**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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No. 04-15736

JOHN GILMORE,

Plaintiff-Appellant,

v.

JOHN ASHCROFT, *et al.*,

Defendants-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. CV-02-03444-SI
Honorable Susan Y. Illston, United States District Court Judge

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# BRIEF OF AMICUS CURIAE ELECTRONIC FRONTIER FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT JOHN GILMORE

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## I. STATEMENT OF AMICUS CURIAE

The Electronic Frontier Foundation ("EFF") is a non-profit, public-interest organization dedicated to protecting civil liberties and free expression in the digital world. Founded in 1990 and based in San Francisco, California, EFF has more than 13,000 paying members and represents the interests of Internet users in court cases and in the broader policy debates surrounding the application of law in the computer age. EFF publishes a comprehensive archive of digital civil liberties information at one of the most linked-to websites in the world, <http://www.eff.org>. EFF has participated as amicus curiae in many privacy cases, including *Hiibel v. Sixth Judicial District Court of Nevada*, 124 S.Ct. 2451 (2004), *Doe v. Chao*, 124 S.Ct. 1204 (2004), *Klimas v. Comcast Cable Communications, Inc.* (No. 02-CV-72054-DT) (Sixth Circuit, appeal pending), and *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868 (9th Cir. 2002).

EFF has received consent to file this brief from all parties in this action.

## II. SUMMARY OF ARGUMENT

The Fourth Amendment "generally bars officials from undertaking a search or seizure absent individualized suspicion. Searches conducted without grounds for suspicion of particular individuals have been upheld, however, in certain limited circumstances." *Chandler v. Miller*, 520 U.S. 305, 308 (1997) (internal quotation marks and citation omitted).

A key question presented by this case is whether the Fourth

Amendment permits the government, without any suspicion of wrongdoing, to demand that every would-be air traveler present official identity credentials at airports or else be denied the right to fly, as part of a program to "screen" for terrorists.

Under this Court's decisions, however, the administrative purpose of air traffic safety justifies only narrowly defined searches of passengers for weapons and explosives at airports, while generalized law enforcement searches of all passengers as a condition for boarding a commercial aircraft would be unconstitutional. *United States v. Davis*, 482 F.2d 893, 910 (9th Cir. 1973); *United States v. $124,570 U.S. Currency,* 873 F.2d 1240, 1243 (9th Cir. 1989).

In this case, the government has failed to show that it is legally authorized to demand official ID from would-be air travelers, that such demands further the air traveler screening program's purpose of deterring people from bringing weapons or explosives onto planes, or that such demands are reasonable for any other constitutionally permissible administrative purpose. Accordingly, amicus EFF argues that the demands for identity credentials at issue in this case do not "fit within the closely guarded category of constitutionally permissible suspicionless searches," *Chandler*, 520 U.S. at 309, and violate the Fourth Amendment.

## III. FACTUAL AND LEGAL BACKGROUND

In the late 1960s and early 1970s, the federal government created a program directing that all air travelers and their carry-on baggage be

screened for dangerous items before boarding. General Accounting Office, *Computer-Assisted Passenger Prescreening System Faces Significant Implementation Challenges* 5 (February 2004) ("GAO Report"), available at <http://www.gao.gov/cgi-bin/getrpt?GAO-04-385>; *Davis*, 482 F.2d at 897-904 (explaining history of airport search program).

In 1994, the Federal Aviation Administration (FAA) provided funding to a major U.S. air carrier to develop a computerized system for prescreening passengers. This first-generation Computer Assisted Passenger Prescreening Program (CAPPS), now administered by the Transportation Security Administration (TSA), was implemented in 998 and is in use today by most U.S. air carriers. GAO Report at 5

CAPPS enables air carriers to separate passengers into two categories: those who require additional security scrutiny—termed "selectees"—and those who do not. When a passenger checks in at the airport, the air carrier's reservation system uses certain information from the passenger's itinerary for analysis in CAPPS. This analysis checks the passenger's information against the CAPPS rules, which are rules about behavioral characteristics used to select passengers who require additional security scrutiny, and also against a government-supplied watch list that contains the names of known or suspected terrorists. A passenger's selectee status is then transmitted to the check-in counter where a code is printed on the boarding pass of any passenger determined to require additional screening, and at the screening checkpoint, passengers who are selectees are subject to additional security

measures. CAPPS currently prescreens an estimated 99 percent of passengers on domestic flights. GAO Report at 5-6.

