Before the Transportation Security Administration U.S. DEPARTMENT OF HOMELAND SECURITY

Washington, DC

| Minimum Standards for Driver's |
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| Licenses and Identification Cards |
| Acceptable by Federal Agencies for |
| Official Purposes; Phased Approach |
| for Card-Based Enforcement; Docket |
| No. TSA-2023-0003, RIN 1652-AA77, |
| FR Doc. 2024–20616 |

COMMENTS OF THE IDENTITY PROJECT

The Identity Project (IDP)

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October 15, 2024

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The Identity Project (IDP) submits these comments in response to the Notice of Proposed Rulemaking (NPRM) "Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes; Phased Approach for Card-Based Enforcement", Docket No. TSA–2023–0003, RIN 1652–AA77, FR Doc. 2024–20616, 88 *Federal Register* 74137-74161 (September 12, 2024).

By this NPRM, the Transportation Security Administration (TSA) proposes to grant to itself and to delegate to other agencies – including other components of the Department of Homeland Security (DHS), other departments, and components of other departments – authority to establish rules ("phased enforcement plans") governing who is, and who is not, under what conditions, allowed to access Federal facilities or exercise Federally-recognized rights including the right to travel by air by common carrier. These rules could be adopted by the TSA and other agencies without notice, public comment, publication in the *Federal Register*, or codification in the Code of Federal Regulations (CFR). Instead of standards for the acceptance of IDs, the TSA is proposing to delegate authority to itself and other agencies for decentralized and nonstandard acceptance or rejection of noncompliant IDs. Congress has given the TSA no such authority.

This NPRM is premised on erroneous explicit and implicit legal and factual findings, including claims that some or all states and territories have complied with the requirements of the REAL-ID Act of 2005 and that airline passengers are required to have, carry, and/or show ID. These findings are arbitrary, capricious, contrary to law, and not entitled to deference.

Compliance with the REAL-ID Act requires a state to electronically share information concerning all driver's licenses and state-issued IDs with *all* other states, but not all states do so.

Because no state complies with this provision of the REAL-ID Act, or could do so unless and until *all* states do so, no state-issued driver's licenses or ID cards comply with the REAL-ID Act. No state is currently able to issue licenses or IDs that comply with the REAL-ID Act.

The findings by the DHS that some states "comply" with the REAL-ID Act are arbitrary, capricious, contrary to law, and not entitled to deference. Any rules – such as the proposed "phased enforcement plans" – applicable to holders of noncompliant state-issued licenses or IDS must be applied to holders of all state-issued licenses and IDs, since all are noncompliant.

The proposed rules exceed the authority of the TSA. They would violate the Administrative Procedure Act (APA) and rights including the "public right of transit" by air.

Pursuant to the APA, neither the TSA nor any other agency has the authority to issue rules through the procedures contemplated by the proposed rules. And the REAL-ID Act does not authorize the TSA to delegate the promulgation of implementing regulations to other agencies or departments. Neither the TSA nor any other agency has the authority to issue regulations rescinding the statutory and Constitutional right to travel by air.

The proposed rules must be withdrawn in their entirety.

1. About the Identity Project

The Identity Project (IDP) is an independent not-for-profit civil liberties and human rights project, founded in 2006, which 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. IDP has submitted comments on proposed rules for implementation of the REAL-ID Act,

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has published investigative reports concerning the REAL-ID Act and the associated "SPEXS" national ID database, and has testified before state legislatures regarding the REAL-ID Act.

2. The proposed rules exceed the statutory authority of the DHS and TSA.

The REAL-ID Act authorizes the DHS to issue regulations to implement that Act by establishing standards for issuance by states and territories of ID credentials acceptable for Federal purposes in circumstances in which ID is required by other laws.

But nothing in the REAL-ID Act authorizes the DHS or any of its components, including the TSA, to (A) delegate its regulatory authority to other departments or agencies or (B) impose, by regulation, ID requirements where such requirements are not imposed by other statutes.

The proposed rules would do both, thereby exceeding the authority of the TSA and DHS.

The "phased enforcement plans" contemplated by the proposed rules would establish who is, and who is not, permitted to enter Federal facilities or exercise other Federally-recognized rights. In establishing with finality the relationship between individuals and Federal agencies, and who is and who is not permitted by Federal agencies to engage in specific activities, these "phased enforcement plans" would constitute Federal regulations. For the purposes of the APA, a regulation by any other name is still a regulation. But these plans would be issued by other departments and agencies, not the DHS. They would vary from agency to agency, rather than being "standards" applicable to all agencies as contemplated by Congress.

