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

13 JOHN GILMORE,
 14 Plaintiff,

15 v.

16 JOHN ASHCROFT, in his official capacity as
 Attorney General of the United States,
 17 ROBERT MUELLER, in his official capacity as Director
 of the Federal Bureau of Investigation, NORMAN
 18 MINETA, in his official capacity as Secretary of
 Transportation, MARION C. BLAKEY, as Administrator
 19 of the Federal Aviation Administration,
 20 ADM JAMES M. LOY, in his official capacity as Acting
 Undersecretary of Transportation for Security,
 21 TOM RIDGE, in his official capacity as chief of the
 Office of Homeland Security, UAL CORPORATION aka
 22 UNITED AIRLINES, SOUTHWEST AIRLINES,
 DOES I-XXX,

23 Defendants.
 24

Case No. C-02-3444 SI

**FEDERAL DEFENDANTS'
 MOTION TO DISMISS**

HON. SUSAN ILLSTON

**Date: January 17, 2003
 Time: 9:00 a.m.**

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 26
 27
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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

NOTICE OF MOTION AND MOTION TO DISMISS 1

MEMORANDUM OF SUPPORTING POINTS AND AUTHORITIES 1

PRELIMINARY STATEMENT 1

STATUTORY AND REGULATORY BACKGROUND 4

STATEMENT OF FACTS 6

ARGUMENT 7

I. PLAINTIFF LACKS STANDING TO CHALLENGE ANY ACTION BY THE
FEDERAL DEFENDANTS OTHER THAN THE ALLEGED REQUIREMENT
THAT AIRLINE PASSENGERS PRODUCE IDENTIFICATION 7

II. THE UNITED STATES COURT OF APPEALS HAS EXCLUSIVE
JURISDICTION TO REVIEW ORDERS ISSUED BY THE
UNDER SECRETARY WITH RESPECT TO HIS SECURITY
DUTIES AND POWERS 10

III. THE GOVERNMENT IS NOT REQUIRED TO PUBLISH SCREENING
CRITERIA USED TO IDENTIFY PERSONS WHO MAY POSE A RISK TO
AIRLINE SAFETY 12

A. The Due Process Clause Does Not Require Publication Of
Screening Criteria 12

B. Notwithstanding The Requirements Of The FOIA, The Under Secretary
Is Not Required To Publish Or Disclose Screening Criteria Obtained
Or Developed In Carrying Out Security Activities 16

IV. THE AIRLINES' REQUEST FOR IDENTIFICATION DOES NOT INFRINGE
UPON PLAINTIFF'S CONSTITUTIONAL RIGHT TO TRAVEL 18

V. PLAINTIFF'S FIRST AMENDMENT CLAIMS ARE INSUBSTANTIAL 20

VI. THE AIRPORT SCREENING PROCESS IS FULLY CONSISTENT WITH
FOURTH AMENDMENT REQUIREMENTS 21

VII. THE AIRPORT SCREENING PROCESS COMPLIES WITH
EQUAL PROTECTION REQUIREMENTS 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page

CASES

1

2

3 Allen v. Wright, 468 U.S. 737 (1984) 9

4 Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986) 24

5 Barber v. Hawaii, 42 F.3d 1185 (9th Cir. 1994) 20, 24

6 Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986) 7

7 Blum v. Yaretsky, 457 U.S. 991 (1982) 8

8 Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356 (2001) 24, 25

9 Caplan v. Bureau of Alcohol, Tobacco & Firearms, 587 F.2d 544 (2d Cir. 1978) 15

10 Clark v. Busey, 959 F.2d 808 (9th Cir. 1992) 10, 11,12

11 Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) 24

12 Coates v. City of Cincinnati, 402 U.S. 611 (1971) 13

13 Connally v. General Constr. Co., 269 U.S. 385 (1926) 13

14 Cramer v. Skinner, 931 F.2d 1020 (5th Cir. 1991), cert. den. 502 U.S. 907 (1991) 19, 20

15 Crist v. Leippe, 138 F.3d 801 (9th Cir. 1998) 10, 11, 12

16 Crooker v. Bureau of Alcohol, Tobacco & Firearms,
670 F.2d 1051 (D.C. Cir. 1981) (en banc) 15

17 Department of Housing and Urban Development v. Rucker, 122 S.Ct. 1230 (2002) 21

18 Dirksen v. United States Department of Health and Human Services,
19 803 F.2d 1456 (9th Cir. 1986) 15

20 Foster v. Skinner, 70 F.3d 1084 (9th Cir. 1995) 11

21 Ginsburg, Feldman & Bress v. Federal Energy Administration, 591 F.2d 717, aff'd en banc
22 by an equally divided court, 591 F.2d 752 (D.C. Cir. 1978), cert. den. 441 U.S. 906 (1979) .. 15

23 Go Leasing v. National Transportation Safety Board, 800 F.2d 1514 (9th Cir. 1986) .. 13, 14, 15

24 Hardy v. Bureau of Alcohol, Tobacco & Firearms, 631 F.2d 653 (9th Cir. 1980) 15

25 Harris v. McCauley, 814 F.2d 1350 (9th Cir. 1987) 12

26 Heller v. Doe, 509 U.S. 312 (1993) 24

27 Holt Civic Club v. Tuscaloosa, 439 U.S. 60 (1978) 24

28 Federal Defendants' Motion to Dismiss,
Gilmore v. Ashcroft, et al., C 02-3444

TABLE OF AUTHORITIES (Continued)

Page

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CASES (CONT.)

Houston v. FAA, 679 F.2d 1184, 1198 (5th Cir. 1982) 19

Houston v. Roe, 177 F.3d 901 (9th Cir. 1999), cert. denied 528 U.S. 1159 (2000) 13

Kolender v. Lawson, 461 U.S. 352 (1983) 13

Laird v. Tatum, 408 U.S. 1 (1972) 9-10

Lewis v. Casey, 518 U.S. 343 (1996) 8

Los Angeles v. U.S. Federal Aviation Administration, 239 F.3d 1033(9th Cir. 2001) 11

LSO v. Stroh, 205 F.3d 1146 (9th Cir. 2000) 7

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 7

Lyng v. International Union. UAW, 485 U.S. 360 (1988) 20, 21

Mace v. Skinner, 34 F.3d 854 (9th Cir. 1994) 11

Miller v. Reed, 176 F.3d 1202 (9th Cir. 1999) 18, 19

Pillar v. Civil Aeronautics Board, 485 F.2d 1018, 1027 (D.C. Cir. 1973) 17

Planned Parenthood v. Arizona, 718 F.2d 938 (9th Cir. 1983), appeal after remand,
789 F.2d 1348 (9th Cir.), aff'd, 479 U.S. 925 (1986) 13

Public Citizen v. Federal Aviation Administration, 988 F.2d 186 (D.C. Cir. 1993) 16, 17

Renne v. Geary, 501 U.S. 312 (1991) 7

Saenz v. Roe, 526 U.S. 489 (1999) 18

Shapiro v. Thompson, 394 U.S. 618 (1969) 18

Smith v. Goguen, 415 U.S. 566 (1974) 13

Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26 (1976) 7

Steel Company v. Citizens for a Better Environment, 523 U.S. 83 (1998) 7

Torbet v. United Airlines, 298 F.3d 1087 (9th Cir. 2002) 15, 20, 22, 23

United States v. Davis, 482 F.2d 893 (9th Cir. 1973) 1, 22, 23, 24

United States v. Henry, 615 F.2d 1223 (9th Cir. 1980) 22

United States v. Lanier, 520 U.S. 259 (1997) 13

Federal Defendants' Motion to Dismiss,
Gilmore v. Ashcroft, et al., C 02-3444

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES (Continued)

Page

CASES (CONT.)

