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Department of Homeland Security
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Washington, DC 20528.

Facsimile: 866-466-5370

Re: DHS Docket Number DHS-2006-0030, Real ID Rulemaking

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Attention:

The American Civil Liberties Union hereby comments on and formally opposes the Department of Homeland Security's ("DHS") proposed rules implementing the Real ID Act of 2005. The proposed rule is outlined at 72 Fed. Reg. 10820, DHS Docket Number-2006-0030. We have not limited our comments to the regulations themselves but also to the underlying problems with the act. We believe the regulations are unworkable and urge DHS not only to withdraw the regulations but also to seek federal legislative action to overhaul the ill-conceived Real ID Act itself. Alternatively, if DHS will not withdraw these proposed regulations, it must substantially redraft them and provide for an additional comment period.

REAL ID Imposes the First True National Identity Card System

Since its enactment, the Real ID Act has troubled people across the political spectrum. It was enacted through procedural trickery out of keeping with the spirit of democratic process vital for such a sweeping measure. It imposes substantial burdens on the states without providing funding, amounts to a hidden tax increase, invades everyone's privacy, and embodies the worst excesses of bureaucratic government. Real ID particularly harms the poor, victims of domestic violence, immigrants and religious minorities. Our comments will discuss all of these problems in detail. However, at the outset it is important to understand the fundamental problem with Real ID: it imposes the United States' first-ever national identity card system.

The creation of a National ID would irreparably damage the fabric of American life. Our society is built on openness, the assumption that as long as they obey the law, everyone is free to go where they want and do what they want – embrace any type of political, social or economic behavior they choose. And all without the government (or the private sector) looking over their shoulder monitoring their behavior. We at the ACLU believe that this freedom is one of the keys to America's success as a nation. It allows us to be creative, enables us to pursue our entrepreneurial interests wherever they

might lead and validates our democratic instinct to challenge any authority that may be unjust.

A National ID card would turn those assumptions on their head. Under Real ID, a person's ability to participate in at least two fundamental, constitutionally protected, aspects of American life – the right to travel and to petition the government – would become contingent upon government approval. DHS has already noted it is considering expanding the uses of the Real ID card, and Congressional proposals have already been circulated to expand its use to such sweeping purposes as voting, receiving authorization to obtain every new job, obtaining benefits such as Medicaid, and traveling on interstate buses, trains and planes. See, e.g. H.R. 1645, the Security Through Regularized Immigration and a Vibrant Economy Act of 2007 (110th Congress). Under a National ID system, a Real ID becomes a permission slip – one that is necessary to take part in the civic and economic life of an American.

Historically, National IDs have been a primary tool of social control. It is with good reason that the phrase “Your papers please” is strongly associated with dictatorships and other repressive regimes. Registration regimes were an integral part of controlling unauthorized movement in the former Soviet Union and enforcing South Africa's old apartheid system. Daniel J. Steinbock, *National Identity Cards: Fourth and Fifth Amendment Issues*, 56 Fla. L. Rev. 697, 709. They also helped both Nazi Germany and Rwandans commit genocide by identifying and locating particular ethnic groups. *Id.*

The danger of a National ID is greatly exacerbated by the huge strides that information technology (“IT”) has made in recent decades. National IDs would violate privacy by helping to consolidate data. There is an enormous and ever-increasing amount of data being collected about Americans today. Grocery stores, for example, use “loyalty cards” to keep detailed records of purchases, while Amazon keeps records of the books Americans read, the airlines keep track of where they fly, and so on. This can be an invasion of privacy, but Americans' privacy has actually been protected by the fact that all this information still remains scattered across many different databases. But once the government, landlords, employers, or other powerful forces gain the ability to draw together all this information, privacy will really be destroyed. And that is exactly what the Real ID national identity system would facilitate.

A National ID like Real ID would also facilitate tracking. When a police officer or security guard scans an ID card with his or her pocket bar-code reader, for example, it will likely create a permanent record of that check, including the time and location. How long before office buildings, doctors' offices, gas stations, highway tolls, subways and buses incorporate the ID card into their security or payment systems for greater efficiency? The end result could be a situation where citizens' movements inside their own country are monitored and recorded through these “internal passports.”

The sordid history of National IDs combined with the possibilities of modern IT paint a chilling picture. These problems cannot be solved by regulation or by tinkering around the edges of Real ID. Instead the entire unworkable system must be scrapped and replaced with a system that does not endanger Americans' civil liberties.

In these comments, we will discuss four main problem areas with Real ID: privacy, constitutional problems, the problems it creates for individuals, and the problems it creates for the states. We will also discuss the primary impetus and justification for this program, which is increasing Americans' security.

I. Privacy Threats Arising from the Real ID Act Not Resolved by Proposed Regulations

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 three areas:

- a. information in the interlinked National ID database supporting the cards;
- b. information in the machine readable zone on the back of the ID card; and
- c. information on the face of the ID card.

a. Information in Interlinked Databases

The regulations state that “the recommended architecture for implementing these data exchanges does not create a national database, because it leaves the decision of how to conduct the exchanges in the hands of the States.” 72 Fed. Reg. 10825. This statement is highly disingenuous. By requiring the creation of an all-jurisdiction, interconnected set of databases, regardless of the particular details of its architecture, the Real ID Act and its regulations would create a massive, national database of all drivers and ID holders. As noted later in the regulations

the Act mandates that States provide electronic access to information contained in the motor vehicle database of the State to all other States; and section 202(d)(13) requires that the State motor vehicle database contains, at a minimum, all data fields printed on driver's licenses and identification cards, and motor vehicle driver's histories, including motor vehicle violations, suspensions, and points on licenses.

Id. While the regulations are silent on this question, it is also likely that most states will scan and save electronically all source documents (birth certificates, proof of address etc.), making this information part of state databases as well. Whether or not the federal government oversees this database is irrelevant. Like the Commercial Driver's License Information System (CDLIS) database (which DHS says is a potential model for this

database) the federal government will have free and unfettered access to the information. Federal Motor Carrier Safety Administration (FMCSA), Fact Sheet-Commercial Drivers' License (<http://www.fmcsa.dot.gov/registration-licensing/cdl/cdlfactsheet.htm>).

