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UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

JOHN GILMORE, Plaintiff, v. JOHN ASHCROFT, in his official capacity as Attorney General of the United States, ROBERT MUELLER, in his official capacity as Director of the Federal Bureau of Investigation, NORMAN MINETA, in his official capacity as Secretary of Transportation, MARION C. BLAKEY, as Administrator of the Federal Aviation Administration, ADM JAMES M. LOY, in his official capacity as Acting Undersecretary of Transportation for Security, TOM RIDGE, in his official capacity as chief of the Office of Homeland Security, UAL CORPORATION aka UNITED AIRLINES, SOUTHWEST AIRLINES, DOES I-XXX, Defendants.	Case No. C-02-3444 SI **REPLY IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS** **HON. SUSAN ILLSTON** **Date: January 17, 2003** **Time: 9:00 a.m.**

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PRELIMINARY STATEMENT

With no concern for logic or reason or, more importantly, the safety of the traveling public, plaintiff argues that the government and the defendant airlines are prohibited from making any inquiry at all about the identity of airline passengers. He insists that verification of the identity of an airline's passengers before allowing them to board an aircraft does nothing to further the government's objective of preventing air piracy, violates the passengers' most basic constitutional rights, and is fraught with the danger of governmental abuse. Moreover, he dismisses the government's efforts to prevent known and suspected terrorists from boarding an aircraft as ineffective, easily evaded, and based on faulty information. As plaintiff views it, the government as well as the airlines are constitutionally prohibited from taking any special precaution, regardless of whether a particular passenger is known to pose a threat to passenger safety. To do otherwise would confer "standardless discretion" on airline security officials and invite arbitrary and discriminatory treatment of airline passengers.

At the outset, plaintiff lacks standing to enlist the aid of the federal courts in conducting a wide-ranging investigation into the propriety and efficacy of the federal government's counter-terrorism efforts. Plaintiff's alleged "injuries," to the extent they exist at all, are traceable solely to plaintiff's own preferences and to the identification "requirement" that he challenges in this action. As plaintiff acknowledges, any such requirement is embodied in security directive(s) issued by the Federal Aviation Administration (FAA) and the Transportation Security Administration (TSA) and, as federal defendants previously established, the United States Court of Appeals has exclusive jurisdiction over plaintiff's constitutional challenge to the validity of such directive(s). For these reasons alone, plaintiff's claims here must be dismissed for lack of subject matter jurisdiction.

Even if this Court were to reach the merits of plaintiff's constitutional claims, the authorities cited by plaintiff, which are largely taken out of context, fail to provide any support for plaintiff's contentions in this case. The Ninth Circuit long ago held that the government may adopt reasonable

measures that are confined to the purpose of preventing air piracy without infringing upon a passenger's constitutional right to travel. Plaintiff has cited no authority to the contrary.

The Ninth Circuit has also repeatedly held that the passenger screening procedures typically utilized at airports, including random hand searches of passengers bags for weapons and explosives, conform with the requirements of the Fourth Amendment. Moreover, the Supreme Court has explicitly held that a *request* for information, including a request for identification, cannot, by itself, run afoul of the Fourth Amendment. While the government cannot arrest an individual based solely on his failure to respond to such a request, plaintiff does not allege that he was arrested, or even threatened with arrest, by any of the defendants in this case. To the contrary, he alleges that he was *asked* for identification prior to boarding an aircraft and, after he refused to provide any identification, he left both of the airports in question without restraint.

Plaintiff's Fifth Amendment claim is baseless for much the same reason. While basic principles of fair notice implicit in the Due Process Clause prevent the government from imposing criminal penalties on a citizen for failing to adhere to a vague, standardless requirement to provide a "credible and reliable" form of identification to police, the Fifth Amendment does not require the government to provide a catalog of acceptable forms of identification before *requesting* that an airline passenger produce identification at an airport.

Finally, a requirement that a passenger produce identification is not subject to scrutiny under the First Amendment where, as here, the government is neither regulating conduct that has an expressive element nor imposing any disproportionate burden on First Amendment activity. Plaintiff's reliance on decisions in cases which involve direct regulations of speech is therefore entirely misplaced.