United States v. Pulido-Baquerizo, 800 F.2d 899 (9th Cir. 1986) 19-20, 22

Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 (1982) 13

UNITED STATES CONSTITUTION

U.S. Const., Art. III 7

U.S. Const. Amend. I 2, 3, 20-21

U.S. Const. Amend. IV 2, 4, 21-23

U.S. Const. Amend. V 2, 3, 4, 12-15, 23-25

STATUTES

28 U.S.C. § 1631 12

49 U.S.C. § 114(h)(2) and (3) 25

49 U.S.C. § 40101-46507 10

49 U.S.C. § 40119(b)(1) 6, 16, 17, 18

49 U.S.C. § 44901(a) 5, 10, 15, 17, 23

49 U.S.C. § 44902(a) 5

49 U.S.C. § 44902(a)(1) 15, 23

49 U.S.C. § 44902(b) 5

49 U.S.C. § 44902(c) 5

49 U.S.C. § 44903(b) 4, 15, 17

49 U.S.C. § 44903(c) 17

49 U.S.C. § 44903(i)(2) 5, 10

49 U.S.C. § 44912 17

49 U.S.C. § 46110(a) 3, 10-12

49 U.S.C. § 46110(c) 10

49 U.S.C. § 46502(a) 4

Federal Defendants' Motion to Dismiss,
Gilmore v. Ashcroft, et al., C 02-3444

TABLE OF AUTHORITIES (Continued)

Page

STATUTES (CONT.)

1

2

3 49 U.S.C. § 46505(b)(1) 4, 14

4 49 U.S.C. § 46505(b)(2) 4, 14

5 49 U.S.C. § 46505(b)(3) 4, 14

6 Pub. L. No. 87-197, 75 Stat. 466 (Sept. 5, 1961) 4

7 Pub. L. No. 93-366, 88 Stat. 409 (Aug. 5, 1974) 4

8 Pub. L. No. 107-71, 115 Stat. 603 (Nov. 19, 2001) 4

9 Freedom of Information Act, 5 U.S.C. § 552(a) 2, 3, 6, 12, 16

REGULATIONS

10

11 49 C.F.R. § 1520.5 6, 17

12 49 C.F.R. § 1520.7 6, 17

13 49 C.F.R. § 1540.5 5

14 49 C.F.R. § 1540.107 5

15 49 C.F.R. § 1540.III(a) 5, 14

16 49 C.F.R. § 1544.101(a) 5, 15

17 49 C.F.R. § 1544.103(a)(1) 5, 15

18 49 C.F.R. § 1544.201-1544.207 5, 23

19 49 C.F.R. § 1544.201(c) 5

20 49 C.F.R. § 1544.305(a) 5

21 49 C.F.R. § 1544.305(b) 11-12

22 56 Fed. Reg. 13552 (April 2, 1991) 17

23 67 Fed. Reg. 8340 (Feb. 22, 2002) 17

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25

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1 federal law requires the Secretary of Transportation to ensure that a passenger prescreening system
2 is used to evaluate all passengers before they board an aircraft to identify passengers who might pose
3 a risk to civil aviation, and to ensure that those identified are adequately screened. Under the
4 governing statute and implementing regulations, the selection criteria used in this security screening
5 process are designated as "sensitive security information" which may not be disclosed to members
6 of the public.

7 In this action, plaintiff alleges that, as part of an airport screening process, employees of two
8 airlines, pursuant to an airline policy adopted at the behest of the government, requested that he
9 produce identification. According to the Complaint, when plaintiff refused to provide any form of
10 identification, Southwest Airlines declined to allow him to board an aircraft and United Airlines
11 informed him that he could board the aircraft only if he consented to a more intensive search of his
12 person and property. Plaintiff alleges that the request that he produce identification as a condition
13 for boarding an aircraft is unconstitutionally vague, and violates his constitutional right to travel, his
14 right under the Fourth Amendment to be free from unreasonable searches and seizures, his Fifth
15 Amendment right to equal protection of the laws, and his First Amendment rights to free association
16 and to petition the government for redress of his grievances. Plaintiff also alleges that a requirement
17 that airlines request identification as part of the security screening process at airports is invalid and
18 unenforceable because the Federal Aviation Administration (FAA) and the Transportation Security
19 Administration (TSA) have not published a regulation incorporating such a requirement in
20 conformance with procedures prescribed by the Freedom of Information Act (FOIA).

21 As a threshold matter, plaintiff has standing in this action solely insofar as he challenges an
22 alleged federally-imposed requirement that airlines request identification as part of the screening
23 process used at airports. The Complaint is devoid of any allegation that plaintiff personally has
24 suffered any injury that is fairly traceable to any other practice, procedure, or criterion that may be
25 used by any defendant in screening airline passengers for weapons and explosives. Inasmuch as
26 plaintiff challenges specific orders issued by the FAA and the TSA with respect to their respective
27

1 duties and powers relating to the security and safety of aircraft, exclusive jurisdiction over plaintiff's
2 claims lies in the United States Court of Appeals.

3 Even if this Court had subject matter jurisdiction to review the type of order challenged here,
4 plaintiff's claims must be dismissed for failure to state a claim upon which relief can be granted.
5 Contrary to plaintiff's claims in this action, the FAA and the TSA are not required to publish
6 screening criteria used for the purpose of identifying passengers who may be more likely to be
7 carrying dangerous weapons, explosives, or other destructive substances aboard an aircraft. Persons
8 of ordinary intelligence can understand that federal law prohibits the unlawful carriage of weapons
9 and explosives on aircraft, and that passengers are subject to search prior to boarding an aircraft. The
10 Due Process Clause requires no more, and plainly does not require the government to divulge the
11 techniques it may use to ensure compliance with these requirements, including any screening criteria
12 it may use to identify persons who may pose a risk to airline safety.

13 Plaintiff's contention that the FOIA requires publication of the screening criteria used in
14 connection with airline security activities is also baseless. Section 46110(a) of Title 49 expressly
15 provides that, notwithstanding the requirements of the FOIA, the Under Secretary is authorized to
16 prohibit disclosure of information obtained or developed in carrying out security activities. That
17 provision is controlling here.

18 Nor do the defendant airlines' requests that plaintiff produce identification as part of an
19 airport screening process violate any of plaintiff's constitutional rights. As the Ninth Circuit has
20 repeatedly held, burdens on a single mode of transportation do not implicate the constitutional right
21 to interstate travel. Even if they did, it is established that airport screening procedures, such as those
22 at issue here, do not unreasonably burden or restrict the right to travel.

23 Similarly, the airport screening process at issue here does not have any significant effect on,
24 much less directly and substantially interfere with, plaintiff's freedom to associate with whomever
25 he wishes. Nor does it infringe upon his right to petition the government for redress of his
26 grievances. Consequently, plaintiff's First Amendment claims are baseless.

1 Plaintiffs claims under the Fourth Amendment are likewise without merit. Even if the
2 airlines' request for identification were considered to be a "search," it is established that an airport
3 screening search is permissible under the Fourth Amendment where, as here, it is no more extensive
4 or intensive than necessary to detect weapons and explosives, it is confined in good faith to that
5 purpose, and passengers may avoid a search by electing not to fly. Such an administrative search
6 is permissible under the Fourth Amendment without a warrant and even in the absence of any
7 reasonable basis for suspicion that a particular passenger is carrying a weapon or explosive.

8 Finally, when a passenger refuses to verify his identity, the airline cannot determine whether
9 the passenger is among those individuals known to pose, or suspected of posing, a risk of air piracy
10 or terrorism. Because it is plainly rational for an airline to take additional precautions to protect the
11 safety of its passengers in these circumstances, plaintiff's equal protection claim is without merit.

12 STATUTORY AND REGULATORY BACKGROUND

13 Since 1961, Congress has adopted numerous provisions designed to deter and prevent acts
14 of violence aboard aircraft. See, e.g., Pub. L. No. 87-197, 75 Stat. 466 (Sept. 5, 1961); Pub. L. 93-
15 366, 88 Stat. 409 (Aug. 5, 1974); Pub. L. 107-71, 115 Stat. 603 (Nov. 19, 2001). For many years,
16 it has been a federal crime to commit "aircraft piracy," i.e., to seize or exercise control of an aircraft
17 by force or violence or threat of force or violence, 49 U.S.C. § 46502(a), to board or attempt to board
18 an aircraft with a concealed dangerous weapon, id., § 46505(b)(1), or to place or attempt to place a
19 loaded weapon, or an explosive or other incendiary, on an aircraft. Id., §§ 46505(b)(2) and (b)(3).

