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# GET REAL: IMPLICATIONS AND IMPOSITIONS OF THE REAL ID ACT OF 2005 ON VULNERABLE INDIVIDUALS AND STATES

*Haley Hoff\**

Legislators passed the Real ID Act in the traumatic aftermath of the September 11, 2001 terrorist attacks.<sup>1</sup> Following the attacks, the 9/11 Commission went to work creating and proposing reforms with the hopes of avoiding future attacks.<sup>2</sup> The Commission focused heavily on security reforms, primarily relating to travel, as a means to increase security.<sup>3</sup> The Commission's reports recommended increasing restrictions and imposing regulations on items such as birth certificates and forms of identification.<sup>4</sup> These travel related suggestions, aimed at increasing national security, had a profoundly detrimental impact on individuals and organizations across the country.

Specifically, the Commission's report resulted in the Real ID Act of 2005, signed by President George Bush, as a part of broader legislation aimed at preventing terrorism and increasing national security.<sup>5</sup> Known as the "Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief,"<sup>6</sup> the legislation addressed a range of issues. According to a statement released by the White House in May of 2005, the purpose of the broader legislation was to provide, "emergency supplemental FY

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1. *The History of Federal Requirements for State Issued Driver's Licenses and Identification Cards*, NCSL, <http://www.ncsl.org/research/transportation/history-behind-the-real-id-act.aspx> (last visited Oct. 8, 2018) [hereinafter *History of Federal Requirements*].

2. *Id.*

3. *Id.* The Commission Report stated:

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.

NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT 390 (2004) [hereinafter THE 9/11 COMMISSION REPORT].

4. *History of Federal Requirements*, *supra* note 1.

5. *Id.*

6. *Id.*

2005 appropriations for military operations, relief and reconstruction, and related activities critical to building stable democracies in Iraq and Afghanistan.”<sup>7</sup>

The section containing the Real ID Act of 2005 focused specifically on “security, authentication, and issuance procedures” relating to driver’s licenses and personal identification documents such as birth certificates.<sup>8</sup> On an individual level, the Act imposed strict requirements for those seeking to obtain personal identification.<sup>9</sup> For agencies like the Department of Motor Vehicles (DMV), the Act significantly expanded the substantive information the agencies needed to include on the physical identification cards.<sup>10</sup>

Controversy surrounded the legislation as it was not enacted through traditional democratic processes, but was instead forced into adoption through the emergency legislation relating to the terrorist attacks.<sup>11</sup> The Act also faced a great deal of backlash for the high costs associated with the stringent reforms and inevitable costly enforcement.<sup>12</sup> Additionally, many states and organizations, such as the American Civil Liberties Union (ACLU), voiced initial concerns over privacy violations, arguing that the legislation would result in the functional equivalent of a national ID database.<sup>13</sup>

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7. *Statement on H.R. 1268, the “Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005,”* WHITE HOUSE: PRESIDENT GEORGE W. BUSH (May 11, 2006), <https://georgewbush-whitehouse.archives.gov/news/releases/2005/05/20050511-5.html>. “This Act also provides funds to assist those suffering in the aftermath of the tsunami in the Indian Ocean in December 2004.” *Id.*

8. *H.R. 1268 (109th): Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005*, GOVTRACK, <https://www.govtrack.us/congress/bills/109/hr1268/summary> (last updated Oct. 11, 2018).

9. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, 2005 (REAL ID Act), Pub. L. No. 109-13, § 202, 119 Stat. 231, 312–13 (2005). “The term ‘identification card’ means a personal identification card, as defined in section 1028(d) of title 18, United States Code, issued by a State.” *Id.* § 201(2).

10. *Id.* § 202.

11. Am. Civil Liberties Union Found., *Real Answers: FAQ on the Real ID Act*, REAL NIGHTMARE, <https://web.archive.org/web/20171124212314/http://www.realnightmare.org:80/about/2>.

12. *See generally id.* (discussing why the Real ID is bad for our country and the burdens the Act imposes on individuals and states).

13. *New Federal Regulations Get an ‘F’ in Addressing Issues with the Real ID Act*, ACLU 1, 8, 18 (Mar. 2007) (on file with author) [hereinafter *New Federal Regulations*]. The report expands on the potential for a national database resulting from the act, explaining:

The regulations do nothing to prevent Real ID from becoming a de facto National ID card. They create a vast infrastructure for such a system, including a common machine readable element (with no protection against private-sector exploitation) and the construction of a national interlinked database. The regulations already require the card in order to fly or enter a federal facility, and explicitly state that Real ID will be considered for a number of other functions including receiving a passport, military common access card, and transportation worker identification card.

*Id.* at 8.

The states' frustration stemmed from the role that their agencies would be forced to play, specifically the increased burden on DMV and Vital Statistics offices. These contentions pushed many states to enact legislation prohibiting funds from being allocated to enforcement of the Act.<sup>14</sup> Even states that proactively complied with the regulations by increasing security measures before the official enforcement of the legislation have struggled and ultimately failed to comply with the increasingly strict federal identification requirements.<sup>15</sup> Virginia is an example of one such state.<sup>16</sup>

Strain on state resources is not the only issue the Act has exacerbated. The Act has also led to a disproportionate and unjust impact on the most vulnerable populations of American society.<sup>17</sup> Lower income, homeless, and elderly individuals who are seeking identification often experience excessive economic and bureaucratic obstacles as a result of the Act.<sup>18</sup> Non-profit organizations, such as Foundry and Bread for the City, have detailed the increased demand of clients seeking their assistance in obtaining a Real ID Act compliant form of identification.<sup>19</sup> These organizations describe the high monetary costs and levels of frustration their clients face because of the unnecessary obstacles the Real ID Act presents.<sup>20</sup>

The ongoing confusion surrounding the Act, the high cost of enforcement for government and nonprofit organizations, and the unduly burdensome restrictions the Act imposes on vulnerable citizens are all evidence that the Real ID Act was ill-conceived and that its enactment and implementation are exceedingly flawed. Despite the allegedly benign motivation for the Act, this Comment will argue that any marginal benefits in national security resulting from the Act do not ultimately outweigh the burden it places on the states and the hardship it causes American citizens. In light of these shortcomings, the

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14. Kelley Beaucar Vlahos, *Several US States Seek To Kill Federal 'Real ID' Requirements*, BANDERAS NEWS (Feb. 2007), <http://www.banderasnews.com/0702/nw-realid.htm>. The article cites Maine and Montana contesting the Act, stating: "Montana is just one of at least 10 states considering bills to reject the Real ID Act . . . . Maine lawmakers last week passed a resolution rejecting the federal Real ID legislation and calls on the state to ignore the rules." *Id.*

15. Kristi King, *Virginia Licenses Fail to Comply with Security Rules*, WTOP (Sept. 28, 2015), <https://wtop.com/virginia/2015/09/virginia-licenses-fail-comply-security-rules-deadline-looms/>.

16. *Id.*

17. Patrick Marion Bradley, *The Invisibles: The Cruel Catch-22 of being Poor with No ID*, WASH. POST (June 15, 2017), [https://www.washingtonpost.com/lifestyle/magazine/what-happens-to-people-who-cant-prove-who-they-are/2017/06/14/fc0aaca2-4215-11e7-adba394ee67a7582\\_story.html?utm\\_term=.6120aa6f04b4#comments](https://www.washingtonpost.com/lifestyle/magazine/what-happens-to-people-who-cant-prove-who-they-are/2017/06/14/fc0aaca2-4215-11e7-adba394ee67a7582_story.html?utm_term=.6120aa6f04b4#comments).

