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8 UNITED STATES DISTRICT COURT  
 9 NORTHERN DISTRICT OF CALIFORNIA  
 10 SAN FRANCISCO DIVISION

11 JOHN GILMORE,  
 12  
 13 Plaintiff,

14 v.

15 JOHN ASHCROFT, in his official capacity as  
 16 Attorney General of the United States; ROBERT  
 17 MUELLER, in his official capacity as Director of  
 18 the FEDERAL BUREAU OF INVESTIGATION;  
 19 NORM MINETA, in his official capacity as  
 20 Secretary of Transportation; JANE F. GARVEY,  
 21 as Administrator of the Federal Aviation  
 22 Administration; JOHN W. MAGAW, in his  
 23 official capacity as chief of the Transportation  
 24 Security Administration; TOM RIDGE, in his  
 25 official capacity as chief of the OFFICE OF  
 26 HOMELAND SECURITY; UAL  
 27 CORPORATION aka UNITED AIRLINES;  
 28 SOUTHWEST AIRLINES; and DOES I-XXX,  
 Defendants.

) Case No. C 02-3444 SI  
 )  
 ) SOUTHWEST AIRLINES CO.'S NOTICE  
 ) OF MOTION AND MOTION TO DISMISS  
 ) PURSUANT TO FRCP 12(b)(6);  
 ) MEMORANDUM OF POINTS AND  
 ) AUTHORITIES IN SUPPORT THEREOF

Hearing Set By Stipulation And Order

DATE: January 17, 2003  
 TIME: 9:00 A.M.  
 CTRM: 4

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MEMORANDUM OF POINTS AND AUTHORITIES

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NOTICE OF MOTION AND MOTION

TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT on January 17, 2003, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 4 of the above-entitled Court, located at 450 Golden Gate Avenue, 17<sup>th</sup> floor, San Francisco, California, Defendant Southwest Airlines Co. ("Southwest") will move the Court for an order dismissing all of the Claims set forth in Plaintiff John Gilmore's Complaint. The hearing date and time was set by stipulation of the parties signed by the Court on October 3, 2002.

Southwest respectfully moves the Court to dismiss all of the Claims set forth in John Gilmore's Complaint against Southwest. This Motion is made pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure on the grounds that the Claims are not based on cognizable legal theories and/or are not supported by factual allegations that, even if taken as true, would entitle Gilmore to the relief he requests. This Motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the pleadings and papers on file in this action, and upon such further evidence as may be presented at the hearing on this matter.

Dated: October 31, 2002

Piper Rudnick LLP

By: 

JANE H. BARRETT  
Attorneys For Defendant  
SOUTHWEST AIRLINES CO.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Since the September 11<sup>th</sup> terrorist attacks, the major U.S. airlines and the federal government  
4 have individually and collectively taken steps to increase airline security. One security measure  
5 employed to protect passengers involves verifying passenger identity. This is not an onerous task.  
6 Identity verification involves looking at a passenger's identification card to ensure that the name on  
7 the identification matches the name on a passenger's boarding pass. The passenger identification  
8 policy is based on the commonsense notion that preventing known terrorists and terrorist sponsors  
9 from accessing U.S. airlines is a laudable goal, a goal that can be achieved without infringing on  
10 personal freedoms.  
11

12 Plaintiff John Gilmore alleges that the government's identification policy is unconstitutional  
13 because it violates his purported "right to anonymous airline travel." The policy involves nothing  
14 more than an airline employee or representative looking at an airline passenger's identification and  
15 even that is not required. If an airline passenger refuses to show identification for verification  
16 purposes, he or she has two options. First, the passenger can consent to a more thorough search prior  
17 to boarding. This search involves walking through a magnetometer, a "wanding," and a light pat-  
18 down search. Second, the passenger can refuse the search and travel by other means, like train, bus,  
19 boat, or automobile. The airline passenger is never forced to show his or her identification.  
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21 The passenger identification policy does not infringe on personal freedoms and does not  
22 violate any constitutionally-protected rights. Gilmore's claims have no basis in law and must,  
23 therefore, be dismissed.  
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II. STATEMENT OF ISSUES TO BE DECIDED

Southwest moves for an order dismissing each of Gilmore's seven Claims against Southwest, pursuant to Federal Rule of Civil Procedure 12(b)(6), on the grounds that the Claims are not based on cognizable legal theories and/or are not supported by factual allegations that, even if taken as true, would entitle Gilmore to the relief he requests. The specific issues to be decided are:

