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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA

10 RAHINAH IBRAHIM, )  
Plaintiff, )  
11 v. )  
12 DEPARTMENT OF HOMELAND )  
13 SECURITY, et al., )  
14 Defendants. )

No. CV 06-00545 WHA

FEDERAL DEFENDANTS' MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT OF THEIR MOTION TO DISMISS  
PLAINTIFF'S CLAIMS FOR LACK OF  
SUBJECT MATTER JURISDICTION

Date: June 29, 2006  
Time: 8:00 a.m.  
Courtroom: 9 – 19<sup>th</sup> Floor

Hon. William Alsup

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PRELIMINARY STATEMENT

1  
2 Plaintiff in this lawsuit challenges the administration, management, and implementation of  
3 security watch lists, known collectively as the “No Fly list,” which were implemented after  
4 September 11, 2001 by the Transportation Security Administration (“TSA”) in order to protect  
5 against persons who may pose a threat to the safety of aircraft and those on board. Based on  
6 “information and belief,” plaintiff alleges that she was wrongly placed on the No Fly list for a  
7 period of time because of her nationality, ethnicity, and religious beliefs, rather than because she  
8 poses a threat to transportation safety or national security. Plaintiff further contends that her  
9 alleged placement on the No Fly list caused her to be arrested and detained for questioning by  
10 local law enforcement personnel for a little over two hours at the San Francisco Airport on the  
11 morning of January 2, 2005, before being released and allowed to continue on her way. Pursuant  
12 to these allegations, plaintiff brings claims, *inter alia*, under 42 U.S.C. § 1983, alleging that her  
13 constitutional rights under the First, Fourth, Fifth, and Fourteenth Amendments were violated.  
14 Plaintiff asks for both equitable relief and damages.

15  
16 Plaintiff, however, is in the wrong forum and her claims against the federal defendants,  
17 which include the TSA, must be dismissed for lack of subject matter jurisdiction.<sup>1</sup> The No Fly list  
18 is a “final order” within the meaning of special review provisions enacted by Congress and can  
19 only be challenged in a United States Court of Appeals, not in a United States District Court.  
20 Pursuant to applicable standards, because plaintiff’s claims against the federal defendants are

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23 <sup>1</sup> In addition to the TSA, federal defendants consist of the Department of Homeland  
24 Security; Michael Chertoff, in his official capacity as Secretary of the Department of Homeland  
25 Security; Tom Ridge, in his official capacity as the former Secretary of the Department of  
26 Homeland Security; Edmund S. Hawley, in his official capacity as Assistant Secretary of TSA;  
27 David M. Stone, in his official capacity as former Administrator of TSA; the Terrorist Screening  
28 Center; Donna A. Bucella, in her official capacity as Director, Terrorist Screening Center; Norm  
Mineta, in his official capacity as Secretary of Transportation; the Federal Aviation  
Administration; Marion C. Blakely, in her official capacity as Administrator of the Federal  
Aviation Administration; the Federal Bureau of Investigation (“FBI”); and Robert Mueller, in his  
official capacity as Director of the FBI.

1 inescapably intertwined with the merits and procedures of the No Fly list, they cannot be brought  
2 in this Court.

3 Plaintiff's damage claims against the federal defendants must be dismissed for additional  
4 reasons. Plaintiff seeks damages, in part, under 42 U.S.C. § 1983, which is available only against  
5 *state* actors, not federal officials. Moreover, to the extent that plaintiff seeks to bring damage  
6 claims against the federal defendants under the California constitution, the California Civil Code,  
7 or pursuant to common law tort theories, the federal defendants are sovereignly immune to such  
8 claims. By its express terms, the Administrative Procedure Act ("APA"), on which plaintiff  
9 apparently relies as a waiver of sovereign immunity, does not allow for damages to be awarded  
10 against the federal government.

11 Because plaintiff is in the wrong court and has furthermore sought monetary relief  
12 pursuant to causes of action that do not apply to the federal government, her claims against the  
13 federal defendants must be dismissed.

#### 14 I. STATUTORY AND REGULATORY BACKGROUND

15 Federal law renders unlawful certain conduct that is threatening or dangerous to airline  
16 security and safety. It is a crime to commit "aircraft piracy," defined as "seizing or exercising  
17 control of an aircraft . . . by force, violence, threat of force or violence." 49 U.S.C. § 46502(a). It  
18 is also unlawful to physically assault or threaten a member of a flight or cabin crew, or to take any  
19 action that poses an imminent threat to the safety of the aircraft or other individuals on board. 49  
20 U.S.C. § 46318. Federal law furthermore prohibits interference with the duties of a flight crew  
21 member or a flight attendant, 49 U.S.C. § 46504, and makes it a crime to have a concealed  
22 weapon, loaded firearm, or explosive device on one's person or in one's property while on board,  
23 or attempting to board, an aircraft, 49 U.S.C. § 46505(b); *see also* 49 C.F.R. § 1540.111.