18. Sari Horwitz, *Getting a Photo ID So You Can Vote Is Easy. Unless You're Poor, Black, Latino or Elderly*, WASH. POST (May 23, 2016), [https://www.washingtonpost.com/politics/courts-law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972\\_story.html?utm\\_term=.2dc069c55544](https://www.washingtonpost.com/politics/courts-law/getting-a-photo-id-so-you-can-vote-is-easy-unless-youre-poor-black-latino-or-elderly/2016/05/23/8d5474ec-20f0-11e6-8690-f14ca9de2972_story.html?utm_term=.2dc069c55544).

19. Bradley, *supra* note 17.

20. *Id.*

need for reform is clear. State agencies and vulnerable individuals cannot afford to continue without significant improvements to the Act.

Part I of this Comment will provide a background of the Real ID Act, including its controversial enactment, flawed implementation, and the unfortunate effects the Act has on vulnerable citizens. Part II will examine the various approaches states have employed during their process of coming into compliance with the progressively stricter federal standards. This examination will focus particularly on the states which are still struggling to comply with the Act and the repercussions that the citizens of non-compliant states may face.

Part III of the Comment will transition into the most critical critiques of the Real ID Act, focusing on the unique issues that lower income and elderly individuals face as a result of the Act. The majority of these issues arise from the relatively high costs and significant bureaucratic barriers that the new legislation produces for those trying to prove their identity.

Lastly, this Comment will offer various practical and legal solutions that must be implemented if states and citizens are expected to comply with the Real ID Act. Specifically, it will address the need for reform in the shape of specific legal remedies, reduced barriers for vulnerable citizens, and increased bureaucratic support and accessibility.

## I. HISTORY OF THE REAL ID ACT

### *A. Driving Forces Behind the Real ID Act: A Country in Turmoil.*

The Real ID Act is a direct result of the September 11, 2001 terrorist attacks that stunned the nation.<sup>21</sup> In response to these unprecedented attacks, President George Bush formed the Office of Homeland Security within the White House in 2001.<sup>22</sup> This office released a report known as the “National Strategy for Homeland Security,” which highlighted the role that states played in homeland security.<sup>23</sup> The terrorists involved in the attacks used fraudulent papers to obtain their identifying documents, driver’s licenses, and airline tickets.<sup>24</sup> As a result of this, the report focused heavily on the need to prevent access to fraudulent driver’s licenses in an effort to prevent future terrorist attacks.<sup>25</sup> The report suggested that these new security measures were primarily the states’ responsibility.<sup>26</sup>

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21. *History of Federal Requirements*, *supra* note 1.

22. *Id.*

23. *Id.* “The law, among other things, required the U.S. Secretary of Transportation to establish a negotiated rule making process to establish minimum standards for state-issued driver’s licenses (DL) and identification cards (ID).” *Id.*

24. See Janice Kephart, *Driver’s License Insecurity*, CTR. FOR IMMIGRATION STUDIES (Sept. 4, 2012), <https://cis.org/Memorandum/Drivers-License-Insecurity>.

25. See *History of Federal Requirements*, *supra* note 1.

26. *Id.*

In addition, President Bush created the bipartisan National Commission on Terrorist Attacks Upon the United States (9/11 Commission) in late 2002.<sup>27</sup> The Bush administration instructed the 9/11 Commission to “prepare a full and complete account of the circumstances” of the 9/11 attacks and “provide recommendations designed to guard against future attacks.”<sup>28</sup>

In line with its charter, the 9/11 Commission released *The 9/11 Commission Report*, which described the necessary reforms it believed the nation should implement to increase the security of the nation and safeguard against future attacks.<sup>29</sup> The report specifically instructed the federal government to “set standards for the issuance of birth certificates and sources of identification, such as driver’s licenses.”<sup>30</sup>

Based on the advice put forth in the Commission’s Report, President Bush signed into law the “Emergency Supplemental Appropriations for Defense, the Global War on Terror, and Tsunami Relief, 2005,”<sup>31</sup> the legislation containing the Real ID Act of 2005. According to the Department of Homeland Security (DHS), the Act “establishes minimum security standards for license issuance and production” and prohibits federal agencies from accepting non-compliant identification cards from individuals for the purpose of traveling and other official uses.<sup>32</sup> The Act resulted in a narrow list of acceptable documents that individuals could use to prove their identity and required additional documents to prove residency.<sup>33</sup> It also increased the amount of information that physical IDs had to contain.<sup>34</sup> Without a federally compliant form of ID, citizens are barred from entering federal facilities and commercial aircraft.<sup>35</sup> The IDs with increased security features are also referred to as “[E]nhanced [D]river’s [L]icenses (EDLs)” and serve the double purposes of “proof of identity and U.S. citizenship.”<sup>36</sup>

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27. *About the Commission*, NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S. (Aug. 21, 2004), <http://govinfo.library.unt.edu/911/about/index.htm>.

28. *Id.*

29. See THE 9/11 COMMISSION REPORT, *supra* note 3, at 399–423; see also *About the Commission*, *supra* note 27.

30. THE 9/11 COMMISSION REPORT, *supra* note 3, at 390.

31. Emergency Supplemental Appropriations Act for Defense, The Global War on Terror, and Tsunami Relief, 2005 (REAL ID Act), Pub. L. No. 109-13, §§ 101–502, 119 Stat. 231, 302–323 (2005).

32. REAL ID, DEP’T OF HOMELAND SEC. (Dec. 18, 2018), <https://www.dhs.gov/real-id> [hereinafter REAL ID]. Minimum issuance standards include: photo identification, documentation of birth date, social security number, and proof of address. REAL ID Act § 202(c).

33. REAL ID Act § 202. The Act also required that the ID-issuing agencies implement “security features designed to prevent tampering, counterfeiting, or duplication of the document for fraudulent purposes.” *Id.* § 202(b)(8).

34. *Id.* § 202(b).

35. REAL ID, *supra* note 32.

36. Hannah Jones, *What is “Real ID” and Will It Affect Your Travel Plans?*, DEPART SMART (Mar. 24, 2017), <https://departsmart.org/what-is-real-id-and-will-it-affect-your-travel-plans/>.

*B. Real ID: Initial Backlash to the Act and Negative Predictions Come True.*

Many legislators criticized the Act as being incomplete and rushed, weakening state and public support for it.<sup>37</sup> For many, the Act lacked legitimacy because its passage failed to follow a “true democratic process.”<sup>38</sup> Congress did not thoroughly debate the Act and instead passed it as a component of a “must-pass” emergency relief supplemental bill.<sup>39</sup> In addition to opposition to the Act’s enactment process, critics, including state legislators and government employees, expressed concern that the Act was written in a way that would place an unnecessary burden on many state agencies and their individual citizens.<sup>40</sup>

In response to DHS’s proposed federal regulations to implement the Act, the ACLU issued a report identifying the myriad of problems produced by Real ID.<sup>41</sup> The report analyzed 56 different issues surrounding the passage of the Act and concluded that the “regulations utterly fail to remedy the problems with Real ID.”<sup>42</sup> Of particular concern to states, the report noted the strain on state governmental agencies, such as a state’s DMV or Vital Statistics offices.<sup>43</sup> More troubling was the potential for “[d]isproportionate burden on low-income individuals,” the “[b]urdens on right to travel,” and the high cost of the regulations to citizens.<sup>44</sup> The next Section will focus on the latter.