In sum, even assuming, *arguendo*, that this Court has subject matter jurisdiction over the claims asserted by plaintiff in this case, those claims are wholly without merit as a matter of law, and must be dismissed for failure to state a claim upon which relief can be granted.

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S CLAIMS IN THIS ACTION

A. Plaintiff Lacks Standing to Challenge Any Agency Action Other Than The Alleged Identification Requirement

As federal defendants demonstrated in their opening memorandum, the fact that plaintiff may have standing to challenge an alleged requirement that he produce identification at an airport does not provide a jurisdictional license for plaintiff to seek judicial review of other actions allegedly taken by one or more of the federal defendants which have *not* resulted in any injury to plaintiff. See generally Federal Defendants' Motion to Dismiss ("Fed. Def. Mot.") at 8-10. In response, plaintiff argues that the airlines' requests for identification are "inescapably intertwined with the CAPPS program, the No-Fly and Watch list, thereby providing plaintiff standing to challenge each program." Plaintiff's Consolidated Opposition to Defendants' Motions to Dismiss ("Pl. Opp.") at 6.

However, the injuries that plaintiff has identified (Pl. Opp. at 6-7) are all traceable solely to plaintiff's unwillingness to fly, which is, in turn, attributed by plaintiff solely to the challenged requests for identification. Plaintiff does not allege that any defendant in this case refused to allow him to board an aircraft because the name "John Gilmore" appears on a "No-Fly and Watch list." Regardless of whether some other individual's name was erroneously or improperly included on such a list as plaintiff alleges (see, e.g., Plaintiff's Complaint ("Compl."), ¶ 43), plaintiff does not allege that *he* was injured thereby. Similarly, plaintiff does not allege that he was prevented from flying because of the nature of his ticket purchase; therefore, even if such factors are considered as part of the so-called "CAPPS" system as plaintiff alleges (Compl., ¶ 36), plaintiff has not alleged any cognizable injury as a result. As federal defendants previously explained (Fed. Def. Mot. at 9), plaintiff's "generalized yet speculative apprehensiveness that the [government] may at some future date misuse the information in some way that would cause direct harm to [plaintiff]" is "not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." Laird v. Tatum, 408 U.S. 1, 13-14 (1972).

B. The Court of Appeals Has Exclusive Jurisdiction to Review the Validity of Security Directives Issued By The FAA and the TSA

Section 46110 of Title 49 provides that the United States Court of Appeals shall have "exclusive jurisdiction to affirm, amend, modify, or set aside any part of [an] order" issued by the TSA or the FAA in the exercise of their respective duties and powers with respect to security and aviation safety. See generally, Fed. Def. Mot. at 10-12. Plaintiff asserts that this provision applies solely to an adjudication in which findings of fact are made regarding specific parties after an administrative hearing. Pl. Opp. at 8-10. However, these contentions simply cannot be reconciled with controlling Ninth Circuit precedent.

The Ninth Circuit has concluded that the term "order," as used in section 46110, must be interpreted expansively to apply to "an[y] agency decision which imposes an obligation, denies a right, or fixes some legal relationship." Crist v. Leippe, 138 F.3d 801 (9th Cir. 1998), quoting Mace v. Skinner, 34 F.3d 854, 857 (9th Cir. 1994). Moreover, contrary to the claims asserted by plaintiff here, the court has explicitly ruled that the jurisdiction of the court of appeals extends not only to adjudicative determinations, but also to other final agency actions, including "rules:"

