UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-15736

JOHN GILMORE,

Plaintiff-Appellant,

v.

JOHN ASHCROFT, *et al.*,

Defendants-Appellees.

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

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

APPELLANT JOHN GILMORE'S REPLY BRIEF

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I. INTRODUCTION

Whether Americans must show identification to travel domestically, and whether laws to that effect can be kept secret are the issues in this case. TSA signs at airports state that passengers must provide identification. Plaintiff John Gilmore believes this requirement impinges on a number of his fundamental rights. In 2002, after being physically screened without incident, along with all other passengers at a typical airport security checkpoint, Plaintiff was physically barred from entering an airplane because he would not present identification at the gate. Solely because he would not present identification, he was prevented from purchasing a ticket at a second airport unless he agreed to be more intrusively searched. To date, airlines and governmental agencies have been unable to identify a specific statute or regulation that requires such identification. Mr. Gilmore has nonetheless been unable to travel because all major forms of long distance transport require the production of ID.

The right to travel freely throughout America without bearing papers of any kind is a well-recognized component of citizenship. "[A] large number of nations do not share our belief in the freedom of movement and travel, requiring persons to carry identification cards at all times." *Foley v. Connelie*, 435 U.S. 291, 300, n.9 (1977). Any law that mandates the production of government-issued photo ID

without articulable suspicion is an "internal passport" – an anathema to virtually all Americans. Security experts agree that the effective way to provide safety on airplanes is to conduct random physical searches of people and luggage combined with the use of skilled observation of the subject searched. Identification-based security does not work because terrorists can easily game the system by sending members of their group through checkpoints without weapons or explosives, and find out whose identity is suspect. (ER 46:1-6.)

The government and airline response to Plaintiff's claims have revolved around secrecy, obfuscation, and procedural challenges. Contrary to TSA signs prominently displayed at airports, Government Defendants now claim that travelers can elect to be subjected to a "heightened" level of search instead of showing ID. Defendants do not want the public to know the details of its programs. While Defendants' motives may be driven by security, the result is that judicial review of TSA actions is essentially precluded. Defendants try to collapse an entire system of secret law, regulations, and security directives into the phrase "identification-or-search requirement" (Government Respondents' Brief (hereinafter "RB") 16-17), and innocuously term it a "law-enforcement-detection-technique." (RB 34.) This "technique" has imposed an unprecedented and unconstitutional requirement on citizens to carry and present ID, or be denied fundamental rights.

II. ARGUMENT

A. The Government Sets Up A Straw Man Instead of Responding to Plaintiff's Causes of Action

The Government's Brief restricts itself to discussing, at great length, what they call "the identification-or-search requirement." (RB 4.) Though this term is used dozens of times throughout the brief, it is poorly defined, and the casual reader might assume that they are referring to the subject of Plaintiff's Complaint. However, Defendants' "identification-or-search requirement" is very different from the Scheme described in Plaintiff's Complaint. Plaintiff's allegations must be taken as if true at this stage. Defendants cannot defeat these allegations by merely substituting in some other straw man and then arguing how innocuous it is.

Plaintiff challenged "any requirement that he produce a government-issued document, whether it contains his identity or not, as a precondition of exercising his constitutional right to live or travel within the United States." (ER 2.) He stated that "[h]e was stopped because he refused to identify himself before boarding the flight." *Id*. He quoted the FAA and TSA websites as reading: "a government-issued ID (federal, state or local) with photograph is required." (ER 5.) He alleged that "similar requirements have been placed on travelers who use passenger trains … and … are being instituted for interstate bus travel." (ER 7.) He repeated these allegations in his Appellate Brief. (Br. 5.) He challenged "the government-created 'No-Fly' watchlist." (ER 2.) He challenged "that the airlines

have been mandated by the federal government to inform air travelers that they are required to show identification." *Id.* He challenged the enforceability of "secret regulations." *Id.* Plaintiff called the whole set of challenged practices "the Scheme." (ER 12.)

By contrast, though Defendants' brief uses the term "identification-or-search requirement" throughout, they do not define that term until page 18, and even then indirectly. (RB 18.) Defendants seem to be confusing their legal arguments about standing with the subject matter of the case. If Plaintiff had not made these "stray" allegations (RB 19-20), their approach might be accurate. But they can't just wish the troublesome allegations away, claim that Plaintiff has little standing, and then make the allegations re-appear to call them irrelevant trivia beyond what "plaintiff has standing… to challenge." (RB 19-20.)

