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SUBMITTED VIA REGULATIONS.GOV

**COMMENTS ON:**

**U.S. Department of Homeland Security, Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes; Waiver for Mobile Driver’s Licenses, Docket No. TSA–2023–0002**

**SUBMITTED BY THE NATIONAL IMMIGRATION LAW CENTER, SURVEILLANCE RESISTANCE LAB, AND THE UNDERSIGNED ORGANIZATIONS**

The Transportation Security Administration (“TSA”), an agency of the Department of Homeland Security (“DHS”), invites comments on its notice of proposed rulemaking (“NPRM”) that seeks to “amend the REAL ID regulations to waive, on a temporary and State-by-State basis, the regulatory requirement that mobile or digital driver’s licenses or identification cards . . . must be compliant with REAL ID requirements to be accepted by Federal agencies for official purposes.”<sup>1</sup>

The National Immigration Law Center (“NILC”) and several other organizations submitted comments in response to DHS’ April 2021 Request for Information (“RFI”) regarding mDL rulemaking.<sup>2</sup> In those comments, our organizations raised concern that DHS’ RFI and subsequent federal rulemaking on mobile driver’s licenses and identification cards (collectively “mDLs”) could set the stage for a national identification system that presumes data-sharing and communication between state departments of motor vehicles (DMVs) and federal agencies, with serious privacy and security implications, particularly for immigrant communities.

NILC, the Surveillance Resistance Lab (“the Lab”), and additional signatories remain deeply concerned with DHS’ premature regulatory actions to fast-track mDL adoption at the risk of short-changing the privacy and security interests of U.S. citizens and noncitizens alike. We therefore submit the following comments on the proposed rule in its entirety, as well as in response to Specific Questions Nos. 8 and 9.<sup>3</sup> We strongly urge TSA to reconsider its proposed rule in light of the following concerns that TSA is:

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<sup>1</sup> Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes; Waiver for Mobile Driver’s Licenses, 88 Fed. Reg. 60056, 60056 (proposed Aug. 30, 2023) (to be codified at 6 C.F.R. pt. 37) [hereinafter “NPRM”].

<sup>2</sup> Nat’l Immigr. L. Ctr. et. al, Comment Letter on Request for Information on Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes; Mobile Driver’s Licenses (Jul. 29, 2021), <https://www.regulations.gov/comment/DHS-2020-0028-0041>.

<sup>3</sup> See NPRM at 60083.

1. stretching the bounds of its regulatory authority to waive through mDLs;
2. creating urgency, demand, and necessity to drum up mDL adoption;
3. facilitating, rather than preventing, technological lock-in and DHS mission creep over state driver's license programs;
4. sweeping aside important civil liberties and privacy interests, among other public, social costs, in its rush to regulate and promote mDLs;
5. overlooking the actual costs and fiscal consequences of mDLs; and
6. relying on nineteen industry standards and guidelines that are insufficient, functionally inaccessible, and unaccountable.

Established in 1979, NILC is one of the leading organizations in the U.S. exclusively dedicated to defending and advancing the rights and opportunities of low-income immigrants and their loved ones.<sup>4</sup> For many years, NILC has published articles, provided technical assistance, engaged in advocacy, and brought litigation on issues pertaining to driver's licenses, the REAL ID Act, and immigration enforcement.

The Surveillance Resistance Lab ("the Lab") is a think and act tank focused on state and corporate surveillance as one of the greatest threats to migrant justice, racial equity, economic justice, and democracy.<sup>5</sup> The Lab challenges the surveillance state and how it increases corporate power and state violence as not just a threat to privacy, but also as a threat to fundamental rights. To counter this threat, the Lab engages in investigative research, campaign incubation, advocacy, and organizing. The Lab is committed to movement building to fight for accountability and government divestment from technologies that expand systems of control and punishment (as well as suppress dissent and difference) in public spaces, schools, workplaces, and at and across borders.

## **I. TSA STRETCHES THE BOUNDS OF ITS REGULATORY AUTHORITY TO WAIVE THROUGH MDLS.**

Among the amendments to REAL ID regulations proposed in the NPRM, TSA's attempt to establish a process to temporarily waive compliance with certain REAL ID rules and permit federal agencies to accept mDLs reaches beyond the agency's delegated authority under the REAL ID Act of 2005 and the REAL ID Modernization Act (collectively, "the Acts"). Specifically, under the Acts, DHS has authority to prescribe standards, certify REAL ID compliance, and grant extensions of time to states in order to meet compliance requirements. However, it does not have authority to promulgate the waiver process described in the NPRM, which is designed to temporarily work around the agency's regulatory limits.

The subject of DHS' delegation of REAL ID regulatory authority to TSA is not publicly available and is likely improper. The DHS Secretary purportedly delegated authority to administer REAL ID to the Administrator of TSA pursuant to DHS Delegation No. 7060.2.1.<sup>6</sup>

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<sup>4</sup> See generally NAT'L IMMIGR. L. CTR., <https://www.nilc.org/> (last visited Oct. 5, 2023).

<sup>5</sup> See generally SURVEILLANCE RESISTANCE LAB, <https://surveillanceresistancelab.org/> (last visited Oct. 5, 2023).

<sup>6</sup> See NPRM at 60057, n. 2.

Yet, this delegation document has not been made public, such that neither the undersigned nor the general public were provided an opportunity to comment fully on the nature of DHS' delegation. However, it seems highly improper on its face that TSA—a federal sub-agency whose narrow mission is to “[p]rotect the nation’s transportation systems”<sup>7</sup>—can regulate the use and acceptance of mDLs by certain other federal agencies or officials in contexts entirely removed from transportation systems. Indeed, TSA’s enabling statute, the Aviation and Transportation Security Act of 2001, suggests that Congress intended the TSA Administrator to serve certain discrete functions, duties, and powers—none of which include regulating identification requirements for all official federal purposes.<sup>8</sup> Although the Homeland Security Act of 2002 transferred TSA from the Department of Transportation to DHS,<sup>9</sup> Congress did not materially alter TSA’s underlying functions and in fact committed to maintaining TSA as a “distinct entity” with a discrete mission.<sup>10</sup> While some delegation of REAL ID authority to TSA as it pertains to federal air travel may be proper, DHS’ relinquishment of *all* regulatory authority, with implications for numerous federal agencies, appears beyond the scope of TSA’s enabling purpose, as ordained by Congress.