> The use of the word "order" in section 1486(a) [the predecessor of section 46110] is somewhat problematic. When reviewing administrative action, we are required to differentiate between "orders" and "rules." *Compare* 5 U.S.C. § 553 *with* 5 U.S.C. § 554. Those who deal closely with administrative law have developed labels that include "orders," "rules," "hybrid rules," "policies," and "actions." [citation omitted]. Thus, it would be quite easy to become mired in tautological debate when considering the extent of jurisdiction under section 1486(a).
>
> Several other circuits have had to interpret section 1486(a). The Fourth, Seventh, Eighth, and District of Columbia Circuits have held that section 1486(a) is not to be given a narrow, technical reading; instead, it is to be interpreted expansively. [citations omitted]. We agree with these courts that "the purposes of special review statutes - - coherence and economy - - are best served if courts of appeals exercise their exclusive jurisdiction over *final agency actions.*"
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> * * *
>
> [W]e hold that section 1486(a) does provide us with jurisdiction over the FAA's final determination. In this case, as discussed below, that final determination constitutes a rule.

San Diego Sports Center, Inc. v. Federal Aviation Administration, 887 F.2d 966, 968-969 (9th Cir. 1989) (emphasis by court); accord, Hawaii Helicopter Operators Association v. Federal Aviation

Administration, 51 F.3d 212, 213 (9th Cir. 1995) (exercising jurisdiction under section 46110 over petition for review of Special Federal Aviation Regulation ('SFAR') No. 71 establishing special operating rules, procedures and limitations for airplane and helicopter air tour operators").

The Ninth Circuit has also repeatedly rejected the notion advanced by plaintiff here that section 46110 and its predecessor apply only where the agency has made findings of fact after a formal hearing. San Diego Air Sports Center, Inc., v. Federal Aviation Administration, 887 F.2d at 969 (letter from the FAA that says that parachuting will no longer be allowed in the San Diego Terminal was a final "order" even though "[t]he record in this appeal [] consists of little more than the letter"); Southern California Aerial Advertisers' Ass'n v. Federal Aviation Administration, 881 F.2d 672, 676 (9th Cir. 1989)(letter from the FAA prohibiting fixed wing aircraft from traveling through shoreline area near Los Angeles airport was a final "order" even though the "entire administrative record in this case consists of the [] letter and the FAA's proposal for [Special Federal Aviation Regulation] 51"); cf. Morongo Band of Mission Indians v. Federal Aviation Administration, 161 F.3d 569, 572 (9th Cir. 1998) (court of appeals has jurisdiction under section 46110(a) to review NEPA challenge to "record of decision" implementing Los Angeles airport enhancement project); see also, Atorie Air, Inc., v. Federal Aviation Administration, 942 F.2d 954, 960 (5th Cir. 1991), quoting in part, Nevada Airlines v. Bond, 622 F.2d 1017, 1020 n.5 (9th Cir. 1980) ("To be deemed 'final,' an order under section 1486(a) need not be the culmination of lengthy administrative proceedings. It need only be an agency decision which 'imposes an obligation, denies a right, or fixes some legal relationship.'").[1]

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[1] Plaintiff's argument to the contrary rests on an opinion rendered by the D.C. Circuit in 1950 in which the court held that the term "order," as used in the Natural Gas Act, contemplated "review of a decision based on evidence presented in a quasi-judicial proceeding before the [Federal Power] Commission." United Gas Pipeline Co. v. FPC, 181 F.2d 796, 798 (D.C. Cir.), cert. denied 340 U.S. 827 (1950). However, the D.C. Circuit subsequently disavowed the reasoning of United Gas Pipeline in Investment Company Institute v. Board of Governors, 551 F.2d 1270, 1276 (D.C. Cir. 1977) ("Although some courts persist in reading special review statutes covering 'orders' as not encompassing regulations, . . . the general approach taken by

Plaintiff also asserts that his claim here is a "broad constitutional challenge" which is outside the scope of section 46110. Pl. Opp. at 10-11. Specifically, plaintiff argues that his "multiple and complex constitutional claims surrounding the issue of the identification requirement is broad using any accepted interpretation of the word." Pl. Opp. at 10. Notwithstanding the "multiple" number and "complexity" of plaintiff's constitutional claims, all of these claims challenge the validity not of some broad array of agency practices, but instead of a specific "order" which plaintiff himself describes as an "identification requirement." As such, plaintiff's challenge falls well within the scope of section 46110, which vests exclusive jurisdiction over such challenges in the courts of appeals.

