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TO: Twila Brase
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DATE: September 2, 2025

SUBJECT: Analysis of Potential Legal Attacks Against the REAL ID Act

EXECUTIVE SUMMARY

Federal mandates for driver's license standards have been driven by immigration concerns, albeit wrapped in a veneer of transportation security. The current regime—the REAL ID Act—is a worst-of-all-worlds design: it's largely ineffective vis-à-vis actually establishing the identity of aliens and excluding illegal aliens from the transportation system; it imposes billions of dollars in unfunded mandates on States; and it gravely threatens citizens' privacy and civil liberties.

The REAL ID Act operates by coercion: if states don't comply, their citizens can't board commercial aircraft without obtaining a passport. That coercion worked: 14 states passed laws banning implementation, but they ultimately yielded, "fearing constituents would not be able to travel commercially." S. Rep. No. 116-303, at 2 (2020).[1] The REAL ID Act is a novel and extraordinary affront to the Tenth Amendment.

BACKGROUND

I. Introduction of Identification Requirements for Air Travel

In late 1995, the Federal Aviation Administration first introduced a requirement that air travelers provide identification.[2] Although the FAA confirmed the existence of the requirement, it refused to disclose the requirement's text.[3] After the July 1996 crash of TWA Flight 800, the identification requirement was strengthened, with government-issued identification becoming the standard.[4] Although the loss of Flight 800 was ultimately attributed to an explosion caused by an

[1] States that passed anti-REAL ID laws include Alaska, Arizona, Idaho, Louisiana, Maine, Minnesota, Missouri, Montana, New Hampshire, Oklahoma, Pennsylvania, South Carolina, Utah, and Viriginia. Several more states passed resolutions opposing the REAL ID Act.

[2] Edwin McDowell, *Clamping Down on Airport Security*, N.Y. TIMES (Oct. 24, 1995).

[3] Associate FAA Administrator Cathal L. Flynn Letter to Robert E. Smith (Mar. 13, 1996).

[4] Michael Conlon, *Photo ID Requirement May Be Permanent*, L.A. TIMES (Sept. 11, 1996).

electrical problem, the identification requirement never went away. Normally regulation-averse airlines were all-to-happy with a mandate that prevented passengers from reselling their tickets.[5]

II. History of the REAL ID Act

Later in 1996—as part of a bill targeting illegal immigration—Congress prohibited federal agencies from accepting "for any identification-related purpose a driver's license or other comparable identification document, issued by a State," unless the application process included "the presentation of such evidence of identity as required by regulations promulgated by the Secretary of Transportation." Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") of 1996, Pub. 104-208, Division C, § 656(b), 110 Stat. 3009, 3009-718 (1996). The statute notably required driver's licenses to be tied to social security numbers, either on the face of the license or via submission and verification of the applicant's social security number as part of the application process. *Id.*

The National Highway Traffic Safety Administration dutifully issued a notice of proposed rulemaking, but the agency identified what it believed was a statutory problem: "Many nonimmigrant aliens … are lawfully present in the United States long enough to need to obtain a State issued driver's license, but may not have INS work authorization or any other reason to be eligible to obtain a social security number." State-Issued Driver's Licenses and Comparable Identification Documents, 63 Fed. Reg. 33,220, 33,222 (June 17, 1998). According to NHTSA:

> The Immigration Reform Act was not enacted into law to prevent individuals who are legally in the United States from holding valid driver's licenses or identification documents. Rather, the statute was enacted to deter illegal immigration into the United States. The agency [accordingly] propose[d] to permit States to continue processing applications for driver's licenses and identification documents for individuals legally in the United States.

Id. Several members of Congress expressed concern with NHTSA's proposed rulemaking, which resulted in formal meetings and a reopening of the comment period. 63 Fed. Reg. 44,415 (Aug. 19, 1998). Congress subsequently repealed IIRIRA's driver's license provision—but not a related birth certificate provision—apparently in response to civil liberties concerns. Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 106-69 § 355, 113 Stat. 986, 1027; *see also* 66 Fed. Reg. 56,261 (Nov. 7, 2001) (recounting events and withdrawing NPRM). The driver's license requirements of IIRIRA were never implemented.