Since September , 2001, TSA has been developing a second-generation prescreening system known as CAPPS II. A major difference between CAPPS and CAPPS II is that while CAPPS focused on passenger behavior like ticket purchases, CAPPS II seeks to authenticate the identity of each passenger. According to Admiral David Stone, acting TSA administrator, "one of the primary functions of CAPPS II is to verify the identities of air travelers." Prepared testimony of David M. Stone, Acting Administrator, TSA, before U.S. House of Representatives, Comm. of Transportation and Infrastructure, Subcomm. on Aviation, at 9 (March 7, 2004) ("Stone testimony"), available at <http://www.house.gov/transportation/aviation/03-17-04/stone.pdf>. CAPPS II will then "[c]ompare the passenger identity information against the Terrorist Screening Center's consolidated terrorist screening database, and against lists of individuals who are the subject of outstanding warrants for violent criminal behavior." Stone testimony at 2.[1]

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[1] While CAPPS II has not yet been implemented, even the attempt to implement it has raised considerable public concern about its privacy and civil liberties implications; as the GAO Report details, the government has "not yet determined and verified the accuracy of the databases to be used by CAPPS II, stress tested and demonstrated the accuracy and effectiveness of all search tools to be used by CAPPS II, completed a security plan to reduce opportunities for abuse and protect the system from unauthorized access, adopted policies to establish effective oversight of the use and operation of the system, identified and addressed all privacy concerns, and developed and documented a process under which passengers impacted by CAPPS II can

Curiously, however, the federal laws and regulations that govern air passenger screening do not, so far as amicus has been able to discover, expressly authorize any governmental demand for proof of identity. The laws authorize the sharing of information about individuals who may pose a risk to transportation or national security, both with government entities and airline and airport security. 49 U.S.C. § 114(h)(1), (2). They authorize the establishment of policies or procedures to prevent those named on certain "watch lists" from boarding airplanes. *Id.* at § 114(h)(3). And they authorize TSA to "consider requiring passenger air carriers to share passenger lists . . . for the purpose of identifying individuals who may pose a threat to aviation safety or national security." *Id.* at § 114(h)(4). These laws neither establish nor authorize the establishment of a government mandate that all air travelers present official identity credentials to government officials in order to board a plane. Indeed, Section 114(q), which sets forth the powers of TSA law enforcement personnel, is silent on the power of such personnel to impede the progress of, or detain, air travelers for failing to show ID. *Id.* at § 114(q).

Similarly, the laws that authorize passenger screening do not refer to or otherwise mention any general requirement to present official identity

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appeal decisions and correct erroneous information." GAO Report, at 4. The GAO further noted that among the "additional challenges" facing CAPPS II are "managing the expansion of the program's mission beyond its original purpose" and "ensuring that identity theft . . . cannot be used to negate the security benefits of the system." GAO Report, at 5 (terming these challenges "major risks" to CAPPS II's success).

credentials in order to fly. *See, e.g.*, 49 U.S.C. §§ 44901, 44903. In accordance with the administrative purpose found in *Davis*, 482 F.2d at 908 – deterrence of weapons and explosives – the law only mandates "consent to search" for the purpose of detecting "dangerous weapon[s], explosive[s], or other destructive substance[s]." 49 U.S.C. § 44902(a)(1).

Furthermore, the government has by regulation defined the term "screening function" to mean "the inspection of individuals and property for weapons, explosives, or incendiaries" and the term "screening location" to mean "each site at which individuals or property are inspected for the presence of weapons, explosives, or incendiaries." 49 C.F.R. § 1540.5. Accordingly, the "screening" of passengers relates only to inspecting for "the presence of weapons, explosives, or incendiaries" and does not, as a matter of law, include ID checks.

## IV. ARGUMENT

### A. Demands for identity credentials pursuant to federal airport search programs for domestic flights violate the Fourth Amendment.