24 Congress, in addition, has mandated certain preventive measures designed to stop such  
25 threats before they happen, including "the screening of all passengers and property . . . before  
26 boarding," 49 U.S.C. § 44901(a), in order to ensure that no passenger is "carrying unlawfully a  
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1 dangerous weapon, explosive, or other destructive substance," 49 U.S.C. § 44902(a). *See also* 49  
2 C.F.R. § 1540.5 (defining "[s]creening function" as "the inspection of individuals and property for  
3 weapons, explosives, and incendiaries"); *id.* §§ 1540.107, 1544.201(a)-(b), 1544.203(c) (requiring  
4 screening of all passengers, their accessible property, and their checked baggage, for dangerous  
5 items).

6 In addition to these safeguards, after September 11, 2001, Congress mandated other  
7 prophylactic measures and conferred overall responsibility for airline security on the Under  
8 Secretary of Transportation for Security, who is the head of the TSA.<sup>2</sup> Among other actions, the  
9 Under Secretary must require each airport operator to "establish [a] security program . . . that is  
10 adequate to ensure the safety of passengers," 49 U.S.C. § 44903(c)(1); *see also* 49 C.F.R. §§  
11 1544.101(a), 1544.103(a)(1). TSA can amend those security programs, including on an  
12 emergency basis, if the public interest requires, 49 C.F.R. § 1544.105. The Under Secretary can  
13 also issue "Security Directives" to aircraft operators when he "determines that additional security  
14 measures are necessary to respond to a threat assessment." 49 C.F.R. § 1544.305(a). Compliance  
15 with those Directives by air transport personnel is mandatory. 49 C.F.R. § 1544.305(b).

17 The Under Secretary must also ensure that federal agencies "share . . . data on individuals  
18 identified . . . who may pose a risk to transportation or national security," and "use information  
19 from government agencies to identify individuals on passenger lists who may be a threat to civil  
20 aviation or national security." 49 U.S.C. §§ 114(h)(1) and (3)(A). If such an individual is

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22 <sup>2</sup> Following September 11, 2001, Congress enacted the Aviation and Transportation  
23 Security Act ("ATSA"), by which it created TSA as an agency within the Department of  
24 Transportation. Under the ATSA, Congress charged the Under Secretary of Transportation for  
25 Security, as head of TSA, with responsibility for security in all modes of transportation. This  
26 included all responsibilities previously exercised by the Administrator of the Federal Aviation  
27 Administration for civil aviation security under Chapter 449 of Title 49. *See* Pub. L. No. 107-71,  
28 § 101, 115 Stat. 597, 597-604 (2001). Subsequently, Congress transferred TSA to the newly  
created United States Department of Homeland Security, whose primary mission is to "prevent  
terrorist attacks within the United States, . . . [and] reduce the vulnerability of the United States  
to terrorism." Homeland Security Act of 2002, Pub. L. 107-296, § 101(b)(1), 116 Stat. 2135,  
2142 (2002).



1 identified, the Under Secretary must, in consultation with other appropriate federal agencies and  
2 air carriers, establish policies and procedures to “notify appropriate law enforcement agencies,  
3 prevent the individual from boarding an aircraft, or take other appropriate action with respect to  
4 that individual.” 49 U.S.C. § 114(h)(3)(B). TSA has implemented these provisions through a  
5 series of Security Directives and Emergency Amendments to air carrier security programs, which  
6 include the No Fly list.

7           The No Fly list consists of two watch lists which are appended to the TSA’s Security  
8 Directives. *See* Declaration of Joseph Salvatore, Deputy Assistant Administrator for Intelligence,  
9 TSA, Department of Homeland Security, ¶ 7. Two groups of individuals are identified on these  
10 respective lists based on an assessment of the degree of risk that they pose to aviation safety. *Id.*  
11 The first list – the actual “No Fly List” – identifies individuals who are prohibited from boarding  
12 aircraft and flying altogether. *Id.* The second list, referred to as the “Selectee List,” identifies  
13 those individuals who must be “selected” by air carriers for additional screening before they are  
14 permitted to fly. *Id.* The Security Directives also prescribe the procedures to be followed and the  
15 specific security measures to be taken by air carriers when individuals identified on the No Fly list  
16 or Selectee list (hereinafter referred to collectively as the “No Fly list”) seek to board an aircraft.  
17 *Id.*

18  
19           Passenger compliance with security procedures is a mandatory precondition for boarding  
20 and flying. Airlines must "refuse to transport" a passenger who does not consent to a search of his  
21 person or baggage, 49 U.S.C. § 44902(a); 49 C.F.R. § 1540.107, and are authorized to "refuse to  
22 transport a passenger or property the carrier decides is, or might be, inimical to safety," 49 U.S.C.  
23 § 44902(b). Furthermore, if the Under Secretary determines that "a particular threat cannot be  
24 addressed in a way adequate to ensure . . . the safety of passengers and crew of a particular flight  
25 or series of flights," he "shall cancel the flight or series of flights." 49 U.S.C. § 44905(b).