20 Congress has also authorized the Administrator of the FAA, and subsequently the Under
21 Secretary, to "prescribe regulations to protect passengers and property on an aircraft . . . against an
22 act of criminal violence or aircraft piracy." 49 U.S.C. § 44903(b). Pursuant to this authority, the
23 Under Secretary has promulgated regulations which, with limited exceptions, prohibit an individual
24 from having a weapon, explosive, or incendiary on or about the individual's person or accessible
25 property when the person is aboard, or attempts to board, an aircraft; when a person enters a "sterile
26 area" of an airport (i.e., a portion of an airport that provides passengers access to boarding aircraft);

1 or "[w]hen performance has begun of an inspection of the individual's person or accessible property
2 before entering a sterile area." 49 C.F.R. § 1540.111(a); see also, id. at § 1540.5 (defining "sterile
3 area"). In addition, the implementing regulations require each aircraft operator to adopt a "security
4 program" approved by the TSA which must "[p]rovide for the safety of persons and property
5 traveling on flights provided by the aircraft operator against acts of criminal violence and air piracy,
6 and the introduction of explosives, incendiaries, or weapons aboard an aircraft." 49 C.F.R. §§
7 1544.101(a) and 1544.103(a)(1). The regulations also provide that TSA may issue a "Security
8 Directive" when the TSA determines that "additional security measures are necessary to respond to
9 a threat assessment or a specific threat against civil aviation." 49 C.F.R. § 1544.305(a).

10 By statute, the Under Secretary must "provide for the screening of *all* passengers and property
11 . . . that will be carried aboard a passenger aircraft . . ." 49 U.S.C. § 44901(a) (emphasis added);
12 see 49 C.F.R. §§ 1544.201-1544.207. In addition, the Under Secretary is required to prescribe
13 regulations requiring an air carrier to "refuse to transport - [] a passenger who does not consent to
14 a search . . . establishing whether the passenger is carrying unlawfully a dangerous weapon,
15 explosive, or other destructive substance." 49 U.S.C. § 44902(a); see 49 C.F.R. §§ 1540.107 and
16 1544.201(c). By operation of law, "[a]n agreement to carry passengers or property in air
17 transportation . . . is deemed to include an agreement that the passenger or property will not be
18 carried if consent to search for [these] purpose[s] . . . is not given." 49 U.S.C. § 44902(c). Subject
19 to implementing regulations, the statute also permits an air carrier to "refuse to transport a passenger
20 or property the carrier decides is, or might be, inimical to safety." 49 U.S.C. § 44902(b).

21 The statute also mandates the use of a "passenger prescreening system" to identify passengers
22 who might pose a risk to civil aviation, and to ensure that those identified are adequately screened.
23 The statute also requires the Secretary of Transportation to "ensure that the Computer-Assisted
24 Passenger Prescreening System, or any successor system - (i) is used to evaluate all passengers
25 before they board an aircraft; and (ii) includes procedures to ensure that individuals selected by the
26 system and their carry-on and checked baggage are adequately screened." 49 U.S.C. § 44903(i)(2).

1 Finally, the statute provides that: "Notwithstanding [the FOIA], the Under Secretary shall
2 prescribe regulations prohibiting disclosure of information obtained or developed in carrying out
3 security or research and development activities . . . if the Under Secretary decides disclosing the
4 information would . . . be detrimental to the safety of passengers in transportation." 49 U.S.C.
5 § 40119(b)(1). The regulations prohibit disclosure of "sensitive security information" which
6 includes, among other things, security programs, security directives, and "selection criteria used in
7 any security screening process." 49 C.F.R. §§ 1520.5 and 1520.7.

8 STATEMENT OF FACTS

9 Plaintiff alleges that, on July 4, 2002, he went to Oakland International Airport with "paper
10 tickets, in his own name, to fly to Baltimore-Washington International Airport." Complaint
11 ("Compl."), ¶ 24.¹ The purpose of his trip was to "petition the government for redress of grievances -
12 specifically, the requirement for airline travelers to provide identification." *Id.* After plaintiff
13 declined to comply with requests made by Southwest Airlines officials (hereinafter "Southwest") for
14 identification, he was told he would not be permitted to board the aircraft. *Id.*, ¶¶ 25-27.

15 Plaintiff then went to San Francisco Airport and sought to purchase a ticket to Washington,
16 D.C., from United Airlines officials (hereinafter "United"). *Id.*, ¶¶ 28-29. After plaintiff declined
17 to comply with requests made by United for identification, he was informed that he had to show
18 identification at the ticket counter, at security, and when boarding. *Id.*, ¶ 29. Subsequently, plaintiff
19 was informed by United that he would be permitted to fly without identification, but he would be
20 subject to a more intense search of his person and bags. *Id.*, ¶ 31. When plaintiff stated that he
21 would not agree to have his bags searched by hand, he was told by United that he could not fly
22 without identification. *Id.*, ¶ 32. Since plaintiff is unwilling to show identification, and unwilling
23 to be subject to a more intrusive search than travelers who provide identification, he alleges that he
24 has been unable to fly since September 11, 2001. *Id.*, ¶ 34.

25 _____
26 ¹ For purposes of this motion to dismiss, federal defendants assume the truth of all well-
27 pleaded factual allegations in the Complaint.

ARGUMENT

I. PLAINTIFF LACKS STANDING TO CHALLENGE ANY ACTION BY THE FEDERAL DEFENDANTS OTHER THAN THE ALLEGED REQUIREMENT THAT AIRLINE PASSENGERS PRODUCE IDENTIFICATION

As "the party invoking federal jurisdiction," plaintiff "bears the burden of establishing its existence," Steel Company v. Citizens for a Better Environment, 523 U.S. 83, 103-104 (1998); LSO v. Stroh, 205 F.3d 1146, 1152 (9th Cir. 2000), and the Court must presume that it lacks jurisdiction "unless the contrary appears affirmatively from the record." Renne v. Geary, 501 U.S. 312, 315 (1991), quoting Bender v. Williamsport Area School Dist., 475 U.S. 534, 546 (1986) (internal quotation omitted). "It is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." Renne v. Geary, 501 U.S. at 315, quoting Bender v. Williamsport Area School Dist., 475 U.S. at 546 n. 8. The "irreducible constitutional minimum of standing" requires that plaintiff demonstrate (a) an "injury in fact" which is "concrete and particularized," (b) "a causal connection between the injury and the conduct complained of - - the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant,'" and (c) that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (1992), quoting in part Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38, 41-42, 43 (1976). "This triad . . . constitutes the core of Article III's case-or-controversy requirement . . ." Steel Company v. Citizens for a Better Environment, 523 U.S. at 103-104.

The only "concrete and particularized" injury identified in the Complaint is that plaintiff was allegedly prevented from boarding two aircraft because he refused to produce any form of identification at the request of defendants Southwest and United, and because he refused to consent to a hand search of his baggage. Complaint, ¶¶ 24-34. Plaintiff further alleges that the airlines acted pursuant to unpublished regulations and/or Security Directives issued by the FAA and the TSA, Complaint, ¶¶ 23, 25, 33, 37-39, - - allegations that are sufficient, on a motion to dismiss,

1 to give plaintiff standing to challenge a requirement that airline passengers produce identification.²

2 The fact that plaintiff may have standing to challenge a requirement that he produce
3 identification at an airport does not, however, provide a jurisdictional license for plaintiff to seek
4 judicial review of other actions allegedly taken by one or more of the federal defendants. As the
5 Supreme Court explained in Lewis v. Casey, 518 U.S. 343, 358 n. 6 (1996):

6 [S]tanding is not dispensed in gross. If the right to complain of *one* administrative deficiency
7 automatically conferred the right to complain of *all* administrative deficiencies, any citizen
8 aggrieved in one respect could bring the whole structure of state administration before the
9 courts for review. That is of course not the law. As we have said, "[n]or does a plaintiff who
has been subject to injurious conduct of one kind possess by virtue of that injury the
necessary stake in litigating conduct of another kind, although similar, to which he has not
been subject."