Federal identification standards again became an issue following the 9/11 attacks. Although the 9/11 hijackers boarded aircraft using their own names and more than half were flagged for additional inspection, the 9/11 Commission report included the following brief recommendation:

> Secure identification should begin in the United States. The federal government should set standards for the issuance of birth certificates and sources of identification such as drivers licenses. Fraud in identification documents is no longer just a problem of theft. At many entry points to vulnerable facilities, including gates for boarding aircraft, sources of identification are the last opportunity to ensure that people are who they say they are and to check whether they are terrorists.[6]

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[5] Betsy Wade, *Now You Need A Photo ID As Well As Your Ticket*, DESERET NEWS (Dec. 29, 1996)

[6] The 9/11 Commission Report 390, 392 (2004).

Buried in footnotes was an acknowledgment that identification would not be reliable until biometric identifiers are introduced.[7]

Congress accordingly reversed course—again—and included identification standards in a statute intended to implement the 9/11 Commission's recommendations. Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, §§ 7201-7220, 118 Stat. 3638, 3808-3839. As relevant here, Section 7212 required the Secretary of Transportation to undertake a negotiated rulemaking to set minimum standards for driver's licenses, authorized grants to states to assist in conforming to those standards, and set "a date after which no driver's license or personal identification card shall be accepted by a Federal agency for any official purpose unless such driver's license or personal identification card conforms to [those] minimum standards."

That provision was repealed less than six months later—together with the remaining portions of IIRIRA Section 656—in the immigration-focused REAL ID Act of 2005, Pub. L. No. 109-13, Division B, § 206, 119 Stat. 231, 316. In place of a negotiated rulemaking with the States, the new law decreed specific requirements to establish identity, verify lawful immigration status, retain records, and share a state's driver's license database with other states. *Id.* § 202 (codified as amended at 49 U.S.C. § 30301 note). Like the earlier statutes, it also came with a gun-to-the-head: "[b]eginning 3 years after the date of the enactment of [the REAL ID Act, *i.e.*, beginning on May 11, 2008], a Federal agency may not accept, for any official purpose, a driver's license or identification card issued by a State to any person unless the State is meeting the requirements of this section," with "official purpose" defined as "include[ing] but is not limited to accessing Federal facilities, boarding federally regulated commercial aircraft, … and any other purposes that the Secretary [of Homeland Security] shall determine." *Id.* §§ 201(3), 202(a). Congress did, however, authorize grants and a corresponding appropriation to assist States "in conforming to the minimum standards set forth in this Title." *Id.* § 204.[8]

III. Regulatory Implementation of the REAL ID Act and the REAL ID Modernization Act

In 2007, the Department of Homeland Security published a notice of proposed rulemaking to implement the REAL ID Act. 72 Fed. Reg. 10,820 (Mar. 3, 2007). The agency anticipated federalism concerns, but took a dismissive attitude toward the Act's commandeering of State driver's licensing agencies:

> [T]he REAL ID Act is binding on Federal agencies, rather than on States. The proposed rule would not *formally* compel any State to issue driver's licenses or identification cards that will be acceptable for federal purposes. Importantly, under this scheme, "[a]ny burden caused by a State's refusal to regulate will fall on those [citizens who need to acquire and utilize alternative documents for federal purposes], rather than on the State as a sovereign." In other words, the citizens of a given State—

[7] *Id.* at 565 n.39.

[8] Almost immediately, however, Congress began to walk back the identification requirements for victims of domestic violence and certain aliens. VAWA and DOJ Reauthorization Act, Pub. L. No. 109-162 § 827, 119 Stat. 2,960, 3,066 (2006). Identification requirements for certain federal officials were walked-back too. Court Security Improvement Act of 2007, Pub. L. No. 110-177 § 508, 121 Stat. 2534, 2543 (2008).