Even if DHS’ delegation of all REAL ID regulatory authority to TSA is proper, this authority is limited by the statutory provisions of the REAL ID Act of 2005 and the REAL ID Modernization Act. Under Section 202(a)(1) of the REAL ID Act, Congress provided that “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 *certain requirements* . . .”<sup>11</sup> Section 202(a)(2) of the REAL ID Act provides that the DHS Secretary has authority to “determine whether a State is meeting *the[] requirements* . . . in a manner as *the [DHS] Secretary*, in consultation with the Secretary of Transportation, *may prescribe by regulation*.”<sup>12</sup> Additionally, Section 205 separately grants the DHS Secretary “authority to issue regulations, set standards, and issue grants . . . in consultation with the Secretary of Transportation and the States.”<sup>13</sup> In 2020, with passage of the REAL ID Modernization Act, Congress amended the definition of “driver’s license” and “identification card” to include mobile or digital driver’s licenses and identification cards, “which have been issued in accordance with regulations prescribed by the Secretary.”<sup>14</sup> Read together, the Acts clarify that (1) TSA—by virtue of DHS’s delegation of regulatory authority—has authority to issue regulations that lay out final requirements for mDLs to qualify as REAL ID-compliant *and* (2) until TSA does so, state mDLs cannot be considered REAL ID-

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<sup>7</sup> See generally *Mission*, TRANSP. SEC. AGENCY, <https://www.tsa.gov/about/tsa-mission> (last visited Oct. 5, 2023).

<sup>8</sup> Aviation and Transp. Sec. Act (ATSA) § 101, 49 U.S.C. § 114.

<sup>9</sup> Homeland Security Act of 2002 § 401, 6 U.S.C. § 203.

<sup>10</sup> *Id.* §§ 423-24.

<sup>11</sup> REAL ID Act of 2005 § 202(a)(1), 49 U.S.C. § 30301 note.

<sup>12</sup> *Id.* § 202(a)(2) (emphasis added).

<sup>13</sup> *Id.* § 205.

<sup>14</sup> REAL ID Modernization Act, Title X, Div. U of the Consolidated Appropriations Act, 2021, 49 U.S.C. 30301 note (amending the REAL ID Act § 201).

compliant and cannot be used for federal purposes, like boarding a plane, when card-based enforcement begins at TSA’s current projected date of May 2025.<sup>15</sup>

The NPRM’s proposed waiver process is not part of the formal certifications, regulations, or standards for which DHS has authority to prescribe under the Acts. Rather, the proposed rule is intended as a stop-gap measure to temporarily waive statutory requirements. Relying on a legal fiction, the NPRM’s waiver process allows TSA to essentially waive states’ noncompliance with the final requirements for State issuance of REAL ID-compliant mDLs—which do not yet exist—in order to allow federal agencies to begin accepting mDLs.<sup>16</sup> The minimum criteria that the states must meet to receive a *waiver* are not designed to set parameters around REAL ID compliance. Indeed, TSA repeatedly emphasizes that the NPRM does not set forth the actual standards for issuing mDLs that it recognizes it is required to issue under the Acts.<sup>17</sup> Moreover, the agency’s suggestion that a state’s certificate of waiver “has no bearing on TSA’s determination of that State’s compliance or non-compliance with [REAL ID regulations]”<sup>18</sup> is yet another indication that the proposed rule does not fulfill DHS’ regulatory mandate to set standards and determine compliance.

Further, the proposed waiver process is not in keeping with DHS’ prior rulemaking pursuant to the REAL ID Act, which underscores that the agency can consider some regulatory workarounds, but cannot create a waiver process. Section 202(a)(2) of the REAL ID Act notes that if a state provides adequate justification for its non-compliance, the DHS Secretary “may grant to a State an extension of time to meet the [minimum REAL ID] requirements.”<sup>19</sup> DHS’ implementing regulations, promulgated in January 2008, established standards for states to meet the REAL ID minimum requirements.<sup>20</sup> However, consistent with Section 202(a)(2), the 2008 regulations explicitly stated that while DHS can grant states extensions of time to meet the minimum requirements of the REAL ID Act, the agency does not have “authority to *wave* any of the mandatory minimum standards set forth in the Act.”<sup>21</sup> DHS subsequently issued six other final rules and interim final rules amending the REAL ID regulations, including changes to compliance deadlines and State extension submission dates.<sup>22</sup> These regulations further indicate

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<sup>15</sup> NPRM at 60059 (“An mDL cannot be REAL ID-compliant until TSA establishes REAL ID requirements in regulations and States issue mDLs compliant with those requirements”).

<sup>16</sup> *See id.* at 60057, 60058.

<sup>17</sup> NPRM at 60057 (“This proposed rule is part of an incremental multi-phased rulemaking that *will culminate in the promulgation of comprehensive requirements* for State issuance of REAL ID-compliant [mDLs].” (emphasis added)), 60058 (“TSA believes it is *premature to issue final, comprehensive requirements* for mDLs...” (emphasis added)).

<sup>18</sup> *Id.* at 60071.

<sup>19</sup> REAL ID Act § 202(a)(2).

<sup>20</sup> Minimum Standards for Driver’s Licenses and Identification Cards Acceptable by Federal Agencies for Official Purposes, 73 Fed. Reg. 5272 (2008).

<sup>21</sup> *Id.* at 5273 (emphasis added).

<sup>22</sup> *See* 74 Fed. Reg. 49308 (Sep. 28, 2009) (setting deadline for seeking an extension), 74 Fed. Reg. 68477 (Dec. 28, 2009) (staying deadline for state compliance), 76 Fed. Reg. 12269 (Mar. 7, 2011) (extending document enrollment dates), 79 Fed. Reg. 77836 (Dec. 29, 2014) (extending document enrollment dates); 84 Fed. Reg. 55017 (Oct. 15,

that DHS has authority to extend deadlines to facilitate compliance, but not to waive a state’s non-compliance altogether. Lacking any statutory basis, the proposed waiver process—a policy DHS understood as beyond the scope of its authority as early as 2008—certainly falls outside the scope of TSA’s authority today.