II. THE AIRLINES' REQUESTS FOR IDENTIFICATION DO NOT INFRINGE UPON PLAINTIFF'S CONSTITUTIONAL RIGHT TO TRAVEL

Plaintiff contends that he has a constitutional right not only to travel, but to travel *by air*, and any law (or, indeed, any action by the airlines) which burdens that right must be necessary to further a compelling state interest. Pl. Opp. at 11-13. However, the Ninth Circuit has specifically rejected the notion that the Constitution encompasses any such right in holding that "burdens on a single mode of transportation do not implicate the right to interstate travel." Miller v. Reed, 176 F.3d 1202, 1205 (9th Cir. 1999). In so doing, the court endorsed the reasoning of the Fifth Circuit in City of Houston v. FAA, 679 F.2d 1184 (5th Cir. 1982), which responds directly to plaintiff's contention here that there is a constitutional right to travel by air:

> At most, [the air carrier plaintiffs'] argument reduces to the feeble claim that passengers have a constitutional right to the most convenient form of travel. That notion, as any experienced traveler can attest, finds no support whatsoever in [the Supreme Court's right of interstate travel jurisprudence] or in the airlines' own schedules.

Miller v. Reed, 176 F.3d at 1206, quoting City of Houston, 679 F.2d at 1198. Thus, while it may well be that it would take plaintiff "many days" to get to his chosen destination by some other "method of transportation" (Pl. Opp. at 19), such as an automobile, plaintiff does not have a

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United Gas Pipeline is no longer good law in this circuit."). In any event, as set out in the text, the Ninth Circuit has repeatedly declined to adopt such a limited construction of the term "order."

constitutional right to the "most convenient form of travel." Id.

Plaintiff argues that the reasoning of Miller v. Reed is inapplicable here because other "common carriers" have also begun requesting that passengers produce identification. Pl. Opp. at 12. Indeed, plaintiff asserts in his brief that "[g]overnment-issued ID is now required to commercially travel domestically by air, rail, water and bus within the United States." Id. (emphasis in original). However, plaintiff's own Complaint provides no support for these sweeping assertions. In that regard, plaintiff alleges that he was told by representatives of United Airlines that "it is possible to fly without ID" with an "intense search of one's person and one's bags." Compl., ¶ 31. United did not permit plaintiff to board the aircraft because he "would not agree to having his bag searched by hand." Id., ¶ 32. Thus, *plaintiff* himself has not been required to produce identification as a precondition for travel even by air, except by a single airline (*i.e.*, Southwest) which, in turn, advised plaintiff that it was acting pursuant to that airline's policy. Compl., ¶ 27. Consequently, plaintiff's claim here is even more "feeble" than that rejected in Miller v. Reed and City of Houston in that plaintiff asserts a constitutional right not only to the "most convenient form of travel," but also a constitutional right to travel on Southwest Airlines.

Even if plaintiff's right to travel were implicated in this case, the airlines' requests for identification do not, as a matter of law, constitute a violation of that right. As federal defendants previously explained, plaintiff, like other citizens, has a right to travel throughout the United States "uninhibited by statutes, rules and regulations which *unreasonably burden or restrict* this movement." Saenz v. Roe, 526 U.S. 486, 499 (1999), quoting Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (emphasis added). As the Ninth Circuit recognized in United States v. Davis, the need to prevent airline hijacking is "unquestionably grave and urgent." 482 F.2d 893, 910 (9th Cir. 1973). It follows, as the court in Davis held, that the government does not "unreasonably burden or restrict" the right to travel when it implements reasonable measures that are no more extensive than necessary to prevent air piracy and to detect the presence of weapons and explosives. Id. at 913. To the contrary, "[i]n a broad sense, the airport search program is a governmental effort to protect freedom

of travel from private interference, rather than to impede the individual's right to travel." Id. at 913, n.59.

