

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

DOCKET NO. 05-2024

ROBERT GRAY,	)	
	)	
Petitioner	)	
	)	
v.	)	MEMORANDUM IN SUPPORT OF
	)	EMERGENCY MOTION FOR
TRANSPORTATION SECURITY	)	INTERIM RELIEF PURSUANT TO
ADMINISTRATION,	)	49 U.S.C § 46110
	)	
Respondent	)	

Plaintiff, Robert Gray (“Gray”), hereby submits this memorandum in support of his Emergency Motion For Interim Relief Pursuant To 49 U.S.C. § 46110 (“Motion” pursuant to “Section 46110”). As set forth more fully below, Gray presently is suffering a broad array of irreparable harms as a result of the Government’s decision to retaliate against him for exercising his fundamental rights under the Constitution. Pursuant to Section 46110, Gray respectfully requests that this Court (1) establish an expedited briefing schedule concerning the instant Motion, (2) adjudicate the instant Motion as soon as possible and (3) stay the pertinent decision.

This case began when the Government denied Gray’s request to obtain further training as a pilot without giving him any information to allow a genuine appeal of that decision. Within weeks of Gray’s exercise of his fundamental constitutional right to petition this Court to challenge this denial, he was subjected to dramatic retaliation with severe consequences. In particular, the Government placed Gray on its No-Fly List – a watch-list of suspected terrorists – as a result of which Gray faces the loss of both his job and his ability to travel by air even as a passenger. The Government’s retaliatory motive is evidenced by both (1) the temporal proximity between Gray’s exercise of his right to petition and the Government’s decision to

place him on the No-Fly List and (2) the Government's failure to put forth even an assertedly legitimate basis for its action. Moreover, the Government conducted at least four investigations concerning the issue of whether Gray is a threat to national security in the months prior to the date on which Gray filed suit; each time, the Government decided not to place Gray on the No-Fly List. The only relevant fact that has changed subsequent to these investigations – the most recent of which occurred just two months before Gray filed suit – is that Gray exercised his right under the Constitution to petition this Court.

## I. STATEMENT OF FACTS<sup>1</sup>

Gray is a permanent legal resident of the United States who holds a British passport and has lived in the United States since August 1993. Since 1997, Gray has worked as a pilot for a number of domestic airlines, flying small commercial aircraft in the United States. He has never engaged in or supported any terrorist or other illegal activity. Moreover – and as TSA is aware – Gray has never had any involvement whatsoever with the criminal justice system.<sup>2</sup>

On July 8, 2005, Gray filed a petition with this Court (“Petition”) and a related Verified Complaint in the District Court (“Complaint”), Gray v. TSA et al., Docket No. 05-11445DPW. On July 15, 2005, Gray served these pleadings by mail on TSA and the other District Court Defendants. Both the Complaint and the Petition challenge the decision by Respondent Transportation Security Administration (“TSA”) to deny Gray authorization to obtain training to fly larger aircraft – and, correlatively, to accept any position in the field of his choice – based

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<sup>1</sup> Unless otherwise stated, the facts set forth herein are derived from the Affidavit of Robert William George Mulryne Gray (“Gray Aff.”), filed herewith.

<sup>2</sup> More specifically, TSA received a document from the Federal Bureau of Investigation on or about April 28, 2004 stating that Gray has never been arrested. See Gray Aff. Ex. A.

upon (a) unspecified allegations from unidentified sources and (b) secret evidence that TSA has refused to disclose or even describe.

Upon information and belief, Gray has never appeared on any Government watch-list of suspected terrorists prior to the date on which he filed the Petition and the Complaint. It bears emphasis that TSA maintains two such lists. Individuals on the Selectee List are subjected to certain forms of screening before they are permitted to fly. Individuals on the No-Fly List are absolutely barred from flying a plane as a pilot, boarding any aircraft as a passenger or entering certain areas of airports. In short, the No-Fly List identifies individuals whom TSA regards as more dangerous to national security than the individuals identified on the Selectee List.

As set forth more fully below and in the Affidavit of Robert William George Mulryne Gray ("Gray Aff."), filed herewith, TSA conducted in the months prior to the date on which Gray filed the Complaint and the Petition at least four investigations concerning the issue of whether Gray is a threat to national security.<sup>3</sup> For example, TSA confirmed to Gray's employer on May 2, 2005 – i.e., just two months before Gray filed the Complaint and the Petition – that (a) the "Robert Gray" whose name was included on the Selectee List on that date was not Gray and (b) that Gray was clear to continue to fly as a pilot. See Gray Aff. Ex. B. At no point during any of these investigations did TSA divulge any information tending to suggest the presence of any reason to suspect that Gray is a threat to national security. At the conclusion of each of these investigations, TSA decided not to put Gray on either the Selectee List or the No-Fly List.

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<sup>3</sup> TSA concluded the investigations of which Gray is aware on December 16, 2004 (see Am. Cmplt. Ex. B), January 27, 2005 (see Am. Cmplt. Ex. C), May 2, 2005 (see Gray Aff. Ex. B) and May 11, 2005 (see Am. Cmplt. Ex. J). As stated previously, Gray filed the Complaint and the Petition on July 8, 2005 and served these pleadings by mail on July 15, 2005.

On or about September 6, 2005 – i.e., just seven weeks after Gray served the Complaint and before any Defendant filed a responsive pleading to either the Complaint or the Petition – TSA decided to place Gray on the No-Fly List. Aside from the fact that Gray has filed suit against the Government, Gray is unaware of any relevant fact that has changed subsequent to TSA’s four recent decisions not to place him on either the Selectee List or the No-Fly List. TSA has neither identified such a fact nor otherwise offered a non-retaliatory explanation for its action.