Defendants' "identification-or-search requirement" straw man differs in many important ways from the Scheme. The Scheme includes ID requirements on all modes of travel; the straw man only covers aviation. The Scheme includes the ID requirement that Southwest Airlines invoked to bar Mr. Gilmore from flying even after he had submitted to every search requested of him, including hand-wanding at the magnetometer security checkpoint; the straw man always offers a "heightened" search as an alternative to the production of identification. (RB 24.)

The Scheme includes all regulations issued by Defendants that require identification to travel; the straw man includes only a single secret security directive. (RB 23.) The Scheme includes the No-Fly list, various "watch lists," the CAPPS II program, and other programs that "pull together every traveler's travel history;" the straw man excludes them. The Scheme is understood differently by various government agents who imposed their versions of it on Plaintiff; the straw man is always described and enforced uniformly. (RB 24, 33.) The Scheme involves officials misleading the public about the rules; the straw man is silent about this.

B. Plaintiff's Standing is Based on His Injury Caused by All Security Programs that Motivate the ID Requirement

1. Plaintiff Has Standing to Challenge Aviation Security Programs Predicated on ID Requirements.

Defendants concede that Plaintiff has standing to challenge the airport ID requirement. (RB 19.) They contest whether Mr. Gilmore has standing to challenge the aviation security programs (RB 19-20), specifically the No-Fly and other watch lists (ER 3, 9; Br. 7, 14, 34, 38), and CAPPS II (ER 8-9).[1]

Yet the purpose of the ID requirement was and is to administer these lists and programs. (ER 8-10.) Without the ID requirement, these lists and programs cannot function, because any intended criminal could book a ticket in

[1] CAPPS II was abandoned in June, 2004, then reincarnated as the "Secure Flight" program in September, 2004.

any name, and thus escape detection by them. Without the lists and programs, the ID requirement is a meaningless hurdle that does not advance security. The ID requirement and the programs that use passenger names for security are inextricably intertwined, giving Plaintiff standing to challenge the programs.

Defendants argue that Plaintiff has no standing to challenge how these programs are operated. (RB 19-21.) Plaintiff has standing to constitutionally challenge their existence (ER 8-9), their true purpose (ER 58), and whether they are effective (Br. 19-21), because of their impingement on his rights by means of the ID requirement, which he has undisputed standing to challenge.

The required "causal connection" between Mr. Gilmore's injuries and the programs complained of exists. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Federal Defendants freely admit that the purpose for the ID requirement that injured Mr. Gilmore is to operate these security programs. For instance, during oral argument Government Defendants' attorney argued as follows:

> Mr. Lobue: First, with respect to the standing issue, we would agree with plaintiffs, that part of the reason the identification card is requested is to insure that the individual is not a person who is known to pose a risk to aviation safety. That's all in the statute. It's in 114 of title 49, that the government is suppose to come up with procedures to provide airlines with that type of information, and the only way they can compare their passengers list with that particular group of people is to find out their identity.

(ER 71. pp. 12:23-13:6.)

Defendants have made numerous other admissions that the identification rule is designed facilitate programs to check whether "that person is among those known (or suspected) to pose a risk to aviation safety." (ER 80, pp. 32:12-25, and RB 56 and at Federal Defendants' Motion to Dismiss, page 25.)

2. Plaintiff Has Standing to Challenge ID Requirements on Other Forms of Travel.

Defendants argue that Plaintiff has no standing to challenge ID requirements on anything but air travel. (RB 50.) Defendants are merely being hyper-technical. They have not denied that there is an ID requirement on these other forms of transportation, nor do they assert that Mr. Gilmore is or would have been permitted to travel in these ways without identification. Mr. Gilmore *would* have traveled by those methods, particularly since he has been unable to travel by air for three years, but he did not because of the public representation that identification is required on these modes as well. "He has been harmed numerous times … because he has been chilled from attempting to travel." (Br. 6.) "It is not as obvious as handcuffs, police car doors that will not open from inside, metal bars, and concrete cells. But ID checkpoints in airports, train stations, bus stations and docks place serious restrictions on Mr. Gilmore's free movement. …[He] has experienced this reality since September 2001." (Br. 28.) His right to travel by all modes has been chilled on an ongoing basis – not just in two airports on July 4, 2002.

