

The Identity Project

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**Testimony of Edward Hasbrouck on behalf of The Identity Project
before the California Assembly, Committee on the Budget, Subcommittee No. 3 on
Resources and Transportation (Assemblymember Richard Bloom, Chair)**

Ronald Reagan State Building, Los Angeles, November 20, 2019

“Update on REAL-ID Implementation”

Chair Bloom and Members of the Subcommittee:

On behalf of the Identity Project¹, I would like to call to your attention (1) a major budget item that will be required if California is to comply with the REAL-ID Act, but that has not been included in the budgets presented to you to date; (2) some of the factual errors that underlie the budget recommendations made by the California Department of Motor Vehicles (DMV) and the travel industry; and (3) some of the activities for which the state of California should be budgeting and planning, and questions that you should be asking, at this and future hearings regarding implementation of the REAL-ID Act.

(1) Costs of compliance with the REAL-ID Act

The REAL-ID Act requires explicitly and unambiguously that to be “compliant” with the REAL-ID Act, a state “Shall... Provide electronic access to all other States to information contained in the motor vehicle database of the State.”² The US Department of Homeland Security (DHS) has not yet included this element of compliance in its decisions regarding extensions of time to comply, but the DHS has no statutory discretion to waive this requirement in its final determinations with respect to state compliance.

1. The Identity Project (PapersPlease.org) provides advice, assistance, publicity, and legal defense to those who find their rights infringed, or their legitimate activities curtailed, by demands for identification, and builds public awareness about the effects of ID requirements on fundamental rights including freedom of movement, travel, and assembly. The Identity Project is a program of the First Amendment Project, a nonprofit organization providing legal and educational resources dedicated to protecting and promoting First Amendment rights.

2. REAL-ID Act of 2005, P.L. 109-13, Title II, Section 202(d)(12).

A national ID database aggregated from state drivers license and ID records, the “State Pointer Exchange System” (SPEXS), has been developed by a private contractor to enable states that choose to do so to comply with this provision of the REAL-ID Act.³

The Director of the California DMV has participated in meetings⁴ of the governing body for SPEXS, and “California has requested to load” data about Californians to SPEXS.⁵ But the DMV has not included any line item for SPEXS participation in its budget for REAL-ID implementation – or anywhere else in its budget.

In response to questions raised by the Identity Project⁶ and other organizations⁷ concerning the legal basis for DMV plans to share data about California residents with other state, Federal, and private entities through SPEXS, and the likely conflict with multiple provisions of the California Constitution, the DMV claimed that, “Civ. Code Sec. 1798 et seq. specifically allows the DMV to disclose personal information maintained in its records to another governmental entity when required by federal law.”⁸

This claimed legal basis is clearly invalid, however, because (a) no state is

3. The Identity Project, "How the REAL-ID Act is creating a national ID database", February 11, 2016, <<https://papersplease.org/wp/2016/02/11/how-the-real-id-act-is-creating-a-national-id-database/>>. Immediately after the Identity Project published this analysis of SPEXS, AAMVA removed the SPEXS specifications from its website, where they had been publicly available.

4. Meeting minutes, “S2S Governance Committee monthly meeting (F2F), April 20, 2018”, page 10 of PDF file released in response to public records request by the Identity Project at <<https://papersplease.org/wp/wp-content/uploads/2018/06/180522-AK-docs.pdf>>.

5. Meeting minutes, “S2S Governance Committee monthly meeting (f2f), 11/09/2017”, page 75 of PDF file released in response to public records request by the Identity Project at <<https://papersplease.org/wp/wp-content/uploads/2018/06/180522-AK-docs.pdf>>.

6. The Identity Project, Comments to the California DMV Re: OAL File Number 2017-0822-06, Notice of Proposed Action: "Driver's Licenses and Identification Cards: Real ID", October 11, 2017, <<https://papersplease.org/wp/wp-content/uploads/2017/10/IDP-CA-DMV-REAL-ID-11OCT2017.pdf>>.

7. Comments of the Electronic Frontier Foundation Re: OAL File Number 2017-0822-06, Notice of Proposed Action: "Driver's Licenses and Identification Cards: Real ID". See also ACLU of Northern California and National Immigration Law Center, “How California Driver's License Records Are Shared with the Department of Homeland Security: Documents Obtained under Public Records Act Requests to the California Department of Justice and the California Department of Motor Vehicles”, December 2018, <<https://www.nilc.org/issues/immigration-enforcement/how-calif-dl-records-shared-with-dhs/>>.