*C. The Real ID Act Places an Undue Burden on Individuals Seeking Identification.*

Prolonged wait times at the DMV may seem like a minor imposition. However, the ACLU report emphasizes that the burden the Real ID Act would place on the DMV and similar agencies is not insignificant.<sup>45</sup> The report explains initial applications and renewals for Real IDs would need to take place in person, leading to an increase in already lengthy wait times.<sup>46</sup> The report also

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37. Gerald L. Neuman, *On the Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 136 (2007); *Real Answers: FAQ on the Real ID Act*, *supra* note 11.

38. *Real Answers: FAQ on the Real ID Act*, *supra* note 11. State legislators, non-governmental organizations, and individuals represent a portion of the groups that expressed concern over the Act. *Id.*

39. Neuman, *supra* note 37, at 136; *Real Answers: FAQ on the Real ID Act*, *supra* note 11.

40. *ACLU Scorecard On Final Real ID Regulations*, ACLU 3, 11 (Jan. 17, 2008), [https://www.aclu.org/sites/default/files/field\\_document/asset\\_upload\\_file162\\_33700.pdf](https://www.aclu.org/sites/default/files/field_document/asset_upload_file162_33700.pdf); *New Federal Regulations*, *supra* note 13, at 1.

41. *ACLU Scorecard on Final Real ID Regulations*, *supra* note 40, at 1. The report compiled concerns from diverse parties, “including privacy advocates, domestic violence victims, anti-government conservatives, religious leaders, civil libertarians and DMV administrators.” *Id.*

42. *New Federal Regulations*, *supra* note 13, at 1.

43. *See ACLU Scoreboard on Final Real ID Regulations*, *supra* note 40, at 11–12.

44. *New Federal Regulations*, *supra* note 13, at 1, 5, 20.

45. *Id.* at 3.

46. *Id.*

notes the increased time that individuals would have to invest in obtaining any new documents they need in order to apply for a new, compliant ID.<sup>47</sup>

While increased wait times and additional documents would present only a mild inconvenience for financially stable citizens, the report predicted that the Act would have far-reaching consequences on low-income individuals.<sup>48</sup> The report warns: “It is feared poorer people will find it harder not only to absorb higher license-issuance or renewal fees, but also to skip what will sometimes be multiple days of work in order to stand in long queues to prove their identities in order to obtain a Real ID.”<sup>49</sup>

The added financial strain and extensive time investments constitute only a few of several severe impacts on individuals. The report also warned that the Act could result in obstacles to an individual’s constitutional right to travel.<sup>50</sup> The report cautioned that the regulations would limit the ability to “fly or travel via federally regulated modes of travel such as plane or ship.”<sup>51</sup> The report also criticizes the Act for its constitutional implications concerning the right of assembly and petition because the Act would prevent those without compliant IDs from entering federal buildings.<sup>52</sup>

The report contains many other warnings about the implications of the Act, but it concludes by saying, “DHS cannot be blamed for such problems when they arise out of what is, at its core, simply an ill-conceived and impossible law.”<sup>53</sup> Perhaps its most chilling conclusion is that the Act does not seek to ameliorate the problems it creates.<sup>54</sup> It instead “encourages the states to come up with a solution.”<sup>55</sup>

*D. The Real ID Act Results in Exorbitant Costs to States and Is Effectively an Unfunded Federal Mandate.*

In addition to the high cost to individuals, the report estimates that Real ID will cost states approximately \$23.1 billion.<sup>56</sup> At the time the report was released, Congress had allocated a mere “\$40 million to offset Real ID costs.”<sup>57</sup>

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47. *Id.*

48. *Id.* at 5.

49. *Id.*

50. *Id.* at 20.

51. *Id.*

52. *Id.* The ACLU report warns, “[l]ack of a Real ID compliant license would bar a citizen from a face-to-face meeting with his or her elected or appointed government representatives.” *Id.*

53. *Id.* at 1. The report listed fifty-six potential issues with the regulations ranging from possible driving disruptions as a result of increased verification procedures to concerns that the regulations have the potential to create a national ID and single interlinked database, leading to increased fraud. *See id.* at 7–8 (discussing the various ways the law impacts individuals and states).

54. *Id.* at 1.

55. *Id.*

56. *Id.* at 10.

57. *Id.*



As a result, many concluded that the Act amounted to an unfunded federal mandate.<sup>58</sup> Opponents argued that states were not provided proper funding to account for the sweeping legislation.<sup>59</sup> They warned that “costs would ultimately be borne by the residents of each state—if not in the form of higher fees at the DMV, then in the form of higher taxes.”<sup>60</sup> In any scenario, opponents argued that absent appropriate funding, the states and their citizens would ultimately bear the Act’s costly burden.<sup>61</sup>

Despite the significant initial backlash to the Act, Real ID began its official implementation in 2013 with the DHS announcing the beginning of enforcement.<sup>62</sup> As a result of the significant barriers prompted by the Act, including funding and the need to create new bureaucratic practices, the implementation allowed for deferments and delayed implementation procedures.<sup>63</sup> The next Section of this Comment will examine the barriers to successful implementation of the Act and the various approaches that states and citizens have been forced to employ in attempting to comply with it.

## II. CRITIQUE OF THE REAL ID ACT’S IMPLEMENTATION AND IMPACT ON SOCIETY

States began the process of compliance in 2013.<sup>64</sup> Since then, many states have indeed experienced the problems that experts predicted at the Act’s inception.<sup>65</sup> As of 2017, more than twenty states are still struggling to comply

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58. *Id.*

59. *Real Answers: FAQ on the Real ID Act*, *supra* note 11.

60. *Id.*

61. *Id.*; *see also New Federal Regulations*, *supra* note 13, at 10.

62. *History of Federal Requirements*, *supra* note 1.

63. *Id.* According to the National Conference of State Legislators (NCSL): DHS organized states into three groups based on their standing with regards to REAL ID compliance. The first group, consisting of 13 states (Colorado, Connecticut, Delaware, Georgia, Iowa, Indiana, Maryland, Ohio, South Dakota, Tennessee, West Virginia, Wisconsin, and Wyoming) was found to have met the standards of the REAL ID Act of 2005 for driver’s licenses and identification cards. The second group consisted of those states that are not yet compliant with the standards but have contacted DHS regarding the status of their implementation efforts. The third group consists of states from which DHS has not received any information regarding that state’s REAL ID implementation efforts.

*Id.*

64. *See id.* Republican Senator Warren Limmer of Minnesota cited privacy concerns to explain why Minnesota was hesitant to come into compliance stating, “Now we’re more concerned about the efficiency of getting on an airliner rather than protecting the data privacy rights of our citizens. And I’m somewhat taken aback because, quite honestly, I think the federal government is using a heavy club to bring the states into submission.” Brian Naylor, *Homeland Security Begins Crackdown On ‘Real IDs’*, NPR (Jan. 8, 2016), <http://www.npr.org/2016/01/08/462412582/homeland-security-begins-crackdown-on-real-ids>.