As discussed more fully below, TSA’s placement of Gray’s name on the No-Fly List has had dramatic consequences in nearly every aspect of Gray’s life. In broad strokes, Gray is barred from pursuing his career in his chosen field, substantially limited in pursuing a career in any other field and prevented from both taking his honeymoon in Europe (as he and his fiancée had planned to do next month) and visiting his ailing mother in Ireland in the likely event of a medical emergency in the near term future.

Late on the afternoon of Friday September 19, 2005, Gray filed an Amended Verified Complaint and a Motion For A Preliminary Injunction with the District Court (“District Court Motion”).<sup>4</sup> Following extraordinarily expedited proceedings, the District Court (Woodlock, J.) denied the motion on the morning of Wednesday September 21, 2005 on the procedural ground that this Court enjoys exclusive jurisdiction over Gray’s claims pursuant to Section 46110. Gray does not challenge this ruling before this Court.

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<sup>4</sup> A true and accurate copy of the Amended Verified Complaint is filed herewith. Because the Gray Aff. was filed in support of the District Court Motion, it bears the caption of the matter pending before the District Court.

## II. ARGUMENT

### A. Statutory Framework

Section 46110(c) provides in pertinent part as follows:

After reasonable notice . . . the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists.

As set forth more fully below, there is at least “good cause” for staying TSA’s decision to place Gray on the No-Fly List.<sup>5</sup>

### B. As Both The District Court And TSA Have Acknowledged, The Instant Motion Presents An Emergency And The Government Is Both Willing And Able To Adhere To An Extremely Expedited Briefing Schedule

As set forth more fully below, TSA’s decision to place Gray’s name on the No-Fly List is causing Gray to suffer irreparable harm in every aspect of his life. The District Court responded to this fact – which TSA does not dispute – by (1) scheduling a hearing on the District Court Motion just three business days after it was filed,<sup>6</sup> (2) ordering TSA to file any opposition papers just two business days after it received Gray’s motion and (3) ruling on the motion from the bench. TSA did not challenge the District Court’s response. Instead, TSA filed a twenty page brief and a five page Declaration just sixteen business hours after it received the motion.

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<sup>5</sup> As discussed more fully below, Gray satisfies each of the factors that support the entry of a preliminary injunction. See Wine & Spirits Retailers, Inc. v. Rhode Island, 418 F.3d 36, 46 (1<sup>st</sup> Cir. 2005). It follows a fortiori that Gray has satisfied the dramatically less rigorous standard of “good cause” set forth in Section 46110.

Pursuant to Fed. R. App. P. 18(a)(2)(A)(i), Gray states that seeking a stay from TSA would be impracticable for a number of reasons. To begin with, and as set forth more fully below, the only procedures that TSA has established in connection with the No-Fly List do not apply to Gray. Even if the procedures did apply to Gray, there is no reason to believe that TSA could process Gray’s request in a timely manner. Finally, it is inequitable to require Gray to seek relief from an agency that has retaliated against him for exercising his right under the First Amendment to petition this Court.

<sup>6</sup> More fully, Gray filed the motion on Friday September 16, 2005 at 4:00 p.m. and the District Court scheduled a hearing for Wednesday September 21, 2005 at 10:00 a.m.

Pursuant to Section 46110, Gray respectfully submits that – as both the District Court and TSA have acknowledged – the instant Motion presents an emergency, to which this Court should respond by establishing an expedited schedule upon which to (1) obtain briefs from the parties and (2) adjudicate the instant Motion. See Section 46110 (vesting this Court with authority to take any “appropriate action” for “good cause”).

Gray respectfully suggests a schedule along the lines of those established by the District Court, *i.e.*, opposition from TSA within two business days, reply (if any) from Gray one business day thereafter and an adjudication of the instant Motion as expeditiously as possible.<sup>7</sup> Pursuant to Fed. R. App. P. 27(e), Gray respectfully requests that this Court enter an Order according Gray an opportunity to be heard at oral argument in connection with the instant Motion.

**C. Absent A Stay, Gray Will Suffer Irreparable Harm**

It is undisputed that, absent a stay of TSA’s decision to place Gray’s name on the No-Fly List, Gray will suffer irreparable harm in every aspect of his life.<sup>8</sup> To begin with, if allowed to stand, TSA’s decision to place Gray on the No-Fly List will end Gray’s career as a pilot. Accordingly, he would be unable to hold any position that draws upon his substantial training and experience as a pilot. Moreover, Gray’s reputation and standing within the airline industry will be substantially and irrevocably diminished.

With respect to positions outside the airline industry, Gray does not have any other professional or vocational training. Even if he did have any other training, it is difficult to

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<sup>7</sup> During a teleconference with undersigned counsel on September 21, 2005, counsel for TSA refused to identify the earliest date by which he would assent to file his papers in opposition to the instant Motion.

<sup>8</sup> Gray prominently discussed this issue in his memorandum in support of the District Court Motion. TSA did not in its opposition papers dispute Gray’s position.

imagine an employer who would hire a person whom the Government has placed on a watch-list of suspected terrorists. For these reasons, it is unclear whether or how Gray will be able to even make ends meet, let alone earn an income commensurate with what he earned before TSA placed him on the No-Fly List.

In addition, TSA's decision to place Gray on the No-Fly List precludes him from boarding any plane, which will have devastating consequences on several aspects of Gray's family life. Perhaps most significantly, his mother, who lives in Ireland, has been in continuous ill health for approximately five years. More than once in the past few years she has been hospitalized in an intensive care unit and has been on the brink of death. On those occasions, Gray has been required to fly to Ireland on extremely short notice. Unless Gray's name is removed from the No-Fly List, there is a very real possibility that he will be unable to visit his mother on her deathbed.