8. California Department of Motor Vehicles, “Final Statement of Reasons”, OAL File Number 2017-0822-06, "Driver's Licenses and Identification Cards: Real ID", December 22, 2017, <<https://www.dmv.ca.gov/portal/wcm/connect/e49a36e5-dd78-441f-803b-2915256a181d/FinalStatementofReasons202031801.pdf?MOD=AJPERES>>. See also the Identity Project, “A REAL-ID Christmas present from the California DMV”, January 5, 2018, <<https://papersplease.org/wp/2018/01/05/a-real-id-christmas-present-from-the-california-dmv/>>.

required by Federal law to comply with the REAL-ID Act⁹, and (b) SPEXS is not operated by a government agency but by a private contractor for a nongovernmental entity, the American Association of Motor Vehicle Administrators (AAMVA), and data uploaded to SPEXS is shared with numerous other nongovernmental entities.¹⁰

This Subcommittee and other appropriate committees of the Assembly should schedule additional hearings to hear independent testimony and to question the DMV concerning its plans, budget, and claimed legal basis for uploading personal information about California residents to SPEXS in order to comply with the REAL-ID Act.

(2) Factual errors in DMV and travel industry claims and budget estimates

The DMV claims that, “Starting October 1, 2020, you will need to show federally-compliant identification in order to board a domestic flight within the U.S.”¹¹

The DMV cites no authority for this claim. But despite TSA signs to the contrary in airports¹² (with, of course, no force of law in and of themselves), the consistent position of the TSA in litigation has been that no Federal law or regulation requires air travelers to have or show any ID. “People fly without ID every day. We have a procedure for that,” the TSA’s lead witness said under oath in one such case.¹³ Neither the REAL-ID Act, the implementing regulations for that Act, nor any other current or proposed Federal law or regulations will require airline passengers to have or to show any ID.

A Federal lawsuit seeking to challenge airline demands for ID brought by John Gilmore, founder of the Identity Project, was dismissed after lawyers for the TSA provided evidence to the 9th Circuit Court of Appeals, which has jurisdiction over California, that neither any law or regulation nor the TSA's Security Directives require air travelers to show ID to fly.¹⁴ Because the 9th Circuit panel found, after *in camera* review of the Security Directives, that no ID is required to fly, it did not reach the question of

9. Indeed, the reason why the REAL-ID Act is designed to extort compliance from states by threatening to restrict the rights of their residents if they don't comply is precisely that the Federal government lacks the authority to compel states to comply with these provisions.

10. See “Figure 1: AAMVAnet usage” showing connections to “Business Partners” and other “Gateways”, AAMVA SPEXS Master Specification (AMIE), r6.0.8, page 5, available at <<https://papersplease.org/wp/wp-content/uploads/2016/02/SPEXS-central-files.jpg>>.

11. “When Do I Need A REAL ID?”, <<https://realid.dmv.ca.gov/when-do-i-need-real-id/>>.

12. The Identity Project, “TSA plans to put new lying signs in airports”, April 4, 2019, <<https://papersplease.org/wp/2019/04/04/tsa-plans-to-put-new-lying-signs-in-airports/>>.

13. *State of New Mexico v. Phillip Mocek*, Criminal Case 2573709, Bernalillo County Metropolitan Court. No transcript of the trial was prepared. Audio recordings made by the Identity Project with the permission of the court are available at <<https://papersplease.org/wp/2011/01/24/audio-state-of-new-mexico-v-phillip-mocek/>>.

14. *Gilmore v. Gonzales*, 435 F. 3d 1125, <<https://papersplease.org/gilmore/>>.

whether an ID requirement for travel by common carrier would be Constitutional.

The U.S. Travel Association makes the same false claim that the REAL-ID Act will require all air travelers to show compliant ID, and further suggests that air travelers without compliant ID may be “turn[ed] away... at the checkpoint”.¹⁵

But the TSA’s practice is to harass and delay travelers without ID, not turn them away. According to incident reports and daily tally sheets on people who fly without ID disclosed by the TSA in response to our FOIA requests, on average, 77,000 people each year — more than 200 each day — pass through TSA checkpoints to board airline flights in the U.S. without carrying or showing any ID at all, or with ID that TSA checkpoint staff consider “unacceptable”. Ninety-eight percent of the would-be travelers who show up at TSA checkpoints without ID are eventually allowed to board their flights.¹⁶

No new regulations have been promulgated or proposed that would change this. In 2016, the TSA gave notice that it intended to seek approval from the Office of Management and Budget, pursuant to the Paperwork Reduction Act, for the form that it has (illegally) been requiring travelers without ID to fill out since 2008.¹⁷ But after the Identity Project¹⁸ and other organizations filed comments pointing out the lack of any legal basis for requiring travelers to fill out this form or answer other questions, the TSA has not, to date, requested approval for this or any other form or questioning.

