The Identity Project

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The Honorable Jonathan Kreiss-Tomkins, Chair
The Honorable Gabrielle LeDoux, Vice-Chair
House State Affairs Committee
Alaska Capitol Building, Room 120
Juneau, AK 99801

by email: Representative.Jonathan.Kreiss-Tomkins@akleg.gov
Representative.Gabrielle.LeDoux@akleg.gov
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Re: Alaska and the right to travel by air

On behalf of the Identity Project (PapersPlease.org) – a nonprofit legal and educational organization founded by John Gilmore, the plaintiff in *Gilmore v. Gonzales* – I would like to correct some misunderstandings about the decision in this case in the April 3, 2017, letter to your committee from Deputy Commissioner Leslie Ridle of the Alaska Department of Administration in response to questions about HB 74, the Federal REAL-ID Act of 2005, and the ability of the State of Alaska to challenge any future Federal attempt to impose an ID requirement for airline travel by Alaskan residents.

Deputy Commissioner Ridle's letter states that, "In *Gilmore v. Gonzales*, 435 F.3d 1125, 1136 (2006), the court stated: 'we reject Gilmore's right to travel argument because the Constitution does not guarantee the right to travel by any particular form of transportation.'"

Gilmore v. Gonzales was not an Alaskan case. Mr. Gilmore was trying to fly from San Francisco to Washington, DC, and the Ninth Circuit Court of Appeals found that there were adequate alternative means of surface travel available for that journey:

"[Gilmore's] argument is that 'air travel is a necessity and not replaceable by other forms of transportation.' Although we do not question this allegation for purposes of this petition, it does not follow that Defendants violated his right to travel, *given that other forms of travel remain possible*." (435 F.3d at 1136; emphasis added)

The factual predicate for the court's decision in *Gilmore v. Gonzale*s, "other forms of travel remain possible," obviously isn't true in parts of Alaska. Alaskan circumstances are readily distinguishable from the facts considered by the Court of Appeals in *Gilmore v. Gonzale*s. This is why Alaska has the best legal case of any state against interference with its residents' right to travel by air.

Deputy Commissioner Ridle's letter continues, "This case is pre-Real ID Act, but it involved a person refusing to show ID to board a plane for interstate travel post-9/11."

But as it was decided by the Court of Appeals, *Gilmore v. Gonzales* was about whether a person who doesn't have ID can be required to submit to a more intrusive search ("screening"). The Court of Appeals did not reach the question of whether such a person could Constitutionality be prevented from boarding a flight without being given the option of flying without ID if he submitted to a more intrusive search.

The Court of Appeals found – after reviewing the applicable Security Directives from the TSA to the airlines, *ex parte* and *in camera* – that Mr. Gilmore could have traveled without ID, if he had been willing to submit to more intrusive search:

"Gilmore had a meaningful choice. He could have presented identification, submitted to a search, or left the airport." (435 F.3d at 1139)

The decision in *Gilmore v. Gonzales* was about whether airline passengers who don't show ID can be required to submit to more intrusive search, not about whether they could be denied transport if they declined to show ID but were willing to submit to more intrusive search.

Deputy Commissioner Ridle's letter continues, "The court went on to explicitly hold that a person does not have a right to travel by plane, and that the identification policy is not burdensome. Id. At 1136-37."

As noted above, the first part of this statement rests on the availability of adequate alternative means of surface travel, which in parts of Alaska are clearly absent.

The second part, that "the ID policy is not burdensome", pertains to the "ID policy" of requiring those who doesn't have ID to submit to more intrusive searches. The Court of Appeals described "the identification policy" as follows:

"The identification policy requires that airline passengers either present identification or be subjected to a more extensive search. The more extensive search is similar to searches that we have determined were reasonable and 'consistent with a full recognition of appellant's constitutional right to travel'." (435 F.3d at 1137)

An ID policy that prohibited airline travel altogether for those who don't have ID would be readily distinguishable, and obviously more burdensome.

Deputy Commissioner Ridle's response to this question concludes, "We believe this analysis would continue to apply to a facial challenge to the ID requirements in the REAL ID Act."

It's not clear to what "ID requirements in the REAL ID Act" Deputy Commissioner Ridle's letter is referring. The REAL-ID Act does not contain any ID requirement to fly. It pertains only to what ID is acceptable, in situations where some *other* valid law, regulation, or policy already requires ID for a Federal purpose

Deputy Commissioner Ridle's letter cites and quotes from 49 US Code § 44901, which provides that the TSA "shall provide for the screening of all passengers … that will be carried aboard a passenger aircraft operated by an air carrier." But this is the requirement for search ("screening") discussed by the Court of Appeals in its opinion in *Gilmore v. Gonzales*, and not an ID requirement. Nothing in this or any other current or proposed Federal law or regulation imposes an ID requirement for airline travel.

A requirement for all airline passengers to show ID is not the same as a requirement for those passengers without ID to submit to more intrusive search.

If the TSA were to propose or impose an ID requirement for airline travel, it would be readily distinguishable from the ID policy (requiring more intrusive searches of airline passengers without ID) described by the Court of Appeals in *Gilmore v. Gonzales*.

While the TSA and DHS have made contradictory statements in some of their press releases, their consistent position in court has been that no Federal law or regulation or TSA policy requires airline passengers to show any ID. Our experience, and the reports we have obtained in response to our Freedom Of Information Act requests, confirm that this is true, and that people travel by air with no ID, throughout the US, every day.

So far as we have been able to determine, no court has yet ruled on whether an ID requirement for airline travel would be Constitutional, in Alaska or any other state. A new law, regulation, or policy imposing an ID requirement for airline travel would be untested and highly vulnerable to Constitution challenge, especially by the State of Alaska.

I am available to you or to other members of your Committee and the Legislature to answer any questions you may have about *Gilmore v. Gonzales* and the right to travel.

Sincerely,

Edward Hasbrouck
Consultant on travel-related civil liberties and human rights issues
The Identity Project (PapersPlease.org)