1. Whether Gilmore's First Claim fails to state a legally sufficient claim against Southwest for (a) vagueness in violation of the Due Process Clause of the Fifth Amendment or (b) violation of the right to travel.
2. Whether Gilmore's Second Claim fails to state a legally sufficient claim against Southwest for violation of the right to be free from unreasonable searches and seizures under the Fourth Amendment.
3. Whether Gilmore's Third Claim fails to state a legally sufficient claim against Southwest for violation of the right to travel.
4. Whether Gilmore's Fourth Claim fails to state a legally sufficient claim against Southwest for (a) violation of the right to travel or (b) violation of the right to freedom of association under the First Amendment.
5. Whether Gilmore's Fifth Claim fails to state a legally sufficient claim against Southwest for violation of the right to petition the government for redress of grievances under the First Amendment.
6. Whether Gilmore's Sixth Claim fails to state a legally sufficient claim against Southwest for violation of the right to equal protection of the laws under of the Fifth Amendment.
7. Whether Gilmore's Seventh Claim fails to state a legally sufficient claim against Southwest for violation of the Freedom of Information Act

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### III. STATEMENT OF THE FACTS

On July 18, 2002, Plaintiff John Gilmore filed suit against the representatives of a host of governmental entities responsible for ensuring airline safety, including Norm Mineta as Secretary of the Department of Transportation ("DOT"), John W. Magaw as the Chief of the Transportation Security Administration ("TSA"), Jane F. Garvey as Administrator of the Federal Aviation Administration ("FAA"), and Tom Ridge as Chief of the Office of Homeland Security. Gilmore also filed suit against John Ashcroft as the Attorney General of the Department of Justice ("DOJ"), Robert Mueller as Director of the Federal Bureau of Investigation ("FBI"), and two private airlines: United Airlines, Inc. ("United") and Southwest Airlines Co. ("Southwest"). Gilmore alleges that these federal agencies and passenger airlines have conspired to develop and enforce "secret" security measures that infringe on his First, Fourth, and Fifth Amendment rights. Compl. ¶¶ 4-5, 22.

The gravamen of Gilmore complaint is that current "secret" security measures mandated by the federal agencies require commercial passenger airlines, specifically United and Southwest, to check the identity of their passengers before the passengers board a plane. *Id.* ¶¶ 2-3. When a passenger refuses to show identification, he or she is either subject to a more thorough search before boarding or is prevented from traveling by air. *Id.* ¶ 6. Gilmore alleges that these security measures infringe on his purported constitutional right to anonymous airline travel. *Id.* ¶ 1, 4, 9.

#### A. Gilmore's Attempts to Avoid Showing Identification Before Boarding an Airplane

In July 2002, Gilmore attempted to fly from Oakland, California to Baltimore-Washington International Airport on Southwest. *Id.* ¶ 24. At the check-in line, a Southwest customer service agent asked Gilmore for his identification. *Id.* ¶ 25. Gilmore refused to provide it. *Id.* The customer service agent allowed Gilmore to proceed to the boarding area, but informed him that if he



1 refused to show his identification prior to boarding, he would be subject to a more thorough search.  
2 Id. At boarding, Gilmore told a second Southwest employee that he had identification in his  
3 possession, but that he would not show it to any Southwest employee. Id. ¶ 26. After Gilmore's  
4 continued refusals, he was not permitted to board the plane. Id.  
5

6 Having failed in his attempt to board a Southwest flight without first showing identification,  
7 Gilmore went to the San Francisco airport to purchase a ticket to Washington, D.C. on United. Id. ¶  
8 28. At the ticket counter, Gilmore again refused to show his identification. Id. ¶ 29. A United  
9 service director told Gilmore that he could fly without showing identification, but that he would be  
10 subject to a more thorough search. Id. ¶ 31. Gilmore refused to subject himself to a more thorough  
11 search, which involved going through a magnetometer, being "wanded," and receiving a "light  
12 patdown search." Id. Based on his refusal to show identification and his subsequent refusal to be  
13 subjected to a more thorough search, United did not permit Gilmore to board its plane. Id. ¶ 32.  
14