His injuries are fairly traceable to the ID requirements imposed on all forms of travel, which were alleged. (ER 7:24-28, 48:23-49:1.) Mr. Gilmore's full exercise of his right to travel was chilled because he knew that travel by trains, buses, and boats required identification. If this Court denies him standing to challenge the ID requirement on those modes of travel, he is willing to "go back and touch second base," amend his Complaint, and return to the Courts. However, requiring such actions would be contrary to judicial economy.

C. The District Court Has Jurisdiction to Hear Plaintiff's Case

Defendants have applied both legislation and obfuscation to insulate their actions from effective judicial review.

1. Defendants' Legislation.

Section 46110 of Title 49 originally assigned to the Appellate Courts review of adjudicative proceedings against airlines or pilots by an Administrative Law Judge. Section 46110 logically resides within Chapter 461–Investigations and Proceedings of Subpart IV–Enforcement and Penalties. Review of these administrative proceedings against airlines and pilots was limited to the record and issues brought before the Administrative Court and the finding of facts were conclusive. The logic to bypass the District Court made sense as Appellee's case had already been heard administratively and the Appeals Court then reviewed for procedural error.

Through a textually tiny 2003 amendment to §46110,[2] enacted after this case was filed, §46110 appeals are now claimed by Defendants to be the exclusive means of judicial review for all TSA's regulations and actions. "[Section] 46110 should apply to all challenges to 'orders' (whether facial or as applied) and … to challenges to actions 'inescapably intertwined' with an 'order' (whether facial or as applied)…." (RB 27, n.11.)

Such a jurisdictional rule would essentially preclude effective judicial review due to the impossible circumstances imposed by this provision. No issue raised by Plaintiff would be considered by the Court unless it had previously been made "in the proceeding conducted by the [agency]," even though Plaintiff never

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[2] This amendment to §46110 resulted from a single amendment neatly tucked into the Vision 100—Century of Aviation Reauthorization Act, Pub. L. 108-176, §228. The purpose of the amendment was to clarify that airport development projects are reviewable in the Court of Appeals, not strip all non constitutional claims against the TSA from the District Court. The amendment reads in its entirety:

SEC. 228 JUDICIAL REVIEW.

The first sentence of section 46110(a) is amended –

(1) by striking 'safety'; and

(2) by striking 'under this part' and inserting 'in whole or in part under this part, part B, or subsection (l) or (s) of section 114'.

Title 49 §114(l) empowers TSA to issue regulations. Subsection (s) enables TSA to order that anything be kept secret, in its sole discretion. The legislative history of §228 shows that it originated in §505 of S. 824, which was merged into S. 2115 in conference to become Pub. L. 108-176. The legislative history reads:

Section 505 would amend the judicial review provision in chapter 461 of title 49 to clarify that decisions to take actions authorizing airport development projects are reviewable in the circuit courts of appeals…. It also would clarify that orders of the Transportation Security Administration under 49 U.S.C. 114(s) (relating to nondisclosure of security activities) are similarly treated. S. Rep. No. 108-41.

had an opportunity to participate in any agency proceeding. 49 U.S.C. §46110(d). "The petition must be filed not later than 60 days after the order issued," even though Plaintiff has no way to know when secret orders are issued. 49 U.S.C. §46110(a). The court's consideration would be limited to the factual "record of any proceeding in which the order was issued," even though there was no such proceeding. 49 U.S.C. §46110(b). "Findings of fact by the [agency], if supported by substantial evidence, are conclusive," even though Plaintiff would be unable to introduce *any* facts into a record. 49 U.S.C. §46110(c). Defendants have the discretion to keep the proceeding, record, order, and rule secret and thus unavailable to Plaintiff, the public, and the Court. 49 U.S.C. §114. Defendants state a secret security directive (the order) is the record. (RB 27.) Defendants have the temerity to suggest that if there is *no* agency record, "it simply means that the scope of the Court's review would be correspondingly narrow" and "limited [to] review [of] procedural issues." (RB 27-28.)