10 Id., quoting in part Blum v. Yaretsky, 457 U.S. 991 (1982).

11 Thus, for example, regardless of whether plaintiff has suffered some injury as a result of a
12 requirement that he produce identification, he does not claim that he personally has suffered any
13 injury whatsoever as a result of the Federal Bureau of Investigation's alleged action in maintaining
14 a "No Fly watchlist." Complaint, ¶¶ 15, 42-44. He does not assert that he is on such a list. Nor does
15 he claim that he was prevented from flying as a result of the referenced list. Instead, he alleges that

16
17 ² Plaintiff does not allege that any of the remaining federal defendants have taken any
18 independent action to impose such requirements on the airlines. Instead, he alleges "upon
19 information and belief" that the defendants "collectively caused" the FAA and the TSA to issue
20 and enforce "secret transportation security directives requiring that the airlines demand travelers
21 reveal their identity before they are permitted to board an airplane." Compl., ¶¶ 22 and 35; see
22 also Compl., ¶ 14 (alleging that the Department of Justice "vetted the secret regulations and
23 found them constitutional."). Even if that were the case, the requirement to which plaintiff
24 objects (i.e., that airline passengers produce some form of identification) was, according to the
25 Complaint, imposed by the airlines, pursuant to a requirement or other directive of the FAA and
26 the TSA, id., ¶¶ 23, 25, 33, 37-39, and it is the TSA (formerly the FAA) which has the lawful
27 authority to prescribe the directives to which plaintiff objects. Consequently, plaintiff's injury, if
any, is "fairly traceable" to the actions of those agencies. Moreover, disposition of plaintiff's
claims depends entirely on whether these two agencies have the lawful authority to act, and
plaintiff's injury can be redressed by this Court only if the actions of the two agencies are found
to be unlawful. Accordingly, on this ground alone, plaintiff's claims against the remaining
federal defendants must be dismissed for lack of subject matter jurisdiction.

1 he "objects to the unregulated use of such lists because he believes history teaches that granting the
2 government unlimited control over an 'enemies list' will inevitably result in abuse." Compl., ¶ 42.
3 But such objections do not provide plaintiff with standing to challenge the legality of such a list.
4 Even if plaintiff's objections were to have some foundation in law, "an asserted right to have the
5 Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on
6 a federal court." Allen v. Wright, 468 U.S. 737, 754 (1984).

7 Similarly, plaintiff has failed to allege that he personally has suffered any injury as a result
8 of any action taken by the Office of Homeland Security (OHS) in connection with its duty to
9 coordinate efforts to protect transportation systems in the United States from terrorist attack (Compl.,
10 ¶¶ 19 and 45), or any action by the "Technical Support Working Group" as part of its asserted
11 "mission of conducting a national interagency research and development program" (id., ¶ 35).

12 Nor does plaintiff assert that he personally has suffered any injury that would provide
13 standing to challenge any aspect of airport screening procedures other than the alleged requirement
14 that he produce identification. See, e.g., id., ¶ 36 (alleging that the Computer-Assisted Passenger
15 Prescreening System (CAPPS) "include[s] such details as whether a ticket was paid in cash, whether
16 it was one-way, and how long before the date of departure it was purchased"); id., ¶ 40-41 (CAPPS
17 II "will pull in data from banks, credit reporting agencies, and other companies that aggregate
18 personal information"); id., ¶¶ 48-50 ("federal aviation authorities and technology companies will
19 soon begin testing a vast air security screening system").

20 Plaintiff's "generalized yet speculative apprehensiveness that the [government] may at some
21 future date misuse the information in some way that would cause direct harm to [plaintiff]" is "not
22 an adequate substitute for a claim of specific present objective harm or a threat of specific future
23 harm," and fails to provide a basis for plaintiff to invoke the judicial power of the federal courts.
24 Laird v. Tatum, 408 U.S. 1, 13-14 (1972). As the Supreme Court held in Laird, plaintiff may not
25 use the federal courts to conduct a "broad scale investigation" into what information the government
26 does or does not collect in connection with airport screening operations; nor can the court render
27

1 judgment at the conclusion of that investigation regarding "the extent to which those activities may
2 or may not be appropriate." *Id.* at 14. "[S]uch a role is appropriate for Congress acting through its
3 committees and the 'power of the purse'; it is not the role of the judiciary, absent actual present or
4 immediately threatened injury resulting from unlawful governmental action." *Id.* at 15. Since
5 plaintiff has failed to allege any such actual present or immediately threatened injury here, he lacks
6 standing to challenge any action of the government other than the alleged federally imposed
7 requirement that airline passengers produce identification.

8 **II. THE UNITED STATES COURT OF APPEALS HAS EXCLUSIVE JURISDICTION**
9 **TO REVIEW ORDERS ISSUED BY THE UNDER SECRETARY WITH RESPECT**
10 **TO HIS SECURITY DUTIES AND POWERS**

11 Section 46110(a) of Title 49 provides that a "person disclosing a substantial interest in an
12 order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security
13 with respect to security duties and powers designated to be carried out by the Under Secretary or the
14 Administrator of the Federal Aviation Administration with respect to aviation safety duties and
15 powers designated to be carried out by the Administrator) under this part may apply for review of
16 the order by filing a petition for review in the United States Court of Appeals for the District of
17 Columbia Circuit or in the court of appeals of the United States for the circuit in which the person
18 resides or has its principal place of business." 49 U.S.C. § 46110(a).³ The court of appeals in which
19 the petition is filed, in turn, has "*exclusive* jurisdiction to affirm, amend, modify, or set aside any part
of the order" *Id.*, § 46110(c) (emphasis added).

20 "[T]he district court's federal question jurisdiction is preempted by section [46110] as to
21 those classes of claims reviewable under [that] section." *Crist v. Leippe*, 138 F.3d 801, 803 (9th Cir.
22 1998), quoting *Clark v. Busey*, 959 F.2d 808, 811 (9th Cir. 1992). In contrast, where a party is not
23 asserting a claim that is "inescapably intertwined with a review of the procedures and merits
24

25 ³ The phrase "this part" in section 46110(a) refers to Part A of Subtitle VII of Title 49 (49
26 U.S.C. §§ 40101-46507). The statutory provisions requiring the Under Secretary to provide for
27 the screening of passengers and the use of a passenger pre-screening system are contained in 49
U.S.C. §§ 44901(a) and 44903(i)(2), which are encompassed within Part A.

1 surrounding the [agency's] order," but instead is asserting "broad challenges to the constitutionality
2 of the agency's actions," the Ninth Circuit has held that "the district court may exercise jurisdiction,"
3 as section 46110 "provides no remedy for such claims." Foster v. Skinner, 70 F.3d 1084, 1087-1088
4 (9th Cir. 1995); accord, Crist v. Leippe, 138 F.3d at 803.

5 As set out in Point I above, plaintiff lacks standing to bring a "broad constitutional challenge"
6 to the airport screening procedures used by the federal defendants for the purpose of identifying
7 passengers who may be more likely to be carrying dangerous weapons, explosives, or other
8 destructive substances aboard an aircraft. Under Article III, plaintiff may invoke the jurisdiction of
9 the federal courts only insofar as he seeks to challenge a narrow, federally imposed requirement that
10 airlines request identification during an airport screening process, a requirement which plaintiff
11 alleges is embodied in transportation security directives issued by the FAA and the TSA. Compl.,
12 ¶¶ 23, 25, 33, 37-39.

13 Such directives are plainly "orders" relating to security and safety which are thus reviewable
14 by the court of appeals pursuant to 49 U.S.C. § 46110. Los Angeles v. U.S. Federal Aviation
15 Administration, 239 F.3d 1033, 1036 (9th Cir. 2001) ("§ 46110(a) encompasses orders relating to
16 airline safety"). As the Ninth Circuit explained in Crist, section 46110 authorizes appellate review
17 of "orders" which the court described as follows:

18 "Order" carries a note of finality, and applies to an[y] agency decision which imposes an
19 obligation, denies a right, or fixes some legal relationship. In other words, [i]f the order
20 provides a "definitive" statement of the agency's position, has a "direct and immediate" effect
21 on the day-to-day business of the party asserting wrongdoing, and envisions "immediate
22 compliance with its terms," the order has sufficient finality to warrant the appeal offered by
23 section [46110].