26           Lastly, the Under Secretary must “prescribe regulations prohibiting the disclosure of  
27 information obtained or developed in carrying out security . . . if the Under Secretary decides that  
28

1 disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. §  
2 114(s)(1)(C). Pursuant to that authority, the Under Secretary has defined a set of information  
3 known as "sensitive security information" or "SSI" (see 49 C.F.R. part 1520), and has directed that  
4 such information shall not be disclosed except in certain limited circumstances. 49 C.F.R. §  
5 1520.9(a)(2). The Under Secretary has defined SSI to include, *inter alia*, "[a]ny Security  
6 Directive . . . [i]ssued by TSA." 49 C.F.R. § 1520.5(b)(1)(i), (b)(2)(I). The No Fly list is  
7 appended to TSA Security Directives and is thereby protected from disclosure by these provisions  
8 because they constitute SSI pursuant to 49 C.F.R. § 1520.5(b)(2)(i).

9 II. PLAINTIFF'S ALLEGATIONS AND CLAIMS

10 a. The Alleged Events Giving Rise To Plaintiff's Claims

11 Plaintiff identifies herself as a Muslim and a citizen of Malaysia with no ties to terrorism,  
12 who was in this country on a student visa to obtain a doctorate degree from Stanford University.  
13 Complaint, ¶¶ 4, 38. Plaintiff alleges that she arrived at the San Francisco International Airport  
14 with her daughter at approximately 7:00 a.m. on January 2, 2005, to board a 9:00 a.m. flight to  
15 Malaysia, with a changeover in Hawaii. *Id.*, ¶ 38. Plaintiff maintains that she notified United  
16 Airlines of certain medical complications and requested wheelchair assistance to the gate. *Id.*, ¶  
17 41. During check-in, a United Airlines employee allegedly asked to see plaintiff's ticket; notified  
18 the San Francisco Police Department that plaintiff was on the No Fly list; and asked for police  
19 officers to come to the check-in counter. *Id.* Plaintiff alleges "on information and belief" that a  
20 police officer checked the No Fly list for plaintiff's name and called an individual at "TSIS" in  
21 Washington, D.C., who allegedly told the police officer not to allow plaintiff on board her flight,  
22 to contact the FBI, and to detain plaintiff for questioning. *Id.*

23 Plaintiff states that she was then required to wait at the check-in counter until  
24 approximately 8:45 a.m., at which time she was allegedly arrested by the San Francisco police.  
25 *Id.*, ¶ 43. Plaintiff complains of the search that was conducted of her pursuant to the arrest, which  
26 allegedly included the removal of her hijab in front of male officers. *Id.*, ¶ 44. Plaintiff maintains  
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1 that she was then placed in a “holding cell” for approximately two hours during which time she  
2 suffered from abdominal and back pain. *Id.*, ¶ 45. Plaintiff represents that, on information and  
3 belief, the FBI requested the police to release plaintiff at approximately 11:45 a.m.

4 Plaintiff states that unidentified defendants represented to her that her name had been  
5 removed from the No Fly list. *Id.*, ¶ 47. Plaintiff, however, believes that she was still on the No  
6 Fly list the following day, January 3, 2005, because she was allegedly subjected to enhanced  
7 searches before boarding her flight in San Francisco and before boarding subsequent, connecting  
8 flights. *Id.*

9  
10 b. Plaintiff’s Claims

11 As a foundation in support of her constitutional claims, plaintiff represents that defendants  
12 “have refused to disclose important information regarding the No-Fly List, including the criteria  
13 for placing names on or removing names from the No-Fly List . . .” Complaint, ¶ 34.<sup>3</sup> Plaintiff  
14 contends that, “[b]ecause defendants have refused to provide any of this information, defendants  
15 may be using race, religion, ethnicity, national origin, or the exercise of protected  
16 First Amendment rights as factors in maintenance and implementation of the No-Fly list.” *Id.*, ¶  
17 34.

18 Pursuant to this belief, plaintiff contends that her alleged placement on the No Fly list  
19 violates her alleged constitutional rights as follows:

- 20 ● Plaintiff’s substantive and procedural Fifth Amendment rights were allegedly  
21 violated because the placement of names on the No Fly list is allegedly done in an  
22 arbitrary and capricious manner, and because plaintiff was not informed of her  
23 placement on the No Fly list or given any opportunity to contest such placement.  
24 Complaint, ¶¶ 56-58.

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27 <sup>3</sup> Although plaintiff never differentiates between the many named defendants when  
28 setting forth her various claims, we presume that she is referring to the federal defendants when  
complaining specifically of the No Fly list.