## **II. TSA IS ARTIFICIALLY CREATING URGENCY, DEMAND AND NECESSITY TO DRUM UP MDL ADOPTION**

A mere five months have elapsed since TSA was delegated authority to administer the REAL ID program, including the publication of this NPRM. TSA’s top-line justifications for pursuing rulemaking at this rapid pace are that there is a supposed growing public demand for and interest in mDLs; states are beginning to invest in mDLs in response to this demand; and without federal regulations, states risk making unsuitable investments.<sup>23</sup> Yet to reach these conclusions, TSA leans into urgency, as well as conjectural accounting of public demand and state adoption of mDLs. In doing so, TSA is driving potentially unsuitable investments and rushing states into processes without consideration of safety, equity, and privacy.

### **A. TSA Speculates About Public Demand for mDLs**

Among the reasons TSA cites for moving forward with the proposed rule is the “growing demand for and interest in mDLs due to their potential benefits of increased convenience, security, and privacy.”<sup>24</sup> However, TSA fails to substantiate the scale and source of public demand for mDLs. The agency does not present any statistical evidence to justify its claim of widespread public demand and in fact concedes that “detailed mDL adoption statistics are unavailable.”<sup>25</sup> Instead, TSA vaguely alludes to “anecdotal and fragmented reporting” to suggest that mDLs are “rapidly gaining public acceptance.”<sup>26</sup> Yet the only concrete example cited in the proposed rule is recent reporting in Louisiana that “over one million residents (representing more than 20% of its population) have installed Louisiana’s mDL app on their mobile device.”<sup>27</sup> This reference is not only an insufficient basis for pursuing sweeping rulemaking, but also misleading because the rise in mDL adoption in Louisiana was driven by consumption of pornography, not demand for mDLs. Daily downloads of Louisiana’s mDL app jumped from 1,200-1,500 to more than 5,000 leading up to December 31, 2022, but this surge coincided with the implementation of a state law which requires pornographic websites to introduce “reasonable age verification methods.”<sup>28</sup> Louisiana’s mDL app, which is working with age verification services, might provide a convenient way to verify one’s age and access pornographic websites, but not without

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2019) (clarifying that the enrollment deadline applies to all non-compliant cards); 86 Fed. Reg. 23237 (May 3, 2021) (interim rule delaying REAL ID enforcement).

<sup>23</sup> NPRM at 60058.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 60062.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Lindsay McKenzie, *Digital Drivers License Downloads Soar in Louisiana Amid Porn Restriction*, STATESCOOP (Jan. 4, 2023), <https://statescoop.com/louisiana-porn-restriction-digital-drivers-license-downloads/>.

the risk of privacy and security trade-offs. Critically, usage of Louisiana’s mDL app hardly substantiates TSA’s claim of widespread public demand or justifies the need for untimely mDL regulations.

TSA hastily prioritizes this overblown demand over weightier public considerations such as consumer protection, privacy, and security.<sup>29</sup> TSA not only exaggerates these benefits, as discussed below, but also glosses over the myriad ways in which mDLs are more inequitable, less secure, and less protective of privacy than their physical counterparts. Since mDLs require users to have a smart device with certain minimum specifications, mDLs would confer supposed convenience only<sup>30</sup> to those with certain financial means and technical abilities. TSA also suggests that mDLs may be “privacy-enhancing” because an mDL holder may be able to control what data is released to the verifying agent or agency.<sup>31</sup> Notably, however, in support of its “privacy-enhancing” proposition, TSA cites an op-ed written by an executive at GET Group, one of the private vendors which stands to profit from widespread adoption of mDLs.<sup>32</sup> Furthermore, missing from the agency’s privacy analysis is any discussion of how mDL technologies have the potential to generate troves of information on users, provide verifiers with physical access to smart devices, and generate data trails on users that can be used to track their behaviors, location, and other sensitive information. Moreover, the agency admits that privacy protections governing mDLs are “evolving and unsettled,”<sup>33</sup> which makes it even more difficult to evaluate at this early stage whether mDL technologies are truly privacy enhancing as the agency claims.

Cited urgency aside, TSA’s proposed rule is itself an attempt to drum up public and state support for mDLs artificially. The agency suggests that the proposed waiver requirements would promote trust in mDLs and “enable the public to more immediately realize potential benefits of mDLs.”<sup>34</sup> With standards and guidance still under development, this justification for the proposed rule suggests the agency is attempting to lull the public into a false sense of security around a nascent technology and bypass essential considerations of privacy, safety, security, and equity.

## **B. TSA Exaggerates States’ Needs and Status Regarding mDL Adoption**

TSA urges that the proposed rule is needed now because without it, “[s]tates risk investing in mDLs that are not aligned with emerging industry standards and government guidelines” and establishing “insufficient mDL security and privacy safeguards that fail to meet the security purposes of REAL ID requirements and the privacy needs of users.”<sup>35</sup> While we share TSA’s fear that states could move hastily to invest in substandard mDL technology, TSA blows this

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<sup>29</sup> NPRM at 60058, 60082.

<sup>30</sup> *Id.* at 60060, 60062, 60078.

<sup>31</sup> *Id.* at 60072.

<sup>32</sup> *See id.* at 60078, n. 78.

<sup>33</sup> *Id.* at 60072.

<sup>34</sup> *Id.* at 60059.

<sup>35</sup> *Id.* at 60058.

concern out of proportion to justify its hurried rulemaking, contradicting its own admission that industry-wide standards are still in development.

TSA overstates concerns that states are rapidly adopting mDLs and therefore running the risk of investing in mDL solutions that are not aligned with emerging standards and guidance. The agency misleadingly claims that “mDL-issuance is proliferating rapidly among States,” noting that “nearly half of all States [are] piloting, issuing, or considering mDLs.”<sup>36</sup> But, per TSA’s own state-by-state analysis, most states have yet to announce any concrete steps toward mDL adoption,<sup>37</sup> such that the proposed rule only serves to rush states in their decision making.