> not Congress—ultimately will decide whether the State complies with this regulation and the underlying statute. DHS has concluded that the proposed rule is consistent with the Tenth Amendment to the U.S. Constitution and does not constitute an impermissible usurpation of state sovereignty. Rather, it is a permissible "program of cooperative federalism" in which the federal and state governments have acted voluntarily in tandem to achieve a common policy objective.

Id. at 10,849 (emphasis added; quoting *New York v. United States*, 505 U.S. 144, 167, 173 (1992)). The estimated costs were staggering: over ten years, $23.1 billion in undiscounted 2006 dollars, including $14.6 billion to States. *Id.* at 10,845.

A final rule followed. 73 Fed. Reg. 5,272 (Jan. 29, 2008). The final rule lowered the expected 10-year cost to states to $4 billion, albeit with the public bearing another $10 billion in costs. *Id.* at 5,324 – 5,325. DHS acknowledged those costs were substantial, as well as the financial impact on states of rapidly forcing compliance given the then-low adoption rate by the public. *Id.* at 5,285-5,286, 5,288, 5,324-5,325. In view of those impacts, the final rule stated that extensions would be granted to states. The final rule nevertheless provided that after May 11, 2011, driver's licenses and ID cards would not be accepted from states that were not in full compliance with the REAL ID program, although full enrollment for persons under fifty years old would not be required until December 1, 2014, and full enrollment for persons over fifty years of age would not be required until December 1, 2017.

The final rule was both invasive and ineffective. For example, it mandated states collect photographs designed to facilitate biometric identification. 73 Fed. Reg. at 5,335 (codified at 6 C.F.R. § 37.17(e)). But the final rule also acknowledged the ready circumvention of REAL ID requirements. Even for a federal official purpose, the requirement for a REAL ID requirement applied only to driver's licenses and identification cards, but other forms of identification could be accepted by federal agencies. 73 Fed. Reg. at 5284. The requirements to get a REAL ID were themselves watery: a homeless shelter would be a satisfactory address, and the handling of transgender individuals would be left to the states. *Id.* at 5301, 5302. The final rule also acknowledged that the utility of a REAL ID for disincentivizing unlawful immigration was already being undermined: "A number of States issue or plan to issue [non-compliant] licenses to individuals that cannot document lawful status." *Id.* at 5,323.

In late 2009, DHS stayed the material compliance deadline because 46 of 56 jurisdictions would be unable to meet it. 74 Fed. Reg. 68,477 (Dec. 28, 2009). DHS noted that it had "supported the efforts of Governors and Congress to enact [the PASS ID bill], which puts states on the path to implementing national security standards for State identification cards that will enhance security across the country." *Id.*; *see also* S. Rep. No. 111-104 (2009) (reviewing cost and implementation concerns with REAL ID Act and detailing the proposed PASS ID Act). Noting compliance difficulties and fiscal impacts to states, DHS then extended the compliance deadline from May 11, 2011, until January 15, 2013. 76 Fed. Reg. 12,269 (Mar. 7, 2011).

States continued to oppose the REAL ID Act. In 2017, for example, dozens of Pennsylvania legislators wrote President Trump expressing continued concerns with the REAL ID Act usurping state authority, creating a centralized national identity registry, and imposing at least $39 million dollars

in annual operating costs on the State of Pennsylvania alone.[9] A small cadre of DHS officials circumvented that opposition with quintessential deep state action: they camouflaged their activities by changing their moniker to the benign "Office of State Issued ID Support," then sidestepping state political leaders and working directly with career officials in state DMVs. As one DHS official explained: "Even when the governors were against REAL ID, at the DMV level they were still very helpful. I don't know of any state where at the DMV level they were not helpful."[10]