The challenged requests for identification are of central importance to achieving the government's objective of preventing air piracy and protecting the safety of airline passengers. The Aviation Transportation and Security Act requires the Under Secretary of Transportation to establish procedures for notifying airline security officers of the identity of individuals "known to pose, or suspected of posing, a risk of air piracy or terrorism or a threat to airline passenger safety." 49 U.S.C. § 114(h)(2). As the statute reflects, Congress intended that air carriers use this information to identify individuals who "may be a threat to civil aviation or national security" and, once such an individual is identified, to "notify appropriate law enforcement agencies, prevent the individual from boarding an aircraft, or take other appropriate action . . . ." Id., § 114(h)(3). Such information would be of little value, however, if airlines were prohibited from seeking to verify the identity of their passengers. Without any mechanism for verifying the identity of airline passengers, efforts by airline security officers to prevent even known terrorists from boarding an aircraft would be jeopardized.

Plaintiff insists that less restrictive means of achieving these objectives are available. Pl. Opp. at 13. In particular, plaintiff suggests that the government publish what types of identification are "acceptable." Id. However, a limitation on the types of identification that are "acceptable" at airports would be more restrictive, not "less restrictive" than the current procedures. Plaintiff also urges that the government may rely instead on "intensified" physical searches. Id. at 14. With unlimited time and resources and extensive (if not intolerable) flight delays, the government could seek to undertake a thorough and intensive hand search of the person and bags of each and every airline passenger. Such an intrusive process might well limit the need for the pre-screening process to which plaintiff objects, but it is difficult to conceive of why such a procedure would be any "less restrictive" on plaintiff's right to travel than the current process employed at airports. Indeed, according to the Complaint, plaintiff declined to consent to such an intensive search. Finally, plaintiff suggests that terrorists may be subdued once airborne through the use of armed pilots and

air marshals, strengthened cockpit doors, and advice to passengers and crew "to resist any hostile takeover." Id. Notwithstanding the potential availability of such "last resort" measures, federal defendants respectfully submit that it is necessary and, indeed, essential to passenger safety for the government to seek to prevent known terrorists from boarding an aircraft in the first instance.

For all of these reasons, the airlines' requests for identification do not unreasonably burden or restrict plaintiff's constitutional right to travel.

III. THE AIRLINES' REQUESTS FOR IDENTIFICATION COMPLY WITH THE FOURTH AMENDMENT

Plaintiff argues that any requirement that passengers produce identification as part of an airport screening process violates the Fourth Amendment, regardless of whether it is imposed by the government or the airlines. Pl. Opp. at 15-19. In support of this contention, plaintiff relies on Lawson v. Kolender, 658 F.2d 1362, 1367-1368 (9th Cir. 1981), aff'd on other grounds, Kolender v. Lawson, 461 U.S. 352 (1983); Martinelli v. City of Beaumont, 820 F.2d 1491, 1494 (9th Cir. 1987); and Carey v. Nevada Gaming Board, 279 F.3d 873, 880 (9th Cir. 2000). In each of these cases, the plaintiff was arrested for refusing to provide identification to a police officer, and the court concluded that the arrest violated the Fourth Amendment because the officer lacked probable cause to believe that a crime had been committed.

In Lawson v. Kolender, for example, the plaintiff had been arrested 15 times under a California vagrancy statute which "require[d] a person to provide reliable identification when requested by a police officer who has a reasonable suspicion of criminal activity . . . ." 658 F.2d at 1366. The Ninth Circuit concluded that such a statute violates the Fourth Amendment because it "subverts the probable cause requirement" in that it "authorizes arrest and conviction for conduct that is no more than suspicious." Id. at 1367, quoting in part Powell v. Stone, 507 F.2d 93, 96 (9th Cir. 1974), rev'd on other grounds, 428 U.S. 465 (1976). As the court explained, "as a result of the demand for identification, the statutes bootstrap the authority to arrest on less than probable cause, and the serious intrusion on personal security outweighs the mere possibility that identification may provide a link leading to arrest." Lawson, 658 F.2d at 1366-1367.