Finally, amendments to 46110(a) to include 114(s) and (l) were enacted in December 2003. Plaintiff's claim was filed in July of 2002. There is no indication that Congress intended 114(s), 114(l), or 46110(a) to have retroactive effect. A statute should not impose new procedural rules on parties once they have filed their complaint. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 n.29 (1994); *Hyatt v. Northrop Corp.,* 80 F.3d 1425, 1429 (9th Cir. 1996). As neither 114(s) nor 46110(a) contains an explicit retroactivity provision, these statutes should not be applied to Plaintiff's case.

2. Defendants' Obfuscation.

In an amazing feat of legerdemain, Defendants claim that only one secret security directive constitutes the "ID-or-Search" requirement (RB 19), that it constitutes both an "order" (RB 23-24) and the entire "reviewable administrative record" (RB 28-29), and blame Plaintiff for his "failure to pursue administrative review." (RB 30-31.) Defendants obliquely address the required "finality" of the order, hoping to dodge this issue. Defendants then curiously claim that Plaintiff could not support a broad constitutional challenge because his narrow facts are somehow intertwined.

a. No "order" exists because there is no administrative record of a final adjudication.

In his Opening Brief, Plaintiff relied on *Sierra Club v. Skinner*, 885 F.2d 591, 592-593 (9th Cir. 1989) and related cases (see *Morris v. Helms,* 681 F.2d 1162, 1164 (9th Cir. 1982) for the need for an "agency proceeding with a reviewable administrative record" for an "order" to exist. (Br. 45) Defendants strenuously pound the round peg of a secret security directive into the square hole of an administrative "order."

Defendants claim that the "ID-or-Search" security directive *is* the administrative record even though it remains secret. (RB 28.) Defendants rely on *Nevada Airlines Inc. v. Bond* to minimize the need for an administrative record as there was no substantive administrative record in that case. *Id.* However, *Nevada*

Airlines involved an *emergency* order revoking the operating certificate of an airline, and was *limited* "at this stage of the proceedings…to determining whether the Administrator's finding of an emergency was arbitrary and capricious…." 622 F.2d 1017, 1020 (9th Cir. 1980). *Nevada Airlines* did not dismiss the record requirement for administrative review of change the requirements of an "order."

Rather than rebut Plaintiff's arguments and supporting cases, Defendants try to shift the focus of what an "order" is into a discussion on the classes of claims reviewed by the Appellate Court. Defendants talk past Plaintiff's arguments when stating an order is a "definitive statement of [an] agency's position [that] has a direct and immediate relationship on day to day business of the party asserting wrongdoing, and envisions immediate compliance with its terms." (RB 23-24.)

While Defendants merely erect another straw man they believe conquerable, their argument is unpersuasive. Their secret security directive is not "definitive" as Defendant airlines admit that it is ever-changing. (ER 7:20.) Defendants' recent acknowledgment of the ID requirement in 69 Fed. Reg. 28,066, 28070-28071 (the only published evidence of the security directive), which Defendant amazingly suggest is notice to passengers of the "order," sheds little light on its definitiveness. (RB 15.)

b. The "order" must be "final."

Factors relevant to the finality issue include whether the order has a direct and immediate effect on the day-to-day business of the subject party; whether the order has the status of law or comparable legal force; whether immediate compliance with the terms of the order is expected; whether the order or regulation is a "definitive statement of policy;" and whether the order clearly established the parties' rights. *See FTC v. Std. Oil Co.*, 449 U.S. 232, 239-240 (1980); Sierra *Club v. NRC*, 862 F.2d 222, 225 (9th Cir. 1988). Agency orders are final for purposes of appellate review if the action: "mark[s] the consummation" of the agency's decision-making process; and is one by which rights or obligations have been determined, or from which legal considerations will flow. *Bennett v. Spear*, 520 U.S. 154, 177-178 (1997); *Alaska Dept. of Environmental Conservation v. EPA*, 244 F.3d 748, 750 (9th Cir. 2001).

Rather than offer any evidence of "final agency action," Defendants merely cite the "security directive alleged by Plaintiff" (RB 24), and infer the action was final by oblique references that "immediate compliance is mandatory pursuant to 49 C.F.R. 1544.305" and that Plaintiff admits that passengers are affected on a "daily basis." (RB 24.)

