

# **The Identity Project**

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## **Alaska and the REAL-ID Act**

Testimony of Edward Hasbrouck on Alaska SB34 and HB16  
House and Senate State Affairs Committees

Juneau, March 21, 2017

### **Senator Dunleavy, Representative Kreiss-Tomkins, and Members of the House and Senate State Affairs Committees:**

On behalf of the Identity Project, I thank you for the opportunity to share some of our research into the national ID database being created to implement the REAL-ID Act, and some of our experience working with residents of other states that have embarked on the path you are contemplating of compliance with the REAL-ID Act.

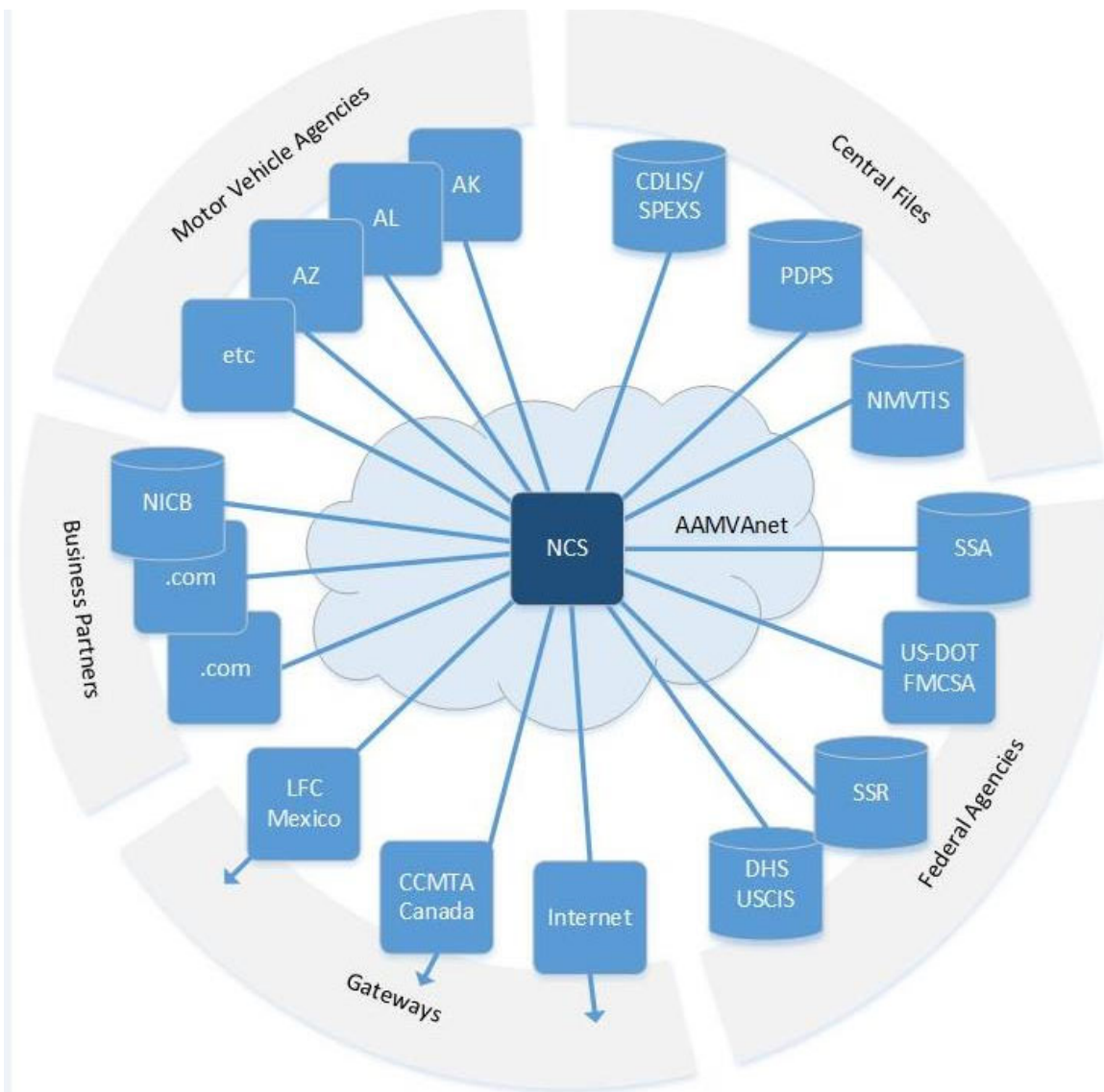
The Identity Project is a non-profit education, research, litigation, and advocacy organization which defends the right of U.S. citizens to move freely throughout our country without having to show our papers or obtain permission from the government.