In enacting the REAL-ID Act, Congress chose to delegate to the DHS the authority to implement that Act by promulgating regulations to establish standards for acceptable ID. But

Congress did not authorize the DHS or its components such as the TSA to re-delegate that authority to other departments or agencies. The proposed rules thus exceed the TSA's authority.

The NPRM does not explain on what basis the TSA claims the authority to delegate its regulatory authority to establish standards for acceptance of ID to other agencies, including other departments and components of other departments. There is no basis for this re-delegation.

Even with respect to the TSA itself and other DHS components, the REAL-ID Act limits the authority of the DHS, in issuing implementing regulations, to establishing criteria for which ID may be accepted by Federal agencies in circumstances in which ID is required. Nothing in the REAL-ID Act authorizes the DHS or TSA to establish new ID requirements.

The proposed rules purport to impose a new ID requirement for airline passengers.

According to the NPRM, "absent a phased enforcement plan, individuals without a REAL ID-compliant DL/ID or acceptable alternative would be unable to board federally regulated aircraft upon card-based enforcement."

While flight crew members might need to present pilot's licenses or other ID to board aircraft (a question not at issue in this rulemaking, and on which we need not now comment), passengers do not. The claim in the NPRM quoted above would be true if and only if the TSA intended, through these proposed rules, to impose a new requirement for ID for air travel, expanding the requirement for ID to board airline flights from flight crews to passengers. Such a regulation imposing a new ID requirement is not authorized by the REAL-ID Act.

In litigation, the TSA has consistently and explicitly recognized that airline passengers are not required to show ID or to identify themselves. They have a choice of showing ID or submitting to a more intrusive search.

The 9th Circuit Court of Appeals described the TSA's identification policy as follows in *Gilmore v. Gonzales*, on the basis of the TSA's own *ex parte*, *in camera* submissions:

"The identification policy requires airline passengers to present identification to airline personnel before boarding or be subjected to a search that is more exacting than the routine search that passengers who present identification encounter....

"Gilmore had a meaningful choice. He could have presented identification, submitted to a search, or left the airport. That he chose the latter does not detract from the fact that he could have boarded the airplane had he chosen one of the other two options." (435 F.3d 1125 at 1139)

This decision was issued in 2006, based on submissions to the Court of Appeals by the TSA after the enactment of the REAL-ID Act of 2005. If the TSA believed that the REAL-ID Act itself had removed the option of submitting to a more intrusive search, and had imposed a new requirement for airline passengers to show ID, it could and should have made this claim in its submissions to the 9th Circuit in *Gilmore v. Gonzales*. It did not do so, presumably because it recognized that the REAL-ID Act had not imposed such a requirement.

The REAL-ID Act did not remove the option for airline passengers of not showing ID and submitting to a more intrusive search. The TSA may not, by regulation, remove this option.

REAL-ID Act standards for acceptance of ID by Federal agencies apply to those airline passengers who choose the option of showing ID and having it "accepted", not to those who choose the alternative of not showing ID (or having ID accepted) and instead submitting to a more intrusive search. We would object to any statutory or regulatory provision requiring all airline passengers to show ID to fly as unconstitutional and in violation of the right to travel, but the REAL-ID Act neither imposed nor authorizes such a requirement.

Travel by common carrier is a right, and the TSA has not authority to promulgate regulations conditioning the exercise of this right on a waiver of other rights.

The Airline Deregulation Act, 49 U.S. Code § 40101(c)(2), recognizes and requires the Federal Aviation Administration to consider "the public right of freedom of transit through the navigable airspace." This provision was made applicable to the DHS and TSA by the Aviation and Transportation Security Act of 2001 and the Homeland Security Act of 2002. In addition, numerous bilateral and multilateral aviation treaties to which the US is a party recognize airlines as common carriers and commit the U.S. to require them to operate as common carriers.

The new ID requirement for airline passengers imposed by, or implicit in, the proposed rule exceeds the authority of the TSA pursuant to the REAL-ID Act, and is contrary to law.