15 As a result of Gilmore's refusal to show his identification and refusal to consent to a more  
16 thorough search, he was not permitted to travel to Washington, D.C. or Baltimore by airplane. Id. ¶  
17 34. Gilmore claims that the purpose of the trip was to petition the government for redress of  
18 grievances, and that the airline passenger identification policy prevented him from doing so. Id. ¶  
19 24.  
20

#### 21 B. Airline Screening Policy

22 Until passage of the Aviation and Transportation Security Act, the FAA was responsible for  
23 airline security. Compl. ¶ 18. The FAA was authorized to develop airline security measures and to  
24 withhold the details of these measures when public disclosure would be detrimental to the safety of  
25 airline passengers. Id. ¶ 37. When the Aviation and Transportation Security Act was enacted in  
26 November 2002, the airline security duties of the FAA were transferred to the TSA. Id. ¶ 18. The  
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1 TSA was authorized to implement security measures without notice and comment when it  
2 determined that the regulation or security directive "must be issued immediately in order to protect  
3 transportation security." Id. ¶ 46. The TSA was also permitted to issue regulations requiring air  
4 carriers to identify airline passengers who were on certain "watch" lists and who may be a threat to  
5 civil aviation. Id. ¶ 47. When an airline identified such an individual, it was instructed to notify law  
6 enforcement and prohibit the individual from boarding the aircraft. Id. ¶ 47.

8 Gilmore alleges that on September 18, 1996, the FAA implemented Security Directive 96-05,  
9 which required airlines to conduct a more thorough search of airline passengers who could not  
10 produce identification. Id. ¶ 37. The FAA never published this Security Guidance, because  
11 disclosure would be "detrimental to the safety of persons traveling in air transportation." Id. ¶ 37.  
12 Gilmore complains that after September 11<sup>th</sup>, the FAA's interest in airline security has increased, and  
13 that airline security measures have intensified. Id. ¶ 39.

15 Finally, Gilmore cites a number of newspaper and magazine articles discussing vast  
16 government security systems and financial service databases which, on their face, seem entirely  
17 unrelated to the airline passenger identification policy at issue. See id. ¶¶ 48-50. He attempts to link  
18 the airline passenger identification policy with a grand Orwellian scheme by the government to  
19 develop facial-recognition and financial data analysis systems. Curiously, Gilmore does not allege  
20 that the government or the airlines do anything with an airline passenger's identification other than  
21 confirm that the name on the identification matches the name listed on an airline ticket.

### 23 C. Gilmore's Claims

24 Gilmore alleges that the airline passenger identification is unconstitutional because it  
25 deprives him of his purported constitutional right to travel anonymously by airplane. He  
26 reformulates this into six Claims:  
27

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MEMORANDUM OF POINTS AND AUTHORITIES

Case No. C 02 3444 SI

- 1 • First Claim: vagueness in violation of the Due Process Clause of the Fifth Amendment;  
violation of the right to travel.
- 2
- 3 • Second Claim: violation of the right to be free from unreasonable searches and seizures  
under the Fourth Amendment.
- 4
- 5 • Third Claim: violation of the right to travel.
- 6
- 7 • Fourth Claim: violation of the right to travel; violation of the right to freedom of  
association under the First Amendment.
- 8
- 9 • Fifth Claim: violation of the right to petition the government for redress of grievances  
under the First Amendment.
- 10
- 11 • Sixth Claim: violation of the right to equal protection of the laws under of the Fifth  
Amendment.

12 ¶¶ 51-72. Gilmore also alleges that the airline passenger identification policy violates the Freedom  
of Information Act. Seventh Claim, ¶¶ 73-75.

#### 13 IV. STANDARD

14 Pursuant to Federal Rule of Civil Procedure 12(b)(6), "the court may dismiss a complaint as a  
15 matter of law for (1) lack of a cognizable legal theory or (2) insufficient facts under a cognizable  
16 legal claim." SmileCare Dental Group v. Delta Dental Plan, 88 F.3d 780, 783 (9<sup>th</sup> Cir. 1996)  
17 (internal citation omitted). When appraising the sufficiency of the complaint under this standard,  
18 "the court must determine that if all of the facts alleged were true, the [plaintiff] would be entitled to  
19 a legal remedy. If [the plaintiff] would not be, then the claim must be dismissed." Davis v. Palo  
20 Alto, 930 F. Supp. 1375, 1376 (N.D. Cal. 1996). In engaging in this analysis, the court must assume  
21 that the facts alleged are true. It may not, however, consider conclusory allegations and unwarranted  
22 inferences. Parrino v. FHP, Inc., 146 F.3d 699, 706 (9<sup>th</sup> Cir. 1998).