However, §1544.305 is directed at airport workers and not at passengers. Also, Courts, not Defendants, decide what is and is not "final" agency action

subject to judicial review. *San Diego Air Sports Center v. FAA*, 887 F.2d 966, 968-969 (9th Cir. 1989). The power of review has been judicially restricted to final orders." *Sierra Club*, 885 F.2d at 592; *Southern Cal. Aerial Advertisers' Ass'n. v. FAA*, 881 F.2d 672, 675 (9th Cir. 1989). Finally, all statutes - including §46110 – are, whenever possible, interpreted to avoid unreasonable results. *Dougherty v. Carver F.S.B.*, 112 F.3d 613, 624 (2nd Cir. 1997)(citing *American Tobacco Co. v. Patterson,* 456 U.S. 63, 71 (1982)).

Because the "order" is secret, we don't know if immediate compliance with the terms of this "order" are expected. What has been revealed does more to raise new questions than to respond to any of these factors. The agency action is not a "definitive statement of policy." The parties' rights are not clearly established. Measured by these well-established criteria, whatever Defendants are referring to is clearly not a "final order" for the purposes of §46110.

c. <u>Plaintiff sets forth a broad constitutional challenge.</u>

Even if a "final order" exists (which it doesn't), broad constitutional challenges to administrative orders are heard by the District Court because administrative agencies are not "tooled" for such considerations. "[A]ny examination of the constitutionality of the FAA's revocation power should logically take place in the district courts, as such an examination is neither peculiarly within the agency's 'special expertise' nor an integral part of its 'institutional

competence.'" *Mace v. Skinner*, 34 F.3d 854, 859 (9th Cir. 1994). Plaintiff has clearly brought a broad constitutional challenge to these administrative actions.

Defendants argue that Plaintiff has not brought a broad constitutional challenge by stating that Plaintiff's facts are particularized to his personal situation, and hence his constitutional challenge is a narrow one and the facts impermissibly intertwined. (RB 25-26.) This makes no sense. Defendants cite *Tur v. FAA* and *Mace*, claiming that if a District Court case arises primarily "out of the facts of [a Plaintiff's] individual case" rather than a broad constitutional challenge, then it belongs in the Court of Appeals. (RB 25-26.)

That is not the case here. Plaintiff is a typical American citizen who faces the ID demand when seeking to board an airplane, and this case has virtually nothing to do with individualized facts such as his medical condition or the differing stories he was told by airport employees. The case is not designed to solely exempt just Mr. Gilmore from the ID requirement. If the court finds in his favor, the result will apply to all American air passengers.

D. Right to Travel

Looking beyond Defendants' procedural challenges, Plaintiff has claimed a number of civil rights and liberties violations. Although no constitutional right is "absolute," the constitutional right of interstate travel is "virtually unqualified." *Califano v. Torres*, 435 U.S. 1, 4, n.6 (1978); *United States v. Guest,* 383 U.S. 745,

757-758 (1966); *Eunique v. Powell*, 302 F.3d 971, 973 (9th Cir. 2002). It is also one of the few individual rights protected against private interference. *Guest,* 383 U.S. 745 at 757.

Defendants argue that Plaintiff was not barred from traveling, and that the ID requirement is not a ban on travel and therefore does not violate the right to travel. (RB 47-48.) The position that a ban on travel is required to violate the right is insupportable. For example, in *Maldanado v. Houstoun*, a state residency duration requirement for public assistance was found to violate the right to travel and strict scrutiny was applied. 157 F.3d 179, 191 (3rd Cir. 1998), citing *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986). Obviously, no travel ban was involved. The right to travel is violated if its exercise somehow involves a penalty for the person exercising that right. *Id.* at 186. Plaintiff's exercise of his right to travel would result in the *penalties* of (among others) the loss of his travel privacy, being subjected to data aggregation of his travel information, and having to submit to constant governmental conditions placed on this fundamental right.