The REAL-ID Act requires compliant states to take certain actions with respect to (1) physical attributes of ID cards and drivers licenses and (2) ID card and license issuance procedures. But there's also a third element of compliance in the law: "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."<sup>1</sup>

It would be prohibitively expensive for any state to try to build its own network of connections to each other state. In practice, the only way a state can comply with this requirement of the REAL-ID Act is to upload "pointers" for all drivers licenses or ID cards issued by the state (including "noncompliant" IDs and licenses) to a new national ID database, SPEXS. Full details about any of those IDs and licenses are sent to any other state on request through the national "hub" which connects all participating states to the S2S network as well as to other state, Federal, foreign, and private entities.<sup>2</sup>

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

2 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 report on SPEXS, AAMVA removed the SPEXS specifications and other SPEXS and S2S documentation from its public website.



"Diagram 1: AAMVAnet Usage", in "AAMVA State Pointer Exchange Services (SPEXS) Master Specification (AMIE), r6.0.8", page 5, available at <[https://papersplease.org/\\_dl/SPEXS%20Master%20Specification%20%28AMIE%29%20r6.0.8.pdf](https://papersplease.org/_dl/SPEXS%20Master%20Specification%20%28AMIE%29%20r6.0.8.pdf)>.

If SPEXS were operated by the Federal government, it would be subject to the Federal Privacy Act<sup>3</sup>. The responsible Federal agency would have to publish a notice, before the system went into operation, describing the categories and sources of information in the database, how it is indexed and retrieved, how it is used, and to whom it is disclosed, and designating a point of contact and procedures for correction of records. Individuals about whom records are maintained would have the right to obtain copies of the records about themselves and an accounting of disclosures of those records to third parties, and to have inaccurate or irrelevant information corrected or deleted.

3 Privacy Act of 1974, 5 U.S.C. § 552a

If SPEXS were a government database, SPEXS policies and specifications would also be accessible to the public through the Freedom Of Information Act<sup>4</sup>.

However, development and operation of S2S and the SPEXS database has been outsourced to AAMVA (a nominally private organization) and a private contractor in the Washington, DC, area, Clerus Solutions. Neither AAMVA nor Clerus Solutions are subject to the Privacy Act or to any Federal or state Freedom Of Information Act.

Neither AAMVA nor Clerus Solutions are required to disclose their policies, procedures, or decisions; to tell individuals what information about them is included in SPEXS or the other central files, how it is used, or to whom it is disclosed; or to provide any mechanism for correction or deletion of inaccurate, out-of-date, or irrelevant data.

A year ago, I asked AAMVA and Clerus Solutions whether there was any way to find out what information about me is included in SPEXS. It took more than six months to get the answer: to find out what information about me is contained in SPEXS, I would need to make a separate request to the agency in each state that participates in SPEXS. If there is an error in the SPEXS records about me, I could only get it corrected by first identifying which agency (if any) in which state supplied the erroneous data, and then getting that agency to get AAMVA to correct or delete the record.<sup>5</sup>

There's no procedure for correcting an error by AAMVA or its subcontractors. "AAMVA does not have the unilateral authority to change pointer index data. It can do so only at the direction of the state that posted the pointer."<sup>6</sup> So if an error by AAMVA results in a SPEXS record that doesn't correspond to data supplied by any state, neither AAMVA nor any state has the authority to correct or delete it. Catch 22!

If a pointer record in SPEXS suggest that you still have a driver's license or ID in any other state, the Alaska DMV will not be allowed to issue you a new license or ID.