TSA claims that the states issuing, piloting or having piloted mDLs are “believed to be using technology solutions provided by multiple vendors . . . which could result in non-standard, non-compatible technologies.”<sup>38</sup> But the agency’s belief, absent cited facts, should not be the basis for hastily-crafted, far-reaching rulemaking. Indeed, the agency falls short of pinpointing any vendor that is in fact developing mDL technology contrary to its liking. Moreover, of the eight states cited as already issuing mDLs, four are part of TSA’s partnerships with Apple (Arizona, Colorado, and Maryland) and GET Group North America (Utah) that allow mDLs to be used at select airport security checkpoints,<sup>39</sup> suggesting that vendors are in fact developing mDL solutions consistent with the federal government’s priorities. Notwithstanding TSA’s own initiatives, while the agency questions whether “technological diversity provides the safeguards and interoperability necessary for Federal acceptance”<sup>40</sup> when card-based enforcement of REAL ID goes into effect on May 7, 2025, this technological diversity is especially needed to promote innovation in a still-nascent industry and prevent government-supported market monopolization, *see* Section III, *infra*, for more.<sup>41</sup>

TSA suggests that the proposed rule responds to “[m]any stakeholders [who] have already expressed [] concerns” around the lack of common standards.<sup>42</sup> Yet the agency notes only two commenters who provided such feedback in response to the April 2021 RFI. Notably, one of the commenters was the American Association of Motor Vehicle (“AAMVA”), which is heavily involved in mDL standard-setting and thus has a vested interest in seeing their standards promulgated, as discussed below in Section V, *infra*. Neither comment came from states piloting mDLs, which the agency claims will be most burdened by a lack of clear standards.<sup>43</sup> Nor does the NPRM set forth the finalized “clear, uniform, flexible standards” sought by the

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<sup>36</sup> *Id.* at 60061.

<sup>37</sup> *See id.* at 60061 (noting eight states are piloting or have piloted mDLs and 17 states have indicated they are studying mDLs or considering enabling legislation).

<sup>38</sup> *Id.* at 60061-62.

<sup>39</sup> *Id.* at 60066-67.

<sup>40</sup> *Id.* at 60061.

<sup>41</sup> *Id.* at 60061.

<sup>42</sup> *Id.* at 60058 (quoting comments submitted by the American Association of Motor Vehicle Administrators and DocuSign).

<sup>43</sup> *See id.* (noting that without federal rulemaking, states “could face a substantial burden to redevelop products acceptable to Federal agencies. . .”)

commenters.<sup>44</sup> To the contrary, the NPRM creates a burdensome temporary waiver process, in which states must demonstrate adherence to TSA’s “minimum” rules for mDLs.

TSA’s rush to create “minimum” rules through the NPRM’s waiver process contradicts its own admission that “it is premature to issue final, comprehensive requirements for mDLs.”<sup>45</sup> While the agency describes the NPRM as setting “minimum” rules, not finalized standards, setting minimum rules at this juncture will have actual and premature industry-wide impacts. Indeed, the agency acknowledges that its own analysis of industry and government documents revealed that only “a few international industry standards applicable to mDLs are available, while most are years away from publication.”<sup>46</sup> Moreover, the agency admits that “multiple emerging industry and government standards and guidelines necessary to ensure mDL privacy and security [] are still in development.”<sup>47</sup> TSA’s promulgation of minimum rules thus seems predicated on the agency’s premature assessment of which standards ultimately will be accepted and likely to meet its regulatory objectives.

But more importantly, the waiver process proposed in the NPRM is not simply a “regulatory bridge” devoid of real-world consequences.<sup>48</sup> If implemented, the waiver process would in many respects and in the eyes of the general public, rubber-stamp state mDL programs that the federal government *knows* to be built on an incomplete, changing, or otherwise unfinished set of industry standards. The waiver process, therefore, is not only misleading to consumers, but also irresponsible and risky from a privacy and civil rights perspective.

### **C. TSA is Overplaying the Necessity for and Potential Benefits of mDLs**

To support its push for staggered rulemaking, TSA purports that mDLs have “potential benefits for all stakeholders.”<sup>49</sup> Per the proposed rule, mDLs provide “efficiency and security enhancements” for federal agencies, “more secure, convenient, private-enhancing, and ‘touchless’ method of identity verification” for consumers, and “[p]otential hygiene benefits.”<sup>50</sup> However, at this early stage of development, these benefits are largely speculative and, as discussed above, difficult to evaluate against competing social costs in the form of civil liberties, privacy, and consumer safety.

TSA suggests that federal agencies can benefit from the efficiency and security enhancements allegedly associated with mDLs. Specifically, TSA claims that unlike their physical counterparts, mDLs rely on digital security features which are immune from tampering and other vulnerabilities associated with physical cards. However, to evaluate this alleged benefit, the agency must provide evidence that driver’s license fraud is a sufficiently widespread problem, which it fails to do. Indeed, 2010 reporting by the Federal Trade Commission suggests that

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<sup>44</sup> *Id.* (quoting comments to the RFI submitted by DocuSign).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* (internal citations omitted).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 60059.

<sup>49</sup> *Id.* at 60062.

<sup>50</sup> *Id.*



driver's license forgery accounts for only 0.9 percent of all identity theft complaints received by the agency.<sup>51</sup> Additionally, the agency does not consider security and privacy from a user standpoint. Traditional driver's license databases are already vulnerable to cyberattacks. In early 2023, for instance, a cyberattack compromised the personal information of everyone with a driver's license in Louisiana, including those with mDLs.<sup>52</sup> By further digitizing driver's licenses and storing more personal identifying information in centralized databases that will be frequently pinged to exchange driver data, security permissions, and other information, mDLs potentially increase the risk of disclosures and breaches of sensitive information.

TSA also claims that mDLs are privacy-enhancing. As discussed above, TSA's privacy analysis is premature and far from comprehensive. Aside from discussion of one potentially protective feature of mDLs, the agency does not consider the ways in which mDLs can be used to interfere with user privacy and compromise sensitive user information. Moreover, TSA explains that it anticipates addressing specific security, privacy, and interoperability requirements in Phase 2 of the rulemaking, recognizing that the privacy and security of mDLs are still being evaluated.<sup>53</sup> It is therefore not only premature but extremely misleading for the agency to suggest that mDLs are privacy-enhancing.