The district court found that the Fourth Amendment was not implicated by the demand for identity credentials because "[i]dentification requests unaccompanied by detention, arrest, or any other penalty, other than the significant inconvenience of being unable to fly, do not amount to a seizure within the meaning of the Fourth Amendment." *Gilmore v. Ashcroft*, 2004 WL 603530, *5 (N.D. Cal. 2004). Amicus respectfully submits that this finding ignored the difference between a request for ID that can be

refused with no detriment and a demand for the presentation of official identity credentials, as well as the role of demands for identity credentials in the federal air traveler screening program, and thus was erroneous as a matter of law.

The district court erred in analyzing the demand for identity credentials as a mere request for identification.

The district court erred first in confusing a non-coercive request for identification with a coercive demand for official ID credentials that cannot be refused without loss of freedom of movement. The former does not implicate the Fourth Amendment; the latter does.

The first difference is between a request and a demand. A mere request for information, including identity information, which can be refused without any negative consequences beyond the encounter itself, is not coercive. *Hiibel v. Sixth Judicial District Court of Nevada*, 124 S.Ct. 2451, 2458 (2004), citing *INS v. Delgado*, 466 U.S. 210, 216 (1984) (noting that a police ID request "does not, by itself, constitute a Fourth Amendment seizure").[2] The government relies heavily on this proposition.

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[2] *Hiibel* does not help the government in this case. First, *Hiibel* is distinguishable on its facts because the request for ID at issue in *Hiibel* was grounded in reasonable suspicion. *Hiibel*, 124 S.Ct. at 2457 ("there is no question that the initial stop was grounded in reasonable suspicion"). *Hiibel* is thus irrelevant to suspicionless administrative searches. Second, the ID demand in *Hiibel* was based on a statute that was authoritatively construed to require only the disclosure of one's name. *Id.* In this case, the government has cited no statutory or regulatory authority that establishes a legislative or quasi-legislative basis for demanding official identity credentials.

Government's Reply Memorandum in Support of Motion to Dismiss at 2, 22 ("Govt's Reply Memo").

A request that cannot be refused without negative consequences is coercive, however. *Delgado*, 466 U.S. at 216-17 ("if the person refuses to answer and the police take additional steps . . . to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure"); *Florida v. Bostick*, 501 U.S. 429, 435 (1991) (police may ask questions without basis for suspicion "as long as the police do not convey a message that compliance with their requests is required") (internal citations omitted).

The request in this case, and in the air traveler screening program generally, is a coercive demand that a would-be air traveler is not truly free to refuse. Absent the governmental ID requirement, the passenger would be able to board his or her plane; plaintiff in this case presumably would have proceeded to his intended destination had he not been required to show ID.

Although the record is unclear on this point, it appears that any passenger who refuses to show ID will either be required to undergo some unspecified, heightened search or be unable to travel. To characterize this choice as voluntary, as a search that a would-be traveler is free to refuse, is to elevate legal fiction over social fact. This Court has previously recognized that "[t]he true voluntariness of an airport search is doubtful in any event," and approvingly quoted one commentator as saying: "A passenger is not, of course, compelled to travel by airplane, but many

travelers would reasonably conclude that they had no realistic alternative. . . . [W]e should candidly acknowledge the element of coercion and seek a rationale which justifies them, coercion notwithstanding." *$124,570 U.S. Currency*, 873 F.2d at n. 8 (citation omitted); see *United States v. Berry*, 670 F.2d 583, 596-97 (5th Cir., Unit B, 982) (en banc) (noting that airport stops are inherently intimidating and justify a presumption that a reasonable person would not feel free to leave).

The governmental ID requirement therefore restricts the would-be passenger's freedom or liberty of movement and implicates the Fourth Amendment. *Brower v. County of Inyo*, 489 U.S. 593, 596-97 (1989) ("a Fourth Amendment seizure [occurs] . . . only when there is a governmental termination of freedom of movement *through means intentionally applied*") (emphasis in original); *United States v. Jacobsen,* 466 U.S. 109, n. 5 (1984) ("seizure" of person defined as "meaningful interference, however brief, with an individual's freedom of movement"); *Florida v. Royer*, 460 U.S 491, 498 (1983) (an individual "may not be detained even momentarily without reasonable, objective grounds for doing so"); *Henry v. United States*, 361 U.S. 98, 103 (1959) ("When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete").