The creation of a massive national database loaded with Americans' personal information would be a dream come true for identity thieves. DMV databases contain Social Security numbers, birth dates and birth certificates and other personal information. Because the regulations suggest using a monthly bank statement and yearly financial statement to verify your address, they may also contain your bank account and tax information. 72 Fed. Reg. 10831. This information and these documents are all a criminal needs to steal someone's identity – but instead of remaining under an individual's control, they will be housed at the DMV, at risk of being taken by hackers, burglars or rogue officials. And, because they are stored as digital images, anyone with a color printer will be able to produce high-quality forgeries of these documents.

The Real ID database system will not only store all this personal information on nearly everyone in America, but will also offer access to millions of federal, state and local government employees around the nation. A single break in the security of this system at any of the thousands of DMV offices across the nation could potentially compromise the personal information and documents of 240 million Americans. Worse, there is no mechanism in the regulations for states to assure that officials in other states are properly protecting personal information. Nor do the regulations provide any guidance, besides the meaningless phrase “best practices,” for how states are to safeguard their databases. 72 Fed. Reg. 10825. Personal information will only be as secure as the state with the weakest security.

Identity thieves will quickly recognize that DMVs' records are a central location for obtaining all the documents and personally identifiable information they need to commit fraud. Insider fraud, where state licensing officials sell IDs and information, will become even more profitable and prove impossible to stop. 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 for the most part 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 the data contained within the system will not be segmented or compartmentalized, any hacking 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.

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 more vulnerable, not less.**¹

The Real ID database will also lead to significant privacy invasions by government snooping through data mining.² Despite calls to expressly forbid data mining of the information aggregated in the Real ID database, to date, DHS refuses to promise not to mine this interlinked data set or to prohibit data mining by other federal anti-crime or anti-terror agencies. It seems likely 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 are linked under Real ID, such data mining will be impractical or impossible. Under Real ID, it will become possible for the government to conduct data mining on an unprecedented scale.

Current federal law will not provide protections against this data mining. While the Drivers’ Personal Privacy Act (“DPPA”), Pub. L. 103-322, 18 U.S.C. § 2721, *et seq.*, does prohibit DMVs from reselling data about licensees, it does not prohibit other agencies from accessing each DMV’s databases. Misuse of drivers’ license data has been a problem in the past. In 1994, the Congress passed the DPPA in response to the murder of a woman named Amy Boyer by a man who obtained her address from the New Hampshire DMV. Every state has passed legislation to implement the DPPA. Many of these state statutes, such as California’s, provide broader licensee privacy protection than the federal DPPA. However Real ID’s information-sharing provisions erode many of the protections of the DPPA. How long will it be before another Amy Boyer?

Finally, as noted above, expansions to Real ID have already been proposed in a host of areas, from voting to employment. If those changes are enacted, the Real ID database will become a *de facto* requirement for

¹ 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.

² Assertions in the regulations that “neither the Real ID Act nor these proposed regulations gives the Federal Government any greater access to information than it had before” are disingenuous at best. It may be true that government could get access to information like birth certificates, bank information, and address information before but that is very different from having such information centralized and searchable with the click of a button.

participation in American life. Errors at the DMV could affect an individual's ability to get a job, receive medical benefits, vote or participate in civic life.

b. Data Contained in the Machine Readable Zone

The Real ID Act creates an enormous threat of private sector, third-party skimming and resale of data contained in the "machine readable zone" ("MRZ") on each card. The Privacy Impact Statement for Real ID contains an extensive discussion of this problem and notes, "[t]his inherent capacity of digital records [to be readily accessed] requires closer scrutiny of which records and what information is accessible in digital form, because efficiency in access and availability for additional uses raises important privacy issues." Department of Homeland Security, *Privacy Impact Assessment for the Real ID Act*, March 1, 2007, Pg 13.

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 both the MRZ and the front of the card, combined with a record of each licensee's purchases. *PIA for Real ID*, pp. 14. The retailers will have two ready markets to profit off such skimming:

- Using the data to engage in highly-targeted direct marketing back to their customers thereby producing significant amounts of unwanted solicitations, and
- Reselling the data to data brokers such as Accurant, Axciom, 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 they read, what types of birth control they use, and the prescriptions they obtain.

In addition, by placing the information in a standard format it will be much easier to link disparate information and allow for the creation of more detailed electronic profiles. *PIA for Real ID*, pp 14.

The regulations do nothing to solve these problems. DHS states that it "leans toward" requiring that data be encrypted but opts not to mandate encryption due to "practical concerns." 72 Fed. Reg. 10819, at 10838. Unfortunately, even encryption alone is not enough to stem the tide of private use of personal information. A number of companies already produce machines capable of scanning and saving the information on both the front

and back of a driver's license.³ Similar to the technology that is used to translate the information on business cards into electronic form; these scanners create the same skimming problems inherent in reading the MRZ of the card. Because drivers' license information is considered by many to be of higher quality than commercial data amassed from warranty cards and the like, we believe that there will be a continuing incentive to amass this information. We fear that mandating encryption will create a false sense of security, one that is not borne out by existing technological realities.

Instead we believe that any skimming of the card for storage, sale or other purpose besides age verification, should be made illegal through an expansion of the DPPA. This addresses the problem directly, rather than relying on technological fixes that may quickly become obsolete.

While we agree with the DHS's Privacy Office that "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," we believe that is true primarily for information that is not contained on the front of the license. *PIA for Real ID*, pg. 3. For example if, in the future, a state were to attempt to place additional information on the MRZ – such as a licensee's race or authority to carry a firearm – that information should be encrypted. Alternatively, information like name change history should also only be available to law enforcement because it might, for example, prove harmful to victims of domestic violence who are hiding from an abuser or to transgender people who risk discrimination and even violence when their history is disclosed. This would be true whether or not the information was in the MRZ or simply in the state database.

c. Information on the face of the card

Real ID requires that an individual's principal address be listed on the front of the card and that all temporary licenses contain a mark identifying them as temporary. Both of these changes will have considerable negative impact on significant segments of the population.