Finally, TSA states that the contact-free method of identity verification enabled by mDLs confers potential hygiene benefits. Specifically, TSA suggests that by allowing an mDL user to transmit data to a verifying agency's mDL reader by hovering their phone above the reader, mDLs "potentially eliminat[e] any physical contact...thereby reducing germ transmission."<sup>54</sup> The germ-free benefits of mDLs are overstated. Although there is no disputing that germs can spread through contact, eliminating one minor point of contact is not going to benefit public health appreciably, especially in the context of air travel when travelers are regularly in direct and indirect contact with airport staff, security agents, and other travelers. Moreover, in many cases, an mDL user may physically hand over their device to be scanned, eliminating any hygiene benefits. Put simply, adoption of mDLs should not be justified on public health grounds.

### **III. TSA FACILITATES, RATHER THAN PREVENTS, TECHNOLOGICAL LOCK-IN AND DHS MISSION CREEP OVER STATE DRIVER'S LICENSE PROGRAMS**

TSA's other cited concern that, absent the changes proposed in the NPRM, states could be "locked-in" to existing mDL solutions that fall short of emerging industry standards obscures the role that the proposed rule will have in ensuring that states are instead locked into a federal model controlled and set by TSA and DHS and influenced by a small subset of corporate actors. As explained above, the scope of the REAL ID Act is limited to setting requirements for driver's

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<sup>51</sup> GOV'T ACCOUNTABILITY OFF., DRIVER'S LICENSE SECURITY 3 (2012), <https://www.gao.gov/assets/gao-12-893.pdf>.

<sup>52</sup> See *Major Cyber Attack at OMV Vendor, Louisianans Should Act Urgently to Protect Their Identities*, OFF. OF GOVERNOR (June 15, 2023), <https://gov.louisiana.gov/index.cfm/newsroom/detail/4158>.

<sup>53</sup> NPRM at 60059.

<sup>54</sup> *Id.* at 60062.

licenses and identity credentials *that may be accepted for certain federal purposes*. But the federal government cannot require states to issue REAL ID compliant licenses, nor can it lawfully commandeer the states' authority to issue driver's licenses programs in order to mandate additional and specific requirements for credentials used for non-federal purposes. However, the NPRM sets the stage for DHS and TSA to exert their influence over state mDL programs, including the development and administration of non-REAL ID licenses. The federal government's mission creep over state mDL programs, as proposed in this NPRM, will compromise the privacy of all drivers and could make state driver's license programs less effective.

The NPRM would push states to adhere to certain mDL criteria<sup>55</sup>—set and chosen by TSA that are incomplete and likely to change. Troublingly, TSA states clearly that this current set of criteria only captures some, but not all, critical parts of the mDL machinery. For example, as the NPRM explains, the “critical requirements for the interface between a State driver's licensing agency and mobile device” have not been published and therefore “are not sufficiently mature to inform regulatory requirements.”<sup>56</sup> Despite the NPRM's careful language that “nothing in th[e] proposed rule would require a State to seek a waiver or issue mDLs,”<sup>57</sup> formal rulemaking, in and of itself, has a compelling effect, and the proposed waiver process is no different. With the waiver process in place, states will feel pressure to align their mDL programs with TSA's quasi-final criteria set forth in the proposed waiver.

TSA's existing work and partnerships with certain private industry vendors undoubtedly will influence changes in the market, including states' decisions on who to contract with for their mDL products. While lambasting market fragmentation and technological diversity,<sup>58</sup> the NPRM notes that DHS and TSA already partner with and advise states, industry, and non-governmental bodies in the development and deployment of mDL technologies.<sup>59</sup> Of note, TSA has been testing the use of mDLs from Arizona, California, Colorado, Georgia, Iowa, Maryland, and Utah at various TSA checkpoints in collaboration with Apple, Google, GET Group North America, IDEMIA, and other vendors.<sup>60</sup>

By leaning on select corporate vendors, TSA is enabling the long-term monopolization and, by extension, privatization of an essential government service: the provisioning of official license credentials. These public-private partnerships significantly increase the risk of elevating

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<sup>55</sup> See NPRM at 60068 (explaining that the waiver application requires states to demonstrate adherence to ISO/IEC 18013-5:2021; NIST FIPS PUB 180-4, 186-5, 197, 198-1, and 202; and AAMVA mDL Guidelines v. 1.2 as well as the requirements listed in Appendix A to subpart A of the part).

<sup>56</sup> *Id.* at 60064.

<sup>57</sup> *Id.* at 60071.

<sup>58</sup> See *id.* at 60061.

<sup>59</sup> See *id.* at 60066.

<sup>60</sup> See *id.* at 60066-67; *When Will the Phased Digital ID Rollout Start? Which Airports/States Will Be First in Line for This New Technology*, Transp. Sec. Agency, <https://www.tsa.gov/travel/frequently-asked-questions/when-will-phased-digital-id-rollout-start-which-airportsstate> (last visited Oct. 5, 2023); *IDEMIA Enables Acceptance of State IDs and Driver's Licenses in Apple Wallet at TSA Checkpoints*, IDEMIA (Mar. 24, 2022), <https://www.idemia.com/press-release/idemia-enables-acceptance-state-ids-and-drivers-licenses-apple-wallet-tsa-airport-checkpoints-2022-03-24>.

corporate interests above the public. With major government tech infrastructure programs like the mDL development, states often enter long-term contractual relationships with a particular vendor during the initial procurement process because the company that builds the infrastructure will likely be chosen to provide maintenance, ongoing support, and further development. By gaining a foothold in the marketplace now, certain corporations will be positioned as default providers for mDL and related technologies. This is especially problematic, as many of the corporations currently involved in federal partnerships with regard to mDL development have a demonstrated business model built on data collection.<sup>61</sup> By virtue of a federal partnership with TSA, the companies named in the NPRM as collaborating with TSA currently have an edge on competitors and stand to gain even more. Not only is TSA highly likely to fast-track waiver approvals to states where TSA has an existing contract or partnership, as TSA has already sunk costs into the development and launch of its pilots and projects, but because of the pre-existing affiliation with TSA, additional states could be more likely to contract with these “approved” vendors. Such “approved” vendors will be well positioned during future procurement processes, which could limit other corporate options, including the potential of developing a mDL program inside a government agency rather than contracting with an external vendor. In effect, the NPRM is contributing to, rather than diverting from, technological lock-in, where states would be locked into not only the criteria that TSA selects but also the universe of TSA’s approved vendors and mDL solutions. This potential for market impact and sway over state decision-making would increase the role of the federal government over state mDL programs dramatically, including the potential to influence states’ implementation of non-REAL ID mDLs.