Similarly, in Martinelli v. City of Beaumont, the plaintiff had been arrested for violating section 148 of the California penal code, which provides for a fine and imprisonment of "[e]very person who wilfully resists, delays, or obstructs any public officer or peace officer." The plaintiff was arrested after she refused to provide identification on demand by a police officer. The court held that "the use of Section 148 to *arrest* a person for refusing to identify herself during a lawful *Terry* stop violates the Fourth Amendment." 820 F.2d at 1494 (emphasis added). Likewise, in Carey v. Nevada Gaming Control, the Ninth Circuit held that the arrest of the plaintiff for refusing to identify himself violated the Fourth Amendment because "there was no probable cause to believe that the plaintiff had violated [Nevada's] gaming laws, and [the plaintiff's] name was not relevant to determining whether [he] had cheated." 279 F.3d at 880.

Plaintiff's reliance on these cases is misplaced for two reasons. First, plaintiff does not allege that he was arrested or otherwise seized by any of the defendants. Compl., ¶¶ 24-34. Consequently, the probable cause requirement of the Fourth Amendment has no application in this case.[2] Second, plaintiff was not *compelled* to reveal his identity. Instead, he was "asked for his identification." Compl., ¶¶ 25, 26, 29. "[A] request for identification by the police does not, by itself, constitute a Fourth Amendment seizure," Immigration and Naturalization Service v. Delgado, 466 U.S. 210, 216 (1984); Florida v. Royer, 460 U.S. 491, 497 (1983) ("[L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is

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[2] Plaintiff does assert in his brief that he was "previously arrested in 1996 for refusing to comply with the ID requirement at SFO." Pl. Opp. at 7. However, in plaintiff's "Addendum of New Facts" (¶ 16), plaintiff admits that he was not arrested for violation of any federally imposed "identification requirement." Instead, he was "arrested at SFO in 1996 for violation of California Penal Code Section 148 ('delaying . . . a peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment') during an event where he refused to show his ID shortly after the institution of Security Directive 96-05. (The charges were later dropped.)." While plaintiff is free to assert a cause of action against the state officials who arrested him for violating section 148, see Martinelli v. City of Beaumont, his 1996 arrest for violation of a state penal statute is wholly irrelevant to the validity of the TSA's security directives.

willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions."); see also, id. at 501 ("Asking for and examining Royer's ticket and his driver's license were no doubt permissible in themselves . . . ."). Since a police officer's request for identification does not violate the Fourth Amendment, a similar request by airline officials cannot, as a matter of law, violate the Fourth Amendment.

Nor did defendants require plaintiff to "relinquish" his Fourth Amendment rights as a condition for the exercise of his right to travel. Pl. Opp. at 16-17. As the Ninth Circuit has repeatedly held, "[a]irport security screening procedures must comply with the Fourth Amendment." Torbet v. United Airlines, Inc., 298 F.3d 1087, 1089 (9th Cir. 2002). "The procedures therefore must be reasonable." Id. As federal defendants explained in Point II above, it is plainly reasonable for both the government and the defendant airlines to seek to identify individuals "known to pose, or suspected of posing, a risk of air piracy or terrorism or a threat to airline passenger safety" before they are permitted to board an aircraft. The requests for identification at issue here are of central importance to the achievement of this objective. Consequently, even if a request for identification were to trigger the requirements of the Fourth Amendment, the requests at issue here were plainly reasonable and thus consistent with Fourth Amendment requirements.

Plaintiff's remaining contentions are equally unavailing. Plaintiff's assertion that Fourth Amendment principles governing "administrative searches" are inapplicable to the airport screening program at issue in this case (Pl. Opp. at 17-19) is irreconcilable with the Ninth Circuit's decision in United States v. Davis, in which the court reached precisely the opposite conclusion. 482 F.2d at 908 ("The appropriate standards for evaluating the airport search program under the Fourth Amendment are found in a series of Supreme Court cases relating to administrative searches . . . .").