At the same time, DHS continued with its incremental, phased enforcement policy. Beginning in 2018, the Transportation Security Administration accepted driver's licenses and identification cards only "if issued by compliant states (or states with an extension from DHS) at screening checkpoints, which in practice was all states and territories. *See* 85 Fed. Reg. 23,205 (Apr. 27, 2020). In April 2020, however, DHS extended to October 1, 2021, the REAL ID card-based enforcement date, *i.e.*, the date after which "federal agencies are prohibited from accepting for official purposes a license or identification card issued by a state unless the license or card itself was issued in accordance with the REAL ID standards by a REAL ID compliant jurisdiction." *Id.*

In July 2020, Senators Ron Johnson (R-WI), Gary Peters (D-MI), and Ron Wyden (D-OR) introduced S. 4133, the REAL ID Modernization Act. The accompanying Senate Report noted that "approximately 14 states passed legislation prohibiting their state from complying with [the REAL ID Act]," but "[m]any states repealed their state laws fearing constituents would not be able to travel commercially." S. Rep. No. 116-303, at 2 (2020). "[B]y March 26, 2019, 52 states and territories were in compliance," "and two states had received extensions and were expected to become complaint in the near future." *Id.* The Real ID Modernization Act was ultimately enacted as Title X of Division U of the Consolidated Appropriations Act, 2021, Pub. L. No. 116–260, 134 Stat. 1182, 2304 (2020). As relevant here, it eliminated the requirement for "proof" of the applicant's Social Security Number, added provisions for "mobile" or "digital" driver's licenses, and eliminated the authorization for grants to states. *Id.*

In May 2021, DHS again extended the card-based enforcement date, this time to May 3, 2023. 86 Fed. Reg. 23,237 (May 3, 2021). In May 2023, DHS finalized that rule and further extended the enforcement date to May 7, 2025. 88 Fed. Reg. 14,473 (Mar. 9, 2023). DHS explained that its estimates were "that only about 56 percent of the state driver's licenses and identification cards in circulation will be REAL ID compliant by the current May 3, 2023 card-based enforcement deadline." *Id.* at 14,475. "TSA estimate[d] up to half a million passengers per day without alternate acceptable IDs could be denied access to security screening." *Id.* "This could result in significant backlogs at the TSA security checkpoint, which would not only cause delays and missed flights but may also create a significant security risk both to passengers and TSA personnel." *Id.*

REAL ID adoption continued to be slow. As of January 2024, DHS continued to estimate that "only approximately 56 percent of DL/IDs in circulation nationally are REAL ID compliant," "[i]n 34 states, less than 60 percent of DL/IDs in circulation are REAL ID-compliant, and in 22 states

[9] Rep. Daryl D. Metcalfe et al Letter to President Donald J. Trump (Jan. 24, 2017).

[10] Magdalena Krajewska, *Implementing the REAL ID Act: Intergovernmental Conflict and Cooperation in Homeland Security Policy*, 50(3) PUBLIUS: THE JOURNAL OF FEDERALISM 398, 409, 411 (May 7, 2020).

less than 40 percent are REAL ID-compliant." 89 Fed. Reg. 74,137, 74,138 (Sept. 12, 2024). DHS accordingly proposed a phased-enforcement plan, to extend until May 5, 2027, *id.* at 74,137, which it finalized in the last days of the Biden Administration. 90 Fed. Reg. 3,472 (Jan. 14, 2025). DHS noted the burden of its plan: "In states with low adoption rates, large numbers of individuals may rapidly seek to obtain REAL ID-compliant DL/IDs." *Id.* at 3,477. "This potential increase in demand may challenge the capacity of licensing jurisdictions and may create backlogs in issuance of REAL ID-compliant cards." *Id.*

POLICY CONSIDERATIONS

1. **The REAL ID Act is a multi-billion-dollar unfunded mandate.** In the 2008 Final Rule, DHS estimated the 10-year cost of REAL ID as $4 billion to states and over $10 billion to citizens, both in undiscounted 2006 dollars. 73 Fed. Reg. at 5,324 – 5,325. Subsequent events have suggested the real costs to states are much greater, with comments suggesting costs of around $100 per license. Compliance with REAL ID requirements slows the process for issuing drivers licenses and accordingly requires additional state employees in order to handle the same volume. And the expected surge now that the card enforcement date has passed will require even more state employees. Since the 2020 REAL ID Modernization Act repealed DHS's REAL ID grant authority, that expense is borne entirely by states.