24 Crist, 138 F.3d at 804, quoting Mace v. Skinner, 34 F.3d 854, 857 (9th Cir. 1994).

25 Because plaintiff in this action challenges the substance of a transportation security directive
26 issued by the Under Secretary of Transportation for Security, see, e.g., Compl., ¶¶ 37-38, exclusive
27 jurisdiction lies in the court of appeals. Such a directive "impose[s] an obligation," provides a
28 "'definitive' statement of the agency's position," has a "direct and immediate effect" on airlines and
airline passengers, and envisions "immediate compliance with its terms." See 49 C.F.R. §

1 1544.305(b) (each aircraft operator "must comply with each Security Directive issued to the aircraft
2 operator by the TSA"). Moreover, because the court of appeals has exclusive jurisdiction to review
3 such a directive, "its jurisdiction to review at that time any procedural irregularities . . . is also
4 exclusive." Clark v. Busey, 959 F.2d at 811. Consequently, the court of appeals also has exclusive
5 jurisdiction to adjudicate plaintiff's claim that, to be effective, such a directive must be published.

6 Because this Court's jurisdiction is "preempted by section [46110] as to those classes of
7 claims reviewable under [that] section." Crist v. Leippe, 138 F.3d at 803, quoting Clark v. Busey,
8 959 F.2d at 811, the Court must either enter an order dismissing the claim or, "if it is in the interest
9 of justice," transfer the claim to the United States Court of Appeals. See 28 U.S.C. § 1631;
10 Harris v. McCauley, 814 F.2d 1350 (9th Cir. 1987).

11 **III. THE GOVERNMENT IS NOT REQUIRED TO PUBLISH SCREENING CRITERIA**
12 **USED TO IDENTIFY PERSONS WHO MAY POSE A RISK TO AIRLINE SAFETY**

13 Plaintiff alleges that an unpublished federally imposed requirement that airlines request that
14 airline passengers produce identification during an airport screening process is a "secret law" which
15 is invalid and unenforceable: (a) because it is unconstitutionally vague, and therefore violates the
16 Due Process Clause of the Fifth Amendment (Compl., First Cause of Action); and (b) because it
17 violates the publication requirements of the Freedom of Information Act (FOIA), 5 U.S.C. § 552.
18 However, neither the Due Process Clause nor the FOIA require publication of airport screening
19 procedures and other techniques used to identify airline passengers who may pose a risk to airline
20 safety, and to prevent airline passengers from carrying weapons and explosives aboard aircraft.

21 **A. The Due Process Clause Does Not Require Publication of Screening Criteria**

22 Plaintiff's Complaint does not specify what type of interest he allegedly has been deprived
23 of without due process of law. Compl., ¶¶ 52-55. Presumably, he contends that he has been
24 deprived of one or more liberty interests (e.g., his right to travel). As set out in Points IV through
25 VII below, plaintiff has not been deprived of any of these liberty interests. For that reason alone,
26 plaintiff's Due Process claim must be dismissed. But even if plaintiff had properly alleged the
27 deprivation of an interest protected by the Due Process Clause, plaintiff's claim that the challenged

1 requirement is unconstitutionally vague is wholly without merit.

2 "As generally stated, the void-for-vagueness doctrine requires that a penal statute define the
3 criminal offense with sufficient definiteness that ordinary people can understand what conduct is
4 prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."
5 Kolender v. Lawson, 461 U.S. 352, 357 (1983); Houston v. Roe, 177 F.3d 901, 907 (9th Cir. 1999),
6 cert. denied 528 U.S. 1159 (2000). "The degree of vagueness that the Constitution tolerates, and the
7 level of judicial scrutiny applied to a vagueness challenge, depend upon the nature of the enactment."
8 Go Leasing v. National Transportation Safety Board, 800 F.2d 1514, 1525 (9th Cir. 1986). "The
9 courts are more tolerant of possible vagueness in laws that impose civil rather than criminal
10 penalties, or that do not implicate free speech concerns," id., and even more tolerant where, as here,
11 the consequence of noncompliance is not a penalty at all. Planned Parenthood v. Arizona, 718 F.2d
12 938, 948 (9th Cir. 1983), appeal after remand, 789 F.2d 1348 (9th Cir.), aff'd, 479 U.S. 925 (1986).

13 The vagueness doctrine "bars enforcement of 'a statute which either forbids or requires the
14 doing of an act in terms so vague that men of common intelligence must necessarily guess at its
15 meaning and differ as to its application.'" United States v. Lanier, 520 U.S. 259, 266 (1997) (quoting
16 Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)). In making this determination, the
17 Supreme Court has indicated that the more important aspect of the vagueness doctrine is "the
18 requirement that a legislature establish minimal guidelines to govern law enforcement," because, in
19 the absence of such minimal guidelines, a criminal statute may permit "'a standardless sweep [that]
20 allows policemen, prosecutors, and juries to pursue their personal predilections.'" Kolender, 461
21 U.S. at 358 (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)). To sustain a challenge to a statute
22 on vagueness grounds, a defendant "must prove that the enactment is vague 'not in the sense that it
23 requires a person to conform his conduct to an imprecise but comprehensible normative standard,
24 but rather in the sense that *no standard of conduct is specified at all.*" Village of Hoffman Estates
25 v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 n. 7 (1982) (emphasis supplied) (quoting
26 Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971)); Go Leasing, 800 F.2d 1514 at 1525 ("A
27

1 statute is not unconstitutionally vague if it gives fair warning of the proscribed conduct.").

2 Plaintiff alleges that a requirement that airline carriers request that passengers produce
3 identification is a "secret regulation" which "is vague, being unpublished, and thus provides no way
4 for ordinary people or reviewing courts to determine what is legal." Compl., ¶ 52. In addition,
5 plaintiff alleges that a requirement that airlines request identification "vests standardless discretion
6 in the hands of its enforcers, because the legal authority for the scheme is secret." Id.

7 However, the request for identification is merely one part of the passenger screening process
8 used at airports, and there is nothing vague or "standardless" about that process. Plaintiff's allegation
9 that "ordinary people" cannot determine "what is legal" is baseless. The statute and regulations
10 plainly specify what conduct is proscribed. In that regard, it is a federal crime to board an aircraft
11 with a concealed dangerous weapon, 49 U.S.C. § 46505(b)(1), or to attempt to place a loaded
12 weapon or an explosive on an aircraft. Id., §§ 46505(b)(2) and (b)(3). Similarly, federal regulations
13 prohibit an individual from having a weapon, explosive, or incendiary when he enters a "sterile area"
14 of an airport, when an inspection of his person and accessible property begins prior to entering such
15 an area, or when he boards or attempts to board an aircraft. 49 C.F.R. § 1540.111(a). There is
16 nothing "secret" about these laws, and "ordinary people" can understand what conduct is proscribed.

17 The requests for identification merely represent one of many techniques used to ensure
18 compliance with the underlying restrictions on the carriage of weapons and explosives aboard
19 aircraft. Such enforcement techniques need not be disclosed to provide fair notice of what conduct
20 is proscribed. Nothing in the Due Process Clause requires that the government provide fair notice
21 to plaintiff not only of what conduct is proscribed, but also what techniques it may use to ensure
22 compliance. Go-Leasing, 800 F.2d at 1525 (rejecting claim that enforcement decisions made "on
23 a case-by-case discretionary basis" violate due process).⁴ The government is not required to disclose
24

25
26 ⁴ As the Ninth Circuit has observed, there is a "distinction between law-enforcement
27 materials, which involve enforcement *methods*, and administrative materials, which *define*
violations of laws. [citation omitted]. The latter are more likely to contain 'secret law' that

1 how and when it may perform a more thorough search of a passenger's person or property. To do
2 so "would not promote lawful behavior; it would only facilitate law evasion," Caplan v. Bureau of
3 Alcohol, Tobacco & Firearms, 587 F.2d 544, 548 (2d Cir. 1978), and, in the process, jeopardize the
4 safety of airline passengers. Dirksen, 803 F.2d at 1459; quoting Ginsburg, Feldman & Bress v.
5 Federal Energy Administration, 591 F.2d 717, 730, aff'd en banc by an equally divided court, 591
6 F.2d 752 (D.C. Cir. 1978), cert. denied 441 U.S. 906 (1979) ("To turn such manuals over to those
7 who are the subject of regulatory supervision is to dig a den for the fox inside the chicken coop.").