The second difference is between a demand for identification and a demand for official identity credentials. It is one thing to be asked one's name; it is another to be required to produce proof via official identity

credentials. The Supreme Court recently made exactly this point in distinguishing the statutory demand for "credible and reliable" identification at issue in *Kolender v. Lawson*, 461 U.S. 352 (1983), from the Nevada statute at issue in *Hiibel*, which "does not require a suspect to give the officer a driver's license or any other document." *Hiibel*, 124 S.Ct. at 2457.

In short, this case does not involve a request for ID "by itself." Accordingly, the district court erred as a matter of law in finding that the Fourth Amendment was not implicated by the demand for plaintiff's identity credentials.

2. The district court erred in analyzing the demand for identity credentials independently of the federal airport search program.

The district court also erred in treating the demand for plaintiff's official identity credentials as though it were completely independent of the federal air traveler screening program. In *Davis*, this Court held that an airport search is a "functional, not merely a physical process ... [that] begins with the planning of the invasion and continues until effective appropriation of the fruits of the search for subsequent proof of an offense." *Davis*, 482 F.2d at 896 (internal quotation marks and citation omitted); *id.* at 904 ("since late 1968, the government's participation in the development and implementation of the airport search program has been of such significance so as to bring any search conduct pursuant to that program within the reach of the Fourth Amendment"). Accordingly, the district court erred as a matter of law in not analyzing the demand for plaintiff's official identity

credentials as an airport search.

Today, that "functional process" includes statutory requirements that pertain to the identity of air travelers. *Gilmore*, 2004 WL 603530, *4-5 (citing, inter alia, 49 U.S.C. §§ 114(h)(2), 14(h)(3)(A), and 14(h)(3)(B)). The government told the district court that ID demands are "one part of the passenger screening process used at airports." Government Memorandum in Support of Motion to Dismiss at 14 ("Gov't Memo").

Indeed, this Court expressed concern in *Davis* that the airport screening process "will be subverted into a general search for evidence of crime," noting that "[t]he record is not entirely comforting in this respect" and citing the following testimony from then-FAA Administrator Schaffer:

> "We have law enforcement information now available. . . . [W]e are going to scrub down the manifest. People buy tickets on airlines and make reservations; once their name appears, we then start the process. Is this man evading the law? Is he a known international operator? Has he any record at all?"

*Davis*, 482 F.2d at 909 and n. 43. This Court's 1973 concern that identity information would be used for ordinary law enforcement purposes has now materialized; the current CAPPS program checks passenger ID information "against a government-supplied watch list that contains the names of known or suspected terrorists." GAO Report at 5. The contemplated future CAPPS II program intends to make even greater use of information about an air passenger's identity; one of its goals will be to discover "individuals who are the subject of outstanding warrants for violent criminal behavior." Stone testimony at 2. Accordingly, for purposes of this appeal, the demand for ID

at issue here is as much a part of the "functional process" of air traveler screening as the searches for weapons and explosives at issue in *Davis*. The district court erred as a matter of law in finding that no Fourth Amendment search or seizure occurred.

### B. Airport searches pursuant to the federal airport search program are limited to searches for weapons and explosives and do not encompass demands for official identity credentials.

In *Davis*, this Court upheld the constitutionality of the airport search program under the administrative search doctrine, finding that the permissible "administrative purpose" of the scheme was "to prevent the carrying of weapons or explosives aboard aircraft" or "to deter persons carrying such material from seeking to board at all." *Davis*, 482 F.2d at 908; *id.* at n. 41 ("The only purpose for which the general search or inspection of persons and their property shall be undertaken is to insure that dangerous weapons will not be unlawfully carried in air transportation or in interstate commerce") (internal quotation marks and citation omitted).

Because administrative search schemes "require no warrant or particularized suspicion," they "invest[] the Government with the power to intrude into the privacy of ordinary citizens," a power that "carries with it a vast potential for abuse." *United States v. Bulacan*, 156 F.3d 963, 967 (9th Cir. 1998). Accordingly, administrative searches of would-be passengers at airports are constitutional only if tightly limited. *$124,570 U.S. Currency*, 873 F.2d at 1244 (Supreme Court has "repeatedly emphasized the

importance of keeping criminal investigatory motives from coloring administrative searches"; need to keep administrative searches from becoming "infected by general law enforcement objectives, and the concomitant need for the courts to maintain vigilance").