- 1 ● Plaintiff was denied her rights of equal protection because, on information and
- 2 belief, she was placed on the No Fly list and arrested based on her religious beliefs
- 3 and her national origin as a citizen of Malaysia. *Id.*, ¶¶ 64-65.
- 4 ● Plaintiff’s placement on the No Fly list caused her to be arrested and searched
- 5 without probable cause in violation of the Fourth Amendment because “it is
- 6 common for individuals who have no links to terrorist activity to be placed on the
- 7 No-Fly list . . .” *Id.*, ¶ 72.
- 8 ● Plaintiff’s “right to freedom of religion” under the First Amendment was violated
- 9 because she was placed on the No Fly list based on her “religious beliefs or
- 10 appearances.” *Id.*, ¶ 79.
- 11 ● Plaintiff’s First Amendment right of association was violated because she was
- 12 placed on the No Fly list based on her “association with the Muslim community or
- 13 the Islamic religion, and based on her national origin.” *Id.*, ¶ 86.

14 Plaintiff additionally brings various claims under the California constitution, the California  
 15 Civil Code, and pursuant to common law tort theories, complaining of her alleged arrest by local  
 16 law enforcement personnel and her treatment after arrest. Complaint, ¶¶ 91-120. It is uncertain  
 17 whether plaintiff brings these claims against the federal defendants. For relief pursuant to all of  
 18 her claims, plaintiff asks for damages and for declaratory and injunctive relief, including a  
 19 declaration that defendant’s maintenance, management, and dissemination of the No Fly list  
 20 violated her constitutional rights.

21  
 22 ARGUMENT

23 I. JUDICIAL REVIEW OF PLAINTIFF’S CHALLENGES TO THE  
 24 NO FLY List IS VESTED EXCLUSIVELY IN CIRCUIT  
 25 COURTS OF APPEALS

26 Under a special statutory review provision, 49 U.S.C. § 46110, this Court lacks  
 27 jurisdiction over plaintiff’s claims challenging the No Fly list, which must be brought, instead, in  
 28 an appropriate United States Court of Appeals. The governing statute provides in relevant part:

1 [A] person disclosing a substantial interest in an *order* issued by the  
2 . . . Under Secretary of Transportation for Security . . . in whole or  
3 in part under this part, part B, or subsection (l) or (s) of section 114  
4 may apply for review of the order by filing a petition for review in  
the United States Court of Appeals for the District of Columbia  
Circuit or in the court of appeals of the United States for the circuit  
in which the person resides or has its principal place of business. . . .

5 49 U.S.C. § 46110 (a) (emphasis supplied). The statute further provides that the Courts of  
6 Appeals have “exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order . .  
7 . . .” 49 U.S.C. § 46110 (c).

8 Pursuant to these provisions, as recently explained by the Ninth Circuit, the question  
9 “whether the district court ha[s] jurisdiction over [plaintiff’s] claims turns on whether the Security  
10 Directive that established [the No Fly list] is an ‘order’ within the meaning of this statute.”  
11 Gilmore v. Gonzales, 435 F.3d 1125, 1132 (9<sup>th</sup> Cir. 2006). The terms “order” under section  
12 1486(a) (§ 46110's predecessor) has been given broad construction by the courts.<sup>4</sup> *Id.*; *see also*  
13 Sierra Club v. Skinner, 885 F.2d 591, 592 (9<sup>th</sup> Cir. 1989) (same). As the Ninth Circuit  
14 emphasizes, “finality is key”:  
15

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

20 Gilmore, 435 F.3d at 1132, quoting Crist v. Leippe, 138 F.3d 801, 804 (9<sup>th</sup> Cir. 1998); Mace v.  
21 Skinner, 34 F.3d 854, 857 (9<sup>th</sup> Cir. 1994). *See also* San Diego Air Sports Center, Inc. v. Fed.  
22 Aviation Administration, 887 F.2d 966, 968 (9<sup>th</sup> Cir. 1989) (explaining that “the purposes of  
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26 <sup>4</sup> Section 46110's predecessor statute was codified at 49 U.S.C. § 1486. *See* City of Los  
27 Angeles v. FAA, 239 F.3d 1033, 1036 (9<sup>th</sup> Cir. 2001); Pub. L. No. 103-272 § 1(e), 108 Stat.  
28 1230 (1994) (recodifying statute at § 46110). The Ninth Circuit’s cases interpreting § 46110  
have cited and relied upon cases interpreting former § 1486. *See, e.g.*, Foster v. Skinner, 70 F.3d  
1084, 1087 (9<sup>th</sup> Cir. 1995).

1 special review statutes – coherence and economy – are best served if courts of appeal exercise  
2 their exclusive jurisdiction over final agency actions”).