Requiring that everyone disclose their home address threatens the safety of many people who have good reason to keep such information private. They include law enforcement officers, elected officials, judges and victims of domestic violence. The regulations do create a partial exemption to the principal address requirement, but it is inadequate. It covers "individuals who are entitled to enroll in State address confidentiality programs, whose addresses are entitled to be suppressed under State or Federal law or by a court order" and some individuals protected by immigration law (pp. 10,836). However, only 24 states currently have such confidentiality programs, according to the National Network to End Domestic Violence. In the other jurisdictions, victims are now protected

³ Card Scanning Solutions, Id Scan. For more information see <http://store.card-scanning-solutions.com/idscan-for-driver-license.html>. Avery, Photo ID Reader. See <http://photoid.avery.com/pid/Main?action=product.Details&catalogcode=WEB01&node=10211119&productcode=2910&hierarchy=PID>.

instead by the fact that they are not required to put their principal address on their license – as are federal judges, which, as DHS acknowledges in the regulations are not shielded by state laws at all. The regulations seem to maintain the same status that police officers, state and local judges, and protected witnesses currently enjoy under state law. However, by removing the option of not listing an address and relying solely on state laws that don't cover many vulnerable individuals, the regulations fail badly. (For more information on the effects of Real ID on victims of domestic violence please see section III, part d of these comments, below.)

In addition, requiring that licenses “must clearly identify on the face of the document that they are temporary” is in essence a “scarlet letter” for immigrants and other newcomers to our country, who are the only people who will be issued temporary cards. It immediately identifies them as non-citizens and could lead to innumerable discriminatory interactions between police and/or bigoted private citizens and individuals who are thus marked as foreign. (For more information on the discriminatory impact of Real ID please see section III part c, below.)

II. Constitutional Problems

a. Facial Photo Capture Requirement Burdens Free Exercise of Religion.

Section 202(b)(5) of Real ID mandates that each state “shall include” a “digital photograph” on each license issued. Furthermore, § 202(d)(3) requires that “a State shall” “[s]ubject each person applying for a driver’s license or identification card to mandatory facial image capture.” The regulations reemphasize that “DHS recognizes that some individuals that may apply for a REAL ID driver’s license or identification card are opposed to having their photograph taken based on their religious beliefs. However, the Act requires a facial photograph, which serves important security purposes. Given these concerns and the clear statutory mandate, DHS believes that a driver’s license or identification card issued without a photograph could not be issued as a REAL ID driver’s license or identification card.” 72 Fed. Reg. at 10835. According to a survey submitted to DHS from the states, 35 states don’t require photographs for all licenses and states issue more than 260,000 licenses and identification cards annually without a photograph. Real ID Impacts, Survey One, June 23, 2006.

Numerous religious orders’ free exercise of religion is burdened by this requirement. For example, Amish Christians, as well as members of other Christian sects, are opposed to being photographed as they believe the photograph is a graven image. After Real ID’s enactment, a half dozen elders of the Amish community traveled from around the country to raise their religious concern to the Department of Homeland Security’s Real ID Working Group. The elders explained that virtually every state provides the Amish and other religious minorities with the ability to obtain photograph-free licenses, and that the Real ID Act’s mandates jeopardize these exceptions. In 1999, the ACLU of West Virginia represented a minister in the

Church of the Firstborn at New Jerusalem in his suit seeking a religious exemption from the state's requirement that he take a photograph on his driver's license. The minister's religious beliefs prohibit the use of "graven images," including photographs.⁴ Some members of some religious groups have already moved to different states in an effort to escape the photo requirements of Real ID.⁵

Muslim women may object to being photographed without having their heads or much of their faces covered. In 2003, the ACLU of Florida represented a Muslim homemaker whose driver's license was revoked after she declined on religious grounds to remove her veil for a driver's license photo. Noting that the state allowed others to obtain driver's permits without photographs, the ACLU argued that the photograph requirement imposed a needless burden on the woman's exercise of her religion with no benefit to public safety.⁶

b. Requirement to Provide Social Security Number Burdens Free Exercise of Religion.

Section 202(c)(1)(C) of Real ID requires that individuals provide "[p]roof of the person's social security account number" in order to obtain a license. Furthermore, § 202(d)(5) requires that "a State shall" "[c]onfirm with the Social Security Administration a social security account number presented by a person using the full social security account number."

Numerous Christian sects believe that "the enumeration" of individuals is tantamount to stamping them with the Mark of the Beast referred to in the Biblical Book of Revelations.⁷ Therefore, certain citizens may not, because of their religious beliefs, have a Social Security number or Social Security card to provide. The Real ID Act's mandate requiring such a number and/or card burdens the First Amendment-protected Free Exercise of Religion.

In 2005, the ACLU of Vermont brought suit on behalf of a family that held sincere religious beliefs preventing them from obtaining Social Security numbers for their children. The Vermont Human Services Board agreed with the ACLU of Vermont and ordered the Social Welfare Department to make an exception to its general rule requiring children who receive government benefits to have Social Security numbers.

c. Classes of Lawful Residents Denied Opportunity to Be Issued Licenses Violates Equal Protection and Due Process Clauses.

⁴ For additional information please see:

<http://www.aclu.org/religion/discrim/16173prs19990720.html>

⁵ "Mennonites Leaving Missouri Over Photo Requirement," *Associated Press*, March 19, 2007.

⁶ See, e.g. <http://www.aclu.org/religion/frb/16220prs20030606.html>,
<http://www.aclu.org/religion/gen/16218prs20030527.html>

⁷ "And he causeth all, both small and great, rich and poor, free and bond, to receive a mark in their right hand, or in their foreheads: And that no man might buy or sell, save he that had the mark, or the name of the beast, or the number of his name." (*Revelation 13:16*).