This vigilance is articulated by the administrative search doctrine's requirements that "the search serves a narrow but compelling administrative objective" and that the intrusion is as "limited . . . as is consistent with the administrative need that justifies [it]" *$124,570 U.S. Currency*, 873 F.2d at 244-45 (internal quotation marks and citations omitted). These limits are necessary because if administrative searches are allowed to serve "the general interest in crime control, the Fourth Amendment would do little to prevent such intrusions from becoming a routine part of American life." *Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000).

1. By its own terms, *Davis* only authorizes administrative searches for weapons and explosives.

The demand for identity credentials is not encompassed by *Davis*. Under *Davis*, the "essential purpose" of the air traveler screening process "is not to detect weapons or explosives or to apprehend those who carry them, but to deter persons carrying such material from seeking to board at all." *Davis*, 482 F.2d at 908 (footnote omitted). The government told the district court that "the governing statute and regulations plainly reflect that the purpose of the screening procedure is to detect weapons and explosives." Gov't Memo at 23

But the government has not justified demands for identity credentials on this basis. The physical processes of magnetometer and x-ray screening, perhaps augmented by more intense checking of baggage and the use of chemical "sniffers," are clearly connected to the detection of weapons and explosives. Requiring passengers to present identity credentials is not. Nowhere has the government explained how the ID requirement deters people from carrying weapons or explosives aboard airplanes. Moreover, given that the government already screens every passenger for weapons and explosives, the additional intrusion of demanding proof of identity logically is not as limited as is consistent with the administrative need that justifies it.

### C. Demands for official identity credentials cannot otherwise be justified as administrative searches, especially in light of the danger that the airport search program will be infected by ordinary law enforcement goals.

The government argued below that demanding ID credentials is necessary to ensure that known or suspected terrorists, named on secret government "watch lists," do not board airplanes. *Gilmore*, 2004 WL 603530, *5. The first problem with this reasoning is that it contradicts the government's representation that "the purpose of the screening procedure is to detect weapons and explosives" the "essential purpose" of the airport search program upheld in *Davis* – and thus expands the search program's purpose to include searching for known or suspected terrorists who are not carrying weapons or explosives. As noted above, the term "screening" is defined by regulation to mean only the detection of weapons, explosives,

and incendiaries. 49 CFR § 1540.5. The government has cited no authority that shows that the "screening" of passengers by law includes official identity verification.

Second, just as identifying passengers does not obviously further the "essential purpose" of deterring people from carrying weapons or explosives on board a plane, it also does not obviously further the detection of any other kind of threat. The government has not introduced evidence that ID requirements help identify terrorists or any other kind of threat to air safety in addition to screening for weapons and explosives; the government has offered no evidence to show that the list of known or suspected terrorists used in screening would-be air travelers is at all reliable. The objective may be compelling, but there has been no showing that the ID requirement serves it.

Even if the Court were to accept for the sake of argument that the ID requirement furthers the public interest in aviation safety, there is a significant risk that it will be corrupted by general law enforcement goals. *Bulacan*, 156 F.3d at 969 ("an unlawful secondary purpose invalidates an otherwise permissible administrative search scheme"). The current CAPPS program checks passenger ID information "against a government-supplied watch list that contains the names of known or suspected terrorists." GAO Report at 5.

More generally, given the rise of computer technology, one's name is more than a mere identifier: it is a key to many databases containing vast

amounts of personal information, such as the National Crime Information Center ("NCIC") and the Multi-State Anti-Terrorism Information Exchange ("MATRIX"). The NCIC, for example, makes criminal history information available to law enforcement officials throughout the United States. See Bureau of Justice Statistics, *Report of the National Task Force on Privacy, Technology and Criminal Justice Information*, NCL 187669, at 47 (Aug. 2001) (BJS Report), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rntfptcj.pdf> The temptation to use information from ID checkpoints to match against NCIC or other systems of records will be great, yet there is no obvious way to hold the government accountable for such data-mining, or even to know whether the government uses airport ID searches for ordinary law enforcement purposes.