65. *See id.*; *see also History of Federal Requirements*, *supra* note 1.

with the new regulations.<sup>66</sup> The law has also, unfortunately, resulted in many of the societal injustices that opponents of the Act feared.<sup>67</sup>

According to DHS, “23 states still operating under extensions, which delay their Real ID mandate, have until October 10th [2018] to comply.”<sup>68</sup> Compliance is critical if citizens of a state wish to exercise their fundamental right to travel, including transportation on commercial air flights which the Act has the potential to burden.<sup>69</sup> According to the ACLU report, “The situation is particularly acute for residents of Hawaii or Alaska who often have no choice but to fly or travel via federally regulated modes of travel such as plane or ship.”<sup>70</sup> This Section will explore the approaches and solutions that states are employing to make compliance more feasible. In doing so, this Section will evaluate the relative effectiveness of these various approaches in assisting state and citizen compliance with this complex legislation.

*A. States are Struggling to Comply with the Act Due to Exorbitant Costs and Excessive Requirements.*

As of October 2017, twenty-two states had failed to comply with the standards put forth in the Act.<sup>71</sup> This has forced DHS to grant extensions to seventeen states, leaving many citizens in a panic.<sup>72</sup> The high costs of compliance to states and the additional bureaucratic barriers necessary for the Act, such as creating more secure machines for verifying IDs, has contributed to states’ inability or reluctance to comply with the Act.

Virginia provides a helpful example of the difficulties many states are struggling with as a result of the complex Act.<sup>73</sup> Virginia is a unique example because almost half of the ID cards used by the 9/11 attackers were driver’s licenses from Virginia branches.<sup>74</sup> As a result, Virginia led the way in ID security reform as “the first state to try to increase the security of its driver’s

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66. See *REAL ID*, *supra* note 32; see also Brianna Chambers, *Here’s Why Travelers From 22 States Could Face Conflict With Domestic Flights in 2018*, *AJC* (Oct. 18, 2017), <https://www.ajc.com/news/national/travelers-from-states-will-need-passports-for-domestic-flights-2018/iKabYtavZrrDvX4VpGyJBM/?t9QEPn>.

67. See Interview with Danielle Moise, Staff Attorney, Bread for the City, in Washington, D.C. (Nov. 2, 2017) [hereinafter Interview with Danielle Moise]; see also Bradley, *supra* note 17.

68. David Grossman, *You Might Soon Need a New State ID To Fly Domestic*, *POPULAR MECHANICS* (Jan. 9, 2018), <http://www.popularmechanics.com/flight/airlines/a14799186/real-id-domestic-flying/>.

69. *New Federal Regulations*, *supra* note 13, at 20.

70. *Id.*

71. See *REAL ID*, *supra* note 32; see also Chambers, *supra* note 66.

72. Chambers, *supra* note 66.

73. Luz Lazo, *Virginia among States Scrambling To Comply With Federal Real ID Law*, *WASH. POST* (May 29, 2017), [https://www.washingtonpost.com/local/trafficandcommuting/virginia-among-states-scrambling-to-comply-with-federal-real-id-law/2017/05/29/2195d8e8-3cd2-11e7-8854-21f359183e8c\\_story.html?tid=graphics-&utm\\_term=.bbbc052faa3c](https://www.washingtonpost.com/local/trafficandcommuting/virginia-among-states-scrambling-to-comply-with-federal-real-id-law/2017/05/29/2195d8e8-3cd2-11e7-8854-21f359183e8c_story.html?tid=graphics-&utm_term=.bbbc052faa3c).

74. *Id.*

licenses after the Sept. 11 attacks,” and with a great deal of support from Virginia legislators.<sup>75</sup>

Despite the progressive steps that Virginia’s legislators and state agencies have taken, Virginia remains one of the many states still struggling to comply with the Act.<sup>76</sup> As a result of insufficient government guidance, Virginia officials have been unsuccessful in their attempt to implement the regulations for over a decade.<sup>77</sup> The complexity of the legislation and high cost of implementation are significant causes of this failure.<sup>78</sup> For example, the regulations would require that an individual’s Social Security Number (SSN) be verified during every application and subsequent renewal for his or her driver’s license.<sup>79</sup>

Brandy Brubaker, spokesperson for Virginia’s DMV, stated, “Since we have already verified every SSN in our active records with the Social Security Administration, we feel that performing this re-verification adds no value to the security of our credentials and is an unnecessary use of resources and taxpayer dollars.”<sup>80</sup> While Brubaker now expresses confidence that Virginia will be compliant by 2018, the repeated extensions and persistent confusion has cost Virginia roughly \$20.7 million.<sup>81</sup>

The problems Virginia faces are not unique. Even states that have “successfully” implemented the Act have concerns about compliance by the 2020 deadline. In North Carolina, DMC Commissioner Torre Jessup expresses concern that DMV offices will be overwhelmed with requests for the new IDs, which must be obtained in person.<sup>82</sup> Jessup cautions:

We need people to come in now . . . . If we set out to achieve a goal of getting every driver’s license holder a REAL ID by this deadline, we’re talking about 220,000 additional people coming through our offices each month. We can’t handle that with our current infrastructure, and we definitely can’t handle it if everybody waits

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75. *Id.*

76. *Id.* Missouri is yet another state that has struggled to come into compliance with the 2005 Act. Kathryn Hardison, *Missouri needs Real ID extension for air travel in 2018*, MISSOURIAN (Aug. 31, 2017) [https://www.columbiamissourian.com/news/state\\_news/missouri-needs-real-id-extension-for-air-travel-in/article\\_44b8b1ea-8dcc-11e7-a224-b749342265ef.html](https://www.columbiamissourian.com/news/state_news/missouri-needs-real-id-extension-for-air-travel-in/article_44b8b1ea-8dcc-11e7-a224-b749342265ef.html).

77. Lazo, *supra* note 73.

78. *Id.*

79. *Id.*

80. King, *supra* note 15.

81. Lazo, *supra* note 73.

82. Richard Stradling, *Think DMV Lines Are Long Now? Imagine If 4 Million People Wait To Get Their REAL ID*, NEWS & OBSERVER (Nov. 28, 2017), <http://www.newsobserver.com/news/traffic/article186824703.html>. According to the paper, DMV commissioner Torre Jessup “expects as many as 4 million North Carolinians will want a REAL ID before October 2020, and he fears too many of them will wait until the last minute to come in.” *Id.*

until the last minute. And it would be a disaster. So we've got to start now.<sup>83</sup>

Lack of funding to states could be heavily to blame.<sup>84</sup> Some states, including Oklahoma, cite budget shortages as a primary reason for failing to comply.<sup>85</sup> Many states as well as other opponents of the Act have criticized the regulation as an unfunded federal mandate.<sup>86</sup> Unfunded mandates occur “when a new piece of federal legislation requires another entity to perform functions for which it has no funds.”<sup>87</sup>

The Real ID Act was effectively an unfunded mandate because it required massive changes with limited financial support to the necessary entities, including government, private, and non-profit sectors.<sup>88</sup> Specifically, the DHS predicted that implementation of the Act would cost non-profits and states approximately \$9.9 billion.<sup>89</sup> However, the Act appropriated only “\$90 million in federal funds to pay for Real ID—less than 1% of the estimated cost.”<sup>90</sup>

DHS's flawed methods in calculating the cost make the lack of funding even more egregious. The ACLU report examines the full cost of the Act and flags several concerns.<sup>91</sup> First, the \$9.9 billion estimation ignores the expenses required to build the verification systems necessary to verify the various documents needed for a Real ID.<sup>92</sup>

As the report points out, “The regulations also state that ‘DHS is committed to expediting and subsidizing the improvement, design, development, deployment, and operation of verification systems’ . . . but do not include a line

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83. *Id.*

84. *Fuzzy Math and the Real Cost of Real ID*, ACLU, <https://www.aclu.org/other/fuzzy-math-and-real-cost-real-id?redirect=cpreldirect/33690> (last visited Oct. 9, 2018).