Section 202(c)(2)(B)-(C) sets forth those categories of citizens and lawful residents who may obtain either a regular license or temporary license, yet this section omits several classes of lawful residents. The classes omitted are:

- Persons granted withholding of removal or withholding of deportation, who face persecution in their home countries.
- Persons paroled into the U.S., including persons with serious medical conditions.
- Applicants for non-immigrant visas, including victims of trafficking and other crimes, and victims willing to cooperate in the prosecution of certain crimes such as particular classes of individuals granted S, T, U and V visas.
- Cuban and Haitian entrants.
- Battered spouses and their children.
- Persons granted Family Unity status.
- Persons granted Deferred Enforcement Departure (DED) status.
- Applicants for suspension of deportation or cancellation of removal.
- Persons under an order of supervision under § 241(a)(3) of the Immigration and Nationality Act, such as persons who have not been removed after a removal order. Examples would be Cubans under a final order of removal who cannot be deported.

These omissions violate the Equal Protection and Due Process Clauses by denying to individuals in these classes the rights and privileges accorded to others, and doing so without any legal process for so distinguishing these classes.

d. Constitutional Concerns with Preventing Residents of Non-Compliant States from Using Licenses for Federal Purposes.

Section 202(a) mandates that (i) by May 11, 2008 – three years after the date of the Real ID Act’s enactment – the “Secretary [of DHS] shall determine whether a State is meeting the requirements” of the Act, and that (ii) “unless [a] State is meeting the requirements” a “federal agency may not accept, for any official purpose, a driver’s license or identification card issued” by a state deemed non-compliant. Due to the substantial and ongoing delay by DHS in the issuance of the Real ID Act implementing regulations, it is a certainty that many or all states will be deemed non-compliant. The mandate preventing federal agencies from accepting licenses from the residents of non-compliant states triggers a host of constitutional problems.

- Burdens on Constitutionally Protected Right to Travel.

The U.S. Supreme Court has repeatedly recognized a constitutionally protected Right to Travel. The plain implications of a state being deemed out of compliance by the Secretary of DHS are that that state’s residents could not board any plane, interstate bus, or Amtrak train. Therefore, blocking individuals from using non-Real ID compliant licenses to fly or travel via

interstate bus or train burdens the Right to Travel recognized in cases like *the Passenger Cases* and *Shapiro v. Thompson*. *Passenger Cases*, 7 How. 283, 492, 12 L.Ed. 702 (1849) and *Shapiro v. Thompson*, 394 U.S. 618. The situation is particularly acute for residents of Hawaii or Alaska who often have no choice but to travel via federally regulated modes of travel such as plane, bus, ferry or boat.

- Burdens on First Amendment-Protected Right of Assembly.

The First Amendment provides that “Congress shall make no law . . . abridging . . . the right of the people to peaceably assemble.” Blocking individuals from non-compliant states from using their licenses to enter federal buildings burdens the First Amendment Right of Assembly. The Real ID Act’s mandates appear to lead to scenarios where people cannot meet others in public buildings for any of the myriad purposes for which they might wish to do so.

- Burdens on First Amendment-Protected Right to Petition One’s Government for Redress.

The First Amendment also provides that “Congress shall make no law . . . abridging . . . the right of the people to . . . petition the government for a redress of their grievances.” Although modern technology makes a host of communication methods available, everyone in Washington, DC knows there is no substitute for a face-to-face meeting with one’s elected or appointed government representatives. In fact, numerous statutory and regulatory schemes **require** individuals to at times present themselves before elected or appointed officials to raise their grievances. If people cannot even enter their Congressional representatives’ offices, federal court houses or federal agencies, then blocking individuals from non-compliant states from using their licenses clearly burdens their right to petition their government for redress.

e. Lack of Procedural or Substantive Due Process to Challenge Record Errors.

The regulations fail to provide for a system by which individuals can access government records about them, challenge inconsistencies and correct data errors concerning their files. Because the Real ID database system will eventually contain records on virtually all 300 million individuals in this country, this national ID system will be replete with data errors that will be used to deny people the exercise of certain rights and privileges, not least of which is that they may not be able to drive legally. As discussed above, because our society increasingly requires valid, governmentally issued IDs be presented for individuals to access interstate travel or enter governmental buildings, data errors that deny people licenses will burden people’s exercise of numerous rights and privileges. Furthermore, many government benefits schemes require the provision of valid IDs for individuals to obtain benefits. The Real ID Act’s omission of a procedure through which individuals can quickly, efficiently and permanently correct data errors concerning them

violates the Constitution's guarantees of both procedural and substantive Due Process found in the Fifth and Fourteenth Amendments.

Additionally, not only will Real ID potentially deny licenses but it may also incorrectly categorize individuals, which may impact economic and other rights. For example the act requires that a list (with photograph) be kept for 10 years of individuals who are denied a license because they are suspected of attempting to obtain a license fraudulently. If made available such a list would almost certainly be used by retail establishments or for the purposes of running a background check. The absence of standards for what constitutes fraud or a mechanism for challenging such a determination raises significant Due Process concerns.

III. Problems for Individuals

a. Tax Increase

The expense of implementing Real ID is a real and direct cost, one that will be borne by individuals and disproportionately affect the economically disadvantaged. According to DHS estimates, individuals will pay \$7.88 billion to implement Real ID over the next decade; combined with the costs to the states, the Act's total costs will reach \$23.1 billion. This amounts to \$96.25 per license or ID holder. It appears that DHS envisions that this cost will be funded by a de facto tax increase. In recent testimony, DHS Secretary Michael Chertoff told Congress, "I think the concept, though, was that this – like all driver's licenses – is largely a fee-based system, and that, ultimately, the cost of building Real ID should be amortized over the driver's license fee." Senate Homeland Security and Governmental Affairs Committee Holds Hearing on FY2008 Budget, February 13, 2007.