Defendants' argument that "the ID requirement only burdens one mode of travel" (RB 49) is similarly flawed. Such a stance ignores the pleadings, dismisses the importance of its application to common carriers, and addresses only the straw man. Further, as this Court stated in *United States v. $124,570 U.S. Currency*, 873 F.2d 1240, 1246 (9th Cir. 1989), "it is the very ubiquitousness of airport security checks that calls for the greatest vigilance on our part." "Liberty – the freedom from unwanted intrusion by government – is as easily lost through insistent nibbles

by government officials who seek to do their jobs too well as by those whose purpose is to oppress; the piranha can be as deadly as the shark." *Id.*

"[T]he right to travel is fundamental and *any* burden on it is subject to strict scrutiny…." *United States v. Klinzing*, 315 F.3d 803, 808 (7th Cir. 2003)(emphasis added); *United States v. Bredimus*, 352 F.3d 200, 210 (5th Cir. 2003) (holding same); *see also Shapiro v. Thompson*, 394 U.S. 618, 634 (1969); *Memorial Hosp. v. Maricopa County,* 415 U.S. 250, 256 (1974). Defendants not only contest this (RB 51), but apply some incorrect balancing standard stating "[w]hat matters is…whether the burdens are unreasonable." (RB 50.)

Defendants attempt to lessen the effect of the ID requirement by terming it "merely a regulation." However – as discussed at p. 25-26, *infra* – the fact that purpose is said to be "administrative is of limited relevance in weighing [its] intrusiveness on one's right to travel." *United States v. Martinez-Fuerte*, 428 U.S. 543, 560, n.14 (1976). Therefore, mere regulations are still subject to examination for their effect on constitutionally protected rights. Further, as the Supreme Court has stated, "[t]he right to travel is an 'unconditional personal right,' a right whose exercise may not be conditioned." *Dunn v. Blumstein*, 405 U.S. 330, 341 (1972).

Defendants assert *United States v. Davis* as proof of their ability to regulate the right to travel. (RB 4.) Plaintiff acknowledges that the prevention of air piracy is a compelling governmental interest. Defendants have twisted this acknowledgment to mean that Plaintiff has conceded that the ID requirement serves this compelling governmental interest. (RB 52.) This is in fact opposite to Plaintiff's clearly stated and repeated assertion that the ID requirement does not

make flying safer and in fact has the opposite effect by means of a false sense of security and wasted resources. (Br. 19.)

Plaintiff put forward several alternatives in allocating wasted and limited resources that actually serve the interest of preventing air piracy. (Br. 19.) Defendants criticize Plaintiff's alternatives as not serving the goal of keeping dangerous people off airplanes. (RB 52.) The *end* compelling governmental interest of preventing air piracy by *means* of keeping dangerous people off aircraft distinction is purposely ignored by Defendant. If a means is ineffective then it should be discarded and the resources allocated elsewhere to serve the compelling interest.

Finally, Plaintiff does not suggest that the right to travel demands that the government choose between prevention and interdiction after the fact as Defendants' suggest. (RB 53.) What Plaintiff does posit is that Defendants have ignored the imperative in *Waters v. Barry*, 711 F. Supp. 1125, 1135 (D.D.C. 1989) to "act gingerly…narrowly focused on the harm at hand." (see also *Ashcroft v. ACLU*, 124 S. Ct. 2783, 2791 (2004) and *Bourgeois v. Peters*, 2004 U.S. App. LEXIS 21487, p.39, (11th Cir. 2004)).

E. The First Amendment

Defendants completely ignore the fact that freedom of movement and freedom of assembly are fundamentally related. Instead, Defendants attempt to dispatch this issue in isolation using inapplicable First Amendment defenses. (RB 53.) Defendants did not contest that restrictions on one affect the other, they just

ignored the issue. A restriction on movement so that an individual cannot exercise First Amendment rights without violating the law is equivalent to a denial of those rights. *Johnson v. City of Cincinnati*, 310 F.3d 484 (6th Cir. 2002) (drug exclusion zones violated right to travel and right of association); *Shankle v. Texas City*, 885 F. Supp. 996, 1001-1002 (S.D. Texas, 1995) (repeated roadblocks of all roads into subdivision violated rights of privacy, travel and assembly); *City of Maquoketa v. Russell*, 484 N.W.2d 179, 183 (Iowa 1992); *see also Ervin v. State*, 163 N.W.2d 207, 210 (Wis. 1968) ("freedom of movement is inextricably involved with the freedoms set forth in the First Amendment").