Finally, the district court also erred in looking at plaintiff's facts in particular, rather than the ID requirement in general. See *Bulacan*, 156 F.3d at 967 (in administrative search case, court must "consider the entire class of searches permissible under the scheme, rather than focusing on the facts of the case before it"; *$124,570 U.S. Currency*, 873 F.2d at 1244 (same).

This distinction is significant because the ordinary warrantless search

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[3] There are also concerns about the accuracy of such records. The Bureau of Justice Statistics report noted that "inadequacies in the accuracy and completeness of criminal history records is the single most serious deficiency in the Nation's criminal history record information systems." BJS Report at 38. These inadequacies create "a substantial risk that the [database] user will make an incorrect or misguided decision," such as an unjustified arrest or a lost job opportunity. *Id.*

involves a case-specific factual determination, and if the search is upheld, "the approval covers that case only." *Id.* "An administrative search is different. By approving a warrantless search under this rationale, a court places its stamp of approval on an entire class of similar searches," with "general, long-term implications." *Id.*

The obvious long-term implication is the untrammeled expansion of governmental ID checking throughout society. Under the district court's analysis, which ignores the coercive element of requiring ID in order to fly, which accepts without evidentiary justification the government's assertions of the need to check ID, and which does not even require that the government produce duly promulgated laws or regulations establishing the metes and bounds of the authority to demand ID, a regime of ID checking could be established for virtually any public place grounded solely in the need to verify whether a person is on a list of known or suspected terrorists. This is precisely why the Supreme Court in warned that administrative searches must not be allowed to serve ordinary law enforcement purposes: "to prevent such intrusions from becoming a routine part of American life." *Edmond*, 531 U.S. at 42.

### D. Demands for identity credentials pursuant to federal air traveler screening programs are not reasonable under *Brown v. Texas.*

"'Airport searches' are not outside the [Fourth] Amendment simply because they are being conducted at all airports." *Davis*, 482 F.2d at 905 Tacitly conceding this point, the government argued below that demanding

ID is a reasonable means of effectuating the purpose of airline safety. The government's argument, simply stated, is that it is reasonable to seek to identify individuals "known to pose, or suspected of posing, a risk of air piracy or terrorism or a threat to airline passenger safety" before they are allowed to board. The ID requirement is "intended to enable air carriers to identify individuals who pose a threat to airline passenger safety, and to take appropriate precautions for the protection of passengers." Gov't Reply Memo at 12.

Given that this Court has previously found that the mandatory production of official identity credentials in other contexts is a "serious intrusion on personal security," *Lawson v. Kolender*, 658 F.2d 1362, 1366-67 (9th Cir. 1981) aff'd on other grounds, 461 U.S. 352 (1983), amicus respectfully submits that the government has failed to show that the ID demand in this case is reasonable.

1. The government has not shown that demanding official identity credentials is an effective means of furthering the administrative interest in aviation safety.

Under the reasonableness test of *Brown v. Texas*, 443 U.S. 47 (1979), any kind of "checkpoint" search or seizure must be evaluated in terms of "the degree to which the seizure advances the public interest." *Id.* at 51. Although a suspicionless search program need not be the best or only means by which to further the public interest, it cannot be upheld merely because it may be slightly more effective or easier to administer; rather, a court should undertake "searching examination of [the] 'effectiveness'" of the program.

*Michigan Department of State Police v. Sitz*, 496 U.S. 444, 454 (1990); cf. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) ("[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment.").

Courts routinely assess statistical evidence regarding effectiveness. *E.g.*, *Sitz*, 496 U.S. at 455 (upholding sobriety checkpoint where .6% of stopped drivers were arrested for driving under the influence); *United States v. Martinez-Fuente*, 428 U.S. 543, 554 (1976) (noting 146,000 cars stopped over eight days and 171 found to contain illegal aliens). In this case, however, the government presented no evidence demonstrating, and the district court made no factual findings as to, the actual effectiveness of the ID requirement to any public interest. As a matter of law, these factual gaps in the record should preclude judgment for the government.

