut if Congress allows for the easy harvesting of data from both the printed information and the MRZ on the license. How long will it be before another Amy Boyer?

4) Privacy Concerns Arising from Data Amassed by the States

The data storage and aggregation requirements imposed by the Act will lead to massive, and more serious cases of identity theft, which could lead to terrorists and sophisticated criminals impersonating innocent Americans, and will permit unlimited data mining by federal government agencies.

Contrary to DHS's assertions, the unprecedented data aggregation imposed by the Act will make us more vulnerable as a nation, not safer, primarily because it will facilitate massive identity theft and identity fraud, and make these cases more significant. The Act requires, at a minimum, that all source documents for licenses be retained either electronically or in storage at the DMV, along with additional biometric information and a driving history. Identity thieves will quickly recognize that the DMVs' records are a central location for obtaining all the documents and personally identifiable information they need to commit fraud.⁷ Insider fraud, where state licensing officials sell IDs and information, will be impossible to stop and become even more profitable.

Further, identity theft and document fraud stemming from thefts from the Real ID databases will be far more significant than the troubling but garden variety identity theft that victims are currently experience. Instead of obtaining just one password to a bank account or one unique identifier, data thieves who access the Real ID database system will be able to obtain data on millions of individuals and obtain all at once a rich trove of information because DHS failed to require basic computer network data security be built into these databases. Thus, the data contained within the system will not be segmented or compartmentalized, with the result that any hacking event of the Real ID databases by an ID thief will provide access to all available documents and information. In short, the Real ID databases are destined to be the ID thieves' bank of choice to rob.

Further, the privacy invasion for those unfortunate ID theft victims will be more pronounced than current ID theft. The victims of Real ID database ID theft will encounter tremendous difficulty in obtaining new documents and recovering their identity because the ID thieves will have real copies – easily printed on a standard color printer – of the victim's Social Security Card and birth certificate.

⁷ DHS actually exacerbates the identity theft problems in its regulations, suggesting that individuals can prove their principal address with a bank statement. 72 Fed. Reg. 10831.

The seriousness of this ID theft and document fraud will also make it easier for sophisticated criminals, immigrant smugglers and terrorists to obtain the identity of another person and pass themselves off as that person. **The aggregation of the data and the source documents thus opens a substantial security loophole.** This loophole is exactly contrary to the intent of the 9/11 Commission. Because of the rigidity of the Real ID Act's language, DHS had little flexibility to resolve this concern. **As a result, unless Congress revisits this portion of the Real ID Act, we will be weaker, not safer, due to the Real ID Act.**⁸

The Real ID database will also lead to significant privacy invasions by government snooping through data mining. Despite calls to expressly forbid data mining of the information aggregated in the Real ID database, to date, DHS refuses to promise not to data mine this interlinked data set or that to prohibit data mining by other federal anti-crime or anti-terror agencies. Senators should, therefore, expect that DHS would grant unfettered access to untested data mining programs that will search through millions of innocent licensees' most-sensitive personal information. Until these databases were linked under Real ID, such data mining was impractical or impossible. By linking these databases under Real ID, it will become possible for the government to conduct data mining on an unprecedented scale.

Unfortunately, the DPPA will not provide protections against this data mining. While the DPPA does prohibit DMVs from reselling data about licensees, it does not prohibit other agencies from accessing each DMV's databases. Congress should consider closing this loophole.

5) Privacy Concerns Regarding Data Transmissions

Mandated data sharing of licensees' information leads to what is referred to as a "false positive" problem in which the sharing of false or erroneous information leads to significant problems for licensees with the same or similar names as people who have lost their driving privileges, criminals or suspected terrorists. Because many licensees have common names, states will certainly mistakenly confuse licensees with each other. Undoubtedly, this "false positive" problem will lead to innocent Americans being improperly labeled as criminals or worse because the data from one state database transmitted to another state is erroneous. No easy fix exists for this false positive problem. If states send too little personally identifiable information to each other, innocent people will not be distinguishable from similarly named problem drivers, criminals or terrorists.

⁸ For example, see the statement by the Privacy Rights Clearinghouse, a nationally recognized resource center for the victims of ID theft, which states that "[i]f you think identity theft is bad now, wait until something called the Real ID Act goes into effect." http://www.privacyrights.org/ar/real_id_act.htm.

VI. DHS Proposed Regulations Fail to Resolve Significant Constitutional and Civil Liberties Problems Caused by the Real ID Act

The Constitutional and civil liberties infirmities caused by the Real ID Act are unprecedented and are not resolved by DHS' Proposed Regulations. The Act could burden individuals' privacy rights and rights provided by the First and Sixth Amendments to the Constitution and its Due Process Clause. The Act arguable burdens the states in violation of the Tenth Amendment to the Constitution.

The Act unquestionably burdens the First Amendment guarantees of Freedom of Religion. The Act requires that all licensees be photographed and that all licenses contain on their face a digital photograph. As a result, Amish and Mennonite Christians whose religious beliefs forbid their images from being photographed face a clear burden on the practice of their religion. See, Alan Scher Zegeir, Mennonites Leaving Mo. Over Photo Law, Associated Press, Mar. 21, 2007 (“members of a [Missouri town’s] Mennonite community are planning to move to Arkansas over a Missouri requirement that all drivers be photographed if they want a license. . . .because the law conflicts with the Biblical prohibition against the making of ‘graven images.’”) Still other evangelical Christians believe the Real ID Act will enumerate them in a manner contrary to their religious beliefs. Most states currently grant practitioners of these faiths and others license exceptions and states issue more than 260,000 licenses without pictures every year. DHS Real ID Impacts, Survey One. The Real ID Act’s rigid mandates eliminate such state flexibility. Therefore, Congress must revisit the Act to provide for exceptions for First Amendment-protected religious practice.