23  
24 Courts in this jurisdiction have dismissed numerous constitutional claims similar to this at the  
25 onset for failure to state a claim under Rule 12(b)(6). See, e.g., Miller v. Reed, 176 F.3d 1202 (9<sup>th</sup>  
26 Cir. 1999) (finding that plaintiff, who claimed that he had a fundamental right to drive an automobile  
27 and that the government violated this right by denying him a driver's license, failed to state a claim  
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1 upon which relief can be granted because there is no fundamental right to drive); Morse v. North  
2 Coast Opportunities, Inc., 118 F.3d 1338 (9<sup>th</sup> Cir. 1997) (finding that plaintiff, who sued a state-  
3 funded nonprofit agency for violating his constitutional rights, failed to state a claim upon which  
4 relief can be granted because private parties cannot be held liable for constitutional violations).

## 5 6 V. ARGUMENT

### 7 A. The Constitution Does Not Guarantee The Right To Travel by Air (First, Third and Fourth Claims).

8 The First, Third and Fourth Claims are all premised on an alleged right to travel by air. As  
9 the Constitution does not recognize a right to travel by a particular mode of transportation,  
10 Southwest has not violated Gilmore's right to travel.<sup>1</sup>

11  
12 The Ninth Circuit has twice held that burdens placed on a single mode of transportation do  
13 not implicate the fundamental right to interstate travel. Just three years ago it ruled in a case similar  
14 to this that there is no "fundamental right to drive an automobile." In Miller v. Reed, the plaintiff's  
15 application for a driver's license was rejected by the California DMV because he refused to divulge  
16 his social security number. 176 F.3d 1202 (9<sup>th</sup> Cir. 1999). Plaintiff claimed that this rejection  
17 violated his "fundamental right to drive." Id. at 1204. The Ninth Circuit found that there was no  
18 fundamental right to drive, and quoted the Supreme Court of Rhode Island in stating that  
19  
20

21 <sup>1</sup> Gilmore alleges incorrectly that Southwest infringed on his right to travel, and therefore violated  
22 his First and Fifth Amendment rights. The right to travel, however, does not exist under the First or  
23 Fifth Amendments to the Constitution. While the source of the right to travel has been called  
24 "elusive," the Supreme Court has indicated that the right may be contained in the Privileges and  
25 Immunities Clause of Article IV, the Commerce Clause, the Privileges and Immunities Clause of the  
26 Fourteenth amendment, or the "federal structure of government adopted by our Constitution." Att'y  
27 Gen. of New York v. Soto-Lopez, 476 U.S. 898, 902 (1986). The Court has never indicated that the  
28 right to travel is based on the First or Fifth Amendments. Because the right to travel is not contained  
in the First or Fifth Amendments to the Constitution, Gilmore's Third and Fourth Claims must be  
dismissed. Further, since Southwest may only limit one means of travel, it is incapable of violating  
Gilmore's fundamental right to travel. Gilmore's Third and Fourth Claims must be dismissed on  
that basis as well.

1 [t]he plaintiff's argument that the right to operate a motor vehicle is fundamental  
2 because of its relation to the fundamental right of interstate travel is utterly frivolous.  
3 The plaintiff is not being prevented from traveling interstate by public transportation,  
4 by common carrier, or in a motor vehicle driven by someone with a license to drive it.  
5 What is at issue here is not his right to travel interstate, but his right to operate a  
6 motor vehicle on the public highways, and we have no hesitation in holding this is not  
7 a fundamental right.

8 Id. at 1206.

9 More than 25 years before Miller, the Ninth Circuit first recognized that statutes and  
10 regulations which restricted one means of travel did not implicate the constitutional right to travel.  
11 Monarch Travel Serv., Inc. v. Assoc. Cultural Clubs, Inc., 466 F.2d 552 (9<sup>th</sup> Cir. 1972). Specifically,  
12 in Monarch the Ninth Circuit found that when a governmental action had the effect of eliminating  
13 one means of travel for certain classes of passengers, it did not trigger the fundamental right to  
14 travel. Id. at 554. The court stated, "Of course, higher air tariffs will limit travel of those who  
15 cannot pay the price. A rich man can choose to drive a limousine; a poor man may have to walk.  
16 The poor man's lack of choice in his mode of travel may be unfortunate, but it is not  
17 unconstitutional." Id.