In addition, if Gray is unable to board a plane on October 25, 2005, he will be forced to cancel his honeymoon, which he and his fiancée were planning to spend in Europe. Finally, if the TSA's action is not promptly remedied, Gray's reputation and standing within his community will be substantially diminished by the fact that the Government has placed him on a watch-list of suspected terrorists.

**D. Gray Is Likely To Prevail On The Merits<sup>9</sup>**

Retaliation

In order to prevail on his claim of retaliation, Gray must show “that his conduct was constitutionally protected and that this conduct was a ‘substantial factor’ or . . . a ‘motivating

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<sup>9</sup> For purposes of the instant Motion, Gray will limit his analysis to TSA's recent decision to place him on the No-Fly List.

factor' for [TSA's] retaliatory decision.'" Powell v. Alexander, 391 F.3d 1, 17 (1<sup>st</sup> Cir. 2004) (ellipses in original; quoting Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 [1977]).

Gray's right to file the Petition and the Complaint is, of course, specifically and expressly protected by the Constitution. See U.S. Const. amend. I ("Congress shall make no law . . . abridging . . . the right . . . to petition the Government for a redress of grievances"). As this Court has emphasized, "For decades, the Supreme Court has consistently recognized the right to petition all branches of the government, including the courts, for redress of grievances as among the most precious of the liberties safeguarded by the Bill of Rights." Powell, 391 F.3d at 16 (internal citation and quotation marks omitted); see also, e.g., ACLU of Md., Inc. v. Wicomico County, 999 F.2d 780, 785 (4<sup>th</sup> Cir. 1993); NLRB v. Local 30, 939 F.2d 118, 126 (3d Cir. 1991).

Based upon the record before this Court, it is exceedingly likely that Gray will be able to establish that the filing of the Complaint and the Petition was, at a bare minimum, a "substantial" or "motivating" factor in TSA's retaliatory decision to place him on the No-Fly List. Powell, 391 F.3d at 17.

TSA has conducted at least four investigations concerning Gray in the months prior to the date on which he filed the Complaint and the Petition. Although all of these investigations concerned the issue of whether Gray is a threat to national security, TSA decided at the conclusion of each of these investigations not to place Gray on either the Selectee List or the No-Fly List. On December 16, 2004, TSA declined to either process Gray's application for authorization to obtain training on larger aircraft or approve his request for training. See Am. Cmplt. Ex. B. TSA did not place Gray on either the Selectee List or the No-Fly List in the wake of this decision. On January 27, 2005, TSA formally denied Gray's training request. See Am.



Cmplt. Ex. C. TSA did not place Gray on either the Selectee List or the No-Fly List in the wake of this decision. On May 2, 2005, TSA confirmed to Gray's employer (a) that the "Robert Gray" listed on the Selectee List was not Gray and (b) that Gray was clear to continue to fly as a pilot. See Gray Aff. Ex. A. TSA did not place Gray on either the Selectee List or the No-Fly List in the wake of this confirmation. On May 11, 2005, TSA affirmed its denial of Gray's training request. See Am. Cmplt. Ex. J. TSA did not place Gray on either the Selectee List or the No-Fly List in the wake of this decision. At no point during any of these investigations did TSA divulge any information tending to suggest the presence of any legitimate reason for placing Gray on either the Selectee List or the No-Fly List.

Gray served the Complaint in the latter half of July 2005. Seven weeks later, TSA placed him on the No-Fly List – a step that TSA decided not to take in the wake of at least four recent investigations that predated Gray's exercise of his rights under the First Amendment. Standing alone, these facts strongly suggest that Gray's constitutionally protected conduct was, at a bare minimum, a "substantial" or "motivating" factor in TSA's decision to place him on the No-Fly List. Powell, 391 F.3d at 17.

Moreover, it is well-settled that the close proximity in time between Gray's exercise of his constitutional rights and TSA's retaliatory action is itself significant. See, e.g., Quinn v. Green Tree Credit Corp., 159 F.3d 759 (2d Cir. 1998) (prima facie case of causal connection supporting retaliation claim where plaintiff was discharged less than two months after filing internal complaint); accord Manoharan v. Columbia Univ. College of Physicians & Surgeons, 842 F.2d 590, 593 (2d Cir. 1988) ("Proof of the causal connection can be established indirectly by showing that the protected activity was closely followed in time by the adverse action.").

TSA did not even articulate before the District Court a non-retaliatory reason for placing Gray on the No-Fly List, let alone come forward with any evidence to demonstrate any support for such a hypothetical reason.<sup>10</sup> Based upon the record before this Court,<sup>11</sup> it is therefore exceedingly unlikely that TSA will be able to satisfy its burden of establishing that it “would have reached the same decision . . . even in the absence of the protected conduct.” Powell, 391 F.3d at 17 (internal quotation marks omitted).

In the analogous context of retaliation by an employer, in order to avoid liability following proof of protected conduct and an adverse action suffered by the plaintiff, the defendant “must clearly set forth, through the introduction of admissible evidence, the reasons for the [employee's termination]. The explanation provided must be legally sufficient to justify a judgment for the [employer].” Hodgens v. General Dynamics Corp., 144 F.3d 151, 160-161 (1st Cir. 1998) (quoting Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 [1981]). Nothing in the record before this Court suggests that TSA can even begin to satisfy this burden.