It seems likely that poorer people will have the most difficulty with the cost of the new law. Not only will they find it harder to absorb higher license-issuance or renewal fees, but also more difficult to skip what will sometimes be multiple days of work in order to stand in long queues to prove their identities in order to obtain a Real ID (see following section).

b. Administrative Burden

State administrators, governors, and advocates have been warning about the disruption and chaos that actual implementation of Real ID will likely bring. The regulations impose significant new burdens on individuals, as DHS acknowledges. 72 Fed. Reg. at 10,843. Real ID will increase wait times and service times at DMVs, as well as the time necessary to obtain new source documents. Partly this would be caused by the fact that initial applications for all Real IDs (as well as many renewals) must be done in person, and many applicants will not have source documents when they need them. 72 Fed. Reg. at 10,854, 10,845. DHS estimates opportunity costs to individuals from waiting in line at the DMV and obtaining source documents at \$1.7 billion, including more than half a billion lost work hours (pp. 10,845).

This is not mere speculation, however - one attempt to begin initiating early compliance with the law, in Alabama, already created such enormous confusion and disruption that it had to be halted.⁸ One of the Real ID Act's requirements is that names on compliant driver's licenses must exactly match individuals' names as held by the Social Security Administration. Noting this, officials in Alabama decided to get a head start on complying with that aspect of the law. The state's motor vehicles department (the Department of Public Safety or DPS), began sending letters to individuals whose records were mismatched, demanding that they correct the "erroneous" information on their driver's licenses.

The result was a fiasco. Thousands of panicked Alabama residents jammed DPS offices worried that they would lose their right to drive. And, because the state began its records review with the oldest records, many of the reported 65,000-80,000 drivers who got letters were senior citizens.

Many recipients of the letter – some of whom had been driving for 50 years or longer – became panicked that they would lose their means of traveling around the largely rural state. Many elderly drivers were also reportedly worried that their Social Security checks or pensions would be interrupted if they did not "fix" the problem right away. "Here are people who have been law-abiding citizens all their lives, and then they get this letter," state legislator Neal Morrison told the Associated Press. "It scared them to death."

Anyone whose name as recorded by the motor vehicles department differed by the slightest amount from the way his or her name was recorded by the Social Security Administration received a letter. Recipients were instructed that they had to visit a DPS office to "correct" their data before they would be allowed to renew their license. That included, for example, women who had changed their last name on one card but not the other after a marriage or divorce, people with nicknames, and even those with slight variations in their names, such as a middle initial appearing on one database but not the other. In quintessential bureaucratic fashion, the letter informed individuals that the name as listed on their driver's license - though it might well be a person's preferred form of address - was "erroneous."

Many citizens were also angered by the delays and fees that they encountered when they tried to comply with the letter. One 70-year-old woman had to go to the motor vehicles office for three days straight, the AP reported, finally obtaining a new license on the third day after a two-and-a-half-hour wait. Then, she was asked to pay an \$18 fee - the state's standard payment for a new or duplicate license - and she "hit the ceiling." Another

⁸ Information about Alabama's attempt to implement Real ID was compiled from media reports. M.J. Ellington, "Your life on your license: Alabama a step ahead in national ID debate," *The Decatur Daily News*, May 13, 2005; Mark Harrison, "License confusion possible," *[Fort Payne, Alabama] Times-Journal*, October 1, 2005; Alan Elsner, "Road to digital driver's licenses chaotic," *Reuters*, October 10, 2005; Associated Press and *Decatur Daily News* staff, "Alabama puts brakes on license notification," October 7, 2005.

cost for many was the need to pay additional fees to obtain a new or replacement birth certificate.

Apologetic DPS officials halted the effort in the face of all these problems (including calls from state legislators who had heard from their constituents), and promised to try to lessen the problems by clarifying their explanations of the situation in future letters. But of course Alabama officials cannot really fix the problem. As they explained, “Public Safety regrets the inconvenience, aggregation and confusion this has caused licensed drivers, but we are mandated to do this by federal law.”

Alabama's unfortunate experience trying to get a jump on implementing just one aspect of the sprawling Real ID legislation is merely a glimpse of what states and their residents can expect over the next few years if implementation of this legislation proceeds as scheduled. Bureaucratic hair-splitting, confusing instructions, long waits, overwhelmed offices, missed work, infuriating bureaucratic runarounds, and additional fees are what this legislation promises for Americans.

c. Discrimination

Real ID will inevitably cause discrimination against U.S. citizens who may “look” or “sound” foreign to a DMV official. Real ID requires everyone to prove their citizenship before DMV employees can issue a driver's license. The law demands that DMVs distinguish among citizens, permanent resident immigrants and other non-citizens in deciding who is eligible for a license and what type of license may be issued. These requirements mean that DMV employees must make difficult and subtle judgments about complex immigration issues and must decide who is a citizen and who is not. In addition, Real ID only allows many legal immigrants to receive temporary licenses that “must clearly identify on the face of the document that they are temporary.” 72 Fed. Reg. at 10834. This “scarlet letter” is likely to mark these legal immigrants for additional scrutiny.

Examples from the past and present show that the threat of discrimination is real and that citizens and legal residents will suffer discrimination if Real ID is implemented. The 1986 federal employer sanctions law requiring employers to verify citizenship and immigration status of new employees has caused widespread discrimination against citizens who employers think look or sound foreign. This law requires every employer to verify that every new employee is a U.S. citizen or legal immigrant entitled to work. (using an I-9 form). In a 1990 study the U.S. General Accounting Office found that sanctions caused “a widespread pattern of discrimination” on the basis of national origin and “on the basis of the person's foreign appearance or accent...and on the basis of citizenship status.”⁹

⁹ GAO Report, March 1990, “Immigration Reform: Employer Sanctions and the Question of Discrimination.”