2. **The REAL ID Act sets a precedent for circumventing the 10th Amendment**. The basic premise of the REAL ID Act is to coerce states to implement a federal program by threatening their citizens with exclusion from boarding commercial aircraft and accessing federal facilities. REAL ID is immensely unpopular, with 14 states having passed laws prohibiting participation. But those states ultimately complied when faced with the threat of their citizens being unable to fly. And in some states, compliance was a *fait accompli* because of federal circumvention of state political leaders via contact with career DMV employees, who then acted to circumvent state law.

3. **REAL ID is largely ineffective in its immigration-related purpose.** REAL ID is available to aliens in lawful status, which is defined to include asylum applicants, TPS applicants, and persons in deferred action status, 6 C.F.R. § 37.3, *i.e.*, REAL ID is available to the millions of aliens with farcial claims for protection who crossed the border during the Biden Administration. An Employment Authorization Document (Form I-766 or I-688B) suffices to establish the alien's identity. 6 C.F.R. § 37.11(c)(1)(v). But EADs are available to aliens who have merely *applied* for asylum or withholding of removal after 150 days, or for TPS. 8 C.F.R. § 274a.12. Proof of identity isn't well-enforced for such individuals, and many present at the border without identity documents.[11] So they can ultimately obtain a REAL ID and fly. Or not, and still be granted a non-REAL ID driver's license by any of the 19 states that grant driver's licenses to illegal aliens, as the recent tragedy in Florida amply illustrated.[12] [13] So REAL ID does little to identify aliens or exclude illegals from the economy.

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[11] Melissa del Bosque, *Clothes, shoes, passports: migrants forced to dump possessions at US-Mexico wall*, THE GUARDIAN (May 8, 2022).

[12] *Map Shows States Where Illegal Immigrants Can Get Driving Licenses*, Newsweek.com (Aug. 18, 2025).

[13] Melissa Bagg and Brian Hammacher, *Victims of Florida's Turnpike crash involving undocumented truck driver identified*, nbcmiami.com (Aug. 25, 2025).

4. **REAL ID is a danger to citizen privacy.** The information sharing requirements of REAL ID have created a *de facto* national identification card, with states playing only the public-facing role. And the REAL ID Act notably allows the Secretary of DHS to expand the "official purpose" for which a REAL ID is required to "any other purposes that the Secretary shall determine." REAL ID Act § 201(3), 119 Stat. at 312. DHS has touted a number of "ancillary benefits" such as reducing "fraudulent access to public subsidies and benefits," "unlawful access to firearms," and "underage smoking." 73 FR at 5319. Plainly, DHS expects REAL ID to become the de facto identification required for everyday life, including for sensitive transactions like firearms purchases. Indeed, the President of the American Association of Motor Vehicles testified that he expects mobile or digital driver's licenses will become "a singular identity credential" with "the capability to be updated in real time."[14] Consider the risk if such a tool had been available to enforce COVID-era bureaucratic excess, such as mandatory vaccination requirements. *See, e.g.*, *BST Holdings, LLC v. OSHA*, 17 F. 4th 604 (5th Cir. 2021). And consider the risk when that vast, centralized collection of personal and biometric data is inevitably lost to hackers, like the fingerprints, security clearance, and financial information of 5.6 million government employees were in a hack of the Office of Personnel Management.[15]