A central concern is the proposed rule’s impact on state driver’s license programs that provide official state-issued digital identity credentials outside of the requirements of the REAL ID Act (also referred to as standard or non-REAL ID licenses or ID cards). Many states have maintained their standard licenses or have expanded access to driver’s licenses in order to ensure equitable access to driver’s licenses for all eligible residents, regardless of their immigration status. Due to many documented instances of state DMVs sharing data with immigration officials,<sup>62</sup> advocates have made privacy and data sharing protections a key policy priority. To ensure that these programs accomplish their highway safety goals - allowing drivers to be trained, tested, and insured - applicants must be assured that the information they provide does not function as a data pipeline for federal immigration officers to track, arrest, and deport them.

Protecting the privacy and safety of immigrant communities is complicated by the fact that DHS, which administers and enforces immigration law, is engaging in rulemaking and norm-creation over technology that could compromise the information provided by non-REAL ID license

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<sup>61</sup> See, e.g., Michael Gennaro, *Google settles \$93 million lawsuit with California over unauthorized user data collection*, COURTHOUSE NEWS SERV. (Sep. 14, 2023), <https://www.courthousenews.com/google-settles-93-million-lawsuit-with-california-over-unauthorized-user-data-collection/>; Sarah Perez, *Apple faces new lawsuit over its data collection practices in first-party apps, like the App Store*, TECHCRUNCH (Nov. 14, 2022), <https://techcrunch.com/2022/11/14/apple-faces-new-lawsuit-over-its-data-collection-practices-in-first-party-apps-like-the-app-store/?guccounter=1>

<sup>62</sup> Drew Harwell, *FBI, ICE Find State Driver’s License Photos are a Gold Mine for Facial-Recognition Searches*, WASH. POST (July 7, 2019, 3:54 PM), <https://www.washingtonpost.com/technology/2019/07/07/fbi-ice-find-state-drivers-license-photos-are-gold-mine-facial-recognition-searches/>.

holders. In issuing this NPRM, TSA attempts to stay within the bounds of its regulatory authority by stipulating that their exclusive focus is on REAL ID compliant mDLs. However, TSA ignores the ways in which formal federal rulemaking can sway the development of non-REAL ID mDLs, including the set-up of any enabling or relevant support software, hardware, or databases. For several reasons including efficiency and economy, many states administer REAL ID and non-REAL ID programs in tandem, using the same or similar processes, technologies, and vendors to implement both programs.<sup>63</sup> As such, states are likely to lean on what they have done, whom they have contracted with, and the models, criteria, and standards they have used on REAL ID licenses, when developing mDLs for non-REAL ID licenses.

TSA's proposed rule therefore could undermine existing state laws that are designed to protect DMV data from being shared and used to enforce federal immigration law. If the proposed rule is made final, many communities—especially those with high populations of immigrant drivers—could become less safe, as public trust in DMV programs erodes, causing some drivers to forgo a driver's license altogether. Such impacts would undermine, rather than advance, the rulemaking's intention of improving security.

#### **IV. TSA SWEEPS ASIDE IMPORTANT CIVIL LIBERTIES AND PRIVACY INTERESTS, AMONG OTHER PUBLIC, SOCIAL COSTS, IN ITS RUSH TO REGULATE AND PROMOTE MDLs**

In its proposed rule, TSA must, and fails to, account for a myriad of social costs in the form of civil rights and civil liberties, privacy, and consumer protection. We appreciate TSA for considering the concerns that NILC and co-signatories as well as other commenters raised in response to the April 2021 RFI regarding the “server retrieval” method.<sup>64</sup> However, beyond the agency's finding that the server retrieval method is “not appropriate at this time” for REAL ID compliance,<sup>65</sup> the proposed rule does not give sufficient consideration to surveillance and data sharing implications arising from other facets of the mDL infrastructure.

The mDL ecosystem will generate a mass of user data, which can then be accumulated by data brokers, funneled to government agencies, and used for dragnet surveillance. Anytime an mDL is used, data is created. Smart devices—the essential tool for any mDL technology—already leave significant data trails about users and their behaviors, which data brokers are known to sell, often

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<sup>63</sup> While non-REAL ID and REAL ID driver's licenses have inherent differences, beyond establishing proof of eligibility and identity, much of the administration of the programs in many states is similar, if not the same. For example, under the same pilot program, California is already testing mDLs on non-REAL ID licenses as well as on REAL ID licenses. *See CA DMV Wallet Q&A*, CA DMV, <https://www.dmv.ca.gov/portal/ca-dmv-wallet/mdl-faqs/> (last visited Oct. 6, 2023) (explaining that “[a]ll valid California DL/ID cards may be used for mDL”). Other states like Vermont streamline the administration of their multiple driver's license programs through a uniform application, allowing applicants to select which license they are seeking, e.g. REAL ID or non-REAL ID. *See Application for License/Permit*, VT DMV, [https://dmv.vermont.gov/sites/dmv/files/documents/VL-021-License\\_Application.pdf](https://dmv.vermont.gov/sites/dmv/files/documents/VL-021-License_Application.pdf) (last visited Oct. 6, 2023).

<sup>64</sup> *See* NPRM at 60072.

<sup>65</sup> *Id.* The under-signed remain concerned that TSA has not ruled out acceptance of the server retrieval method in subsequent rulemaking. *See id.*

to facilitate mass surveillance.<sup>66</sup> Advocates have raised concern about the extensiveness and profitability of the data trail from smartphones for over a decade.<sup>67</sup> Yet, while corporations continue to collect and monetize smart device data, regulators have not stepped up to mitigate these harms to privacy and safety.

Widespread adoption of mDLs would generate significantly more data trails and, without privacy and security standards in place, provide a ripe opportunity for data profiteering and surveillance. For example, every time a mDL Holder presents their mDL, the Verifier can collect troves of sensitive information—the time it was presented, where, and even for what purpose—and log the visit. Additionally, mDL software (such as an mDL wallet) or the smartphone itself has the potential to log metadata related to any mDL presentation.