Because the ACLU and other organizations voiced concern that the sanctions would cause discrimination, the 1986 law required the GAO to study the impact of sanctions for three years and to determine whether sanctions had led to discrimination against citizens or authorized immigrants. In 1990, the GAO found that employers were discriminating against job applicants with a foreign appearance or accent. The GAO also found that many employers admitted not hiring persons who presented Puerto Rican birth certificates (though Puerto Ricans are of course U.S. citizens) because of the applicants' appearance or accent and the employer's suspicions about the validity of the work eligibility document. The levels of discrimination were found to be especially high in areas with higher Latino and Asian populations. Real ID will have an equivalent or even worse impact, because DMV officials are more likely to deny a license than an employer is to turn away a qualified worker. DMV employees have every incentive to deny licenses rather than to issue them to anyone they deem suspicious.

Examples also abound in the context of driver licensing. In 2004, Tennessee passed a law that restricts full-fledged driver's licenses to those who can prove that they are citizens or certain categories of immigrants. Everyone else is eligible only for a driving "certificate" which is not valid for identification purposes under state law. The Tennessee Immigrant and Refugee Rights Coalition (TIRRC) has received many complaints of discrimination resulting from the Tennessee law, and the League of United Latin American Citizens (LULAC) has filed a lawsuit challenging some aspects of the law. TIRRC and the LULAC suit report a number of troubling incidents:

U.S. citizens born in Puerto Rico

A U.S. citizen went to the DMV office to renew her license. She presented her Puerto Rican birth certificate and Social Security card. The DMV clerk accused the applicant of having purchased the documents, implying that she was in the country illegally. When the applicant explained that she was a U.S. citizen by birth, the clerk replied that Puerto Rico was not a part of the United States. The clerk confiscated the birth certificate and Social Security card, and the applicant received a license only through the intervention of a lawyer.

Limited English Proficiency

A U.S. citizen by birth with limited English proficiency went to renew his license with the help of a family member. The DMV clerk prohibited the family member from answering a question and ordered the family member away from the counter. When the applicant could not answer a question about the Puerto Rican flag, the DMV clerk told him, "Puerto Ricans know English and you don't." The clerk confiscated the applicant's Puerto Rican birth certificate and Social Security card.

Refugees

A refugee entitled to a full-fledged license under Tennessee law showed her documentation stamped refugee and was told that the document was not acceptable and had her license confiscated. The DMV employee told her that she was eligible only for a driving certificate.

Legal Permanent Residents

A thirty-year legal resident of Tennessee applied for a Tennessee license. She presented her green card, her Nicaraguan passport and her Florida driver's license. The DMV clerk accused her of submitting fraudulent documents, confiscated all of them, and told her that they would be turned over to state troopers. The applicant was humiliated and tried to report the incident to the police, who refused to write a report. Only after obtaining legal counsel was the applicant able to recover her Nicaraguan passport but her green card and Florida license were not returned. The DMV insisted that the applicant's documents were fraudulent and that its employees did not need any further training on distinguishing between valid and fraudulent documents.

It has been argued that many of the problems of discrimination can be handled by using the Systematic Alien Verification for Entitlements (SAVE) database to check individual's status. However, the states' experience shows that this database is rife with errors, and its users are often forced to rely upon a secondary, manual, process for verifying status claims that takes several weeks. According to DHS, only 13 states currently use the SAVE database for any type of licensing.¹⁰ This makes it unlikely that it can cure many of the possible problems with discrimination.

d. Victims of Domestic Violence

Victims of domestic violence are likely to suffer substantially and risk further victimization under Real ID because it will force disclosure of where they live, exposing them to attack by their abuser. The Department of Homeland Security regulations allow an exemption to the principal address requirement, but do not go far enough to protect victims of domestic violence. The regulations allow exemptions for "individuals who are entitled to enroll in State address confidentiality programs, whose addresses are entitled to be suppressed under State or Federal law or by a court order" and some individuals protected by immigration law. 72 Fed. Reg. 10836.

According to the National Network to End Domestic Violence, 2.3 million women per year are attacked by an intimate partner. However, only 24 states currently have address confidentiality programs – nowhere near sufficient to cover all potential victims. In addition, the programs themselves are seen as inadequate. One state, Illinois, has stopped accepting applications for its program due to lack of funding. Often, due to limited resources, these programs have stringent requirements for inclusion and many victims are left out. States currently protect these individuals by allowing P.O. boxes and other alternative addresses to be printed on licenses.

¹⁰ Real ID Impacts, Survey One, June 23, 2006.

Under Real ID, victims of domestic violence, sexual assault, and stalking (especially in the remaining 32 districts without address confidentiality programs) will not be protected unless they can obtain a court order suppressing their address (this requirement presents an additional problem since the statutory language of Real ID requires individuals to present a Real ID card in order to enter a federal courthouse. As Real ID becomes the de facto document to verify identity, it may become increasingly required for entering state courthouses as well, placing domestic violence victims in a double bind: not wanting to get a Real ID because of address disclosure, but unable to petition a court for address suppression without one).

A further danger exists for victims through document storage and databases at the DMV. Abusers could purchase address information from an employee, a third party (like a private investigator), or access records themselves if they are employed at the DMV. While Real ID requires a background check, the list of disqualifying offenses contemplated in the regulations (based on the requirements for the Transportation Security Administration's Hazardous Materials Endorsement [HAZMAT] program and the Transportation Workers Identification Credential [TWIC] program) does not include battery and other offenses generally related to domestic violence, nor the existence of a restraining order against the applicant.

All of these problems create the real and continuing possibility that victims of domestic violence will be revictimized as a result of the Real ID Act.

IV. Problems for the States

Real ID imposes an enormous new administrative burden on the states – one for which the federal government seems unwilling to pay. Ultimately, Real ID changes the very nature and mission of DMVs, from agencies responsible primarily for ensuring the safe operation of vehicles on state roadways, into a wide-ranging enforcement agent of the federal government in areas from immigration rules to Social Security fraud. Given the serious and ongoing problem of traffic safety, diluting and confusing the mission of our DMVs is a dangerous prospect.