18 Even assuming Gilmore's factual allegations are correct, the conduct of Southwest does not  
19 trigger the fundamental right to travel. When Gilmore refused to show Southwest employees his  
20 identification, he was not permitted to travel by airplane. Just as in Miller and Monarch, Southwest  
21 only restricted Gilmore's access to one means of travel. Southwest is incapable of preventing  
22 Gilmore or anyone else from driving, taking a bus, taking a train, taking a boat, or finding some other  
23 means to travel from place to place. Because there is no right to travel by air, the First, Third and  
24 Fourth Claims must be dismissed.<sup>2</sup>

25  
26  
27 <sup>2</sup> The Fourth Claim also contains a claim regarding the right to free association, which is addressed  
28 in Section C below.

1 **B. Gilmore's Allegations Do Not Support A Cognizable Claim For Unreasonable**  
2 **Search And Seizure In Violation Of The Fourth Amendment (Second Claim)**

3 Gilmore's Second Claim alleges that the policy of requiring air travelers to provide  
4 identification or submit to a more thorough search is an unconstitutional search and seizure in  
5 violation of the Fourth Amendment. The law does not support such a Claim. The Ninth Circuit has  
6 held that "airport screening searches of the persons and immediate possessions of potential  
7 passengers for weapons and explosives are reasonable under the Fourth Amendment provided each  
8 prospective boarder retains the right to leave rather than submit to the search." United States v.  
9 Davis, 482 F.2d 893, 912 (9<sup>th</sup> Cir. 1973).

10  
11 [A]s a matter of constitutional laws, a prospective passenger has a choice: he may  
12 submit to a search of his person and immediate possessions as a condition to  
13 boarding; or he may turn around and leave. If he chooses to proceed, that choice,  
14 whether viewed as a relinquishment of an option to leave or an election to submit to  
15 the search, is essentially a "consent," granting the government a license to do what it  
16 would otherwise be barred from doing by the Fourth Amendment.

17 Id. at 913.

18 Further, it is well established that a search of a prospective airline passenger's person and  
19 possessions is allowed under the Fourth Amendment as a reasonable and necessary means of  
20 detecting weapons or explosives. Davis, 482 F.2d at 913; Torbet v. United Airlines, Inc., 298 F.3d  
21 1087, 1089-90 (9<sup>th</sup> Cir. 2002). In Torbet, the Ninth Circuit held that it is constitutional to search  
22 passengers' bags by way of an x-ray scan and random post-x-ray searches by hand of some  
23 passengers' bags. 298 F.3d at 1089-90. The court reasoned that post-x-ray searches of passengers'  
24 bags are not unduly intrusive because weapons and explosives can be small and difficult to detect.

25 Id.

26 Gilmore's allegations make clear that under the challenged policy: (1) he had the option to  
27 and in fact did decline to fly rather than provide identification or submit to a search of his person,

1 Compl. ¶¶ 6, 26, 29-34; and (2) the search at issue would have consisted of nothing more than  
2 showing identification, or passage through a magnetometer, being “wanded,” and receiving a “light  
3 patdown search.” Under controlling precedent, such a policy is constitutional as a matter of law.  
4 See Davis, 482 F.2d at 912-13; Torbet, 298 F.3d at 1089-90. As there is no set of facts consistent  
5 with Gilmore’s allegations that would support a Fourth Amendment challenge to the policy,  
6 Gilmore’s Second Claim must be dismissed.  
7

8 **C. Gilmore’s Allegations Do Not Support A Cognizable Claim For Infringement Of**  
9 **His First Amendment Rights (Fourth and Fifth Claims).**

10 Gilmore fails to state with particularity how his First Amendment rights were violated by the  
11 airline passenger identification policy. The Fourth Claim alleges only that “Anonymity of  
12 association is protected by the fundamental right of free association.” ¶66. Similarly, the Fifth  
13 Claim alleges in the same conclusory fashion that his right to petition the government was violated  
14 since he cannot travel to “where the seat of government is located.” ¶69. These statements are  
15 insufficient to sustain his First Amendment claim.  
16