3. The proposed rules would violate the APA.

In accordance with the general requirement for due process of law, the APA imposes procedural and transparency requirements for the promulgation of regulations by Federal agencies. These include, *inter alia*, notice of the proposed rule in the *Federal Register*, an opportunity for public comment on the proposed rule, publication of the final rule in the *Federal Register*, and codification of the final rule in the Code of Federal Regulations (CFR).

As discussed above, the "phased enforcement plans" contemplated by the proposed rules would constitute and function as *de facto* regulations. As such, they are subject to the APA, regardless of whether they are called regulations, plans, policies, or some other name.

By these proposed rules, the TSA would purport to authorize each department or agency to promulgate its individual "phased enforcement plan" without complying with any of the

requirements of the APA for notice, comment, publication, or codification. Individuals would be subject to a plethora of nonstandard rules adopted by individual departments and agencies. The provisions of these rules would be ascertainable, if at all, only by exhaustively searching both departments' and agencies' differently-organized websites. These rules could be changed in any way, at any time, without notice or opportunity for individuals to plan or know what to expect.

Members of the public are entitled to rely exclusively on the *Federal Register* for notice of all proposed or final rules, and on the CFR for all regulations currently in effect.

The TSA has no authority to derogate from the APA, much less to authorize other departments or agencies to do so. The proposed rules, and any "phased enforcement plans" issued pursuant to the proposed rules without proper notice and comment, would by definition be arbitrary, capricious, contrary to the APA, and outside the scope of the TSA's authority.

4. No state complies with the REAL-ID Act.

The NPRM contains a lengthy analysis of the percentage of driver's licenses and IDs that are, or may in the future be, "compliant" with the REAL-ID Act. But this is based on a erroneous assessment of which states, if any, are in compliance with the REAL-ID Act.

To be compliant with the REAL-ID Act, a state-issued driver's license or ID must be issued by a jurisdiction that complies with the REAL-ID Act. According to the NPRM, "All 56 licensing jurisdictions subject to REAL ID have achieved REAL ID certification" by the DHS.

However, no state or territory actually complies with the REAL-ID Act.

The REAL-ID Act, P.L. 109-13, Sec. 202 (d) (12), requires that, "To meet the requirements of this section, a State shall ... Provide electronic access to all other States to

information contained in the motor vehicle database of the State." This section of the law unambiguously requires electronic data sharing with *all* other states for REAL-ID compliance.

In practice, the only available way for a state to comply with this part of the REAL-ID Act is to participate in the "State-to-State" (S2S) data sharing system and the State Pointer Exchange System" (SPEXS) national ID database operated by the Association of American Motor Vehicle Administrators (AAMVA). AAMVA says that, "For those states ... choosing to comply with REAL ID... the Department of Homeland Security has indicated that participation in S2S will be required for the state to be REAL ID compliant. This is because... the law and regulations governing REAL ID include requirements for state licensing agencies to connect their databases." (AAMVA, "S2S Frequently Asked Questions", https://www.aamva.org/technology/systems/driver-licensing-systems/s2s-frequently-asked-questions>.)

Not all states participate in S2S or have uploaded data about all of the driver's licenses and IDs they have issued (including noncompliant licenses and IDs) to SPEXS. (AAMVA, "IT Systems Participation Map", https://www.aamva.org/it-systems-participation-map?id=576>.)

Many states, including California and Illinois, do not participate in these systems.

Unless and until *all* states and territories participate in S2S and SPEXS, no state or territory complies, or will be able to comply, with the REAL-ID Act requirement to provide electronic access to *all* other states and territories to its license and ID database.

All of the certifications by the DHS that states and territories comply with the REAL-ID Act, when no state or territory actually provides electronic access to *all* other states to records of all its driver's licenses and state-issued IDS, are plainly erroneous. These certifications of state compliance are arbitrary, capricious, contrary to law, and not entitled to deference.

Since no state or territory complies with the REAL-ID Act, (A) it is impossible for any individual to obtain a state-issued driver's license or ID that complies with the REAL-ID Act, and (B) any enforcement measures directed at individuals with driver's licenses or IDs issued by noncompliant states must be directed equally at all holders of all state-issued license or IDs.

Rules, such as these proposed rules, predicated on the plainly erroneous finding that some states have complied with the REAL-ID Act and are able to issue licenses and IDs comply with that Act are arbitrary, capricious, contrary to law, and not entitled to deference.

For all of the foregoing reasons the proposed rules must be withdrawn in their entirety.

Respectfully submitted,

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