OVERVIEW OF SELECT POTENTIAL CLAIMS

I. The REAL ID Act is vulnerable to attack via the Tenth Amendment (Non-Statutory Review).

Start with first principles. The "powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const., amend. X. The Supreme Court has accordingly held the federal government may not conscript or commandeer state officials into administering and enforcing a federal regulatory program. *Printz v. United States*, 521 U.S. 898, 935 (1997). In particular, the "Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory provision." *Id.* Congress may, however, constitutionally obtain state cooperation with a federal program by conditioning federal funding on state implementation of a federal mandate. *South Dakota v. Dole*, 483 U.S. 203, 206-208 (1988). But those conditions cannot "be so coercive as to pass the point at which "pressure turns into compulsion." *Id.* at 211; *see also NFIB v. Sebelius*, 567 U.S. 519, 579-580 (2012) (Roberts, Breyer, and Kagan, JJ.); *id.* at 679-680 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

1. **Congress Can Require ID for Air Travel:** Congress can undoubtedly regulate instrumentalities of interstate commerce. *See, e.g.*, *Gibbons v. Ogden*, 22 U.S. 1, 197 (1824). Indeed, notwithstanding any right to travel, Congress could likely use its power under the Commerce Clause to require aircraft passengers to possess a national identification document. *Cf. Free Speech Coalition v. Paxton*, 145 S. Ct. 2291, 2309 (2025) (upholding age verification requirement despite incidental burden on First Amendment rights); *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (rejecting facial challenge to statute requiring photo identification for voting because it "imposes only a limited burden on voters' rights" and the state's interests outweighed those burdens); *United States v. O'Brien*, 391 U.S. 367, 378-380, 386 (1968) (affirming conviction for destroying draft registration card). And Congress can undoubtedly use its Spending Clause power to incentivize state cooperation in securing driver's

[14] Testimony of Ian Grossman, House Committee on Homeland Security Subcommittee on Transportation and Maritime Security (Dec. 5, 2023).

[15] *Millions of fingerprints stolen in US government hack*, bbc.com (Sept. 24, 2015).

licenses and identification cards. What Congress cannot do is use its Commerce Clause or Spending Clause power to commandeer State officials to implement such a program, either directly or via coercion. But that's how the REAL ID Act works, albeit with a novel form of coercion that acts on the citizenry rather than via fiscal or regulatory incentives.[16]

2. **REAL ID Is A Federal Program:** The United States would likely take the position that driver's licenses are state programs, with the federal government permitting use of those licenses for federal official purposes—subject to the standards of the REAL ID Act—only as a convenience to the public. The better argument is that REAL ID is a federal program, particularly given its immigration and air travel justifications. Indeed, two commenters in the original rulemaking noted "the Federal government has an existing program, the passport program, that does everything the REAL ID is supposed to accomplish, and that it makes sense to expand the passport program rather than revamping State driver's license requirements." 73 Fed. Reg. at 5,281. DHS responded that the passport program isn't enough:

> DHS does not agree that a passport issued by the Department of State fulfills the same function as a State-issued driver's license. Individuals who have no intention of leaving the United States do not need to obtain a passport in order to enter another country or reenter the United States. Any of these same individuals who desire to drive would need to obtain a driver's license.

Id. The inference is that DHS believes widespread possession of REAL ID compliant identification is necessary for the federal government's purposes, and that could not be achieved via the federal passport program. So Congress dragooned state driver's license programs for federal ends.

3. **REAL ID Coerces States:** The coercion argument is straight-forward: if a State doesn't adopt the REAL ID standards, its citizens will (practically) be required to obtain a passport in order to fly or access many federal facilities. And the coercion was effective: A 2020 Senate Report noted that 14 states had passed laws prohibiting implementation of REAL ID, but "[m]any States repealed their state laws fearing constituents would not be able to travel commercially." S. Rep. No. 116-303, at 2 (2020).