8 Nor is there any basis for asserting that the airport screening process is "standardless." The
9 statute requires the Under Secretary to provide for the screening of all passengers and property that
10 will be carried aboard a passenger aircraft, 49 U.S.C. § 44901(a), and states that air carriers must
11 refuse to transport any passenger who refuses to consent to a search under that subsection
12 "establishing whether the passenger is carrying unlawfully a dangerous weapon, explosive, or other
13 destructive substance." Id., § 44902(a)(1). Similarly, the Under Secretary is empowered to prescribe
14 regulations to protect passengers and property on an aircraft "against an act of criminal violence or
15 aircraft piracy." 49 U.S.C. § 44903(b); see also 49 C.F.R. §§ 1544.101(a) and 1544.103(a)(1)
16 (requiring aircraft operators to adopt a "security program" which must "[p]rovide for the safety of
17 persons and property traveling on flights provided by the aircraft operator . . ."). The screening
18 procedures employed must be "confined in good faith to that purpose," see Torbet v. United Airlines,
19 298 F.3d 1087, 1088 (9th Cir. 2002), which provides a standard that easily satisfies due process
20 requirements. See, e.g., Go Leasing v. National Transportation Safety Board, 800 F.2d at 1523
21 ("public safety' standard was sufficiently definite to satisfy due process").

22
23
24 should be disclosed if requested." Dirksen v. United States Department of Health and Human
25 Services, 803 F.2d 1456, 1458 (9th Cir. 1986), accord Hardy v. Bureau of Alcohol, Tobacco &
26 Firearms, 631 F.2d 653, 657 (9th Cir. 1980); see also, Crooker v. Bureau of Alcohol, Tobacco &
27 Firearms, 670 F.2d 1051, 1073 (D.C. Cir. 1981) (en banc) (law enforcement manual "does not
28 embody any 'secret law' of the agency. Rather, the deleted portions of the manual refer to
investigative techniques.").

1 **B. Notwithstanding The Requirements Of The FOIA, The Under Secretary**
2 **Is Not Required To Publish Or Disclose Screening Criteria Obtained**
3 **Or Developed In Carrying Out Security Activities**

4 Plaintiff alternatively alleges that the passenger prescreening systems used to identify
5 passengers who might pose a risk to civil aviation contain substantive rules of general applicability
6 which cannot be enforced unless they are published in the Federal Register in conformance with the
7 requirements of section 552(a)(1) of the FOIA. Compl., Seventh Cause of Action. Plaintiff's claim
8 under the FOIA, however, is foreclosed by 49 U.S.C. § 40119(b)(1), which creates an express
9 exemption to the FOIA's publication and disclosure requirements for information relating to aviation
10 security activities. Section 40119(b)(1) provides, in relevant part, as follows:

11 *Notwithstanding section 552 of title 5, the Under Secretary shall prescribe regulations*
12 *prohibiting disclosure of information obtained or developed in carrying out security or*
13 *research and development activities under section 44501(a) or (c), 44502(a)(1) or (3), (b) or*
14 *(c), 44504, 44505, 44507, 44508, 44511, 44512, 44513, 44901, 44903(a), (b), (c) or (e),*
15 *44905, 44912, 44935, 44936, 44938(a) or (b) of this title if the Under Secretary decides*
16 *disclosing the information would - * * **

17 (C) be detrimental to the safety of passengers in transportation.

18 49 U.S.C. § 40119(b)(1) (emphasis added). As the D.C. Circuit concluded in rejecting claims
19 substantially identical to those raised by plaintiff here, "the phrasing clearly and unambiguously
20 provides that § 1357(d) [the current version of which is codified at 49 U.S.C. § 40119(b)(1)], where
21 applicable and invoked by the FAA, trumps FOIA's disclosure requirements." Public Citizen v.
22 Federal Aviation Administration, 988 F.2d 186, 194 (D.C. Cir. 1993). Thus, "Congress intended to
23 allow the FAA to withhold from public disclosure information falling within § 1357(d)(2) whether
24 or not the FOIA is invoked." Id. at 195. Indeed, as the court explains, Congress added the
25 "notwithstanding" clause to this section to overrule lower court cases which had ordered disclosure
26 under FOIA of information covered by the predecessor of section 40119(b)(1). Id.

27 The information at issue here plainly falls within the scope of section 40119(b)(1). As set
28 out above, that section requires the Under Secretary to prescribe regulations "prohibiting disclosure
of information obtained or developed in carrying out security or research and development activities"
under several sections of the Act if the Under Secretary decides that disclosing the information

1 would be "detrimental to the safety of passengers in transportation." The referenced sections include
2 section 44901 (which requires screening of all passengers), section 44903(b) (which authorizes the
3 Under Secretary to prescribe regulations to protect passengers and property on an aircraft against an
4 act of criminal violence or aircraft piracy), section 44903(c) (which authorizes regulations requiring
5 the operator of an airport to establish an air transportation security program), and section 44912
6 (which authorizes the Under Secretary to "accelerate and expand the research, development and
7 implementation of technologies and procedures to counteract terrorist acts against civil aviation").

8 Pursuant to the authority conferred by section 40119(b), the Under Secretary has prohibited
9 disclosure of "sensitive security information," including security programs, security directives, and
10 "selection criteria used in any security screening process." 49 C.F.R. §§ 1520.5 and 1520.7. As the
11 preamble to the TSA's regulation reflects, the rules for protecting sensitive security information are
12 "largely the same" as the prior rule which had been adopted by the FAA. 67 Fed. Reg. 8340, 8342
13 (Feb. 22, 2002). As the D.C. Circuit explained in Public Citizen, the FAA had concluded that
14 disclosure of this information would "undermine the integrity of airport security procedures." 988
15 F.2d at 189. "[I]f such information became available to a person with criminal or terrorist intent, it
16 could focus that person's attention on specific techniques to counter otherwise effective security
17 programs." Id., quoting 56 Fed. Reg. 13552, 13554 (April 2, 1991). The TSA has withheld the
18 information on the same basis. 67 Fed. Reg. at 8342 ("Information that would help someone
19 determine how to defeat security systems is protected from disclosure under part 1520.").

20 The agency's determination that greater disclosure would jeopardize passenger safety is a
21 predictive judgment entitled to "the utmost deference in view of administrative expertise." 988 F.2d
22 at 196, quoting Pillar v. Civil Aeronautics Board, 485 F.2d 1018, 1027 (D.C. Cir. 1973). As the
23 court in Public Citizen explained: "Implicit in the FAA's explanation is the sensible notion that
24 armed with detailed information, not to mention the tools of their deadly trade, potential terrorists
25 might be able to evade *any* security system, for no security system is perfect." 988 F.2d at 197.

26 The agency's determination that it would "be detrimental to the safety of passengers in
27

1 transportation" to publicize the details of procedures used to protect civil aviation was therefore both
2 "adequately explained and rational," *id.*, and complied with the requirements of section 40119(b)(1).
3 Consequently, the agency is empowered by section 40119(b) to prohibit disclosure of this
4 information, "notwithstanding" any provision in the FOIA that might otherwise require publication.

5 **IV. THE AIRLINES' REQUEST FOR IDENTIFICATION DOES NOT INFRINGE**
6 **UPON PLAINTIFF'S CONSTITUTIONAL RIGHT TO TRAVEL**

7 The Supreme Court has "long recognized that the nature of our Federal Union and our
8 constitutional concepts of personal liberty unite to require that all citizens be free to travel
9 throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which
10 *unreasonably burden or restrict* this movement." Saenz v. Roe, 526 U.S. 489, 499 (1999), *quoting*
11 Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (emphasis added). However, as the Ninth Circuit
12 recently emphasized, "burdens on a single mode of transportation do not implicate the right to
13 interstate travel." Miller v. Reed, 176 F.3d 1202, 1205 (9th Cir. 1999). Consequently, the requests
14 for identification at issue here do not even implicate plaintiff's right to travel, *id.*, much less
15 "unreasonably burden or restrict" that right. Saenz, 526 U.S. at 499.⁵

16 In Miller, the California Department of Motor Vehicles (DMV) rejected the plaintiff's
17 application for renewal of his driver's license because he refused to supply his social security
18 number. The plaintiff alleged that the DMV had "violated his fundamental right to interstate travel
19 by depriving him of the use of his primary means of travel, driving an automobile." *Id.* The Ninth
20 Circuit concluded, however, that the DMV had not "unconstitutionally impede[d] his right to
21 interstate travel by denying him a driver's license." 176 F.3d at 1206. As the court explained:

22 _____
23 ⁵ Although plaintiff alleges that he is "informed and believes" that "similar requirements
24 have been placed on travelers who use passenger trains by the government defendants, and that
25 similar requirements are being instituted for interstate bus travel," Compl. ¶ 34, plaintiff does not
26 allege that he personally has been subjected to any such requirement or prevented from using any
27 mode of transportation other than air travel. Consequently, whether or not such requirements
exist, they have not infringed upon *plaintiff's* right to travel; therefore, he has no standing to raise
such claims.