Defendants argue, using traditional First Amendment analysis, that even if the right to assemble was burdened, it was not directly targeted by the ID requirement, nor did it impose a serious burden. (RB 54.) This logic is inapplicable in the restrictions on travel / assembly context.

First Amendment rights in general are "cognate rights" and "indispensable" to our democratic freedoms. *Thomas v. Collins, Sheriff*, 323 U.S. 516, 530 (1945) ("This case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins." *Id.* at 529.) Requiring government permission in order to exercise the First Amendment right of assembly triggers prior restraint analysis. *Bourgeois v. Peters*, 2004 U.S. App. LEXIS 21487, 26 (11th Cir. 2004). Here, there are no articulable standards to guard against governmental discretion.

F. The Fourth Amendment

1. Plaintiff Was "Seized" when Defendants Prevented His Travel.

Defendants rely on *INS v. Delgado* to make their point that merely asking for ID is not a seizure under the Fourth Amendment. (RB 38.) However, an analysis of *Delgado* illustrates the critical distinction between a request and a demand: "(I)f 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." 466 U.S. 210, 216-217 (1984) (emphasis added).

Government authorities restricted Plaintiff's right to travel after he declined to comply with their order to either surrender his ID or otherwise face a more intrusive search than ordinarily applied. (ER 5-11.) Any alleged "freedom to leave the airport" ignores the severe restriction placed on Plaintiff. This Court has cited with approval a commentator's observation that "a passenger is not, of course, compelled to travel by airplane, but many travelers would reasonably conclude that they had no realistic alternative." *$124,570 U.S. Currency*, 873 F.2d at 1248, n.8 (9th Cir. 1989). The "*additional* steps" mentioned in *Delgado* are the inability of Plaintiff to travel.

Contrary to the government's contention (RB 39), *California v. Hodari D.* does not stand for the proposition that there is no seizure if the person feels he is

"free to leave." The test for existence of a seizure is the "show of authority" which is an objective one. 499 U.S. 621, 628 (1991). The question is not whether the citizen was ordered to show ID, but what "the officer's words and actions would have conveyed … to a reasonable person." *Id.* Authorities may ask questions without basis for suspicion as long as they "do not convey a message that compliance with their requests is required." *Florida v. Bostick*, 501 U.S. 429, 435 (1991). TSA signs at airports that state passengers must show ID convey the message that compliance is required. The voluntariness and "free to leave" issues are addressed in the Unconditional Conditions section of this brief. *Infra.*

2. The ID Requirement Exceeds Limitations Imposed by *United States v. Davis.*

The "airport exception" to the Fourth Amendment does not include warrantless general searches for identification. Per *United States v. Davis,* the "screening process [must be] no more extensive nor intensive than necessary … to detect the presence of weapons or explosives." 482 F.2d 893, 913 (9th Cir. 1973). "[W]hen elements of discretion and prejudice are interjected (into the search for hijackers) it becomes constitutionally impermissible." *United States v. Lopez*, 328 F. Supp. 1077, 1101 (E.D.N.Y. 1971). Any demand for ID by police must be based on reasonable suspicion with objective criteria. *Brown v. Texas*, 443 U.S. 47, 51-52 (1979).

Defendants contend that the link between identification and "the threat of weapons or explosives (is) because it seeks to identify whether a boarding passenger is someone likely to pose such a threat." (RB 45.) However, the narrow airport exception to Fourth Amendment protections only applies to physical or visual searches of passengers and luggage. *See $124,570 U.S. Currency*, 873 F.2d at 1244.

Per *Michigan Department of State Police v. Sitz*, 496 U.S. 444, 454 (1990), there must be some empirical data that a seizure advances the public interest. Thus, in *Sitz*, the court upheld sobriety checkpoints where it was shown that 1.5% of stopped drivers were arrested for driving while impaired. In *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976), the Court noted that 146,000 cars were stopped over eight days and 171 found to contain illegal aliens. Here, however, the District Court made *no factual findings as to the actual effectiveness of the ID requirement to any public interest*. Plaintiff vehemently asserts that an ID requirement actually makes aviation *less* safe. (Br. 19.)