85. Chambers, *supra* note 66; *see also Oregon's Real ID Bill Passes House, Moves To Governor's Desk For Signature*, KATU (July 6, 2017), <http://katu.com/news/local/oregons-real-id-bill-passes-house-moves-to-governors-desk-for-signature>. Oregon has failed to comply with the Act for the past twelve years. *Id.* Oregon Representative Mike Nearman cites “a petty dispute with the federal government,” which “threatens to cause significant inconvenience to Oregonians, especially those who want to travel by air or access secure federal buildings.” *Id.*

86. *See Fuzzy Math and the Real Cost of Real ID*, *supra* note 84.

87. Kimberly Amadeo, *Unfunded Mandates: Definition, Examples, Need for UMRA*, BALANCE (Aug. 2, 2018), <https://www.thebalance.com/unfunded-mandates-definition-examples-need-for-umra-3305903>.

88. *See New Federal Regulations*, *supra* note 13, at 1–2.

89. *Fuzzy Math and the Real Cost of Real ID*, *supra* note 84.

90. *Id.*

91. *See id.*

92. *Id.* Other estimates approximate that Real ID could cost the states \$11 billion, a conservative estimate. *New Federal Regulations*, *supra* note 13, at 10. According to the ACLU report, “The regulations acknowledge that the . . . estimate is inadequate and that the actual cost of Real ID will be \$23.1 billion.” *Id.*

item for this in the cost table.”<sup>93</sup> Lack of funding and direction have exacerbated confusion and further burdened government workers.<sup>94</sup>

In addition to ignoring the cost of constructing verification systems, the DHS regulations also fail to address the ongoing expenses related to the Act’s continuing costs.<sup>95</sup> The report points out that a large portion of DMV transactions are in the form of license renewals and that Real ID will have a significant impact on these transactions.<sup>96</sup> The regulations may cause citizens to have to renew IDs more frequently, “whenever there is a ‘material change’ to their identity information.”<sup>97</sup> Although this could increase the frequency of renewal cycles in states, DHS does not consider this possibility and therefore fails to acknowledge the expenses it may entail.<sup>98</sup>

Lastly, the estimations outlined in the regulations assume “that only 75% of eligible driver’s license and ID card holders will ever get a Real ID.”<sup>99</sup> This assumption allows DHS to ignore twenty-five percent of the potential cost required for implementation. This is disconcerting as one of the purported purposes of Real ID is to “set standards for the issuance of sources of identification.”<sup>100</sup>

Identification is becoming a vital part of American society because we use it “to authenticate eligibility for employment, voting, [and] access to public benefits.”<sup>101</sup> Operating on the assumption that twenty-five percent of Americans will never get a Real ID undermines the purpose of requiring one.<sup>102</sup> This omission functions as a blatant attempt to stretch limited funds at the states’ expense. This assumption on the part of DHS indicates that DHS’s “solution” to funding the Act is simply to ignore the actual costs it requires.

#### *B. Strain on Non-Government Organizations.*

The costs associated with the Act come in the form of increased traffic and strain to DMV departments, but can also affect other government agencies, such

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93. *Fuzzy Math and the Real Cost of Real ID*, *supra* note 84.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *REAL ID*, *supra* note 32.

101. *Fuzzy Math and the Real Cost of Real ID*, *supra* note 84.

102. *See id.*

One incredible feature of this calculation is DHS would allow persons to substitute their foreign passport for a Real ID or other US issued document. By permitting the use of foreign passports as travel documents DHS completely undercuts the security rationale for Real ID. All of the 9/11 hijackers held foreign passports, for example, which under DHS’s assumed Real ID security scheme, they could use to board a commercial airplane.

*Id.*

as vital records offices.<sup>103</sup> The expenses are also thrust onto non-government entities, such as non-profit organizations and churches.<sup>104</sup> For example, Bread for the City, a Washington, D.C. based non-profit organization that works to “alleviate poverty and rectify the conditions that perpetuate it,”<sup>105</sup> hired a full-time attorney in 2016 to address the estimated 1,000 client inquiries it received concerning identification issues.<sup>106</sup>

Religious organizations are also attempting to fill in voids for government agencies struggling to provide proper assistance due to inadequate federal funding.<sup>107</sup> This often comes in the form of financial assistance, but also includes assistance filling out and requesting documents.<sup>108</sup> Religious organizations around the country have spent up to \$70,000 a year on ID assistance, with a church in Dallas allocating \$50,000 a year to ID assistance.<sup>109</sup>

Washington, D.C.’s Foundry United Methodist Church (Foundry) spends roughly \$25,000 annually.<sup>110</sup> Foundry receives referrals from “nearly 100 social-service groups, including D.C. agencies such as Vital Records, the DMV,” and many others.<sup>111</sup> While the organizations strive to help citizens, they also experience frustrations with the current status quo. Foundry’s Director of Social Justice Ministries, Reverend Ben Roberts, criticized the irony behind the requests for help on verification documents remarking that, “You would think that government agencies would have a way to do this themselves, since they are the ones issuing the documents in the first place.”<sup>112</sup>

A cruel cycle has developed. Non-government organizations are looking to government entities to help them solve problems created by the Real ID Act, and government organizations are looking for support from those that enacted the regulations, but all are receiving little support or guidance.<sup>113</sup>

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103. Interview with Danielle Moise, *supra* note 67.

104. See Bradley, *supra* note 17.

105. Danielle Moise, Testimony on Behalf of Bread for the City Before the DC Council Committee on Transportation and the Environment (Feb. 10, 2017) [hereinafter Danielle Moise Testimony].

106. Bradley, *supra* note 17; see also Interview with Danielle Moise, *supra* note 67. Bread for the City informally began this program in 2014. *Id.*

107. See Bradley, *supra* note 17; Interview with Danielle Moise, *supra* note 67. According to Foundry’s website, the church’s walk-in ministry “seeks to restore to our low-income and homelessness neighbors the documents they need to obtain jobs, housing, education, or services in the community.” *I.D. & Walk-In Ministry*, FOUNDRY, <http://foundryumc.org/walk-mission> (Oct. 12, 2018).

108. Bradley, *supra* note 17.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. See *id.*

While the bureaucratic and monetary strain on government and non-government entities is troubling, more troubling is the impact that the regulations have had on less fortunate populations in our society. The most critical issues requiring the most creative solutions have fallen on the shoulders of these citizens and the attorneys who assist them in their journey to obtain compliant identification.

The following Section will examine the significant issues that the regulations produce for lower-income, homeless, and elderly populations. Next, it will examine the strategies employed by those working on the “frontlines” of the Real ID Act by helping citizens obtain IDs, and why those solutions are ultimately not enough.