3 “Finality is usually demonstrated by an administrative record and factual findings.”  
4 Gilmore, 435 F.3d at 1133; *see id.* (“The existence of a reviewable administrative record is the  
5 determinative element in defining an FAA decision as an ‘order’ for purposes of Section  
6 [46110]”) (citation omitted). “An administrative record, however, may consist of ‘little more’  
7 than a letter.” *Id.* The Security Directives that implement the No Fly list – which are being  
8 submitted under seal for the Court’s *ex parte, in camera* review – establish on their face that they  
9 are final within the meaning of § 46110. *See id.* (explaining that “we have reviewed *in camera*  
10 the materials submitted by the Government under seal, and we have determined that the TSA  
11 Security Directive is final within the meaning of § 46110(a)”).<sup>5</sup>

12 Thus, as recently held by the court in Green v. Transportation Security Administration,  
13 351 F. Supp.2d 1119 (W.D. Wash. 2005), the No Fly list provides a “‘definitive’ statement” of  
14 TSA’s position and has “a direct and immediate effect on persons listed on the No Fly list . . .”  
15 Green, 351 F. Supp.2d at 1124; *see* Salvatore Declaration, ¶ 7 (explaining the direct and  
16 immediate effect of the No Fly lists on those persons who are identified on these lists). *See also*  
17 Gilmore, 435 F.3d at 1133 (“Because the Security Directive [at issue] prevents from air travel  
18  
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20  
21 <sup>5</sup> Because the No Fly list and the Security Directives that implements it constitute SSI,  
22 they cannot be publicly disclosed and must, therefore, be submitted to the Court under seal for its  
23 *in camera* review. *See* Chowdhury v. Northwest Airlines Corporation, 226 F.R.D. 608, 614  
24 (N.D. Cal. 2004) (ruling that records which constitute SSI cannot be disclosed to parties in civil  
25 litigation pursuant to a protective order even where it is alleged that plaintiff “will not be able to  
26 prosecute his case without the withheld sensitive security information and that public policy in  
27 favor of prohibiting discrimination will therefore be thwarted”). *See also* Salvatore Declaration,  
28 ¶ 8 (explaining the harm that would result from the public disclosure of No Fly list and its  
implementing Security Directives); Gordon v. FBI, 388 F.Supp.2d 1028, 1036 (N.D. Cal. 2005)  
(ruling that information about the maintenance of the No Fly list cannot be released under the  
Freedom of Information Act because “[i]t is not too difficult to believe that if this information  
was publicly disclosed, potential terrorists would use the information to circumvent the watch  
lists”).

1 those who, like [appellant], refuse to comply with the identification policy, it has a ‘direct and  
2 immediate’ effect on the daily business of the party asserting wrongdoing.”). The No Fly list  
3 additionally envisions “immediate compliance with its terms” by all air carriers. *See Gilmore*,  
4 435 F.3d at 1132 (“Pursuant to TSA regulations, aircraft operators that are required to maintain  
5 approved security programs ‘must comply with each Security Directive issued to the aircraft  
6 operator by TSA, within the time prescribed in the Security Directive for compliance.’”). These  
7 factors demonstrate conclusively that the No Fly lists are “orders” under 49 U.S.C. § 46110.  
8 *Green*, 351 F. Supp.2d at 1124-25.

9  
10 There is, moreover, no question that plaintiff’s claims against the federal defendants  
11 directly challenge the procedures and merits of the No Fly lists themselves, thereby divesting this  
12 Court of jurisdiction over these claims. While the district courts retain jurisdiction over collateral  
13 “broad challenges” to TSA’s actions, the district courts are divested of jurisdiction over claims  
14 that are ‘inescapably intertwined with a review of the procedures and merits surrounding the . . .  
15 order [at issue].’ *Gilmore*, 435 F.3d at 1133 n.9, *quoting Mace*, 34 F.3d at 858. A claim is  
16 “‘inescapably intertwined’ with a review of the order [*if*] *it squarely attacks the orders issued by*  
17 *the TSA with respect to airport security.*” *Id.* at 1133 n.9 (emphasis supplied).

18 Plaintiff’s claims against the federal defendants “squarely attack” the No Fly list and are  
19 “inescapably intertwined with a review of the procedures and merits surrounding the [No Fly  
20 list].” *Id.* The analysis of this jurisdictional issue by the court in *Green* directly applies here.  
21 Similar to plaintiff’s claims in this case, plaintiffs in *Green* alleged that: (1) they were “innocent  
22 passengers with no links to terrorist activity”; (2) defendants had failed to make known their  
23 criteria “for placing names on or removing names from the No-Fly List”; and (3) defendants’  
24 maintenance, management, and dissemination of the No Fly list was unconstitutional because  
25 defendants “have ‘deprive[d] Plaintiffs of liberty and property interests protected by the Fifth  
26 Amendment’ and have ‘subjected [Plaintiffs] to unreasonable searches and seizures in violation of  
27 the Fourth Amendment.’” 351 F. Supp.2d at 1122. The court held that it lacked jurisdiction over  
28