The proposed rule, which does not sufficiently account for and regulate against privacy and security threats to users, effectively rubber stamps the data collection and surveillance potential inherent to mDLs. Given the profitability of mDL-generated data, corporate vendors and industry groups in the mDL ecosystem, which hold influence over standard-setting, have an incentive to maximize the potential for data creation, extraction, sale, and sharing. Beyond mDL vendors, other corporations like data brokers, also have a vested interest in mDL adoption and the potential for collecting more data for the purpose of selling data profiles to other corporations and government agencies, including law enforcement. By relying on standards derived from industry to speed up mDL adoption, as discussed above, TSA is ushering in a tool that holds substantial social costs to the public. Indeed, driver’s licenses data is already co-opted to surveil and criminalize communities. With further digitization, mDL data will exacerbate “function creep” that poses grave dangers to the safety and well-being of immigrants but to all people from historically criminalized communities. At a minimum, TSA must account for and protect these public interests in any regulation it considers.

## **V. IN ITS HASTE, TSA OVERLOOKS THE ACTUAL COST AND FISCAL CONSEQUENCES OF MDLS**

In the NPRM, TSA reports that “[t]he rulemaking would not adversely affect the economy, interfere with actions taken or planned by other agencies, or generally alter the budgetary impact

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<sup>66</sup> Among the data trails generated by smart devices, Ad-ID (or IDFA in an Apple product) is a unique ID that is purportedly designed to “allow developers and marketers to track activity for advertising purposes.” *About mobile advertising IDs*, Google, <https://support.google.com/admanager/answer/6274238> (last visited Oct. 6, 2023). Despite its intended purpose, Ad-ID has become a tool for law enforcement to monitor and map the movements of a smartphone user over multiple years. For example, the data broker Fog Data Science aggregated billions of Ad-ID data points dating back to 2017 from more than 250 million smart devices into an easy interface for police to geolocate and track certain smart device users. See generally Bennett Cyphers, *Inside Fog Data Science, the Secretive Company Selling Mass Surveillance to Local Police*, ELEC. FRONTIER FOUND. (Aug. 31, 2022), <https://www.eff.org/deeplinks/2022/08/inside-fog-data-science-secretive-company-selling-mass-surveillance-local-police>.

<sup>67</sup> See, e.g., G.W. Schulz & Daniel Zwerdling, *Easily Obtained Subpoenas Turn Your Personal Information Against You*, Reveal (Sept. 30, 2013), <https://revealnews.org/article-legacy/easily-obtained-subpoenas-turn-your-personal-information-against-you/>.

of any entitlements.”<sup>68</sup> However, TSA’s cost estimates cannot be divorced from its purpose in rulemaking: to fast-track the adoption of a REAL ID compliant mDLs. Notably, despite TSA’s valiant attempt to quantify the financial impact of the proposed rule, TSA acknowledges that, “mDLs are part of an emerging and evolving industry with an elevated level of uncertainty surrounding costs and benefits,”<sup>69</sup> such that a number of variables could tilt the scales toward a more costly burden for states.

As commented above, TSA’s rush to engage in formal rulemaking will likely accelerate the adoption of mDLs by states, leading them to sign contracts and move toward implementation of programs that accelerate through new versions and updates in a short time period. Ideally, contractual language would place the cost burden on the corporations developing the technology, as these companies could earn a significant amount of revenue by facilitating this large-scale infrastructure project. However, companies will likely seek to shift the burden of unexpected costs to the states, as is the norm with government procurement of tech.<sup>70</sup>

Additionally, since corporations are primarily developing the mDL technology, potential for revenues will likely outweigh any public good. Corporations will not shy away from rolling out new versions of their products whenever profitable,<sup>71</sup> which means that states will continue to bear the cost of implementing new software and hardware. And by extension, these costs ultimately will fall to taxpayers. Given these possibilities, TSA cannot accurately quantify the ongoing costs to states at this time.

With the development of new technology, the approach to cost and budgeting should be to expect the unexpected. Developing mDL solutions with clear standards for interoperability and sufficient privacy and security safeguards is complicated, lengthy, and susceptible to trial-and-error as well as unanticipated glitches and security risks. On the flipside, innovations in this rapidly evolving industry could result in competing versions of software and hardware packages and obsolescence of earlier iterations, while also prioritizing increased corporate revenues and data capture rather than residents’ needs.

Since the technology and market are so young, predicting future costs is highly speculative at this stage. TSA does not need to encourage speculative behaviors, especially where the costs will likely be much higher than what the TSA has outlined and the resulting impact on states much murkier than what TSA can forecast at this time. In order to assess the estimated costs outlined in the NPRM accurately, TSA needs to justify the pace at which the agency is moving to develop and implement mDL rules; as discussed above, it has not yet done so. As such, it would be more cost effective for states to move more slowly to allow for a better estimate of the costs over the

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<sup>68</sup> NPRM at 60073.

<sup>69</sup> *Id.*

<sup>70</sup> See generally Hui Chen & Katherine Gunny, Profitability and Cost Shifting in Government Procurement Contracts 4 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2482605](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2482605) (explaining that it “is consistent with conventional wisdom that government contractors . . . engage in cost shifting to obtain higher profits”).

<sup>71</sup> See generally Theodore Levitt, *Exploit the Product Life Cycle*, Harv. Bus. Rev. Mag. (Nov. 1965), <https://hbr.org/1965/11/exploit-the-product-life-cycle> (last visited Oct. 5, 2023).

long-term. This will put less pressure on taxpayers who will be on the hook for the cost of the TSA's rashness.

## **VI. TSA'S NINETEEN CHOSEN STANDARD AND GUIDELINE DOCUMENTS ARE INSUFFICIENT, FUNCTIONALLY INACCESSIBLE, AND UNACCOUNTABLE**

The NPRM proposes to amend 6 CFR § 37.5 by incorporating by reference (IBR) nineteen different industry standards and government guidelines. The nineteen chosen standards and guidelines exist in a market where, as TSA recognizes, there is an “absence of standardized mDL-specific requirements.”<sup>72</sup> As such, the nineteen documents that TSA seeks to IBR only paint a partial picture of what types of requirements are needed to securely and safely operationalize mDL use.