Someone who moves from one state to another won't find out that the SPEXS pointer to their old license hasn't been deleted until they try to get a license in their new state of residence, and are turned down. The best case is that an Alaska resident will have to work through the driver's license agency in some other state they formerly resided in to get an error in SPEXS corrected, before they can obtain an Alaska license or ID. The worst case is an error by AAMVA or one of its contractors that nobody has the authority to correct, and that prevents you from getting a new ID in any compliant state.

4 Freedom of Information Act (FOIA), 5 U.S.C. § 552

5 The Identity Project, "National REAL-ID database replicates problems with FBI rap sheets", June 30, 2016, <<https://papersplease.org/wp/2016/06/30/real-id-national-id-database-replicates-problems-with-fbi-rap-sheets/>>, and email message to Edward Hasbrouck of the Identity Project from Pierre Y. Boyer, Chief Information Security Officer, AAMVA, September 8, 2016.

6 Email message to Edward Hasbrouck of the Identity Project from Nancy Carlson, Senior Business Analyst, Clerus Solutions, June 20, 2016

Records in the SPEXS national ID database currently contain only a subset of the data in state drivers license records. The last version of the SPEXS specifications we were able to retrieve from the public AAMVA website (more recent versions have only been made available only to AAMVA members on a password-protected area of the site) included the following fields from each state license or ID in the national ID database:<sup>7</sup>

## 6.2 CD20 MASTER POINTER

### Description

The CD20 Master Pointer identifies (points to) the jurisdiction in which: (i) for CDLIS purposes, the person's CDL record resides; and (ii) for non-CDLIS purposes, the person's credential record resides.

### Content

The CD20 Master Pointer consists of the following data attributes:

| ID       | Clear Name and Identifier                         | Required (R)                                                      |
|----------|---------------------------------------------------|-------------------------------------------------------------------|
| CD20.C1  | Master Pointer ID (DCDPID)                        | R                                                                 |
| CD20.C2  | Jurisdiction Code - Licensing (DDLJUR)            | R                                                                 |
| CD20.C3  | Driver License Number (DDLNUM)                    | R                                                                 |
| CD20.C4  | Person Name Group (BPENGP)                        | R                                                                 |
| CD20.C5  | Driver Social Security Number (DDVSSN)            | R (only until all Jurisdictions have implemented 5.1 or greater). |
| CD20.C6  | Person SSN Last 5 Digits (BPSSD)                  | R                                                                 |
| CD20.C7  | Driver SSN Type (DDVSSI)                          | R                                                                 |
| CD20.C8  | Driver Date of Birth (DDVDOB)                     | R                                                                 |
| CD20.C9  | Driver Sex (DDVSEX)                               | R (only until all Jurisdictions have implemented 5.1 or greater). |
| CD20.C10 | State Document Type (BJDTYP)                      | R                                                                 |
| CD20.C11 | State Document REAL ID Conformant (BJDRIC)        | R                                                                 |
| CD20.C12 | CDLIS Pointer Indicator (DCDCPI)                  | R                                                                 |
| CD20.C13 | Message SOR Change in Progress Indicator (GMSSCH) | R                                                                 |
| CD20.C14 | Record Creation Date Time Stamp (GRCCDS)          | R                                                                 |
| CD20.C15 | Record Last Update Date Time Stamp (GRCUDS)       | R                                                                 |

Unfortunately, the "limited" character of this pointer data is illusory, because (1) a compliant state must provide its entire license and/or ID record about any individual, not just the pointer, to any other participating state on request, and (2) AAMVA could change the SPEXS specifications at any time (and may already have done so, since they are no longer public) to require that additional data be included in pointer uploads or to impose additional conditions on states that want to participate or remain participants in S2S.

7 "AAMVAState Pointer Exchange Services (SPEXS) Master Specification (AMIE), r6.0.8", <[https://papersplease.org/\\_dl/SPEXS%20Master%20Specification%20%28AMIE%29%20r6.0.8.pdf](https://papersplease.org/_dl/SPEXS%20Master%20Specification%20%28AMIE%29%20r6.0.8.pdf)>.

The purpose of the SPEXS pointers is to index and identify state license and ID records, so that they can be searched and matched with other records that might pertain to the same individual. It's easy to imagine that AAMVA might decide to index and search SPEXS records by photograph as well as by name, and start requiring uploads of license and ID photos in addition to the current pointer data fields.