Real ID and the regulations require wide scale changes to the licensing process. All of these requirements impose significant burdens on the states:

- **Unfunded Mandate.** As we noted above in the context of its impact on citizens, Real ID is almost entirely an unfunded mandate. The regulations state that it is expected to cost states more than \$23 billion over the next ten years. If states are forced to implement Real ID, much of this spending will be wasteful and unnecessary. The federal government should not force new procedures without incorporating the wisdom and experience of the people making the changes;

specifically the states and DMV officials. It seems likely that it will be possible to achieve similar improvements to licensing at a much lower cost if states are allowed to work collaboratively with other stakeholders to find more flexible methods for meeting the common goal of license security.

- **Common data elements.** Real ID requires that IDs contain standard information such as full legal name, gender, address, date of birth, photograph and signature. While many of these data elements already exist on many states' IDs, any state that does not currently incorporate any of these elements will have to add them – in all likelihood a complicated project requiring reprogramming of multiple interlocking state databases, computer entry screens, communications protocols, and paper forms. For example, while all states capture a photo of license holders, few capture digital photos of all *applicants* as the act requires. That requirement alone will necessitate the creation of entirely new systems and databases.
- **Interstate sharing.** As we discussed above in the context of privacy, Real ID requires that each state provide all the other states with access to the information contained in its motor vehicle database – creating, in effect, a single national distributed database operated by the states. The regulations provide no guidance on how to build this system, simply stating that “States will work out the business process and data access rules necessary to implement these provisions prior to May 11, 2008 by means of a collective governance structure.” 72 Fed. Reg. at 10825. This new database will almost certainly require fundamental and costly changes to state motor vehicle databases. ID data elements will likely have to be reconfigured so that they are displayed and stored in the same format from state to state. States will need to buy new software and hardware and convert their existing databases to the new standard. If a dedicated communications network is necessary, states may also need to build fiber optic links with other states.
- **Previous IT investments.** The National Conference of State Legislatures reports that 21 states have invested \$289 million over the last five years to modernize their DMV information systems. Real ID may force much of this work to be thrown out. *The Real ID Act: National Impact Analysis*, presented by the National Governors Association, the National Conference on State Legislatures and the American Association of Motor Vehicle Administrators. Because the regulations do not provide guidance regarding how data sharing will be implemented, it is unclear to what degree states will be able to rely on their previous (costly) IT system overhauls. 72 Fed. Reg. 10,825, 10,855.
- **Immigration enforcement.** Under Real ID, state DMVs must confirm an individual's lawful presence in the country before issuing a license. The immigration code is comparable in complexity to the tax code and there is a large number of documents that are used to verify an individual's lawful status. This provision makes DMV

employees de facto immigration agents – forcing them to perform a job for which they are neither trained nor paid. Under the regulations, DMV workers are supposed to be able to use the Systematic Alien Verification for Entitlements (SAVE) database to check status. However, the states' experience shows that this database is rife with errors, and its users are often forced to rely upon a secondary, manual, process for verifying status claims that takes several weeks. This makes it wholly unsuited for the task of issuing licenses. According to the states, as of June 2006 only 13 states use the SAVE database for any type of licensing.

The regulations also require intimate familiarity with multiple immigration documents in at least two contexts. First, DMV employees must be trained to recognize and distinguish a number of types of fraudulent documents for proof of citizenship (visa, permanent resident card, EAD, Certificate of Citizenship, or Certificate of Naturalization). Second, DMV employees will have to recognize the less commonly presented documents that might demonstrate an individual is not eligible for a Social Security number (those that prove an alien “is currently in a non-work authorized non-immigrant status”). 72 Fed. Reg. 10,829.

- **Document verification.** The Real ID Act includes a requirement that states “shall verify, with the issuing agency, the issuance, validity, and completeness of each document required to be presented” to get a Real ID card. Contrary to the description in the regulations, no electronic system or systems currently exist capable of performing this task. Two systems, the SAVE database and Social Security Number Online Verification (SSOLV) database, are incomplete, inaccurate and so far unable to perform the functions required by Real ID. 72 Fed. Reg. 10,832. According to state reports, for example, SAVE requires a substantial portion of applicants to undergo a secondary screening process that can take weeks. SSOLV cannot verify that someone is not eligible for a Social Security number. Another database, Electronic Verification of Vital Events (“EVVE”), is a pilot program consisting of a limited number of states. It has not demonstrated the funding or ability to capture all birth certificates, which are issued by over 6,000 separate jurisdictions within the United States. Nor, as the regulations acknowledge, is there any electronic system for verifying address. Finally, in spite of the fact that they do not have the legal authority to force compliance, states are required to find their own methods for verifying documents until electronic databases exist – an impossible undertaking. 72 Fed. Reg. 10,831.
- **Records handling.** Some states outsource the maintenance of their records to private third parties, and may have to break existing contracts in order to bring such records in house so that they can be searchable as part of the larger national database. Others will need to engage in significant technological upgrades.