Alternatively, this Court may speculate as to the expected rate of success. *Delaware v. Prouse*, 440 U.S. 648, 659-60 (1986) (absent empirical data, assuming that there are very few unlicensed drivers on the roads, so that on average police would need to stop many cars in order to catch a single unlicensed driver). In this case, the Court should assume that there are very few known or suspected terrorists in comparison to the millions of people who travel by air, and could easily conclude on this basis alone that ID requirements are unlikely to be effective. For instance, the program in *Martinez-Fuente* was about 0.1% effective – slightly more than one in a thousand cars contained illegal aliens. One need not be a terrorism

expert to know that far fewer than one in a thousand air travelers is a known or suspected terrorist.

2. The government has not shown the existence of an "explicit, neutral" plan for ID demands.

Moreover, unless a suspicionless demand for ID is "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers," the demand violates the Fourth Amendment because "the risk of arbitrary and abusive police practices exceeds tolerable limits." *Brown*, 443 U.S. at 52.

The government will likely protest that demanding ID from every passenger is neutral, but this argument is flawed. First, the record does not support the assertion that every passenger is in fact required to show ID. The record shows instead that plaintiff was offered an opportunity to submit to a search as an alternative to presenting identity credentials. *Gilmore*, 2004 WL 603530, *1.

Second, the government has not explained how the option of alternative screening is objectively implemented in a neutral fashion. The problem is that the government has refused to describe the applicable rules. Under the closely related administrative search doctrine, a "statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant." *New York v. Burger*, 482 U.S. 691, 703 (1987), quoting *Donovan v. Dewey*, 452 U.S 594, 603 (1981). The statutes and regulations at issue in this case do not

meet this criterion. Even a cursory review of cases like *Burger* and *Donovan* shows that the Supreme Court carefully examined the statutes in those cases to determine their objectivity and neutrality. *Burger*, 482 U.S. at 711; *Donovan*, 452 U.S. at 603-05. When the regulations that govern the screening process are undisclosed, it is impossible to evaluate whether they constitute a plan embodying explicit, neutral limitations.

In short, the government cannot justify its demand for ID in this case unless it presents "a plan embodying explicit, neutral limitations on the conduct of individual officers." No plan that is kept secret from the public and is not disclosed in the course of a constitutional challenge can be "explicit" for constitutional purposes. Accordingly, this Court cannot find that governmental demands for official identity credentials are reasonable under *Brown*.

### E. Demands for identity credentials pursuant to the federal airport search program cannot be justified under the "special needs" doctrine.

Under the special needs doctrine, a close cousin of the administrative search doctrine, warrantless, suspicionless searches are permissible when the existence of "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring). Such special needs search programs must, nevertheless, assure "citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents." *Skinner v. Railway Labor Executives' Association*,

489 U.S. 602, 621-22 (1989). Amicus has already explained in detail how the program cannot be considered neutral, and focuses here on the simple question of whether "special needs" exist.

The Supreme Court has made clear that the danger of terrorism, in itself, is not a "special need." *Edmond*, 531 U.S. at 44 ("there are circumstances that may justify a law enforcement checkpoint where the primary purpose, but for some emergency, relate to ordinary crime control. For example . . . the Fourth Amendment would almost certainly permit an appropriately tailored roadblock set up to thwart an imminent terrorist attack"). In other words, an imminent terrorist threat has an "emergency' quality that could qualify as a "special need," while the general threat of terrorism is simply "ordinary crime control."

It is true that *Edmond* disclaims any intent to alter the law regarding airport searches. But the law of airport searches has been based on an administrative interest in deterring passengers from carrying weapons or explosives on board planes, not the interest in apprehending terrorists. The Supreme Court's disclaimer should be read in that context, not as a blank check to institute any counter-terrorism program.

## V. CONCLUSION

Aviation security is a serious problem, and the events of September 1 have heightened people's concerns about air travel. But the fact that aviation security is a serious problem does not relieve the government of the duty to promulgate solutions in accordance with the rule of law or the

burden of justifying its proposed solutions. Both the record and the government arguments in this case show that there is no statutory or regulatory authority and no evidentiary justification for suspicionless government ID demands of all would-be air travelers.

For the foregoing reasons, this Court should reverse the district court's decision to dismiss this case and remand this case for further proceedings to determine whether the government acted lawfully in demanding official identity credentials from plaintiff-appellant Gilmore.

DATED: August 19, 2004

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,564 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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