If that were to happen **today**, Alaska could say no and withdraw from S2S.

But there is no way, other than through participation in S2S and uploading of whatever data AAMVA decides to require for SPEXS pointers (and complying with whatever other conditions AAMVA decides to impose on SPEXS and S2S participants) for a state to comply with the national database access requirement in the REAL-ID Act.

**So a state that has complied with the REAL-ID Act through participation in S2S cannot withdraw from S2S or refuse to upload whatever additional data or comply with whatever new conditions AAMVA decides to impose on S2S participation without immediately becoming noncompliant with the REAL-ID Act.**

**Alaskans need to understand that if Alaska agrees to comply with the REAL-ID Act, you will in effect be agreeing in advance to comply with whatever AAMVA later demands, including possible demands to upload additional data about all state residents to the national ID database. You will be handing over control over Alaska residents' license and ID data to private outside entities not subject to any of the transparency or accountability of government agencies.**

Alaska is one of the most recent states to join S2S.<sup>8</sup> Over the weekend of January 28, 2017, the Alaska DMV did a batch upload of pointers to all Alaska drivers licenses and state ID cards to the SPEXS database.<sup>9</sup> The Alaska DMV will undoubtedly say that this was not required for REAL-ID Act compliance. Strictly speaking, that's true. But in practice there is no other path to compliance available or likely to become available.

DHS extensions of time to comply with the REAL-ID Act need not be based on any specific criteria and are not limited by any statutory deadline. According to the REAL-ID Act regulations, "Subsequent extensions, if any, will be at the discretion of the Secretary" of Homeland Security.<sup>10</sup> Many states have been granted extensions despite not being compliant with the database access provisions of the REAL-ID Act.

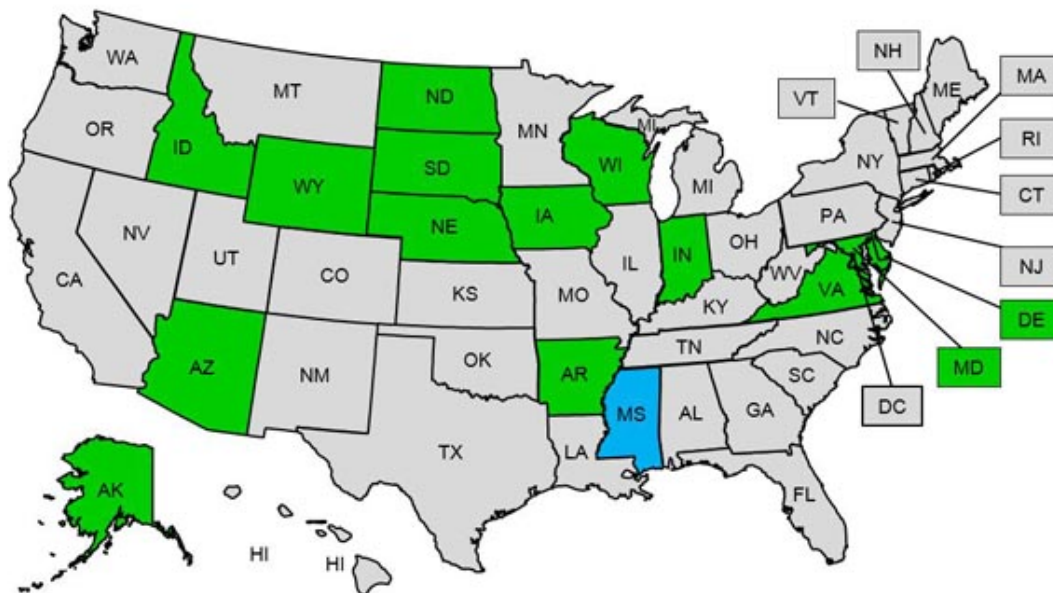
8 "Delaware Joins States-to-State; Alaska to Follow", in "The Week In Review, December 16, 2016", <<http://www.aamva.org/pubDelawareJoinsS2S-TWIR12192016/>>.