For example, in numerous parts of the NPRM, TSA explains that additional documents covering other vital aspects of the mDL ecosystem are under development such as Series ISO/IEC 23220 which “will define critical requirements for the interface between a State driver's licensing agency and mobile device,”<sup>73</sup> or undergoing revision such as NIST SP 800-63-4 “which is expected to impact key issues related to mDL processes.”<sup>74</sup> That TSA is nevertheless moving forward with the IBR of some documents to create interim requirements, while fully recognizing that additional documents covering other essential aspects of the mDL schema are forthcoming, strongly militates against a conclusion that the NPRM is a result of reasoned and thoughtful decision-making.

TSA attempts to address previously-raised concerns around governmental transparency and public access of industry documents that are to be used to inform DHS rulemaking on mDLs by explaining that the nineteen IBR'd documents are available for inspection at DHS Headquarters in Washington DC, or accessible from their publisher.<sup>75</sup> However, as to standard ISO/IEC 18013-5-2021 in particular, several issues remain that make this a rather shallow attempt of public access and accommodation.

Standard ISO/IEC 18013-5:2021 is part of Series ISO/IEC 18013, but it is the only one of three parts that have been published.<sup>76</sup> In particular, standard ISO/IEC 18013-5:2021 governs the interface between an mDL and a Verifier, and critically “sets full operational and communication requirements for both mDLs and mDL readers.”<sup>77</sup> TSA explains that ISO/IEC 18013-5:2021 “provides a sufficient baseline for secure Federal acceptance,”<sup>78</sup> but as occurred during the RFI comment period, serious democratic governance issues—stemming from DHS' continued partnership with ANSI in making the standard publicly available—persist. To view the finalized

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<sup>72</sup> NPRM at 60062.

<sup>73</sup> *Id.* at 60064.

<sup>74</sup> *Id.*

<sup>75</sup> *See id.* at 60062.

<sup>76</sup> *See id.* at 60063, n. 40, 43.

<sup>77</sup> *Id.* at 60063.

<sup>78</sup> *Id.*

standard ISO/IEC 18013–5:2021, ANSI mandates an unnecessarily onerous process. ANSI requires all interested members of the public to sign up for an account and sign an online license agreement form. Further, ANSI only allows the public to view the standard, meaning that individuals cannot print, copy, or save the 162-page, highly-technical and detailed document. Such steps not only chill the public’s ability to access the draft standard, but also fail to allow for fair consideration by those who would be most affected by the standards and accompanying regulations. Given its length, depth, and technicality, access to the standard under these conditions is not meaningful or reasonable access, let alone a good faith attempt at accommodation.

A final global concern regarding the standards is that many have been developed by non-governmental entities, including AAMVA, the International Organization for Standardization (ISO) and International Electrotechnical Commission (IEC), and the World Wide Web Consortium (W3C), that are unresponsive and unaccountable to the general public. In particular, DHS has previously turned to AAMVA for several aspects of REAL ID implementation, including allowing AAMVA to develop and control the interoperability system that allows states to access driver’s license databases of other states.<sup>79</sup> Deference to AAMVA in standard-setting and implementation of mDLs undermines public oversight and accountability: AAMVA standards and policies are developed without public access or participation. Absent affirmative disclosures from AAMVA, AAMVA materials are often unavailable for public review. Since AAMVA is not a federal agency, it may not be subject to the Freedom of Information Act (FOIA), or the Administrative Procedure Act. The same critiques apply to ISO/IEC and W3C, with which DHS participates in developing standards as a non-voting member.<sup>80</sup> Given TSA’s and DHS’ existing partnerships, these non-governmental entities have a vested interest in having their standards be incorporated and adopted through the NPRM. The NPRM, in effect, would institutionalize reliance on standards built by private actors, shielding both the private actors and, in turn, the federal government from true accountability to the public.

The NPRM’s reliance on TSA’s nineteen chosen documents raises serious concerns, as to whether these documents sufficiently address all critical aspects of the proper and secure functioning of an mDL for federal purposes, and as to the accessibility of the documents by members of the public and other stakeholders.

## **CONCLUSION**

For the aforementioned reasons, NILC, the Lab, and the below signatories strongly urge TSA to reconsider and pause implementation of its proposed rule. By pursuing a waiver process, TSA is stretching the bounds of its regulatory authority under the REAL ID Act and REAL ID Modernization Act. Moreover, the proposed rule is motivated by the agency’s false sense of urgency, necessity, and public demand. By rushing its rulemaking, TSA ensures that states will be locked into mDLs solutions prematurely, even while mDL technologies and standards are

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<sup>79</sup> See generally *State-to-State (S2S) Verification Service, Am. Ass’n of Motor Vehicle Admin.* [https://www.aamva.org/technology/systems/driver-licensing-systems/state-to-state-verification-service-\(s2s\)](https://www.aamva.org/technology/systems/driver-licensing-systems/state-to-state-verification-service-(s2s)) (last visited Oct. 6, 2023).

<sup>80</sup> *Id.* at 60066



evolving and under development. Although TSA emphasizes that its regulations pertain only to REAL ID compliant licenses, formal rulemaking will undoubtedly influence the development of mDL programs for non-REAL ID mDL licenses. Finally, when considering formal rulemaking, especially at this early stage, TSA must consider fiscal costs that are passed onto states and taxpayers, as well as the privacy and civil liberties implications of mDLs which disproportionately affect low-income communities of color. TSA's needless haste to regulate will have lasting implications on an essential government service. As such, the agency should provide additional time and consideration in order for standards to develop further, technologies to evolve and improve through pilots, and public awareness of and interest in these technologies to ripen.

Sincerely,

National Immigration Law Center  
Surveillance Resistance Project  
Access Now  
Arkansas United  
Alianza Americas  
Central American Resource Center  
Church World Service  
Connecticut Shoreline Indivisible  
Families for Freedom  
Familias Unidas en Acción  
Fight for the Future  
ICE Out of Tarrant  
Illinois Coalition for Immigrant and Refugee Rights  
Immigrant Legal Resource Center  
Just Futures Law  
Massachusetts Immigrant and Refugee Advocacy Coalition  
Michigan Immigrant Rights Center  
Mijente  
National Korean American Service & Education Consortium  
Nebraska Appleseed  
New Hampshire Brazilian Council  
Nigerian Center  
Oklahoma Policy Institute  
Restore The Fourth  
Service Employees International Union (SEIU)  
Social Workers for Immigration Justice and Human Rights  
Sojourners  
Surveillance Technology Oversight Project