- **Document storage.** Real ID also requires the states to retain a digital scan of source identity documents like birth certificates for at least 10 years (or a paper copy for 7 years, though the regulations make clear that all states should build an electronic system). 72 Fed. Reg. 10839. That means a DMV worker must scan and store three or four source documents for each applicant. States will have to purchase, install and maintain scanners and other hardware, computer storage space, retrieval and transmission mechanisms and other software for running these systems.
- **Same-day licenses.** It appears clear from the regulations that state DMV officials are correct when they report that Real ID could largely prevent over-the-counter issuance of some or all IDs. Under Real ID, license issuance would shift from relatively instant issuance to requiring the mailing of documents to applicants, and an overall process that could range from 2 to 6 weeks in length pending approval of verified documents. While in theory, if every verification database existed and was fully operational, applicants could have their documents verified instantly and walk away with a Real ID, the regulations make it clear that that simply is not going to happen, at least in the foreseeable future. There are too many burdens in the act, too many documents to be verified, and too few existing systems through which to do that, for there to be any realistic chance that same-day licenses will continue to be possible.
- **Fewer offices.** DMV officials in some states also report that the cost increases driven by the act's requirement may force them to close some itinerant field stations and eliminate mobile offices, which can impose considerable burdens on citizens of rural, low-density states. It is likely that the extensive security requirements for DMV offices would make it unlikely that many small DMV offices will be able to remain open at a cost the states can afford. 72 Fed. Reg. at 10,855. This would inconvenience consumers by forcing smaller offices to close their doors and disproportionately impact Americans who live in rural communities.
- **Internet or mail transactions.** Issuing licenses through the Internet and mail will not be possible for at least the first 5 years under Real ID because every individual will be required to register in person to get a Real ID. This will further strain the resources of DMVs and impose burdens on drivers and other applicants. According to the states, these alternative renewals account for more than 6.4 million applications every year. Real ID Impacts, Survey One, June 23, 2006. Remote renewals of a Real ID (after initial issuance) will only be possible for every other renewal, and only if none of the licensing information (such as address) has changed (p. 146). Also, it is unclear whether the regulations will allow the mailing of licenses or whether license holders will have to return to the DMV to receive a license.
- **Effect on state privacy laws.** States have varied privacy and safety laws governing everything from what information can be collected for

the purpose of driver's licensing, to what information can be contained on the machine-readable component of an ID card. It is expected that Real ID would force state legislatures to alter or repeal many of these laws, potentially creating new privacy and security problems. While the regulations allow states to impose greater privacy protections than required by regulation and allow some flexibility to protect the confidentiality of address information, they are silent on how state laws that are directly in conflict with the Real ID regulations will be affected. 72 Fed. Reg. 10,849, 10,854. For example, in order to protect against identity theft, California law allows the DMV to destroy all records that are no longer necessary to issue a license. Cal. Veh. Code § 1807. In New Hampshire, the wholesale sharing of motor vehicle information with other states is prohibited and sharing shall only be "on a case to case basis." N.H. Rev. Stat. Ann. § 260:14 (II)(b). Such state laws would have to be changed in order to secure Real ID compliance.

V. Real ID and Security

The entire Real ID Act rests on the faulty premise that identity-based security is a useful tool for combating terrorism. While the regulations are silent on the issue, the fact is that identity-based security does not work to stop terrorists.

ID-based security is inherently unreliable. While these checks can reveal the bare facts of a person's identity – or even masses of details about their lives – they cannot indicate terrorist or criminal intent. In some cases, they can actually obscure it, as in the case of a decorated military veteran like Timothy McVeigh or a math professor like the Unabomber, Theodore Kaczynski.

Nor would Real ID have prevented 9/11 as some contend. Most of the 9/11 hijackers were in this country legally and were able to obtain legitimate driver's licenses. For all the tough talk, Real ID would probably not have made any difference.

Bad actors will inevitably find ways of obtaining fraudulent cards (either counterfeit or real documents bought from corrupt officials or based on fraudulent feeder documents). Thousands of fraudulent driver's licenses, for example, have been issued through bribed state employees and identity-theft rings that include such employees. Real ID will not solve this problem; in fact, it could exacerbate it by raising demand for the card, and hence the value of a counterfeit. In 2003 alone, one study found 23 separate examples of fraud or lax security in local motor vehicle departments across the country, leading to thousands of fraudulent licenses. Center for Democracy and Technology, "Unlicensed Fraud." January 2004 (www.cdt.org/privacy/20040200dmv.pdf). Although Real ID requires background checks for DMV employees, *there is no foolproof way to prevent this type of fraud*

Ultimately, the security offered by ID cards does not apply to terrorism. Knowing who someone is allows us to hold individuals accountable for their actions. If we know the address of the person who commits a crime, that person can be captured and punished. This type of security vanishes in the case of terrorism. Terrorists usually do not hide their identity; instead, they claim responsibility for their deeds. Knowing a terrorist's name, phone number, Social Security number, etc. does not by itself prevent any acts of terrorism.

Finally, Real ID makes other security problems worse. The single interlinked database of drivers' personal information mandated by the Real ID Act will be an irresistible honey pot for identity thieves. Further, the common machine-readable component and common data elements on the physical card will allow private entities to scan, store, and sell sensitive information.

VI. Conclusion

The Department of Homeland Security's proposed rule and the underlying Real ID Act is unworkable and an intolerable threat to privacy and civil liberties. DHS should withdraw its regulations and work with Congress to repeal the Real ID Act. DHS has a duty to protect the security of our nation. Imposing this ill-conceived federal mandate on every American is an abdication of that duty – one that will be discriminatory, expensive, burdensome, destructive of our privacy, and ultimately counterproductive.

For all of the above stated reasons, the American Civil Liberties Union formally opposes the Department of Homeland Security ("DHS") proposed rules implementing the Real ID Act of 2005 and urges that DHS work with Congress to repeal this unworkable mandate.

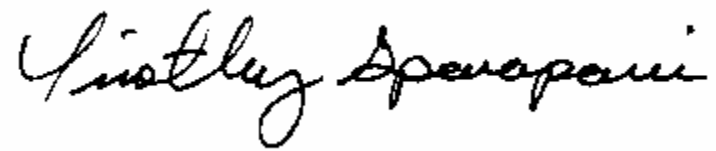
Sincerely,



Caroline Fredrickson
Director, Washington Legislative Office



Barry Steinhardt
Director, Technology & Liberty Program

A handwritten signature in black ink, reading "Timothy Sparapani". The script is fluid and cursive, with the first name and last name clearly distinguishable.

Timothy Sparapani
Legislative Counsel for Privacy Rights

A handwritten signature in black ink, reading "Christopher Calabrese". The signature is more compact and stylized than the one above, with a prominent initial 'C'.

Christopher Calabrese
Counsel, Technology & Liberty Program