If the TSA were to change its procedures and start preventing any undocumented California resident from traveling by air, that action would be subject to legal challenge.

15. “On October 1, 2020, the U.S. Department of Homeland Security will implement the last phase of REAL ID enforcement, which will require Americans to present a REAL ID-compliant driver’s license, enhanced driver’s license or another acceptable form of ID to go through airport security and board a flight within the U.S.” U.S. Travel Association, “Fact Sheet: REAL ID: Get Ahead of October 1, 2020”, <https://www.ustravel.org/sites/default/files/media_root/document/REALID_Factsheet_UST.pdf>.

16. Analysis and links to source documents, “Yes, you can fly without ID”, the Identity Project, April 13, 2017, <<https://papersplease.org/wp/2017/04/13/yes-you-can-fly-without-id/>>. See also the form some travelers without ID are asked to complete, “TSA Form 415, Certification of Identity”, <<https://papersplease.org/wp/wp-content/uploads/2013/05/tsa-form-415.pdf>>, and the TSA procedures for travelers without ID, “Identity verification Call Center Standard Operating Procedures”, <<https://papersplease.org/wp/wp-content/uploads/2018/05/IVCC-SOP-2013.pdf>>, both of which were disclosed by the TSA in response to FOIA requests by the Identity Project.

17. “Intent To Request Approval From OMB of One New Public Collection of Information: Certification of Identity Form (TSA Form 415)”, docket number TSA-2013-0001-0075, FR Doc. 2016-26958, published at 81 *Federal Register* 78624-78625 (November 8, 2016).

18. Comments of the Identity Project and the Cyber Privacy Project, “Intent To Request Approval From OMB of One New Public Collection of Information: Certification of Identity Form (TSA Form 415)”, January 9, 2017, <<https://papersplease.org/wp/wp-content/uploads/2017/01/IDP-form-415-9JAN2017.pdf>>.

Amtrak is a Federal entity. Travel by Amtrak is a “Federal purpose” for purposes of the REAL-ID Act, even when Amtrak services are subsidized by the California Department of Transportation. Amtrak purports to require all passengers 18 and older to show ID, although the Constitutionality of that requirement has yet to be tested. But Amtrak’s employee manual, disclosed in response to one of our FOIA requests, instructs Amtrak staff that, “Failure to possess the proper photo identification is not, by itself, sufficient reason to have the customer removed from the train.”¹⁹

This Subcommittee should reject budgets or predictions based on false claims about what the REAL-ID Act requires. And this Subcommittee and other appropriate committees of the Assembly should question the DMV and the travel industry as to why they are repeating the DHS and TSA lies that the REAL-ID Act will require all air travelers to have ID, rather than educating California residents – including undocumented Californians and those who chose not to show ID – about their right to travel and the obligations of common carriers to transport all would-be passengers.

(3) Other activities to be included and budgeted for as part of California’s response to the REAL-ID Act

The real issue with implementation of the REAL-ID Act is that the Federal government is threatening to interfere unlawfully with the rights of California residents to freedom of movement, assembly, and travel by common carrier.

What, then, is our state’s budget and plan for responding to this threat?

As with other Federal threats to interfere with the rights of California residents, including the rights of undocumented Californians, we strongly believe that the appropriate response by the state of California is vigorous legal defense of the rights of all California residents, including undocumented Californians.

We urge this Subcommittee and other appropriate committees of the Assembly to question the Office of the California Attorney General as to its plans, preparations, and budget for defending any California residents whose rights to freedom of movement, assembly, or travel by common carrier are infringed by Federal agents or contractors.

Sincerely,

Edward Hasbrouck
Consultant on travel-related civil liberties and human rights issues
The Identity Project

19. Analysis and links to source documents, the Identity Project, “Do I need ID to ride a train?”, October 2, 2019, at <<https://papersplease.org/wp/2019/10/02/do-i-need-id-to-ride-a-train/>>.