In a striking admission that it had no legitimate reason to place Gray on the No-Fly List, TSA confirmed to Gray's employer on May 2, 2005 – i.e., just two months before Gray filed the Complaint and the Petition – that (a) the “Robert Gray” whose name was included on the Selectee List on that date was not Gray and (b) that Gray was clear to continue to fly as a pilot.

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<sup>10</sup> TSA filed with the District Court a Declaration of the Executive Director of TSA's Office Of Security Standards and Regulatory Programs. A true and accurate copy of this Declaration is attached hereto as Exhibit B. Nothing in this Declaration so much as alleges that TSA had a legitimate reason to place Gray's name on the No-Fly List, let alone suggests the existence of any evidence in support of such a hypothetical allegation.

<sup>11</sup> During a teleconference with undersigned counsel on September 21, 2005, counsel for TSA represented that he would produce in the context of this litigation the materials upon which TSA allegedly relied in placing Gray's name on the No-Fly List, provided he could first obtain adequate assurances concerning (1) the security measures employed by this Court and (2) any necessary authorizations from foreign governments. Gray does not concur that either such condition is a prerequisite to production of the materials.

See Gray Aff. Ex. B. In other words, TSA decided very shortly before Gray filed suit not to place Gray on the Selectee List (i.e., the list of less dangerous individuals), then decided very shortly after Gray filed suit to take the dramatically more serious step of placing Gray on the No-Fly List (i.e., the list of more dangerous individuals). Because TSA has not come forward with a non-retaliatory explanation for this abrupt about-face, Gray is likely to prevail on the merits of his retaliation claim.

Nothing in the record before the District Court either (1) suggests that TSA had any legitimate reason for placing Gray's name on the No-Fly List or (2) provides any hint as to what that hypothetically legitimate reason might have been. Accordingly, nothing in the record before this Court suggests that TSA will be able to satisfy its burden of establishing that it "would have reached the same decision . . . even in the absence of the protected conduct." Powell, 391 F.3d at 17 (internal quotation marks omitted).

As discussed supra, TSA conducted at least four investigations concerning the issue of whether Gray is a threat to national security in the months prior to the date on which Gray filed suit; each time, TSA decided not to place Gray on the No-Fly List.<sup>12</sup> It is well settled in this Circuit that this kind of striking inconsistency constitutes compelling evidence of retaliation.<sup>13</sup>

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<sup>12</sup> TSA claimed before the District Court that it lacks authority to place individuals on the No-Fly List. This claim is contradicted by, inter alia, a Declaration that TSA filed in another case, in which Lee S. Longmire – the same affiant upon whom TSA relied before the District Court in this case – stated that TSA periodically "revises . . . the specific individuals identified on" the No-Fly List. See June 4, 2004 Decl. Of Lee S. Longmire ¶ 8. A true and accurate copy of this document is attached hereto as Exhibit C. Assuming for the sake of argument that TSA does not place names on the No-Fly List as a matter of course, it appears that TSA improperly deviated from this protocol in order to retaliate against Gray for exercising his right under the First Amendment to petition this Court.

Even if TSA did lack the ability – as opposed to the authority – to place individuals on the No-Fly List, the proper response by this Court would not be to deny the instant Motion. Rather, the proper response would be to allow the instant Motion and order the joinder of all necessary parties for purposes of any remaining proceedings.

<sup>13</sup> TSA's anticipated reliance upon its prior determinations that Gray is a threat to national security gives rise to a different inconsistency: if TSA believed pre-filing that Gray belonged on the No-Fly List, why did it wait until after he had exercised his rights under the First Amendment to petition this Court before placing his name on that

See, e.g., Hodgens v. General Dynamics Corp., 144 F.3d 151, 168 (1<sup>st</sup> Cir. 1998) (in establishing pretext in retaliation case, “one way an employee may succeed is to show ‘such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them unworthy of credence’”).

### Due Process

In order to prevail on his due process claim, Gray must show that he was “deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V. It has long been a matter of black letter law that “the right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the ‘liberty’ and ‘property’ concepts of the Fifth Amendment.” Greene v. McElroy, 360 U.S. 474, 492 (1959) (collecting cases); see also Kartseva v. Dept. of State, 37 F.3d 1524, 1528 (D.C. Cir. 1994).

TSA attached to its opposition to the District Court Motion a document describing certain procedures that an individual mistakenly placed on the No-Fly List can employ to avoid the effects of said designation (“Clearance Procedures”). A true and accurate copy of the Clearance Procedures are attached hereto as Exhibit A. It bears emphasis that the Government did not inform Gray of the Clearance Procedures until he filed the District Court Motion and that TSA expressly admits on its website that – contrary to its representations before the District Court –

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list?

the Clearance Procedures “will not remove a name” such as Gray’s from the No-Fly List.<sup>14</sup> This is particularly the case where Gray’s contention is not that his name was added as the result of mistaken identity, but rather that it was added in retaliation for his exercise of his First Amendment right to petition. The Clearance Procedures – focused as they are on a Passenger Identity Verification Form – simply do not address a claim such as Gray’s. Accordingly, the Clearance Procedures upon which TSA relied before the District Court constitute patently inadequate process in the context of this case.

**E. The Balance Of Relevant Impositions Tips Decisively In Favor Of Gray**

As set forth supra, Gray will suffer a wide array of irreparable harms absent a stay. As of the date of filing, TSA has not come forward with a shred of evidence tending to suggest the presence of any legitimate reason for placing Gray on the No-Fly List. Significantly, TSA itself has effectively admitted that there is no legitimate reason to place Gray on the No-Fly List by (a) assuring Gray’s employer just a few months ago that Gray was not on even the Selectee List and (b) declining to place Gray on either the Selectee List or the No-Fly List based upon the information concerning Gray that TSA reviewed during the course of the four investigations discussed supra.