1 these claims under § 46110, explaining that “[p]laintiffs’ challenge to the adoption, maintenance,  
2 and dissemination of the No-Fly List under the Fourth and Fifth Amendments is inescapably  
3 intertwined with a review of the procedures and merits surrounding the adoption of the No-Fly  
4 List.” *Id.* at 1127. “Plaintiffs’ challenge here . . . would involve a direct challenge to the adoption  
5 and maintenance of the Security Directives. . . . As a result, this Court does not have jurisdiction  
6 to consider these alleged constitutional challenges.” *Id.*; *see also id.* at 1129 (“To the extent that  
7 Plaintiffs base their Fifth Amendment claim on the heightened security measures prescribed by  
8 the Security Directives [implementing the No Fly list], the Court does not have jurisdiction to  
9 consider the claim.”).<sup>6</sup>

10 These same conclusions equally apply here. Plaintiff directly challenges the No Fly list,  
11 arguing that her alleged placement on this list violated her First and Fifth Amendment rights, and  
12 caused her to be arrested by local law enforcement personnel allegedly in violation of her Fourth  
13 Amendment rights. These claims are inescapably intertwined with the procedures and merits of  
14 the No Fly list itself and must, therefore, be dismissed. *See Gilmore*, 435 F.3d at 1133 n9  
15 (explaining that a challenge is “‘inescapably intertwined’ with a review of the order [at issue] . . .  
16 [if] it squarely attacks the order[.]”); *see also Tur v. Federal Aviation Administration*, 104 F.3d  
17 290 (9<sup>th</sup> Cir. 1997) (holding that the district court did not have jurisdiction over plaintiff’s *Bivens*  
18 claims for damages because such claims were inescapably intertwined with the order at issue).<sup>7</sup>

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21 <sup>6</sup> In contrast, the *Green* court accepted jurisdiction over plaintiffs’ additional claim which  
22 did *not* challenge the No Fly list itself, but rather other procedures – the Ombudsman Clearance  
23 Procedures – which did not constitute an “order” under § 46110. 351 F. Supp.2d at 1128  
24 (explaining that, to the extent that “plaintiffs’ Fifth Amendment claim challenges the  
25 Ombudsman Clearance Procedures, this Court does have subject matter jurisdiction because such  
26 procedures do not constitute orders”).

26 <sup>7</sup> The Ninth Circuit in *Gilmore* further found that the district court did not have  
27 jurisdiction over appellant’s claims because they were “as-applied challenges as opposed to  
28 broad facial challenges.” 453 F.3d at 1133 n.9. This same observation applies to plaintiff’s  
claims, which are clearly “as-applied” as opposed to broad facial challenges because they arise  
(continued...)



1 II. ADDITIONAL GROUNDS EXIST FOR THE DISMISSAL OF  
 2 PLAINTIFF’S CLAIMS AGAINST THE GOVERNMENT

3 1. The Federal Defendants Cannot Be Sued Under 42 U.S.C. § 1983

4 An additional ground exists for why the Court lacks jurisdiction over plaintiff’s civil rights  
 5 claims brought against the federal defendants pursuant to 42 U.S.C. § 1983. A section 1983 claim  
 6 is available only against persons acting under the color of law of “any State or Territory or the  
 7 District of Columbia . . .” *Id.* Because the purpose of section 1983 is “to provide a remedy when  
 8 federal rights have been violated through the use or misuse of power *derived from a State,*”  
 9 federal officials acting pursuant to federal law are immune from suit. Cabrera v. Martin, 973 F.2d  
 10 735, 743-44 (9<sup>th</sup> Cir. 1992), *quoting* Kletschka v. Driver, 411 F.2d 436, 448-49 (2d Cir. 1969).

11 The only exception to this rule, which is inapplicable here, is where federal officials “are  
 12 found to have conspired with or acted in concert with state officials to some substantial degree.”  
 13 Cabrera, 973 F.2d at 742. “To transform a federal official into a state actor, the [plaintiff] must  
 14 show that there is a ‘symbiotic relationship’ between the [federal defendants] and the state such  
 15 that the challenged action can ‘fairly be attributed to the state.’” *Id.* at 742-43. “The touchstone of  
 16 this analysis is ultimately ‘whether there is a sufficiently close nexus between the State and the  
 17 challenged action of the [federal actors] so that the action of the latter may be fairly treated as that  
 18 of the State itself.’” *Id.* at 744.

19  
 20  
 21  
 22 <sup>7</sup>(...continued)

23 from facts particular to plaintiff. Specifically, as noted above, plaintiff contends that the No Fly  
 24 lists violated her constitutional rights because: (1) she was not informed of her placement on the  
 25 No Fly lists or given any opportunity to contest such placement; and (2) she was placed on the  
 26 No Fly lists and arrested, not because she has any links to terrorism, but allegedly because of her  
 27 religious beliefs, national origin, association with the Muslim community, and appearance. See  
 28 Complaint, ¶¶ 56-58, 64-65, 72, 79, and 86. Because plaintiff’s claims arise out of these  
 particular facts, they cannot be heard in a district court. *See* Gilmore, 435 F.3d at 1133 n9  
 (“Given that [plaintiffs’ challenges] arise out of the particular facts of [his] encounter with  
 Southwest Airlines, these claims must be brought before the courts of appeals.”).

