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Opinion No. 07-61

Real ID Act of 2005

QUESTIONS

Is the federal Real ID Act of 2005, 119 Stat. 201, open to constitutional challenge as an unlawful attempt to compel the states to enact specific legislation or to conscript state officers to enforce federal law?

OPINIONS

The Real ID Act is neither an attempt to unlawfully compel a state to enact specific legislation nor an attempt to conscript state officers to enforce federal law and is therefore likely to withstand a constitutional challenge.

ANALYSIS

Background. The Real ID Act, 119 Stat 231 (Act), was enacted in 2005 with the stated purpose of improving security for drivers' licenses and personal identification cards. Section 202 prescribes standards that states must meet for the issuance of licenses and identification cards. The requirements include standards governing the information that must be placed on a drivers' license and the types of documents that must be presented to the issuing authority before a license may be issued. 119 Stat 231, §§ 202 (b) and (c)(1). The statute also requires an applicant to provide sufficient evidence that he or she is lawfully present in the United States before a license may be issued. 119 Stat 231, § 220 (c)(2)(B).[1]

The Act does not expressly require states to enact its prescribed standards for issuance of licenses and identification cards. The statute does, however, prohibit Federal agencies from accepting, for official purposes, a drivers' license that is issued by a state that does not comply with

[1]The statute also requires states that adopt it to use technology that can scan and hold images of the documents that are used to obtain a license, capture facial images of applicants, verify social security numbers, require appropriate employees to undergo training in detecting fraudulent documents and require all persons who manufacture or produce the licenses and identity cards to undergo security clearances. 119 Stat 231, §§ 202(d).

the requirements of the statute. The practical effect is that if a state does not comply, its drivers' licenses cannot be used to gain access to federal facilities, board commercial aircraft, enter nuclear power plants or for any other purpose as determined by the Secretary of Homeland Security.[2]

Analysis. Congress cannot compel states to enact specific legislation or adopt specific policies. *New York v. United States,* 505 U.S. 144 (1992). Congress also lacks the authority to conscript state officers to enforce federal law or carry out federal policy. *Printz v. United States*, 521 U.S. 898 (1997). Congress may, however, adopt provisions, such as conditioning receipt of federal funds and other incentives, to induce states to enact specific legislation or adopt specific policies. *New York v. United States, supra.*[3]

There are also limits in the crafting of incentives to induce states to act. As *New York v. United States, supra*, illustrates, Congress must have the constitutional authority to provide the specific incentives.

The Real ID Act does not unlawfully compel the states to enact specific legislation and does not commandeer or conscript any state officer to enforce federal law.[4] The Act does impose consequences in that licenses that fail to meet the requirements of the statute may not be used to gain access to federal facilities or to board commercial aircraft. 119 Stat § 201(a).[5]

Congress has the authority to impose reasonable requirements for gaining access to federal property. The government in its role as property owner may impose restrictions and conditions

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[2]Section 202(a)(1) prohibits federal employees from accepting such licenses as identification for official purposes. The term official purposes is defined in section 201(3), and includes using a license to board a commercial aircraft.

[3]In *New York v. United States,* the plaintiff challenged a statute that was enacted to address the problem of disposing of low level radioactive waste. To induce states to assume primary responsibility, the statute offered a mixed package of incentives and penalties. The incentives included financial incentives, such as monetary payments and more favorable access to disposal sites for states that adopted specific legislation to deal with radioactive waste. The penalties for states that refused or failed to adopt legislation included a provisions that required non complying states to take ownership and assume the liability for radioactive waste within their borders. The Court upheld the financial incentive provisions but struck down the penalties in the statute.

[4]The only exception is 119 Stat 231, § 202(d)(10). That provision requires that states which fail to satisfy the requirements of the act clearly state that their licenses do not meet the requirements of the statute and use special colors and other marking to alert law enforcement personnel and other federal officials that the license does not comply with the Act.

Although that provision might be subject to challenge, such an action could be brought only if a state refuses or fails to adopt the standards by the deadline imposed under the statute. Furthermore, such a challenge, if successful, would not invalidate the entire statute. That part would probably be severable based on the Court's reasoning in *New York v. United States, supra.*

[5]By its terms, section 201(a) is directed toward federal employees, federal facilities and commercial aircraft. That provision imposes no mandates on state governments or state officials.

governing access and use of its property. *See, e.g., United States Postal Service v. Council of Greenburgh Civic Associations,* 453 U.S. 114 (1981) and *Adderly v. Florida,* 385 U.S. 39 (1966). As both cases show, such restrictions and conditions will be upheld as long as they are even handed and reasonably related to the intended use and function of the property. It is arguably appropriate for the government, in its role as a property owner, to set requirements governing the types of identification that would be appropriate to gain access to its property.

Setting standards governing the types of identification that can be used to board a commercial aircraft is likewise within the authority of Congress. Under the Commerce Clause, Congress has the authority to regulate and protect the instrumentalities of interstate commerce. *See, e.g., Reno v. Condon,* 528 U.S. 141 (2000); *United States v. Lopez,* 514 U.S. 549 (1995). Commercial aircraft are such instrumentalities and Congress has the authority to impose conditions for boarding.

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