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<sup>14</sup> According to TSA’s website, the Clearance Procedures “will not remove a name from” the No-Fly List. See TSA Watch Lists Clearance Procedures, available at <http://www.tsa.gov/public/display?theme=157&content=09000519800fb8af> (visited Sept. 21, 2005). For the Court’s convenience, a true and accurate copy of this document is attached hereto as Exhibit D. Instead, the Clearance Procedures simply “distinguish[] passengers [with similar names] from persons who are in fact on the” No-Fly List. Id. It follows that the Clearance Procedures do not apply to a person such as Gray, whose identifying information the Government accurately but improperly placed on the No-Fly List to retaliate against him for exercising his right under the First Amendment to petition this Court.

F. The Public Has A Strong Interest In The Requested Stay

As discussed more fully above, TSA has not come forward with a shred of evidence tending to suggest the presence of any legitimate reason for placing Gray on the No-Fly List and, in fact, has effectively admitted that there is no such reason. Accordingly, the record before this Court is devoid of any public interest to be derived from inflicting a broad array of irreparable harms on Gray.

Meanwhile, the public has a direct stake in (a) holding the Government in general and TSA in particular accountable for its actions, (b) ensuring strict compliance with constitutional protections and (c) ensuring that the Government cannot devastate a citizen's life on the basis of secret evidence. See, e.g., Goss v. Lopez, 419 U.S. 565, 580 (1975) ("Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness." [Internal quotation marks omitted.]).

In addition, the public interest is served by enforcing the fundamental principle that a constitutional right such as the First Amendment right to petition the Government is of limited value if one cannot exercise that right without being subjected to devastating retaliation. See, e.g., Jackson v. Birmingham Bd. Of Ed., 125 S.Ct. 1497, 1508 (2005) ("Without protection from retaliation, individuals who witness discrimination would likely not report it . . . and the underlying discrimination would go unremedied."). Finally, the public interest requires that Gray and others like him be protected from unlawful retaliation during the pendency of their claims that the Government violated their rights under the Constitution. See, e.g., id. (prevention of unlawful practices would be "difficult if not impossible to achieve if persons who complain . . . did not have effective protection against retaliation").

### III. CONCLUSION

For the reasons set forth more fully above, “good cause” exists for staying TSA’s decision to place Gray’s name on the No-Fly List.

WHEREFORE, Gray respectfully requests that this Court:

- (1) Establish a schedule for the briefing and adjudication of the instant Motion along the lines established by the District Court, to wit:
  - (a) Opposition from TSA within two business days of this Court’s scheduling Order,
  - (b) Reply (if any) from Gray one business day thereafter and
  - (c) Adjudication of the instant Motion as expeditiously as possible;
- (2) Enter an Order according Gray an opportunity to be heard at oral argument in connection with the instant Motion;
- (3) Grant the instant Motion and
- (4) Grant such other and further relief as is just.

Respectfully submitted,

ROBERT GRAY,

By his attorneys,



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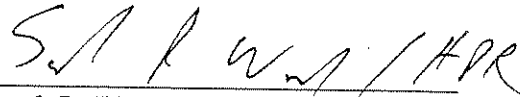
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DATED: September 21, 2005

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Transportation  
Security  
Administration

## TRANSPORTATION SECURITY ADMINISTRATION EXPEDITED NO FLY LIST AND SELECTEE LIST CLEARANCE PROCEDURES

◆ **Who may apply for help from this process?**

This process only applies to a person who has been delayed as a result of the No Fly List and Selectee List clearance procedures when checking in for a boarding pass for scheduled or charter flights.

NOTE: This process does not apply to persons who undergo enhanced screening at airport security checkpoints.

◆ **Who to contact:**

Transportation Security Administration (TSA), Office of the Ombudsman, at any one of the following:

Office of the Ombudsman

TSA Headquarters  
601 South 12<sup>th</sup> Street – West Tower, TSA-22  
Arlington, VA 22202

Phone: (571) 227-2383 or Toll-free: (866) 2-OMBUDS

Email: [TSA.ombudsman@dhs.gov](mailto:TSA.ombudsman@dhs.gov)

◆ **How the process works:**

- A person may contact the Office of the Ombudsman as specified above if that person has been delayed when checking in for a boarding pass due to the No Fly List and Selectee List clearance procedures.
- The Office of the Ombudsman will ask the person to explain their experience to ensure that the delay they encountered is of a type that may be addressed by these procedures. Once the Office of the Ombudsman confirms that the person's experience may be addressed by these