1 The Supreme Court has recognized a fundamental right to interstate travel. Burdens placed
2 on travel generally, such as gasoline taxes, or minor burdens impacting interstate travel, such
as toll roads, do not constitute a violation of that right, however. [citations omitted].

3 * * *

4 We have previously held that burdens on a single mode of transportation do not
5 implicate the right to interstate travel. See *Monarch Travel Servs., Inc. v. Associated*
6 *Cultural Clubs, Inc.*, 466 F.2d 552, 554 (9th Cir. 1972) ("A rich man can choose to drive a
7 limousine; a poor man may have to walk. The poor man's lack of choice in his mode of
8 travel may be unfortunate, but it is not unconstitutional."); *City of Houston v. FAA*, 679 F.2d
1184, 1198 (5th Cir. 1982) ("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.").

9 Id. at 1205-1206. As in Miller, plaintiff's allegations here reduce to the "feeble claim" that
10 passengers have a constitutional right to the "most convenient form of travel," a notion which "finds
11 no support whatsoever" in right to travel jurisprudence. Id.; Cramer v. Skinner, 931 F.2d 1020, 1030
12 (5th Cir.), cert. den. 502 U.S. 907 (1991); Houston v. FAA, 679 F.2d 1184, 1198 (5th Cir. 1982).

13 Even if the requests for identification at issue here did implicate the right to travel, they do
14 not "unreasonably burden or restrict" that right. Indeed, the Ninth Circuit has specifically rejected
15 the contention that passenger screening procedures at airports infringe upon the right to travel.
16 United States v. Davis, 482 F.2d 893 (9th Cir. 1973). As the court explained in Davis:

17 At the minimum, governmental restrictions upon freedom to travel are to be weighed
18 against the necessity advanced to justify them, and a restriction that burdens the right to
travel "too broadly and indiscriminately" cannot be sustained.

19 * * *

20 As we have seen, however, the need for some limitation on these rights is clear. In
21 light of that need, a screening of passengers and of the articles that will be accessible to them
22 in flight does not exceed constitutional limitations provided that the screening process is no
23 more extensive than necessary, in the light of current technology, to detect the presence of
weapons or explosives, that it is confined in good faith to that purpose, and that potential
passengers may avoid the search by electing not to fly.

24 Id. at 913.

25 The screening process here plainly conforms with these criteria. The need to prevent airline
26 hijacking is "unquestionably grave and urgent." Id. at 910; United States v. Pulido-Baquerizo, 800
27 F.2d 899, 901 (9th Cir. 1986) ("The governmental interest in detecting the weapons employed in

1 airline terrorism is great."). Moreover, the screening process described in the Complaint is no more
2 extensive than necessary to detect the presence of weapons or explosives, and within constitutional
3 limits. See, e.g., Torbet v. United Airlines, 298 F.3d 1087, 1089 (9th Cir. 2002), quoting in part,
4 Pulido-Baquerizo, 800 F.2d 899, 901 (9th Cir. 1986) ("[A]n x-ray scan may be deemed inconclusive,
5 justifying further search, even when it doesn't affirmatively reveal anything suspicious. 'Firearms
6 and explosives can be small and easily concealed.'). As the Ninth Circuit observed in Davis: "[F]or
7 the vast majority such a search entails at most a slight delay; it does not bar their intended flight. In
8 a broad sense, the airport search program is a governmental effort to protect freedom of travel from
9 private interference, rather than to impede the individual's right to travel." 482 F.2d at 913, n. 59.

10 **V. PLAINTIFF'S FIRST AMENDMENT CLAIMS ARE INSUBSTANTIAL**

11 Plaintiff alleges that the airlines' request for identification unconstitutionally burdened his
12 fundamental rights of free association and to petition the government. Compl., Fourth and Fifth
13 Cause of Action. Specifically, he alleges that the airlines' request for identification prevented him
14 from "traveling to where the seat of government is located," id., ¶ 69, where he wished "to petition
15 the government for redress of grievances - specifically, the requirement for airline travelers to
16 provide identification." Id., ¶ 24. The Complaint does not specify how plaintiff's right of freedom
17 of association has been hindered. Nor does plaintiff allege that the airlines sought to interfere with
18 his right to petition the government by requesting identification. Instead, plaintiff evidently contends
19 that these rights were indirectly affected by the limitation on plaintiff's right to travel.

20 Such incidental effects of an otherwise valid regulation governing air travel do not infringe
21 upon plaintiff's First Amendment rights. See Cramer v. Skinner, 931 F.2d 1020, 1032-1033 (5th Cir.
22 1991) (statute limiting flights to contiguous states does not violate right to free association). "To
23 infringe on a fundamental right, the regulation must impose a penalty effecting a genuinely
24 significant deprivation . . ." Barber v. Hawaii, 42 F.3d 1185, 1197 (9th Cir. 1994). As the
25 decisions below make clear, plaintiff has failed to allege any such "significant deprivation" here.

26 In Lyng v. International Union, UAW, 485 U.S. 360 (1988), for example, the Supreme Court
27

1 rejected a freedom of association challenge to a statute providing that no household would be eligible
2 to receive food stamps if any household member was on strike. The Court explained:

3 The statute [] does not infringe the associational rights of appellee individuals and
4 their unions. We have recognized that "one of the foundations of our society is the right of
5 individuals to combine with other persons in pursuit of a common goal by lawful means,"
6 But in this case, the statute at issue does not "directly and substantially interfere" with
7 appellees ability to associate for this purpose. [citation and footnote omitted]. It does not
8 "order" appellees not to associate together for the purpose of conducting a strike, or for any
9 other purpose, and it does not "prevent" them from associating together or burden their
10 ability to do so in any significant manner.

11 Id. at 366.

12 Similarly, in Department of Housing and Urban Development v. Rucker, 122 S.Ct. 1230
13 (2002), the Supreme Court upheld the validity of a federal statute which permitted the eviction of
14 a tenant in public housing when a member of the tenant's household or a guest had engaged in drug-
15 related activity, regardless of whether the tenant was aware of that activity. In so doing, the court
16 concluded that "the statute does not raise substantial First Amendment . . . concerns," explaining that
17 "Lyng v. Automobile Workers, . . . forecloses respondents' claim that the eviction of unknowing
18 tenants violates the First Amendment guarantee of freedom of association." Id. at 1236 n.6.

19 As in Lyng and Rucker, the airlines' requests that plaintiff produce identification as part of
20 the airport screening process does not "directly and substantially interfere" with either plaintiff's right
21 to associate or his right to petition the government. Neither the government nor the airlines
22 "ordered" plaintiff not to associate for the purpose of petitioning the government, or for any other
23 purpose. Moreover, the screening process challenged in this case did not "prevent" plaintiff from
24 associating with others or from petitioning the government. Nor did it burden his ability to do so
25 in any significant manner. Accordingly, plaintiff's First Amendment claims are wholly insubstantial.

26 VI. THE AIRPORT SCREENING PROCESS IS FULLY CONSISTENT WITH 27 FOURTH AMENDMENT REQUIREMENTS

28 Plaintiff alleges that the "Scheme" (a term which the Complaint does not define, but which
presumably refers to the screening process employed at airports) "unconstitutionally seizes and
searches citizens who are not suspected of being a threat to airport security," Compl., ¶ 57, and

1 "searches every traveler [though] the Constitution outlaws general warrants." Id., ¶ 59. Plaintiff also
2 alleges that the airlines "request" for identification is a "search" that is subject to Fourth Amendment
3 limitations. Id., ¶ 58. A "request" for identification, *by itself*, is plainly not a "search" particularly
4 where, as here, plaintiff declined to accede to that request, and left the airport without producing
5 identification. Compl., ¶¶ 26, 28, 29, and 34. However, the Ninth Circuit has held that the process
6 in which persons and baggage are inspected at airports is a "search" which is a "functional, not
7 merely a physical process . . . [that] begins with the planning of the invasion and continues until
8 effective appropriation of the fruits of the search for subsequent proof of an offense." United States
9 v. Davis, 482 F.2d at 896. Plaintiff here, however, does not allege that he submitted to that process.
10 Indeed, he specifically alleges that he refused to provide any identification, and refused to consent
11 to a search. Compl., ¶¶ 25 and 32. Because plaintiff does not allege any facts which, if proven,
12 would demonstrate that *he* was seized or searched, his Fourth Amendment claim is without merit.