The United States would likely try to sidestep that point by arguing the REAL ID Act only directly regulates citizens, not states, citing *New York v. United States*, 505 U.S. 144 (1992), and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). Recall DHS's federalism discussion in the 2007 NPRM:

> [T]he REAL ID Act is binding on Federal agencies, rather than on States. The proposed rule would not *formally* compel any State to issue driver's licenses or identification cards that will be acceptable for federal purposes. Importantly, under this scheme, "[a]ny burden caused by a State's refusal to regulate will fall on those [citizens who need to acquire and utilize alternative documents for federal purposes], rather than on the State as a sovereign." In other words, the citizens of a given State—not Congress—ultimately will decide whether the State complies with this regulation

[16] Congress may have greater power to directly regulate States and State officials in the immigration context. *See New York v. U.S.D.O.J.*, 951 F.3d 84, 113-114 (2d Cir. 2020) (discussing *Arizona v. United States*, 576 U.S. 387 (2012)).

> and the underlying statute. DHS has concluded that the proposed rule is consistent with the Tenth Amendment to the U.S. Constitution and does not constitute an impermissible usurpation of state sovereignty. Rather, it is a permissible "program of cooperative federalism" in which the federal and state governments have acted voluntarily in tandem to achieve a common policy objective.

72 Fed. Reg. at 10,849 (emphasis added; quoting *New York*, 505 U.S. at 167). In short, even DHS implicitly recognizes the *informal* coercive aspect of threatening a State's citizens with not be able to use commercial aircraft or access federal facilities, or do so without a passport.

To be sure, the REAL ID Act presents a novel form of coercion: if a State doesn't implement an expensive, privacy-destroying policy, that State's citizens must obtain a passport in order to travel by air or to access many federal facilities. But Supreme Court precedent subsequent to *New York* suggests a softer standard for coercion than DHS implied in 2007, with the dissent in *NFIB* considering it enough that "States may, as a practical matter, be unable to refuse to participate in the federal program." 567 U.S. at 680. That's certainly the case with REAL ID. Similarly, at least the Fifth Circuit has rejected a federal attempt to circumvent constitutional restraints by regulating private parties. *BST Holdings, L.L.C. v. OSHA*, 17 F. 4th 604, 617 (5th Cir. 2021) ("The Commerce Clause power may be expansive, but it does not grant Congress the power to regulate noneconomic inactivity traditionally within the States' police power" by "commandeer[ing] U.S. employers to compel millions of employees to receive a COVID-19 vaccine or bear the burden of weekly testing."). And REAL ID certainly implicates the structural "political accountability" concern highlighted in *NFIB* given that the Act is concededly designed to leverage political pressure on state officials to achieve an unpopular federal end. 567 U.S. at 578.

4. **Bottom Line:** States have a colorable Tenth Amendment claim against the REAL ID Act, but predicting the outcome of such a claim is difficult. Even the Supreme Court has noted its "jurisprudence in this area has traveled an unsteady path." *New York*, 505 U.S. at 160 (compiling cases). Recent appellate authority is relatively limited, and it includes high-profile cases where the end-result may have driven the analysis. So clear legal rules can't be reliably discerned, even for classic fiscal coercion. *See Texas v. Yellen*, 105 F.4th 755, 768 (5th Cir. 2024) ("The point at which permissible inducement crosses over to impermissible coercion is not always easy to discern under the Supreme Court's precedent, but it lies somewhere between *Dole* and *NFIB*."). Here, of course, the form of coercion is novel.

II. States have a weak APA claim based on the costs of rapid enrollment in REAL ID, but that claim would provide useful framing for a Tenth Amendment claim.