1 In this case, the federal defendants acted *exclusively* under federal law when implementing  
 2 and administering the No Fly list, which is the basis for plaintiffs' claims against the federal  
 3 defendants. *See e.g.*, 49 U.S.C. §§ 114(h)(1) and (3)(A) (requiring the Under Secretary to ensure  
 4 that federal agencies "share . . . data on individuals identified . . . who may pose a risk to  
 5 transportation or national security," and "use information from government agencies to identify  
 6 individuals on passenger lists who may be a threat to civil aviation or national security"). Plaintiff  
 7 does not allege, because she cannot, the existence of "a sufficiently close nexus between the State  
 8 [of California] and the . . . [the No Fly list] so that the action of [federal defendants] may be fairly  
 9 treated as that of the State itself." Cabrera, 973 F.2d at 744. This irrefutable conclusion requires  
 10 that plaintiff's section 1983 claims against the federal defendants be dismissed.

11  
 12 2. The Court Does Not Have Jurisdiction Over State Law  
 Claims Brought Against The Federal Defendants

13 It is uncertain whether plaintiff brings claims against the federal defendants pursuant to  
 14 state law, specifically those claims asserted under the California constitution, the California Civil  
 15 Code, and pursuant to common law tort theories. *See* Complaint, ¶¶ 91-129 (the Seventh, Eighth,  
 16 Ninth, Tenth, and Eleventh Causes of Action).<sup>8</sup> If, in fact, that is plaintiff's intent, her state law  
 17 claims against the federal government must be dismissed.

18 First, the federal defendants are sovereignly immune to plaintiff's state law damage  
 19 claims. By its express terms, the APA, on which plaintiff apparently relies as a waiver of  
 20 sovereign immunity, does not allow damages to be awarded against the federal defendants. 5  
 21 U.S.C. § 702 ("A person suffering legal wrong because of agency action . . . [may bring] [a]n  
 22  
 23

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24  
 25 <sup>8</sup> Plaintiff, for example, avers that, "[o]n January 2, 2005, defendants, *police officers*,  
 26 arrested plaintiff without a warrant or other legal process." *See* Complaint, ¶ 99 (Eighth Cause of  
 27 Action) (emphasis supplied). Plaintiff's emphasis on "police officers" strongly suggests that she  
 28 intends to limit her Eighth Cause of Action to the defendant San Francisco police officers, the  
 San Francisco Police Department, and the City of San Francisco, although, admittedly, this  
 conclusion is not free from ambiguity. *See also* Complaint, ¶¶ 107, 113, and 117 (in which  
 plaintiff makes like allegations in support of the Ninth, Tenth, and Eleventh Causes of Action).

1 action in a court of the United States seeking relief other than money damages . . .”).<sup>9</sup>

2 The Court, moreover, lacks jurisdiction over plaintiff’s state law claims for both damages  
3 and equitable relief under 28 U.S.C. § 1331, which provides that the “district courts shall have  
4 original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the  
5 *United States*.” (Emphasis supplied). *E.g.*, Sephus v. Gozelski, 864 F.2d 1546, 1547 (11<sup>th</sup> Cir.  
6 1989) (holding that a claim alleging illegality under state law “does not confer jurisdiction on a  
7 federal court”). Nor can plaintiff establish federal jurisdiction over her state law claims pursuant  
8 to 28 U.S.C. § 1343, on which she also relies. *See* Complaint, ¶ 2. Section 1343(3) is limited to  
9 claims to “redress the deprivation, under color of any State law . . . of any right, privilege or  
10 immunity secured by *the Constitution of the United States or by any Act of Congress* providing for  
11 equal rights . . .”. (Emphasis supplied). *E.g.*, Redd v. Lambert, 674 F.2d 1032, 1035 (5<sup>th</sup> Cir.  
12 1982) (“The district court correctly determined that section 1343(3) only provides jurisdiction  
13 over claims that state officials have violated a constitutional right or a federal statute providing for  
14 equal rights.”).<sup>10</sup>

15  
16 Plaintiff additionally lacks standing to the extent that she seeks to bring claims against the  
17 federal government complaining of treatment by local law enforcement personnel during the  
18

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19  
20 <sup>9</sup> The Federal Tort Claims Act (“FTCA”) “is the exclusive remedy for tortious conduct  
21 by the United States, and it only allows claims against the United States.” F.D.I.C. v. Craft, 157  
22 F.3d 697, 706 (9<sup>th</sup> Cir. 1998). Plaintiff does not, and cannot, bring a claim under the FTCA,  
23 which requires, *inter alia*, that she first file an administrative claim with the appropriate federal  
24 agency before suing for damages in federal court. *E.g.*, Adeleke v. United States, 355 F.3d 144,  
153 (2d Cir. 2004) (explaining that the FTCA’s waiver of sovereign immunity is subject to  
numerous conditions, including the requirement that a plaintiff first file an administrative claim  
before suing in federal court).