13 Even if plaintiff had been searched, the Ninth Circuit has repeatedly upheld the validity of
14 such searches against Fourth Amendment challenge. Torbet v. United Airlines, 298 F.3d 1087 (9th
15 Cir. 2002); United States v. Pulido-Baquerizo, 800 F.2d 899 (9th Cir. 1986); United States v. Henry,
16 615 F.2d 1223 (9th Cir. 1980); United States v. Davis, 482 F.2d 893. As the Ninth Circuit explained
17 in Davis, "searches conducted as part of a general regulatory scheme in furtherance of an
18 administrative purpose, rather than as part of a criminal investigation to secure evidence of crime,
19 may be permissible under the Fourth Amendment though not supported by a showing of probable
20 cause directed to a particular place or person to be searched." Id. at 908. Thus, "[i]t is not fatal that
21 the search . . . was conducted without a warrant." Id. at 910. In addition, the fact that "every traveler
22 is searched" (Compl., ¶ 59) does not render the search unconstitutional:

23 A pre-boarding screening of all passengers and carry-on articles sufficient in scope to detect
24 the presence of weapons or explosives is reasonably necessary to meet the need . . . [T]here
is no foolproof method of confining the search to the few who are potential hijackers.

25 Id., at 910. Moreover, "the Fourth Amendment permits a random search, at an airport security
26 checkpoint, of a carry-on bag that has passed through an x-ray scan *without arousing suspicion* that
27

1 the bag contains weapons or explosives." Torbet, 298 F.3d at 1088 (emphasis added).

2 "To pass constitutional muster, an administrative search must meet the Fourth Amendment's
3 standard of reasonableness." Davis, 482 F.2d at 910. "An airport screening search is reasonable if:
4 (1) it is no more extensive or intensive than necessary, in light of current technology, to detect
5 weapons or explosives, (2) it is confined in good faith to that purpose; and (3) passengers may avoid
6 the search by electing not to fly." Torbet v. United Airlines, 298 F.3d at 1089. Even if plaintiff had
7 submitted to a search, the procedure described in plaintiff's Complaint (Compl., ¶¶ 30-31) plainly
8 conforms with these requirements. First, it is no more extensive or intensive than necessary, in light
9 of current technology, to detect weapons or explosives. As the Ninth Circuit concluded in Torbet:

10 [A]n x-ray scan may be deemed inconclusive, justifying further search, even when it doesn't
11 reveal anything suspicious. "[F]irearms and explosives can be small and easily concealed."
12 . . . Consequently, any x-ray scan that doesn't rule out every possibility of dangerous
13 contents is, of necessity, inconclusive. Given such circumstances, a random post-x-ray
14 search of passengers' bags for weapons or explosives does not violate the Fourth
15 Amendment.

16 298 F.3d at 1089-1090. Second, the governing statute and regulation plainly reflect that the purpose
17 of the screening procedure is to detect weapons and explosives, 49 U.S.C. §§ 44901(a) and
18 44902(a)(1); 49 C.F.R. §§ 1544.201-1544.205, and plaintiff does not allege that the airlines had a
19 different purpose. Finally, plaintiff was free to avoid the search by electing not to fly and, in fact,
20 did so. Compl., ¶¶ 32, 34. Accordingly, plaintiff's Fourth Amendment claim is without merit.

21 VII. THE AIRPORT SCREENING PROCESS COMPLIES WITH 22 EQUAL PROTECTION REQUIREMENTS

23 Plaintiff alleges that the airlines' use of a more intensive screening process for passengers
24 who do not provide any form of identification "burdens the right for equal protection of all citizens
25 who seek anonymity, by creating an invidious classification of 'anonymous travelers.'" Compl.,
26 ¶ 72.⁶ However, equal protection principles do not even apply here because plaintiff has not been

27 ⁶ Plaintiff lacks standing to pursue this claim since he admits that he is not among this
28 group of "anonymous travelers." In that regard, he alleges that he went to Oakland International
29 Airport with "paper tickets, *in his own name*." Id., ¶ 24 (emphasis added). In any event, the

1 treated differently than other passengers, all of whom are asked to produce identification, and all of
2 whom are subject to the same requirements when they fail to produce identification. Plaintiff cannot
3 create an equal protection violation by choosing to be an "anonymous traveler." Because those who
4 do not provide identification are not "similarly situated" to those who do, equal protection principles
5 do not apply. Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985).

6 In any event, the classification identified by plaintiff is fully consistent with equal protection
7 principles. Where, as here, the challenged requirement does not impose a "significant 'penalty' on
8 the right to travel," it is reviewed under the rational basis standard. Barber v. Hawaii, 42 F.3d 1185,
9 1196 (9th Cir. 1994); see also, Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 905
10 (1986). "Such a classification cannot run afoul of the Equal Protection Clause if there is a rational
11 relationship between the disparity of treatment and some legitimate governmental purpose." Board
12 of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 367 (2001), quoting Heller v.
13 Doe, 509 U.S. 312, 320 (1993). "Moreover, the State need not articulate its reasoning at the moment
14 a particular decision is made. Rather, the burden is on the challenging party to negative 'any
15 reasonably conceivable state of facts that could provide a rational basis for the classification.'" Board
16 of Trustees, 531 U.S. at 367, quoting in part Heller, 509 U.S. at 320. A "classification fails rational
17 basis review only when it rests on grounds wholly irrelevant to the achievement of the State's
18 objective." 509 U.S. at 324, quoting in part Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 71 (1978).

19 The distinction made here between passengers who produce identification and those who do
20 not easily satisfies these standards. First, the government's interest in protecting the safety of airline
21 passengers is unquestionably a "legitimate" – indeed, a compelling – governmental purpose. E.g.,
22 United States v. Davis, 482 F.2d at 910. Second, there is plainly a "reasonably conceivable state of
23 facts that could provide a rational basis" for exercising greater caution in screening "anonymous
24 travelers." The Aviation Transportation and Security Act requires the Under Secretary to:

25
26
27 classification identified by plaintiff is fully consistent with equal protection requirements.

1 (2) establish procedures for notifying . . . airline security officers of the identity of individuals
2 known to pose, or suspected of posing, a risk of air piracy or terrorism or a threat to airline
or passenger safety; [and]

3 (3) . . . establish policies and procedures requiring air carriers -

4 (A) to use information from government agencies to identify individuals on passenger
5 lists who may be a threat to civil aviation or national security; and

6 (B) if such an individual is identified, notify appropriate law enforcement agencies,
7 prevent the individual from boarding an aircraft, or take other appropriate action with respect
8 to that individual.

9 49 U.S.C. § 114(h)(2) and (3). If a passenger refuses to provide or verify his or her identity, airline
10 security officers cannot determine whether the passenger is among those individuals "known to pose,
11 or suspected of posing, a risk of air piracy or terrorism or a threat to airline or passenger safety." Id.
12 In these circumstances, it is plainly "rational" for airline security personnel to take additional steps
13 to ensure that the passenger does not threaten passenger safety. Because "there is a rational
14 relationship between the disparity of treatment and some legitimate governmental purpose," Board
of Trustees, 531 U.S. at 367, plaintiffs equal protection claim must be dismissed.

15 CONCLUSION

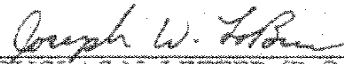
16 For the foregoing reasons, federal defendants' motion to dismiss should be granted.

17 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Federal Defendants' Notice of Motion and Motion to Dismiss, together with a proposed order, was served by overnight courier, on this 31st day of October, 2002 on:

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