- procedures, TSA will send a Passenger Identity Verification Form to that person for completion and return.
- TSA requests that the person submit a completed Passenger Identity Verification Form to the TSA, at the address shown on the TSA letter that accompanies the form. This information may aid TSA's ability to expedite the person's check-in process for a boarding pass. Please note that only the person seeking expedited No Fly List and Selectee List clearance procedures may submit the Passenger Identity Verification Form. We ask that other individuals or organizations not act on their behalf.
  - The personal information requested on the Passenger Identity Verification Form consists of two parts:
    - ◆ The first part includes: name; current address; gender; place of birth; date of birth; social security number; height; weight; hair color; eye color; and home and work telephone numbers.
    - ◆ The second part requires the person to submit notarized copies for at least three of the following documents: passport (including number and country); visa (including number and place of issuance); **birth certificate** (including number and place of issuance)- **If you select to use this document, it must be a certified copy of the original**; naturalization certificate; certificate of citizenship; voter registration card; military discharge paper; driver's license (including number and state of issuance); government identity card (city, State, or Federal); or military identification card.
  - The Passenger Identity Verification Form also requires that the person sign and date the submission under: (i) a Privacy Act notice that explains the purpose and routine use of the information provided by the person; and (ii) a statement attesting to the truthfulness of the information and that knowingly and willfully making any materially false statement, or omission of a material fact, can be punished by fine, imprisonment, or both pursuant to 18 USC § 1001.
  - TSA will review the submission and reach a determination of whether the Expedited No-Fly List and Selectee List clearance procedures may aid in expediting the person's check-in process for a boarding pass.
  - If the Expedited No Fly List and Selectee List clearance procedures will aid in expediting the person's check-in process, TSA will contact the appropriate parties, such as the airlines, to help streamline this process for the person. TSA will also notify the person in writing of its finding. While TSA cannot ensure that these clearance procedures will relieve all delays, it should facilitate a more efficient check-in process.
  - Persons who have received TSA's written notification that the check-in process for a boarding pass has been streamlined should be aware that the notification letter will not aid in their clearance at the check-in counter. No Fly List clearance and Selectee List clearance at the check-in counter is based solely on the information that TSA provides to the airlines.
  - There are over 600 million travelers in the United States each year, and there are many persons involved in carrying out the No Fly List and Selectee List clearance process.
  - If you encounter continuing delays in the issuance of a boarding pass during flight check-in, please contact Virginia Skroski in TSA Office of the Ombudsman at: (571) 227-1449, or e-mail: [TSA.ombudsman@dhs.gov](mailto:TSA.ombudsman@dhs.gov)

October 20, 2004

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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ROBERT GRAY,

Plaintiff,

v.

Civil Action No. 05-11445-DPW

TRANSPORTATION SECURITY  
ADMINISTRATION et al.,

Defendant.

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**DECLARATION OF LEE S. LONGMIRE**

I, Lee S. Longmire, do hereby declare as follows:

1. I am the Executive Director, Office of Security Standards and Regulatory Programs, Transportation Security Administration ("TSA"), United States Department of Homeland Security. I have held this position since March 2003, and, until February 2005, my title was TSA Assistant Administrator for Operations Policy. From November 2001 through March 2003, I was the Director of Aviation Policy first for the Federal Aviation Administration ("FAA") and then for TSA, when the position transferred in March 2002. During the period from January 1980 through November 2001, I was employed by the FAA as a civil aviation security inspector, a Regional Civil Aviation Security Division Manager, Deputy Director and Director of Civil Aviation Security Operations, and as the Director of Civil Aviation Security Policy. As part of my official duties in my present position, I am responsible for the development, coordination and issuance of policies, directives, regulations and procedures to

promote the protection of the civil aviation security system against acts of air piracy and other related criminal acts.

2. The statements made within this Declaration are based upon my personal knowledge, information made available to me in my official capacity, and conclusions reached in accordance with such information. I make this Declaration in support of Defendant's Opposition to Plaintiff's Motion for a Preliminary Injunction.

3. As part of the Aviation and Transportation Security Act ("ATSA"), Pub. L. 107-71 (November 19, 2001), Congress created the TSA as an agency within the United States Department of Transportation ("DOT"). Under the ATSA, the Under Secretary of Transportation for Security, as head of the TSA, was made responsible for security in all modes of transportation, and assumed all the responsibilities previously exercised by the Administrator of the FAA for civil aviation security under Chapter 449 of Title 49. By the enactment of the Homeland Security Act of 2002, the TSA, and all of its functions and personnel, were transferred, effective March 1, 2003, to DHS. Within DHS, the Under Secretary of Transportation for Security first underwent a title change to Administrator of TSA, and then to Assistant Secretary for TSA.

4. As part of its statutory mandates with respect to aviation security, the TSA is required to provide for the screening for weapons, explosives, and other destructive substances transported by all passengers and property that will be carried aboard a passenger aircraft. The TSA also prescribes regulations to protect passengers and property on an aircraft against acts of criminal violence or aircraft piracy. To further these purposes, TSA's implementing regulations require each aircraft operator to adopt a security program, which must be approved by the agency.

5. When the TSA determines that additional security measures (over and above those provided for in the approved security program) are necessary to respond to a specific threat against civil aviation, or a threat assessment, it issues a "Security Directive" to regulated aircraft operators. 49 C.F.R. § 1544.305(a). Similarly, in the case of a foreign air carrier, the TSA may issue an "Emergency Amendment" to the carrier's security program when it finds that there is an emergency requiring immediate action with respect to security in air transportation or in air commerce. 49 C.F.R. § 1546.105(d). Compliance by air carriers with Security Directives and Emergency Amendments is mandatory. See 49 C.F.R. §§ 1544.305(a) and 1546.105(d).

6. The ATSA also requires that the TSA establish procedures for notifying airline security officers of the identity of individuals known to pose, or suspected of posing, a risk of air piracy or terrorism, or a threat to airline or passenger security. See 49 U.S.C. § 114(h)(2). If one of these individuals seeks to board an aircraft, the statute requires the airlines to notify appropriate law enforcement agencies, prevent the individual from boarding the aircraft, or take other appropriate action with respect to that individual. See 49 U.S.C. § 114(h)(3).

7. The TSA has implemented these requirements by issuing a series of Security Directives to regulated aircraft operators and Emergency Amendments to foreign air carriers, which I refer to collectively below as Security Directives. These Security Directives direct air carriers to implement specific security procedures and to take specific security measures with respect to individuals who are identified on the "No Fly List." Individuals on the No Fly List are prohibited from flying altogether. The No Fly List is updated continually, and the TSA requires that air carriers monitor it closely. From time to time, the TSA revises the procedures prescribed by these Security Directives and issues new Security Directives that supersede those previously issued.