*C. The REAL ID Act Has Proved Detrimental to Lower Income, Homeless, and Elderly Individuals.*

Even if a flawless implementation of Real ID in government agencies was possible, there remains a considerable impact that the Act has on lower income, homeless, and elderly populations.<sup>114</sup> For many vulnerable people, the Act presents unique challenges, what many have described as a “Catch-22,” in which people are unable to obtain identification because they are missing one or more of the permitted methods of proving their identity.<sup>115</sup> A person seeking a new ID would need to provide a birth certificate to the DMV.<sup>116</sup> However, requesting a copy of a birth certificate requires a DMV-issued ID, leaving many in a situation where it is challenging to prove their own identity.<sup>117</sup>

In an interview with Bread for the City (BFTC) attorney, Danielle Moise describes her typical client as someone seeking an ID in order to work.<sup>118</sup> Using D.C. as an example, she describes the process her clients must go through to obtain IDs.<sup>119</sup> Real ID requires that a D.C. citizen provide proof of his or her Social Security Number, proof of Identity, and proof of D.C. residency.<sup>120</sup> From these three categories, there is a list of acceptable documents that individuals may use to verify the information.<sup>121</sup>

In her February 10, 2017 testimony before the D.C. Council Committee on Transportation and the Environment, Moise criticized the list of accepted documents, stating that: “Most, if not all, of the accepted documents for each group are based on private wealth, property, or employment—all documents that individuals living in poverty have difficulty obtaining.”<sup>122</sup> First, while Social

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114. Horwitz, *supra* note 18.

115. Bradley, *supra* note 17.

116. Danielle Moise Testimony, *supra* note 105.

117. *Id.*

118. Interview with Danielle Moise, *supra* note 67.

119. *Id.*

120. *Id.*

121. *Id.*

122. Danielle Moise Testimony, *supra* note 105.

Security cards are free, the documents needed to acquire one are often the very documents that those in need of ID are trying to obtain, including birth certificates and drivers licenses.<sup>123</sup> Additionally, people may only claim a certain number of Social Security cards in their lifetime which places even more barriers on those obtaining IDs.<sup>124</sup>

Even considering the difficulties in providing verification of one's SSN, it seems to be the most straightforward part of the equation. In contrast, the process of proving one's identity generates more significant obstacles. To establish one's identity, a citizen must offer either a birth certificate or passport.<sup>125</sup> Moise points out that the majority of her clients do not possess passports, leaving their birth certificate as the only means available to prove their identities.<sup>126</sup> Moise finds that her clients are generally in one of two situations regarding birth certificates: those seeking to replace their birth certificates and other documents, and those that are seeking to obtain birth certificates for the first time.<sup>127</sup>

The first class of individuals, those seeking to replace their birth certificates, often come to Moise after having the entirety of their documents lost or stolen.<sup>128</sup> Since many clients are missing IDs in addition to birth certificates, they are unable to provide an ID sufficient to get a new copy of their birth certificates.<sup>129</sup> Those clients then have to go through additional barriers, such as having a close family member or attorney verify that they are who they claim to be.<sup>130</sup> With each additional barrier, many worry that those seeking IDs will be discouraged from trying altogether as they are "losing out on the jobs, housing, and other services they need to obtain or maintain self-sufficiency."<sup>131</sup>

Elderly individuals face a range of more complicated legal issues because many elderly citizens never possessed IDs in the first place. This situation occurs as a result of several reasons. First, some "DC residents who were born at home and whose births were never registered" were never provided birth

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123. See *Learn What Documents You Will Need To Get A Social Security Card*, SOC. SEC. ADMIN., <https://www.ssa.gov/ssnumber/ss5doc.htm> (last visited Oct. 7, 2018) (listing a U.S. driver's license, state issued identification card, or passport as examples of the document required to establish one's identity and obtain a social security card); see also Interview with Danielle Moise, *supra* note 67.

124. Interview with Danielle Moise, *supra* note 67. "The Intelligence Reform and Terrorism Prevention Act (IRTPA) of 2004 (Public Law 108-458) limits the number of replacement SSN cards an individual may receive to 3 per year and 10 in a lifetime, beginning with cards issued on or after December 17, 2005." *RM 10205.400 Limits on Replacement SSN Cards*, SOC. SEC., <https://secure.ssa.gov/poms.nsf/lnx/0110205400> (last visited Oct. 7, 2018).

125. Interview with Danielle Moise, *supra* note 67.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. Danielle Moise Testimony, *supra* note 105; see also Bradley, *supra* note 17.



certificates.<sup>132</sup> Second, there are others “who were adopted, but not formally through a court process[,]” leaving them without official documentation of their identity.<sup>133</sup> These are common reasons in northern states with historically fewer segregation laws.<sup>134</sup> However, Rich Fiesta, Executive Director of Alliance for Retired Americans, points out that past segregation laws alternatively exacerbate the situation in the South.<sup>135</sup> Fiesta states, “[I]f you’re an older person of color and born in the south, you might not even have a birth certificate if you were born at home.”<sup>136</sup>

Individuals who never had a birth certificate are then forced to petition the court to obtain a “delayed birth certificate.”<sup>137</sup> As stated by the West Virginia Department of Health and Human Services, “A delayed birth certificate is any birth certificate not filed within one year of the date of birth.”<sup>138</sup> In order to apply for this, individuals must first apply to their local vital records division for a birth certificate and wait to receive a rejection letter.<sup>139</sup>

With that rejection letter, the citizen must then obtain a court date to petition the court for a delayed birth certificate.<sup>140</sup> Sometimes this causes individuals to realize that while they previously had a birth certificate, there are errors on the certificate that they now have to amend.<sup>141</sup> This leads to additional bureaucratic barriers and additional costs to the client.<sup>142</sup> The process in its entirety could take up to a year.<sup>143</sup>

Sadly, providing verification of both one’s SSN and proof of identity is still insufficient. Proof of residency is also required for those seeking a compliant

132. Danielle Moise Testimony, *supra* note 105.

133. *Id.* See Horwitz, *supra* note 18. Horwitz describes a common scenario for older individuals attempting to obtain identification:

Many of the residents struggling to obtain a valid photo ID are elderly and poor and were born in homes rather than hospitals. As a result, birth certificates were often lost or names were misspelled in official city records.

Hargie Randall, 72, was born in his family’s home in Huntsville, Tex., and has lived in the state his entire life. Randall, now living in Houston’s low-income Fifth Ward neighborhood, has several health problems and such poor eyesight that he is legally blind. He can’t drive and has to ask others for rides.

*Id.*

134. See Horwitz, *supra* note 18.

135. Beth Baker, *Why Too Many Older Adults Face Voting Obstacles*, FORBES (Nov. 3, 2016), <https://www.forbes.com/sites/nextavenue/2016/11/03/why-too-many-older-adults-face-voting-obstacles/#600e2534cb45>.

136. *Id.*

137. Interview with Danielle Moise, *supra* note 67.

138. *What is a Delayed Certificate of Birth?*, WVDHHR (Jan. 25, 2012), <http://www.wvdhhr.org/bph/hsc/vital/forms/DelayedBirth.pdf>.