The Administrative Procedure Act requires a reviewing court to "hold unlawful and set aside" a final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. An agency action is arbitrary and capricious if it, *inter alia*, "entirely failed to consider an important aspect of the problem," *Motor Vehicle Manufacturer's Ass'n v. State Farm Mut.*, 463 U.S. 29, 43 (1983), failed to "at least display awareness" of a change in agency position," *Encino Motorcars LLC v. Navarro*, 579 U.S. 211, 221 (2016), or failed to provide "a reasoned explanation [that] is needed for disregarding facts and circumstances that underlay or were engendered by the [agency's] prior policy," *id.* at 222.

Viable APA theories are constrained because many of the REAL ID requirements are traceable to the REAL ID statute rather than agency discretion. Further, many of the substantive REAL ID regulations date back to 2008, such that APA challenges are barred by the six-year statute

of limitations in the absence of more recent injury or re-opening. *See Corner Post, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 603 U.S. 799, 825 (2024). There is, however, a viable APA claim based on DHS's 2025 final rule.

In the final rule, DHS specifically noted the low REAL ID adoption rate in many States: "[A]s of January 2024, only approximately 56 percent of DL/IDs in circulation nationally are REAL ID-compliant," "[i]n 34 States, less than 60 percent of DL/IDs in circulation are REAL ID-compliant, and, of those, in 22 States less than 40 percent are REAL ID-compliant." 90 Fed. Reg. at 3,472. DHS noted the public's expectation of continued extensions, "this lack of urgency is likely to delay increased adoption in many States … potentially leading to last-minute surges in demand for REAL ID-compliant IDs leading up to the deadline." *Id.* at 3,472 – 3,473. DHS then acknowledged that "increased demand leading up to and after the deadline may outpace the ability of licensing jurisdictions to meet that demand," and "some States have expressed concern with ability to meet potential demand." *Id.* at 3,475. But rather than extend the card-based enforcement deadline as it had in the past, DHS adopted an opaque, two-year discretionary "phased enforcement" period.

In response to a comment about cost, DHS stated:

> DHS does not possess data on State expenditures, but as all States have met the state-based deadline for compliance, many of the costs associated with implementation of the REAL ID Act have already been incurred and will not be impacted by this rule. States and individuals would continue to incur costs related to obtaining REAL IDs; with or without this rule, which may be impacted by the rate at which they occur. As stated in the rule, DHS anticipates providing the opportunity for a phased approach may actually reduce and/or spread overall costs (rather than processing a higher number of REAL ID requests in a shorter period of time and consequences of a large portion of the population not having acceptable ID).

Id. at 3,488. Maintaining the deadline with opaque phased enforcement was a departure from DHS's earlier policy of entirely avoiding a surge of applications—and the attendant costs to states—by providing very extended, multi-year enforcement phase-ins. *See* 73 Fed. Reg. at 5,285 – 5,286. And it's a marked change from DHS's 2023 conclusion that the same 56% adoption rate warranted extension of the card-based enforcement date. 88 Fed. Reg. at 14,475. Particularly relevant here, the agency's superficial consideration of fiscal impacts to states is arguably arbitrary and capricious. That's because "conclusory statements … do not constitute adequate agency consideration of an important aspect of a problem." *Louisiana v. U.S.D.O.E.*, 90 F. 4th 461, 473 (5th Cir. 2024); *see State v. Biden*, 10 F. 4th 538, 556 (5th Cir. 2021) ("Stating that a factor was considered … is not a substitute for considering it.").

Subjectively, this is a technical and relatively weak claim. By the time the claim could reach summary judgment, the theoretical bolus of REAL ID applications likely would have passed. But bringing the claim would force DHS to concede that compliance with the REAL ID Act itself (as implemented by the 2008 Final Rule) requires states to undertake significant, ongoing expenditures.

DISCLAIMER

This analysis is intended only for the benefit of the Citizens' Council for Health Freedom. Based on the intended use of the analysis and budgetary constraints, this memorandum includes only a limited analysis of a subset of potential claims. It does, however, reflect our opinions based on a reasonable level of research. An attorney initiating litigation should undertake independent research in accordance with applicable rules of professional conduct.