Should an individual be unable to obtain a Real ID-compliant license for any number of reasons, or should DHS follow through on its threat to prohibit the citizens of states that are not complying with the Act from using their licenses for any “federal purpose” or to travel on planes, additional First Amendment and Sixth Amendment protected rights would be implicated. For example, if individuals from those states do not have the proper IDs to enter a federal agency, their ability to petition their government for redress of their grievances is compromised, as is their right to peaceably assemble in a public venue or meeting place. Both such applications of DHS’ authority would impermissibly burden First Amendment protected rights. Similarly, if a federal criminal defendant lacked proper ID, the defendant might not be able to enter a federal court house to confront his accusers. Should DHS block residents of non-Real ID compliant states from flying on planes, those residents First Amendment-protected, U.S. Supreme Court-confirmed, Right to Travel would be impermissibly burdened. See, e.g., *Saenz v. Roe*, 526 U.S. 489 (1999). For residents of Hawaii, Alaska and Puerto Rico, a burden on the Right to Travel would have substantial economic and practical consequences. Congress must revisit the Real ID Act because these burdens are written into the statute and may only be resolved through legislative amendments.

Firearms owners are also concerned that the information sharing mandated by the Real ID Act could lead to a backdoor creation of a federal gun owners’ registry. Many believe this would burden the gun owners’ privacy interests. Although federal statutes contain two prohibitions on the creation of such a registry, many states do not have

similar registry prohibitions. Thus, if a state were to begin to encode gun ownership information in the machine readable zone and/or in the database supporting the ID card, other states would rapidly gain access to a list of the firearm owners of other states. The Real ID Act and the proposed regulations could, therefore, circumvent these two statutory prohibitions.

The Real ID Act and the DHS proposed regulations also raise certain Due Process Clause burdens. First, as noted above, if people cannot obtain Real ID-compliant licenses – because they lack proper documentation, they cannot afford vastly more expensive licenses, or due to bureaucratic bungling – similar burdens, will certainly arise for those unable to obtain licenses who need to visit a Social Security Administration office, federal prison, court house or any other federal agency. Congress must ask, because DHS did not: how will these people gain access to basic federal government services? If these burdens become substantial, Due Process Clause violations could result. Already, similar ID requirements have wrongly forced tens of thousands of individuals off the Medicaid rolls. Robert Pear, Lacking Papers, Citizens are Cut from Medicaid, N.Y. Times, Mar. 12, 2007, at A1. Senators should expect to see their constituent case work rise exponentially with the implementation of the Act and corresponding license requirements to obtain government services and benefits.

Second, Due Process Clause concerns could arise for lawfully present immigrants. The Real ID Act’s drafters failed to list numerous categories of lawful immigrants in the statutory list of those who could obtain a Real ID license or temporary license, such as parolees, persons under order of supervision, applicants for victim or witness visas, and applicants for cancellation of removal. Additionally, many lawfully present immigrants will be unable to prove their identity or immigration status. The proposed regulations unwisely limited the list of documents that immigrants could provide to prove identity and immigration status to a green card, employment authorization document, or current passport accompanied by a valid visa. Unfortunately, all too many lawfully present immigrants, such as many asylum applicants, will not likely possess these documents.

Third, Due Process Clause concerns will arise for the mass of citizens and lawfully present immigrants who find they need to challenge erroneous or incomplete information contained in state databases that wrongly prevents them from obtaining a license. The proposed regulations fail to provide an administrative or judicial process accessible as of right for would-be licensees to efficiently resolve data problems. Similarly, all too many lawfully present immigrants will suffer from an inability to see or correct immigration records. The proposed regulations do not provide a process for those immigrants whose status cannot be verified through DHS’s Systematic Alien Verification for Entitlements (“SAVE”) system. Nor do the regulations provide a process for those whose status was incorrectly reported to obtain their immigration records and correct them. DHS’s only suggestion in its proposed regulations is for burdened immigrants to make an appointment with DHS or visit a local Citizenship and Immigration Service office. To obtain the documents, DHS recommends that immigrants file a Freedom of Information Act request, which could take years to be answered given current backlogs. For all aggrieved citizens and immigrants, DHS’s failure to provide a

process to challenge and correct such errors efficiently and speedily condemns them to a second-class existence. Congress should revisit the Act to create true due process safeguards.

If Congress fails to revisit the Real ID Act and eliminate these Constitutional infirmities, the implementation of the Act and the proposed regulations could be delayed years as provisions are tied up in litigation.

VII. Conclusion: Congress Should Repeal Title II of the Real ID Act and Replace it with an Achievable Licensing Scheme that Does Not Threaten Personal Privacy and Civil Liberties

Congress cannot fix Title II of the Real ID Act; therefore, Congress must repeal the Act. And, if Congress wishes to move forward with a federal standardization of state-based licensing, Congress should replace Title II with legislation – such as S. 717 – creating a flexible, negotiated rulemaking as provided for in the Administrative Procedures Act 5 U.S.C. § 561, *et. seq.* (2007) that brings all interested parties to the negotiating table and grants them equal bargaining power.

S. 717, would eliminate the inflexible sections of the Real ID Act that drive up costs and do not allow for regulatory flexibility to protect privacy and constitutional rights. Without sufficient flexibility, DMVs will struggle to implement any licensing scheme. Further, S. 717 would put in place a negotiated rulemaking comprised of interested stakeholders and experts in various field, including privacy protection and civil liberties, to ensure that the final licensing scheme is workable while also respectful of our norms and values. The ACLU urges Congress to rapidly enact S. 717 to more rapidly produce counter- and tamper-resistant licenses in a statutory and regulatory framework devoid of privacy and civil liberties detriments.

Status of Anti-Real ID Legislation in the States