139. Interview with Danielle Moise, *supra* note 67.

140. *Id.*

141. Danielle Moise Testimony, *supra* note 105.

142. *Id.*

143. *Id.*

Real ID in their home states.<sup>144</sup> Examples of acceptable proof of residency include utility bills and letters from government organizations such as the Internal Revenue Service (IRS).<sup>145</sup> Proof of owning a home in D.C. or receiving income provides the basis of the majority of acceptable documents used for proving residency.<sup>146</sup> For many lower-income individuals, bills or letters to a home that could be used to prove residency are often in someone else's name, making residency even harder to prove.<sup>147</sup> For individuals experiencing homelessness, they may have no proof of residency.<sup>148</sup> Those individuals then have to take yet another additional step of applying for homeless certification.<sup>149</sup>

Only certain social organizations provide homeless certifications, and it adds one more task to the laundry list that citizens must complete before obtaining vital identification.<sup>150</sup> Supporters of the Act argue that proof of residency serves to prevent fraud, particularly that individuals are lying about residency to take advantage of public benefits.<sup>151</sup> Moise dismisses these claims as baseless and in direct opposition of her experience with clients.<sup>152</sup> In her words, "They are not trying to commit fraud, they are not trying to do anything other than survive. And . . . try to make their lives a little better."<sup>153</sup>

Organizations such as Bread for the City try to help solve these types of issues, which have been exacerbated by the enactment of Real ID, by providing their clients with monetary and legal support. BFTC provides tokens for

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144. Interview with Danielle Moise, *supra* note 67.

145. *Id.* Moise suggests a number of proposed additional proofs of residency in her written testimony before the D.C. Council Committee on Transportation and the Environment, including:

Proof of public assistance; [e]mployer pay stubs, W-2, or 1099; [u]tility bill with applicant's name and address issued within last two years; [f]ederal or state tax return and proof of filing with current address; [a]uto, health, or life insurance policy of card; [r]ecord or ID card from an educational institution in the state which establishes enrollment; [v]ehicle or voter registration; [u]nexpired DC driver's license/ID card showing application's current residential address; Social Security documentation; [r]ent receipt; and [c]onfidential address program documents.

Danielle Moise Testimony, *supra* note 105.

146. *See* Interview with Danielle Moise, *supra* note 67.

147. *Id.*

148. Teresa Wiltz, *Without ID, Homeless Trapped in Vicious Cycle*, PEW CHARITABLE TRS. (May 15, 2017), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/05/15/without-id-homeless-trapped-in-vicious-cycle>; *see also* Interview with Danielle Moise, *supra* note 67.

149. Interview with Danielle Moise, *supra* note 67.

150. *Id.*

151. Jessica Zuckerman, *REAL ID Compliance: Enhancing Security, Respecting Liberty, and Reducing Fraud*, HERITAGE FOUNDATION (Nov. 14, 2015), <https://www.heritage.org/defense/report/real-id-compliance-enhancing-security-respecting-liberty-and-reducing-fraud>.

152. Interview with Danielle Moise, *supra* note 67.

153. *Id.*

transportation in combination with providing the funds to pay for birth certificates and IDs,<sup>154</sup> which often cost up to fifty dollars.<sup>155</sup>

Unfortunately, even non-profit and religious organizations cannot overcome every barrier created by Real ID. For example, if a client is born in a state other than D.C., where BFTC attorneys are licensed to practice, the attorney cannot petition the court in that state.<sup>156</sup> The client would have to travel to his or her birth state to petition the court there, a process that Moise describes as “unduly burdensome” for clients that have often lost their jobs, vital documents, and housing.<sup>157</sup>

Another proposed solution to verification issues involves incorporating the use of electronic birth certificates. D.C. Mayor Muriel Bowser has been working to expand this approach.<sup>158</sup> However, electronic birth certificates present potential privacy issues and require very secure software, which has the potential of slowing down the process of automation and adding extra costs.<sup>159</sup>

More promising are bills such as those passed by the D.C. Council in 2016 that would “waive birth certificate and DMV fees for those eligible for Medicaid and food stamps.”<sup>160</sup> Although the bill passed unanimously, it lacks funding because it was excluded entirely from the mayor’s fiscal budget for 2018.<sup>161</sup> Situations like this present a common theme throughout the Real ID Act’s history: without funding and proper instruction, even the most well-intentioned regulations will fail.

Even with the efforts of frustrated individuals and their dedicated attorneys, the process of obtaining documents sufficient to prove identity and applying for acceptable identification can take anywhere from months up until a year.<sup>162</sup> During this prolonged time period, people’s lives are on hold. Moise reminds us that “having your identifying documents is such a vital first step to doing any of the other stuff, that as a society, we say that people have to do.”<sup>163</sup> When we refuse to give people access to that first step, we deprive them of a fair chance to rehabilitate themselves or participate fully in society.<sup>164</sup>

The Real ID Act causes and fails to address a wide range of issues. These issues include the confusion of government agencies regarding enforcement, strains on the resources of non-profits and similar organizations, and often

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154. *Id.*

155. Wiltz, *supra* note 148.

156. Interview with Danielle Moise, *supra* note 67.

157. *Id.*

158. Bradley, *supra* note 17.

159. *See id.*; *see also New Federal Regulations Get an ‘F’*, *supra* note 13, at 11.

160. Bradley, *supra* note 17.

161. *Id.*

162. Danielle Moise Testimony, *supra* note 105.

163. Interview with Danielle Moise, *supra* note 67.

164. *Id.*

insurmountable barriers to lower-income and elderly individuals. These issues emphasize the urgency required to fix the the Real ID Act's regulations.

### III. TAKING RESPONSIBILITY FOR REAL ID: PROPOSALS FOR REFORMING THE REAL ID ACT

The primary rationale that proponents of the Real ID Act cite is the necessity for regulations designed to provide security and prevent fraud.<sup>165</sup> There is little research to support the proposition that the complex issue of national security can be ameliorated with a program that the ACLU describes as “a fundamentally misguided policy that will waste large amounts of money and other limited resources, and impose significant inconveniences, without improving our safety.”<sup>166</sup>

The Real ID Act was enacted in response to a great national tragedy. The Act began as a well-intentioned law attempting to prevent fraud and increase national security. However, its enactment was influenced by the circumstances that gave rise to it, specifically the terror that the nation experienced. As a result, the Act was not subject to the intense debate and planning that should be required of such a far-reaching piece of legislation, considering the consequences the Act has posed for so many Americans.

The existing regulations produce confusion and impose administrative costs on states that most cannot bear without federal funding. Because of these costs, states have struggled to comply with the Act for over a decade, with many states still failing to do so. Citizens have waded through murky bureaucratic waters, forced to spend resources they may not have in complex systems that offer them little relief. To help states and citizens effectuate the Act, federal legislators must do more.

Given the now widespread implementation of the law, this Section will focus on the need to re-visit the Act to address the many issues surrounding compliance and enforcement. It will also suggest practical remedies that states could employ to make the process less burdensome on states and individuals.

#### *A. Avenues For Aiding State Compliance Include Revision of the Act and Increased Funding.*

First, to assist the states, Congress should amend the Act to clarify it.<sup>167</sup> Clarity is critical for states still struggling to comply with the law, and for states who are in compliance but confronting the administrative burdens associated with enforcement.<sup>168</sup> Amendments to the Act should consider the constitutional and funding problems that states have faced, which have delayed the compliance

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165. See *REAL ID*, *supra* note 32; Zuckerman, *supra* note 151.