25  
26 <sup>10</sup> In addition, although the Court need not reach this issue, to the extent that plaintiff  
27 contends that the No Fly list, which is created under federal law, violates or is in conflict with  
28 state law, such claims are preempted by the Supremacy Clause. *See e.g.*, Hillsborough County,  
FLA. v. Auto. Med. Labs., 471 U.S. 707, 712 (1985) (“It is a familiar and well established  
principle that the Supremacy Clause, U.S. Const., Art. VI, cl.2, invalidates state laws that  
‘interfere with, or are contrary to,’ federal law.”).

1 course of, and subsequent to, her arrest.<sup>11</sup> To establish Article III standing, plaintiff has the  
2 burden of demonstrating (1) injury in fact; (2) causation; and (3) redressability. Lujan v.  
3 Defenders of Wildlife, 504 U.S. 555, 560 (1992); Wilbur v. Locke, 423 F.3d 1101, 1107 (9<sup>th</sup> Cir.  
4 2005), *cert. denied*, 126 S. Ct. 1338 (2006). Plaintiff cannot satisfy the causation and  
5 redressability requirements of standing in relation to these claims because her alleged injuries  
6 were not caused by the federal defendants or the No Fly list, and would not be redressed by a  
7 decision by the Court on the No Fly list.

8 3. Plaintiff Lacks Standing, In Part, To Bring  
9 Claims Under Either State Or Federal Law

10 Furthermore, to the extent that plaintiff contends that the No Fly list allegedly injures her  
11 by prohibiting her from returning to the United States by air travel, she lacks standing to bring  
12 such a claim under either federal or state law. As part of her Fed.R.Civ.P. 26(a)(1) initial  
13 disclosures, plaintiff produced a copy of a letter from the United States Embassy in Malaysia,  
14 dated April 14, 2005, informing her that her student visa was revoked by the Department of State  
15 on January 31, 2005. *See* Exhibit 1 (copy of the letter).<sup>12</sup> Because plaintiff cannot establish that  
16 she is currently eligible to return to the United States regardless of the No Fly list, she cannot  
17 show that this list is the cause of her claimed injury or that a favorable decision by this Court  
18

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21 <sup>11</sup> We refer in specific part to plaintiff's claims alleging that "police officers . . .  
22 handcuffed plaintiff in front of her fourteen year old daughter; caused her to miss her flight;  
23 removed part of her hijab and loosened her hair; caused her to experience abdominal pain and  
24 high blood pressure; and forced her to urinate in a public area while in the holding cell. *See*  
25 Complaint, ¶¶ 92, 99, 107, 115, 120 (plaintiff's Seventh, Eighth, Ninth, Tenth, and Eleventh  
26 Causes of Action). These state law claims are separate and distinct from plaintiff's other claims  
alleging that her alleged placement on the No Fly list violated her First and Fifth Amendment  
rights, and also allegedly caused her to be arrested in violation of her Fourth Amendment rights.

27 <sup>12</sup> Records pertaining to the issuance or refusal of visas or permits to enter the United  
28 States are generally considered confidential. 8 U.S.C. § 1202(f). Plaintiff, however, has chosen  
to reveal this information herself.

1 would redress that injury. Lujan, 504 U.S. at 560.<sup>13</sup> Plaintiff, accordingly, lacks standing to  
2 complain of this injury.

3 CONCLUSION

4 For the foregoing reasons, plaintiff’s claims against the federal defendants must be  
5 dismissed *in toto*.

6 Respectfully submitted,

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17 May 22, 2006

18 Attorneys for Defendants.

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20  
21  
22  
23 <sup>13</sup> Nor can plaintiff contend that the denial of her visa under 8 U.S.C. § 1182(a)(3)(B)  
24 (terrorism related) resulted from her alleged placement on the No Fly list. In addition to bringing  
25 this lawsuit, plaintiff, pursuant to 49 U.S.C. § 46110, has petitioned the Ninth Circuit Court of  
26 Appeals for a review of TSA’s Security Directives establishing the No Fly list. The government  
27 in response to this petition raised the standing argument set forth above relating to the revocation  
28 of plaintiff’s visa. In response to assertions made by plaintiff in relation to this argument, the  
government submitted a declaration by Andrew C. Kotval, Deputy Chief in the Coordination  
Division of the Visa Office, Bureau of Consular Affairs, Department of State, attesting that  
“[v]isa decision are independent from and made without reference to any ‘No Fly’ list.” See  
Kotval Declaration, ¶ 3 (Exhibit 2).