Plaintiff's evident contention that airlines have no legitimate need to verify the identity of their passengers (Pl. Opp. at 18-19), and his related suggestion that the government's actual purpose is "to use 'lists' of people sought by law enforcement or politically disfavored" to create a "dragnet for law enforcement" (Pl. Opp. at 11, 19), are wholly without substance. As the Supreme Court has

aptly cautioned, the court's inquiry into the government's purpose "in this context is to be conducted *only* at the programmatic level and is not an invitation to probe the minds of individual officers at the scene." Indianapolis v. Edmond, 531 U.S. 32, 48 (2000) (emphasis added). The pertinent provisions in the statute are intended to enable air carriers to identify individuals who pose a threat to airline passenger safety, and to take appropriate precautions for the protection of passengers. 49 U.S.C. § 114(h)(2) and (3). The airlines' efforts to verify the identity of their passengers for this purpose are plainly reasonable, and fully comply with the Fourth Amendment.

IV. THE CHALLENGED REQUESTS FOR IDENTIFICATION COMPLY WITH THE REQUIREMENTS OF THE DUE PROCESS CLAUSE

Contrary to the claims made in plaintiff's brief, there can be no confusion about what conduct is prohibited by federal law. See, e.g., 49 U.S.C. § 46502(a) (prohibiting aircraft piracy), id., § 46505(b)(1) (boarding an aircraft with a concealed dangerous weapon); id., §§ 46505(b)(2) and (b)(3) (attempting to place a loaded weapon on an aircraft). The requests for identification at issue here merely represent one means used to prevent air piracy and thereby protect the safety of airline passengers. No federal statute or regulation authorizes the imposition of a criminal penalty upon airline passengers for failure to produce any form of identification (much less "credible and reliable" identification) at an airport. Thus, contrary to the implicit suggestion in plaintiff's brief (Pl. Opp. at 14), neither plaintiff nor any other passenger is at risk of arrest or prosecution by any federal defendant for failure to provide identification.[3] For that reason, the Supreme Court's decision in Kolender v. Lawson, 461 U.S. 352 (1983), which concerns the validity of a criminal statute as applied to the arrest of an individual for failing to produce identification, provides no support for plaintiff's claims in this case which pertain to a request by an airline for identification.

Nor is there any basis for plaintiff's contention that the federal government has conferred standardless discretion on airline security officers. To the contrary, the standards governing the

[3] As discussed, supra, at 10 n.2, plaintiff alleges that he was arrested for failure to comply with Section 148 of the California Penal Code, the enforcement of which is controlled entirely by state officials who are not parties to this action.

airport screening process are quite precise. Air carriers must refuse to transport any passenger who refuses to consent to a search "establishing whether the passenger is carrying unlawfully a dangerous weapon, explosive, or other destructive substance." 49 U.S.C. 44902(a)(1). Carriers are permitted to "refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety." Id., § 44902(b). In addition, federal regulations require each aircraft operator to adopt a "security program" which must "provide for the safety of persons and property traveling on flights provided by the aircraft operator." 49 C.F.R. §§ 1544.101(a) and 1544.103(a)(1). These standards are more than sufficient to satisfy Due process requirements. The requests for identification that are challenged by plaintiff in this case are merely one part of the safety and security procedures applied by each of the airline defendants, and thus subject to these same standards.

Plaintiff also does not allege that he was arbitrarily or indiscriminately exposed to an "ID requirement" that is not applied to other passengers. To the contrary, as plaintiff acknowledges, *every* passenger is asked to provide some form of identification, and *every* passenger who refuses to provide any documentation may be subject to further screening procedures. Since plaintiff does not allege that he was arbitrarily and indiscriminately singled out and stopped without reason when other passengers were allowed to proceed, the Supreme Court's concern with arbitrary and indiscriminate seizures of passing automobiles has no relevance to this case. Delaware v. Prouse, 440 U.S. 648, 662-663 (1979).