17 The First Amendment protects two distinct types of freedom of association. One is the  
18 freedom “to enter into and maintain certain intimate human relationships” without undue intrusion,  
19 and the other is the freedom “to associate for the purpose of engaging in those activities protected by  
20 the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of  
21 religion.” City of Dallas v. Stanglin, 490 U.S. 19, 24 (1989) (quoting Roberts v. United States  
22 Jaycees, 468 U.S. 609, 617-18 (1984)). Gilmore’s Fourth and Fifth Claim purport to invoke the  
23 latter sort of freedom of association. However, he has not alleged any conduct that implicates his  
24 right to freedom of association.  
25  
26  
27

1 "To be cognizable, the interference with associational rights must be direct and substantial or  
2 significant." Storm v. Town of Woodstock, 944 F. Supp. 139, 144 (N.D.N.Y. 1996) (quoting  
3 Fighting Finest, Inc. v. Bratton, 95 F.3d 224, 228 (2d Cir. 1996)). It is not enough that a government  
4 action has an indirect effect that makes it more difficult to exercise associational rights. Id. at 143-  
5 44; see also Roulette v. City of Seattle, 97 F.3d 300, 305 (9<sup>th</sup> Cir. 1996) (a freedom of speech  
6 challenge "must fail unless, at a minimum, the challenged statute 'is directed narrowly and  
7 specifically at expression or conduct commonly associated with expression'" (quoting City of  
8 Lakewood v. PlainDealer Pub., 486 U.S. 750, 760 (1988))). For example, in Storm, residents of  
9 Woodstock, New York, who participated in regular "full moon gatherings" for expressive and  
10 religious purposes, challenged a local law that prevented them from parking at night near their  
11 preferred gathering site. In dismissing plaintiffs' freedom of association claim, the court held that  
12 the First Amendment was not implicated because the law did not prevent the moonlight gatherings  
13 from occurring, it merely had the indirect effect of requiring plaintiffs to walk further to the site. Id.  
14 at 144. The court noted that "the First Amendment does not compel government to facilitate the ease  
15 with which an individual may exercise associational rights." Id. (quoting Fighting Finest, 95 F.3d at  
16 228).

17  
18  
19  
20 Similarly, the right to petition the government for redress of grievances is only implicated by  
21 governmental action that *prevents* a protected exercise of the First Amendment right to petition. The  
22 right to petition does not require the government to provide assistance, services or largesse that  
23 would make it *easier* to petition the government in a particular manner. Hilton v. City of Wheeling,  
24 209 F.3d 1005, 1006-07 (7<sup>th</sup> Cir. 2000).

25  
26 Here, the challenged policy is clearly directed at passenger safety, and has no direct or  
27 substantial effect on protected First Amendment liberties, such as the freedom of speech, assembly or  
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SOUTHWEST AIRLINES CO.'S NOTICE OF MOTION AND MOTION TO DISMISS;  
MEMORANDUM OF POINTS AND AUTHORITIES

Case No. C 02 3444 SI



1 petition. Even assuming that Gilmore's purpose in traveling to Baltimore was to engage in political  
2 assembly, the airline passenger identification policy did not prevent him from doing so. Southwest  
3 did not prevent him from attending a rally or engaging in any other form of political speech in  
4 Baltimore or in the nation's capital. Gilmore could have traveled to Baltimore or Washington, D.C.  
5 and engaged in such activities by showing his identification and traveling by airplane, or, if he did  
6 not wish to show his identification, Gilmore could have traveled by car, by bus, or by train.

8 Courts have not extended the First Amendment to include a right to the most convenient form  
9 of travel to a place of assembly. Further, under Gilmore's theory, any restriction on travel would  
10 violate the First Amendment, assuming the purpose of travel was to engage in protected speech of  
11 some kind. This logic is untenable and would lead to absurd results. The Fourth and Fifth Claim  
12 must, therefore, be dismissed.

14 **D. Gilmore's Allegations Do Not Support A Claim For Violation Of The Right To  
15 Equal Protection Under The Fifth Amendment (Sixth Claim)**

16 Gilmore's Sixth Claim alleges in conclusory fashion that the airline passenger identification  
17 policy "unconstitutionally burdens the right for equal protection of all citizens who seek anonymity,  
18 by creating an invidious classification of 'anonymous travelers,' and arbitrarily forcing this entire  
19 class of citizens to endure a higher degree of intrusive searches without good cause than those  
20 endured by other citizens. There is no set of facts consistent with Gilmore's allegation that could  
21 support an Equal Protection Claim.