9 "Alaska Joins State-to-State Verification Service", in "The Week In Review, January 30, 2017", <<http://www.aamva.org/uploadedFiles/MainSite/Content/NewsPublications/TheWeekInReview/Archive-2017/The%20Week%20In%20Review,%20January%2030,%202017.pdf>>

10 Department of Homeland Security, "Minimum Standards for Driver's Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes; Final Rule", 73 *Federal Register* 5272 at 5339 (January 29, 2008).

Alaska is far from alone in not having complied with the REAL-ID Act. The DHS has chosen, in its discretion, to threaten five states including Alaska with interference with your residents' rights, on varied and arbitrary future dates, if you do not comply with DHS desires. But these are **not** the only noncompliant states. No state that is not participating in S2S and SPEXS is currently complying with the REAL-ID Act, regardless of whether it has received a discretionary extension from DHS.

### Jurisdictions' S2S Testing & Implementation Current Status



| Project Phase                                    | Status |     |
|--------------------------------------------------|--------|-----|
| Operational at 6.0                               | 14     | 28% |
| Structured Testing Completed & Ready for Go Live | 0      | 0%  |
| Structured Testing in Progress                   | 0      | 0%  |
| Signed LOI, Go Live Confirmed during S2S Pilot   | 1      | 2%  |

AAMVA "S2S Participation Map - Feb. 27, 2017", at "State to State (S2S) Verification Services: Participation", <<http://www.aamva.org/State-to-State/>>

SPEXS is still relatively new and operating on a relatively small scale. The first states populated the national database in 2015, ten years after the REAL-ID Act was enacted and development of the SPEXS system began. As shown above, only 14 states, not including any of the most populous states, have uploaded their state data to SPEXS.

The total population of states participating in S2S and SPEXS is less than 15% of the US population.<sup>11</sup> **To put it another way, more than 85% of the US population resides in states – at least 36 of them – that are not in compliance with the database access requirements of the REAL-ID Act.** Alaska is being singled out for a Federal threat to interfere with residents' rights sooner than in other noncompliant states not because Alaska is less compliant or is one of only a few noncompliant states, but because the DHS believes that Alaska can be more easily intimidated than more populous states.

Unless the REAL-ID Act is repealed, those other noncompliant states eventually will have to make the same decision as Alaska now faces: Whether to capitulate to Federal threats or challenge Federal interference with residents' rights. **Alaska has nothing to gain from being among the first states to capitulate to these threats.** On the contrary, the lack of alternatives to air transport in many parts of Alaska gives Alaska by far the strongest basis of any state to challenge any Federal attempt to interfere with residents' right to freedom of movement, which in many cases depends on air travel.

In practice, the experience of other states suggests that state-issued IDs may not be accepted for entrance to Federal facilities is less serious than it may appear.

Concerns have been raised about what will happen to civilian contractors, delivery drivers, or other Alaskans who don't already have military or other Federal credentials but who frequently need to visit military bases or other Federal facilities.

As a national point of contact for information about the REAL-ID Act, we regularly hear from residents of other states, including those where state-issued ID cards are already being rejected for access to military bases and other federal facilities.

From what we have heard from around the country, the problems that some Alaskans fear have not materialized in other states. Infrequent visitors or new hires who don't already have a passport, passport card, or other Federal ID can be, and are, escorted until they can obtain Federal ID for unescorted access. Most often this is a passport card.

It's common sense that if the Federal government wants to require different credentials for access to Federal facilities, the Federal government should issue those credentials, not impose an unfunded mandate on the states to change procedures that affect all of their residents in order to provide credentials for Federal contractors.

Compliance by states with the REAL-ID Act in order to provide state-issued credentials for regular visitors to Federal facilities is a solution in search of a problem. A better and more appropriate solution is already available in the form of a passport card.

11 Estimated resident populations of the 14 S2S participant states listed by AAMVA at <<http://www.aamva.org/State-to-State/>> and of the US, July 1, 2016, "Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico (NST-EST2016-01)".

**Any US citizen who qualifies for a REAL-ID Act compliant state ID also qualifies for a passport card. A passport card is valid for any use for which a compliant state ID is valid, plus travel by land or sea between the US and Canada.**

You can apply for a passport card at many US Post Offices, even in small communities. A passport card takes slightly longer to obtain than a state ID, but it already takes several weeks to obtain an Alaska state ID from the out-of-state vendor.