166. *New Federal Regulations Get an 'F'*, *supra* note 13, at 2.

167. See *id.* at 1.

168. *Id.* at 10–11.

process.<sup>169</sup> Without addressing the root issues the Act has caused, states will likely struggle with compliance or enforcement of the Act, and citizens will continue to suffer.

Additionally, Congress must consider ways to increase bureaucratic support within state agencies like the DMV and Vital Records offices.<sup>170</sup> One way to implement this would be to hire additional employees at state agencies that are affected by the Act, including grants from the federal government to compensate states and cover the new costs.<sup>171</sup> Additional employees would reduce the burden on agencies by assisting a smoother transition for the hundreds of thousands of people in each state that will require a new ID.<sup>172</sup> Considering the final implementation deadline of October 1, 2020,<sup>173</sup> this would operate as a temporary measure that states would have the option to phase out when administrative demands return to normal.

An alternative and less costly solution to these administrative burdens are to “grandfather in” those individuals who already have an ID from their state.<sup>174</sup> The Real ID Act requires certification of every document, not only for first-time applicants but also for subsequent ID renewals.<sup>175</sup> The Act should, instead, only require verification of identity documents when acquiring a brand-new ID and only require one proof of residency as opposed to two.<sup>176</sup> This could help alleviate congestion for administrations and reduce barriers to individuals.

Moise suggests that states should allow more DMVs to offer birth certificates at the DMV itself, to reduce the amount of traveling that citizens must do when collecting documents.<sup>177</sup> For example, Virginia and some other states have combined their Vital Records offices with the DMV, making it easier for citizens to acquire the necessary documents.<sup>178</sup> However, this has not been embraced on a national level, and legislators should consider writing this into the legislation itself. Increased staff and streamlined document locations would support a smoother transition into compliance with the Act and help to ensure long-term success.

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169. *Id.* at 10, 18–21.

170. Interview with Danielle Moise, *supra* note 67. Moise suggests that the DMV itself should increase its outreach and better inform citizens on what is now required under the new legislation. *Id.*

171. *Id.*

172. *See New Federal Regulations Get an ‘F’*, *supra* note 13, at 11.

173. Grossman, *supra* note 68.

174. *New Federal Regulations Get an ‘F’*, *supra* note 13, at 11.

175. *Id.* at 1.

176. *Id.*

177. Interview with Danielle Moise, *supra* note 67.

178. *Vital Records at DMV*, DMV NOW, <https://www.dmv.virginia.gov/general/#vital.html> (last visited Oct. 15, 2018).

*B. Alleviating the Burdens on Citizens is a Critical Step to Ensure Access to Identifying Documents.*

There are also practical and legal remedies that states should embrace if they want to support their citizens in the often-exhausting process of obtaining a new, compliant ID. First, Congress should amend the legislation to expand the list of documents acceptable as proof of residency.<sup>179</sup> Examples of documents that could offer alternative proof of residency include: “Proof of public assistance[,]” “[r]ecord or ID card from an educational institution in the state which established enrollment[,]” and evidence of “[v]ehicle or voter registration.”<sup>180</sup>

It is also vital that states embrace an exception process for individuals who, for whatever reason, “are simply unable to reasonably obtain the required proofs.”<sup>181</sup> Exception processes have proven to be a workable option regarding voting laws for elderly citizens over seventy years of age.<sup>182</sup> Moise suggests D.C. and other states employ an exception processing model similar to that of Colorado.<sup>183</sup>

In this model, “Once an applicant receives notice that [his or her] application for an ID is insufficient, he or she can apply for Exceptions Processing. The applicant then returns completed Exceptions Processing application, Notice of Incomplete ID application, and supplemental supporting documentation to [the] DC DMV.”<sup>184</sup> The supplemental information could include items such as voter registration cards or tax notices and bills.<sup>185</sup>

While obtaining IDs can be difficult, it is the price of IDs and accompanying documents that can often be too costly for lower-income individuals to overcome.<sup>186</sup> This is why states should also offer 100% free ID and birth certificate copies for individuals at or below 200% of the federal poverty line. This is a workable guideline as many non-profit and government agencies use

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179. Danielle Moise Testimony, *supra* note 105. Moise explains her central contention over proof of residency, commenting, “Most, if not all, of the accepted documents for each group are based on private wealth, property, or employment—all document that individuals living in poverty have difficulty obtaining.” *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*; see also *Applicants Who Are U.S. Citizens and Permanent Residents*, CDOR, <https://www.colorado.gov/pacific/dmv/applicants-who-are-us-citizens-and-permanent-residents> (last visited Jan. 12, 2019).

184. Danielle Moise Testimony, *supra* note 105. Moise proposes several additional documents that could be offered during Exceptions Processes, including: tax notices and bills, auto title/registration, US Census record, law enforcement records, letters of incarceration, school records or transcripts, yearbooks, student loan documents, hospital and immunization records, tax returns, or “[a]ny other verifiable document as determined by the Department which may serve to provide evidence of the applicant’s identity.” *Id.*

185. *Id.*

186. Bradley, *supra* note 17.

this as a guideline for access to assistance.<sup>187</sup> Without ID, people are denied access to shelters and housing services and other government benefits such as food stamps and Medicaid.<sup>188</sup> By charging for these vital documents, in addition to bureaucratic barriers, we are guaranteeing that individuals will experience a higher difficulty in rehabilitating their lives.<sup>189</sup>

Reverend Roberts views this as a moral issue. In his words, “If you’re not allowed to have a job because you don’t have an ID, then that’s a serious theological problem . . . . You’ve said not only do they not exist on paper, you’re denying them their piece of the image of God.”<sup>190</sup> Without access to housing services and jobs, people are not given a fighting chance.<sup>191</sup>

There is not a “one-size-fits-all” solution to the problems the Real ID Act has created. In order to help the states in effectuating the law, DHS should consider amending the regulations to address issues such as funding and the construction of new verification systems.<sup>192</sup> Federal and state legislators need to consider a combination of practical remedies and legal exceptions if they intend to help their citizens comply with Real ID. Regardless of what solution legislators implement, lack of action is not an option.

#### IV. CONCLUSION

The Real ID Act is a broad, sweeping law that is inherently flawed. Congress should revisit the legislation and subject it to actual debate, as opposed to including it as a component of “must-pass” emergency legislation. This will allow it to address some of the root problems with the legislation. This should include amending the Act to provide funding to states and other organizations to reduce the associated burdens on agencies and individuals. In addition, the legislation should lessen the requirements for acceptable verification. This should include a process for exceptions for individuals that are unable to produce copies of certain documents. Lastly, the legislation should include a plan for funding free identification and birth certificate copies for people at or below 200% of the federal poverty line.

Only once legislators are committed to addressing the problems and limitations created by Real ID will states and citizens begin to benefit from it. The Real ID Act is well-intentioned but inherently flawed, and that is why we must amend it as soon as possible.

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187. *Id.*; Interview with Danielle Moise, *supra* note 67.

188. Wiltz, *supra* note 148.

189. *See id.*

190. Bradley, *supra* note 17.

191. *Id.*

192. *See generally* *New Federal Regulations Get an ‘F’*, *supra* note 13, at 1–2.