22 Where a legislative act or regulation does not interfere with the exercise of a fundamental  
23 right or operate to the disadvantage of a suspect class, it is subject only to rational basis scrutiny.  
24 Yap v. Slater, 128 F.Supp.2d 672, 681 (D. Hawaii 2000) (citing Vance v. Bradley, 440 U.S. 93, 97  
25 (1979)). As discussed above, the airline passenger identification policy does not interfere with any  
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1 fundamental right identified in Gilmore's complaint. Further, "anonymous travelers" are not among  
2 the limited suspect classifications that require courts to apply a more heightened degree of scrutiny.  
3 As a result, the policy is subject only to rational basis scrutiny.

4 Rational basis review is extremely deferential to the government's rulemaking authority. A  
5 non-suspect classification "must be upheld against equal protection challenge if there is any  
6 reasonably conceivable state of facts that could provide a rational basis for the classification."  
7 Aleman v. Glickman, 217 F.3d 1191, 1201 (9<sup>th</sup> Cir. 2000) (quoting FCC v. Beach Communications, Inc.,  
8 508 U.S. 307, 313 (1993)).

9  
10 The airline passenger identification policy is on its face a rational policy designed to protect  
11 the public from the danger of terrorists getting onto commercial flights. It is beyond cavil that public  
12 safety is a proper rulemaking goal, and a regulation must be upheld under rational basis review if it  
13 has any conceivable protective purpose. See Hager v. City of West Peoria, 84 F.3d 865, 873 (7<sup>th</sup> Cir.  
14 1996). There is no sets of facts that Gilmore could develop that would support a successful Equal  
15 Protection challenge to the airline passenger identification policy's impact on "anonymous  
16 travelers." Gilmore's Sixth Claim must therefore be dismissed.

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19 **E. Gilmore's FOIA Claim Is Inapplicable To Southwest And In Any Event FAA  
20 And TSA Are Not Required To Publish Airline Passenger Identification  
Requirements (Seventh Claim).**

21 Gilmore claims that the government failed to publish the rules and regulations related to  
22 airline passenger identification requirements. Compl. ¶ 74. Because the rules have not been  
23 published, Gilmore argues, they cannot be applied against him. Id. This claim is presumably  
24 directed against the government defendants and not Southwest, since Southwest is not required to  
25 publish its internal rules or regulations and since Southwest does not have the authority to publish  
26 the government's rules or regulations. Therefore, the Seventh Claim must be dismissed as to  
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Southwest.

Even assuming Gilmore could make a FOIA claim against Southwest, based on the government’s failure to publish its security directives, this claim has no basis in law. As Gilmore concedes, the FAA and the TSA are not required to publish airline regulations, as agencies usually must pursuant to FOIA. The FAA may keep certain security directives private when the administrator concludes that “disclosure would be detrimental to the safety of persons traveling in air transportation.” Compl. ¶ 37. Similarly, the TSA may keep certain security directives private “in order to protect transportation security.” *Id.* ¶ 46. Because the FAA and TSA are permitted to develop and enforce regulations without first providing notice pursuant to FOIA, Gilmore’s Seventh Claim must be dismissed.

**F. Gilmore’s Fifth Amendment Vagueness Claim Is Inapplicable To Southwest (First Claim).**

Gilmore alleges that the airline passenger identification policy is unconstitutionally vague, because it is unpublished. This claim is presumably directed at the governmental parties only, since Southwest is not responsible for publishing governmental regulations and since the Fifth Amendment does not require Southwest to publish its own internal policies and procedures. For this reason, together with Gilmore’s failure to allege a cognizable violation of the right to travel, *see* Section V.A., *supra*, Gilmore’s First Claim must be dismissed.

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VI. CONCLUSION

Based on Gilmore's failure to plead any viable Claims, Gilmore's Complaint against Southwest should be dismissed in its entirety.

Dated: October 31, 2002

Piper Rudnick LLP

By: 

JANE H. BARRETT  
Attorneys For Defendant  
SOUTHWEST AIRLINES CO.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing:

SOUTHWEST AIRLINES CO.'S NOTICE OF MOTION AND MOTION TO DISMISS  
PURSUANT TO FRCP 12(b)(5); MEMORANDUM OF POINTS AND AUTHORITIES

was served by facsimile and by overnight mail (UPS) on October 31, 2002 on the following persons:

|   |   |
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Janis A. Gabbert

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