What plaintiff does not currently know, and what plaintiff seeks to expose through this Court's discovery procedures, are the law enforcement techniques that federal defendants may use to enforce these requirements. In essence, plaintiff seeks to discover and publicize the type(s) of identification which may trigger further inquiries by security officials (or allay their concerns) and the circumstances in which airline passengers may be subject to a more intensive search. The knowledge of this information would not aid plaintiff's efforts to comply with the law; nor would it create any more definitive standards cabining the discretion of security officers. For both reasons, nothing in the Due Process Clause requires publication of such information. Fed. Def. Mot. at 14-15.

V. PLAINTIFF'S FIRST AMENDMENT CLAIMS ARE WITHOUT MERIT

Plaintiff contends that the airlines' "ID request" has deprived him of a "host of first amendment rights," including "[h]is right to speak without being chilled due to fear of arrest," as well as his rights to freedom of association and to petition the government for redress. Pl. Opp. at 19. However, plaintiff's Complaint makes no reference to any restriction on plaintiff's speech.[4] Moreover, the airlines' requests for identification do not "directly and substantially interfere" with plaintiff's rights to freedom of association or to petition the government. See generally Fed. Def. Mot. at 20-21.[5]

Nonetheless, plaintiff insists that he has suffered various "indirect" injuries to his "relations with his family, his company, and his political advocacy," Pl. Opp. at 20, which are evidently the

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[4] Notwithstanding plaintiff's asserted "fear of arrest," he does not allege that any of the defendants in this case have threatened to arrest him or to prosecute him for any offense at all, much less an offense involving speech. In the absence of a "genuine threat of imminent prosecution," plaintiff lacks standing to pursue a claim on such a basis. Thomas v. Anchorage Equal Rights Commission, 220 F.3d 1134, 1139 (9th Cir. 2000) (*en banc*), cert. denied 531 U.S. 1133 (2001); San Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121, 1126 (9th Cir. 1996), quoting Darring v. Kincheloe, 783 F.2d 874, 877 (9th Cir. 1986) ("an 'imaginary or speculative' fear of prosecution is not enough").

[5] It is precisely for these reasons that plaintiff's claim that "the right to not identify oneself has been upheld in many First Amendment contexts" (Pl. Opp. at 2) has no application here. Each of the cited cases involved either a direct restriction on expressive activity or a restriction which directly and substantially interfered with protected expression. McIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) (statute prohibiting the distribution of anonymous campaign literature); Talley v. California, 362 U.S. 60 (1960) (ordinance prohibiting the distribution of handbills which do not contain the name and address of persons who prepared, distributed or sponsored them); Watch Tower Bible and Tract Society of New York v. Village of Stratton, 536 U.S. 150 (2002) (ordinance prohibiting "canvassers" from promoting any "cause" on private property without obtaining and exhibiting a "Solicitation Permit"); NAACP v. Alabama, 357 U.S. 449, 462 (1958) (order requiring NAACP to disclose its membership lists would impose "substantial restraint" on right to freedom of association by exposing members to "economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility."). In contrast to these cases, the requests for identification challenged here impose no direct restriction on plaintiff's expressive activities, and do not directly and substantially interfere with such activities.

product of his asserted inability to travel. However, a restriction which does not directly regulate or proscribe protected expression, but instead has only an "incidental effect" on such expression, is subject to scrutiny under the First Amendment only if it regulates "conduct which has a significant expressive element" or "impose[s] a *disproportionate* burden upon those engaged in protected First Amendment activities." Arcara v. Cloud Books, 478 U.S. 697, 703-704 (1986) (emphasis added); Nunez v. San Diego, 114 F.3d 935, 950 (9th Cir. 1997). Plaintiff does not allege that the airlines' requests for identification impose any disproportionate burden on protected expression. To the contrary, he admits that all airline passengers are asked for identification, regardless of whether they are embarking on vacation, or traveling to petition the government. In these circumstances, the challenged requests are not subject to scrutiny under the First Amendment merely because they may have some incidental effect on plaintiff's expression.

CONCLUSION

For the foregoing reasons and those set out in federal defendants' initial memorandum, federal defendants' motion to dismiss should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply in Support of Federal Defendants' Motion to Dismiss was served, by overnight courier, this 19th day of December, 2002 on:

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