A first-time adult passport card valid for 10 years costs \$55 (\$40 for a child under age 16), and \$30 for each 10-year renewal (\$15 for a child under 16). A new or renewal REAL-ID Act compliant Alaska state ID valid for 8 years is proposed to cost \$20.

A higher percentage of Alaskans than of residents of almost any other state already have passports. For those whose only international travel is travel by land and/or sea to Canada, a passport card may be a significantly cheaper and more convenient alternative (a wallet-sized card instead of a booklet) to a passport. Indeed, the passport card was specifically designed to serve the needs of residents of states like Alaska.

Anyone who has a problem getting a passport card is going to have at least as much difficulty getting a REAL-ID Act compliant state driver's license or ID card.

In many cases, we advise people who are having difficulty obtaining a state ID card because of REAL-ID Act document requirements that it will be **easier** for them to obtain a passport card than a compliant state ID card.

**As state legislators, you are hearing now from people who fear that they will have to pay a little bit more or wait a little bit longer to get a passport card if the Federal government decides to stop accepting Alaska ID cards for Federal purposes.**

**But if you approve these bills, you will eventually be hearing from larger numbers of people with more serious problems because they don't have, and can't readily obtain, the necessary documents for a compliant state ID card.**

We hear regularly from people in this situation in other states that have implemented compliant state license and ID issuance and document requirements.

The burden of REAL-ID Act compliance falls disproportionately on the elderly, on those who reside in a distant state from their place of birth, and those who were born at home and whose birth was not recorded by a hospital (which is, of course, more common for those who live far from the nearest hospital in areas such as parts of Alaska).

A common Catch-22 is for an elderly person who doesn't have a certified copy of their birth certificate or other required paperwork to find it difficult or impossible to obtain the necessary documents without traveling to the state where they were born, but to be unable to travel there without the ID for which they need the documents.



In other states, the fallback for people in this situation is to get a "noncompliant" state ID, and travel by land. But that isn't an option in parts of Alaska that depend on air transportation for access to essential services and their connection to the rest of the state.

A "noncompliant" state ID card issued by a compliant state isn't what it appears to be. Someone who chooses a "noncompliant" card probably thinks they have opted out of participating in the national ID database. But a compliant state can't let anyone opt out of nationwide sharing of all the state's data about them: **The REAL-ID Act requires a compliant state to make its records about all driver's licenses or ID it issues – including "noncompliant" cards and licenses – available on request to all other states.** Nobody who has a license or ID card issued by a compliant state can really opt out of the national database. A "noncompliant" license or ID card is a misleading sham.

The DHS estimates that anywhere from a quarter to a half of all state residents won't get compliant ID cards. In some cases that will be by choice, even if it fails to protect those who request noncompliant cards against sharing and abuse of their data. In other cases, individuals will get noncompliant cards because they don't have the documents for a compliant card. Many US citizens don't have a certified copy of their birth certificate or other required paperwork, and have never before (or not for many years) been required to present documents to the government to prove who they are.

**If the DHS follows through on its threats, that substantial fraction of Alaskans with "noncompliant" ID cards won't be allowed to fly. That may be tolerable in some other states, but not in Alaska. Unlike other states, Alaska needs a "Plan B", even if Alaska becomes a compliant state, for Alaskan residents who need to travel by air but who won't easily be able to obtain a compliant state ID.**

**These bills won't solve the problem posed by Federal threats to interfere with the freedom of movement of Alaskan residents who don't have ID that the Federal government finds satisfactory. The state of Alaska will have to deal with that problem for a substantial number of its residents – and should start preparing now to do so – even if these bills are approved and Alaska becomes compliant.**

Other courses of action are available to states that don't want to upload information about all their state residents to a new privately operated national database, or agree to whatever future conditions may be imposed by AAMVA on participation in SPEXS, or by DHS (at its standardless discretion) on certifications of "compliance", or have their residents' freedom of movement interfered with by Federal agents.

