

WRITTEN TESTIMONY OF MATT EHLING
HOUSE TRANSPORTATION POLICY AND FINANCE COMMITTEE
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**The following is a summary of testimony presented to the
Senate Transportation Committee on April 26, and the House Government
Operations Committee on April 28**

My name is Matt Ehling. I am a citizen who has been involved in government data and civil liberties issues for many years - as someone who has written about these issues in the press, as a board member of organizations that deal with government data issues, as a plaintiff in lawsuits against the federal government for Freedom of Information Act violations, and in other capacities. I am submitting the following testimony on my own behalf, out of a personal interest in this issue. My aim is to help clarify the discussion around the REAL ID Act - particularly as it relates to issues involving the balance of power between Minnesota and the federal government.

The following summary provides some brief background about the REAL ID Act, as well as federal case law that impacts the discussion of related issues.

The REAL ID Act does not compel Minnesota to implement REAL ID compliant licenses

The REAL ID Act of 2005 established standards for drivers licenses that would be acceptable for federal purposes - including the purpose of passing through TSA checkpoints. However, the law does not *require* states to implement these standards - it merely says that the federal government will not recognize so-called noncompliant drivers licenses for federal purposes.

By crafting the law this way, Congress was attempting to avoid a direct constitutional confrontation over matters of states' rights versus federal power. The U.S. Constitution grants specific and limited powers to the federal government, while intending others to fall under the purview of the states. The text of the Tenth Amendment to the Bill of Rights specifically notes that "the powers not delegated to the United States by the Constitution ... are reserved to the States, respectively, or to the people." The authority to issue state-level drivers licenses is a function of state governments, and does not fall under the enumerated powers of the federal government. Thus, the REAL ID Act cannot compel the states to issue REAL ID compliant licenses.

Existing case law regarding drivers licenses and federal regulation

Congress has - in once instance - moved to regulate how drivers license *data* could be used - particularly how it could be sold - under the Drivers Personal Protection Act

(DPPA), but it has not moved to regulate state drivers licenses more broadly. In deciding the constitutionality of the DPPA, the U.S. Supreme Court ruled in *Reno v. Condon* (2000) that the DPPA was only constitutional because:

- a. It was a legitimate exercise of Congress' power to regulate interstate commerce under the U.S. Constitution's Commerce Clause and;
- b. It was a "generally applicable" statute that regulated individuals, and not just state actors.

That narrow ruling was mindful of prior case law (such as *New York v. United States* and *Printz v. United States*) which noted that Congress cannot place direct demands on a state that "commandeer" that state's inherent authority. If the REAL ID Act mandated states to participate in the REAL ID program, it would violate both of the tenets above.

The REAL ID Act contains some provisions that would be unconstitutional as applied

While the REAL ID Act was largely crafted to avoid a federalism challenge, there are provisions in the federal code implementing the REAL ID Act that cross the line from encouraging state behavior to compelling state behavior.

For instance, 6 CFR 37.33 requires that states "must maintain a state motor vehicle database" that contains specific information. That goes farther than setting out license standards and saying that the federal government will not accept non-compliant licenses for federal purposes. Instead, as this provision would be applied, it would place a *direct* federal mandate on the state to do something specific.

Likewise, 6 CFR 37.71 states that the Department of Homeland Security (DHS) reserves the right to approve the design of non-compliant licenses that are not used for federal purposes. Here, the federal government is making a direct claim on a power that only the state can hold.

The Minnesota legislature has the authority to issue drivers licenses as it sees fit

Since Congress cannot commandeer Minnesota's authority to issue state drivers licenses, the Minnesota legislature holds the authority to issue those licenses in the manner it sees fit.