8. In view of the sensitive nature of these Security Directives, I cannot describe them further on the public record without undermining the effectiveness of the procedures required and directly compromising the security of the traveling public. Disclosure of the specific security procedures to be followed by air carriers when they encounter an individual identified on the No Fly List could enable terrorists and other violent criminals to identify potential weaknesses in the current security system, and to circumvent or otherwise defeat the security measures mandated by the TSA in the directives. For these reasons, TSA's regulations expressly prohibit the disclosure of the contents of Security Directives and Emergency Amendments. See 49 C.F.R. §§ 1520.5(b)(1), (b)(2); 1544.305(f)(2).


9. The No Fly List itself is maintained at the Terrorist Screening Center ("TSC"), which was created by the Attorney General in response to the Homeland Security Presidential Directive ("HSPD-6"), dated September 16, 2003. The TSC is a multi-agency organization, which is funded and administratively managed by the Federal Bureau of Investigation ("FBI"), and is charged with consolidating the government's approach to terrorist screening and providing for the appropriate and lawful use of terrorist information in screening processes. To accomplish this purpose, the TSC maintains the Terrorist Screening Database ("TSDB"), the consolidated federal government database of known and suspected terrorists, as well as several "screening agency" databases, including the No Fly List. TSC exports data to the No Fly List from the TSDB on individuals who: (1) have been nominated for inclusion on the list by either the FBI or the National Counterterrorism Center, and (2) who meet specific criteria.

10. Public disclosure of the identity of individuals on the No Fly List, or the specific criteria used to determine which individuals should be included on the list, would compromise the safety and security of passengers by providing terrorists with information that may reveal

which of their members have been compromised, and which of their members may board an aircraft without any form of enhanced scrutiny. For these reasons, TSA's regulations expressly prohibit the disclosure of the selection criteria to be used in screening airline passengers. See 49 C.F.R. § 1520.9(I).

Pursuant to 28 U.S.C. § 1746, I declare, under penalty of perjury, that the foregoing is true and correct.

Dated on the 20 day of September 2005.

  
Lee S. Longmire

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UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICHELLE D. GREEN, et al.,  
Plaintiffs,  
v.  
TRANSPORTATION SAFETY  
ADMINISTRATION, et al.,  
Defendants.

Case No. C04-763 Z

**DECLARATION OF  
LEE S. LONGMIRE**

I, LEE S. LONGMIRE, do hereby declare as follows:

1. I am the Assistant Administrator for Operations Policy, Transportation Security Administration ("TSA"), Department of Homeland Security. I have held this position since March 2003. From November 2001 through March 2003, I was the Director of Aviation Policy for the Federal Aviation Administration ("FAA"), until this position was transferred to the TSA in March 2002. During the period from January 1980 through November 2001, I was employed by the FAA as a civil aviation security inspector, a Regional Civil Aviation Security Division Manager, Deputy Director and Director of Civil Aviation Security Operations, and as the Director of Civil Aviation Security Policy. As part of my official duties in my present position, I am responsible for the development, coordination and issuance of policies, directives, regulations and procedures to promote the protection of the civil aviation security system against acts of air piracy and other related criminal acts.

Declaration of Lee S. Longmire  
Green v. TSA, CV 04-0763Z

U.S. Department of Justice  
20 Massachusetts Ave., NW, Rm. 7300  
Washington, D.C. 20530  
Tel: (202) 514-4640 Fax: (202) 616-8470



1           2.       The statements made within this Declaration are based upon my personal  
2 knowledge, information made available to me in my official capacity, and conclusions reached in  
3 accordance with such information. I make this Declaration in support of Defendants' motion to  
4 dismiss.

5           3.       The TSA was created as an agency within the United States Department of  
6 Transportation ("DOT") by the Aviation and Transportation Security Act ("ATSA"), Pub. L. 107-  
7 71 (November 19, 2001). Under the ATSA, the Under Secretary of Transportation for Security,  
8 as head of the TSA, was made responsible for security in all modes of transportation, and  
9 assumed all the responsibilities previously exercised by the Administrator of the FAA for civil  
10 aviation security under Chapter 449 of Title 49. Following the enactment of the Homeland  
11 Security Act of 2002, the TSA, and all of its functions and personnel, were transferred, effective  
12 March 1, 2003, to the Department of Homeland Security ("DHS"). Within DHS, the Under  
13 Secretary of Transportation for Security underwent a title change to Administrator of the TSA.

14           4.       As part of its statutory mandate with respect to aviation security, the TSA is  
15 required to provide for the screening for weapons, explosives, and other destructive substances of  
16 all passengers and property that will be carried aboard a passenger aircraft. The TSA also  
17 prescribes regulations to protect passengers and property on an aircraft against acts of criminal  
18 violence or aircraft piracy. To further these purposes, TSA's implementing regulations require  
19 each aircraft operator to adopt a security program which must be approved by the agency.

20           5.       When the TSA determines that additional security measures (over and above those  
21 provided for in the approved security program) are necessary to respond to a specific threat  
22 against civil aviation, or a threat assessment, it issues a "Security Directive" to regulated aircraft  
23 operators. 49 C.F.R. § 1544.305(a). Similarly, in the case of a foreign air carrier, the TSA may  
24 issue an "Emergency Amendment" to the carrier's security program when it finds that there is an  
25 emergency requiring immediate action with respect to safety in air transportation or in air  
26 commerce. 49 C.F.R. § 1546.105(d). Compliance by air carriers with Security Directives and  
27 Emergency Amendments is mandatory. See 49 C.F.R. §§ 1544.305(a) and 1546.105(d).