Congressional delegations from other states threatened with sanctions against their residents for state noncompliance with the REAL-ID Act have introduced legislation to repeal all or the most objectionable portions of the Federal law. Alaska is the only one of the five states being threatened by the DHS for noncompliance none of whose Congressional delegation is co-sponsoring legislation against the REAL-ID Act.

In the current session of the US Congress, three Senators including both Senators from Montana are co-sponsoring S. 126, the "Repeal ID Act of 2017".<sup>12</sup> Seven Members of Congress including Representatives from Maine, Minnesota, and Missouri are co-sponsoring H.R. 755, the "REAL ID Privacy Protection Act".<sup>13</sup>

While S. 126 and H.R. 755 would repeal different portions of the REAL-ID Act, both of these bills would repeal the national database sharing requirement.

Alaska HJR 15 is an important statement of support by the Alaska State Legislature for efforts in Congress to repeal the REAL-ID Act. But Alaskans and the State of Alaska cannot, and should not, merely sit back and wait for Congress to act.

No Federal law or regulations requires air travelers to show any ID.<sup>14</sup> People fly without ID every day. But the TSA has indicated that it intends to propose regulations, revise TSA Standard Operating Procedures, and/or issue Security Directives to air carriers to require air travelers to show ID acceptable to the DHS in order to fly.<sup>15</sup>

This threat poses a special danger to Alaskan residents, especially those in communities and locations not connected to the North American road network, and/or who rely on air transportation for access to essential and emergency services.

Unless and until this threat is withdrawn, Alaskan state authorities including the office of the Attorney General of Alaska should be preparing to defend any Alaska residents whose rights are interfered with by Federal agents.

And rather than waiting to intervene until after Federal agents start denying Alaska residents access to essential air transportation, the state should, as soon as it is ripe for adjudication, initiate litigation to prevent interference with residents' rights.

It makes no sense for your state to capitulate, as these bills would have it do, in response to threats of Federal action whose Constitutionality has yet to be tested.

12 Introduced January 12, 2017, <<https://www.congress.gov/bill/115th-congress/senate-bill/126>>

13 Introduced January 31, 2017, <<https://www.congress.gov/bill/115th-congress/house-bill/755>>

14 A Federal lawsuit brought in 2002 by John Gilmore, founder of the Identity Project, was dismissed after lawyers for the TSA claimed and provided evidence *in camera* and under seal to the 9th Circuit Court of Appeals, which has jurisdiction over Alaska, that neither any Federal law or regulation or the TSA's secret Security Directives require air travelers to show ID to fly. *Gilmore v. Gonzales*, 435 F. 3d 1125, <<https://papersplease.org/gilmore/>>

15 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>>

It would be premature for Alaska to abandon its long-standing and well-founded opposition to the REAL-ID Act in response to DHS threats to interfere with the rights of state residents as a sanction for state noncompliance with the REAL-ID Act, while:

1. A Federal ID credential, a passport card, is available to any U.S. citizen who qualifies for a REAL-ID compliant state ID, and can be used for any purpose for which a compliant state ID can be used as well as for surface travel to Canada;
2. Legislation to repeal the REAL-ID Act or significantly mitigate the dangers of creating an uncontrolled national ID database is pending in Congress;
3. No Federal statute or regulation requires air travelers to show any ID to fly, and residents of Alaska and other states continue to fly every day without ID;
4. No regulations have been proposed that would require anyone to show ID to fly;
5. No court has considered whether it would be Constitutional to require air travelers or passengers of other common carriers to show ID;
6. Compliance with the REAL-ID Act would create special problems for Alaskan residents, especially residents of communities not accessible by road;
7. The lack of alternatives to air transport gives Alaska a uniquely strong legal basis to challenge any Federal attempt to impose an ID requirement for air travel;
8. More populous states that are manifestly not in compliance with the statutory criteria for REAL-ID Act database access have not been similarly threatened; and
9. No court has ruled on the legality of the DHS arbitrarily exercising "discretion" to restrict the rights of residents of some noncompliant states but not others.

We urge the Alaska State Legislature to reject SB34 and HB16, stand firm in your opposition to the REAL-ID Act, and prepare to defend the Constitutional rights of Alaskans and all Americans to freedom of travel and movement, including by air.

Respectfully submitted,

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