28           6.       The ATSA also requires that the TSA establish procedures for notifying airline

1 security officers of the identity of individuals known to pose, or suspected of posing, a risk of air  
2 piracy or terrorism, or a threat to airline or passenger safety. If one of these individuals seeks to  
3 board an aircraft, the statute requires the airlines to notify appropriate law enforcement agencies,  
4 prevent the individual from boarding the aircraft, or take other appropriate action with respect to  
5 that individual.

6 7. The TSA has implemented these requirements by issuing a series of Security  
7 Directives to regulated aircraft operators and Emergency Amendments to foreign air carriers  
8 which I refer to collectively below as Security Directives. These Security Directives establish  
9 two groups of individuals who are identified on separate lists that are appended to the Security  
10 Directives based on an assessment of the degree of risk that they pose to aviation safety. The  
11 first group who are identified on a "No Fly List" consists of individuals who are prohibited from  
12 flying altogether. The second group who are identified on a "Selectee List" consists of  
13 individuals who must be "selected" by air carriers for additional screening before they are  
14 permitted to fly. 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 or  
16 Selectee lists seek to board an aircraft.

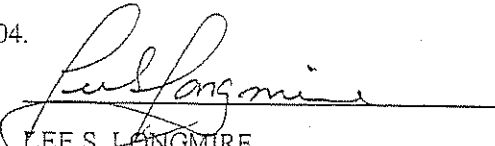
17 8. From time to time, the TSA revises both the procedures prescribed by these  
18 Security Directives and, as updated information becomes available, the specific individuals  
19 identified on the No Fly and Selectee Lists. These revisions are made by issuing new Security  
20 Directives which supersede those previously issued and by updating the information contained on  
21 the No Fly and Selectee Lists appended to the Security Directives.

22 9. In view of the sensitive nature of these Security Directives, I cannot describe them  
23 further on the public record without undermining the effectiveness of the procedures required and  
24 directly compromising the safety of the traveling public. Disclosure of the specific security  
25 procedures to be followed by air carriers when they encounter an individual identified on the No  
26 Fly and Selectee Lists could enable terrorists and other violent criminals to identify potential  
27 weaknesses in the current security system, and to circumvent or otherwise defeat the security  
28 measures mandated by the TSA in the Directives. Similarly, public disclosure of the identity of

1 individuals on the No Fly and Selectee lists, or the specific criteria used to determine which  
2 individuals should be included on the lists, would compromise the safety and security of  
3 passengers by providing terrorists with information that may reveal which of their members have  
4 been compromised, and which of their members may board an aircraft without any form of  
5 enhanced scrutiny. For these reasons, TSA's regulations expressly prohibit the disclosure of the  
6 contents of Security Directives and Emergency Amendments, as well as the selection criteria to  
7 be used in screening airline passengers. See 69 Fed. Reg. 28066, 28083 (May 18, 2004)  
8 (sections 1520.5(b)(1), (b)(2), and (b)(9)(i)).

9 Pursuant to 28 U.S.C. Section 1746, I declare, under penalty of perjury, that the foregoing  
10 is true and correct.

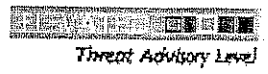
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12 Dated on the 4<sup>th</sup> day of June 2004.

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15 LEE S. LONGMIRE  
16 Assistant Administrator,  
17 Office of Operations Policy  
18 Transportation Security Administration  
19 Department of Homeland Security  
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Transportation Security Administration

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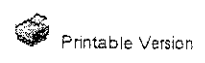
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TSA Customer Service

TSA Watch Lists Clearance Procedures

The Transportation Security Administration (TSA) compiles Watch Lists based on recommendations and information received from Federal agencies, including intelligence and law enforcement agencies. We recognize that the implementation of the Watch Lists has occasionally led to frustrating delays at airports for individuals inadvertently impacted by the clearance procedures. We regret this inconvenience and have developed a clearance protocol that should provide a more efficient process for you during the flight check-in.

If you would like to participate, we ask that you complete the [TSA Passenger Identity Verification Form](#) (PDF 110 KB) Please forward the completed Passenger Identity Verification Form (PIVF) with your original signature and the requested notarized/certified copies of records to the following address:

**Transportation Security Administration**  
**TSA-901**  
**601 South 12th Street**  
**Arlington, VA 22202-4220**

TSA will be unable to process your request without the information requested on the PIVF. We will notify you in writing of our determination and will contact the appropriate parties, including the airlines, in an effort to streamline your check-in.

Please understand that the [TSA clearance process](#) will not remove a name from the Watch Lists. Instead this process distinguishes passengers from persons who are in fact on the Watch Lists by placing their names and identifying information in a cleared portion of the Lists. Airline personnel can then more quickly determine when implementing TSA-required identity verification procedures that these passengers are not the person of interest whose name is actually on the Watch Lists.

Clearance by TSA may not eliminate the need to go to the ticket counter in order to check-in. While TSA cannot ensure that this procedure will relieve all delays, we hope it will facilitate a more efficient check-in process for you. Additionally, TSA has issued guidance to the airlines to clarify further the Watch List clearance protocol.

TSA's clearance procedures apply only to persons affected by the Watch Lists. There are other reasons that a passenger may experience delays, such as random selection for additional screening, alarming at the security checkpoint, or as a result of increased security levels requiring additional screening. These types of delays may not happen every time and this process cannot grant relief

Downloadable [TSA Passenger Identity Verification Form \(PDF 110 KB\)](#)

**How the process works**

Transportation Security Administration

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U.S. Department of Homeland Security