As a matter of law, the state of the pleadings and these factual gaps in the record should preclude judgment for the government. Unlike the facts presented in *Vernonia Sch. Dist. 47 J v. Acton*, 515 U.S. 646, 663 (1995), it is not "self-evident" that an ID-or-search requirement is efficacious in mitigating the threat of terror.

G. The "Unconstitutional Conditions" Doctrine Applies to the ID Requirement

Defendants refuse to address Plaintiffs' citation of this doctrine in airport cases such as *United States v. Lopez*, 328 F. Supp. at 1093 and a long line of Supreme Court precedents. A just-issued Eleventh Circuit case stresses the vitality of the "unconstitutional conditions" doctrine and its applicability here. In *Bourgeois v. Peters*, 2004 U.S. App. LEXIS 21487 (11th Cir.) (October 15, 2004), citizens challenged an unpublished city policy applied to each of the 15,000 people who gather annually to protest near the School of the Americas. An executive branch official unilaterally decided that the protesters must submit to a search for metallic objects at a checkpoint, before being able to assemble, speak, or listen. Those who did not submit to the initial search were excluded. The policy was justified by the threat of terrorism. *Id.* at 4.

The Eleventh Circuit decided that the policy and the city's actions violated both the Fourth and First Amendments. *Id.* at 27. "The City's search policy...is a burden on…association imposed through the exercise of a government official's unbridled discretion...(also) a form of prior restraint on… assembly…." *Id.* at 26-27. "Finally, even putting aside First Amendment analysis, the search policy constitutes an "unconstitutional condition;" protestors were required to surrender their Fourth Amendment rights...in order to exercise their First Amendment

rights." *Id.* at 26-27. "We emphasize that, in establishing such a general policy for determining the specific occasions on which mass searches may be implemented, legislatures or municipal governing bodies must establish specific criteria susceptible to judicial review. They may not simply craft ordinances permitting mass searches `when public safety so requires'" *Id.* at 32. "We cannot simply suspend or restrict civil liberties until the War on Terror is over, because the War on Terror is unlikely ever to be truly over. September 11, 2001, already a day of immeasurable tragedy, cannot be the day liberty perished in this country." *Id.* at 16. "The city (contends) the searches are permissible because they are entirely voluntary." "This is a classic 'unconditional condition' in which the government conditions receipt of a benefit or privilege on the relinquishment of a constitutional right." *Id.* at 45.

H. Due Process – Secret Law

Defendants contend that the secrecy surrounding the ID requirement does not violate due process because 49 U.S.C. §114(s)(1)(c) states that the Under Secretary shall prescribe regulations prohibiting the disclosure of *information* obtained or developed in carrying out security. (RB 31, emphasis added.) However, to claim the ID requirement is *information* which §114(s)(1)(c) gives Defendant the power to keep secret is disingenuous at best. A law is not

"information" and the Under Secretary has plainly exceeded the scope of his authority by treating one as such.

Including the actual law requiring identification to travel in a set of *information* that Defendants defined as "Sensitive Security Information" (RB 32) and restricting its disclosure to "persons with a need to know," which Defendant has decided that Plaintiff is not, violates both due process and common sense. Both Kafka and Orwell would be impressed with such nonsense.

Plaintiff contends that the law's secrecy is the ultimate in vagueness and that it vests standardless discretion in the hands of its enforcers. (ER 12.) Defendants argue that the ID requirement involves a civil penalty and therefore the Court should be more tolerant of any vagueness it may contain. (RB 33.) As the Supreme Court has articulated, "[t]he void-for-vagueness doctrine reflects the principle that 'a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984) quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). A statute is void-for-vagueness if it either (1) fails "to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits;" or (2) authorizes or even encourages "arbitrary and discriminatory enforcement." *Chicago v. Morales*, 527

U.S. 41, 56 (1999). This doctrine, while more commonly employed to invalidate criminal laws, is also applicable to civil statutes and regulations. *See Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982); *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d 1242, 1267 (3rd Cir. 1992). Regardless of the level of tolerance exhibited by the Court, secret laws are prohibitively vague.

Defendants claim that laws prohibiting air piracy provided Plaintiff notice of the ID requirement. (RB 33.) This doesn't make sense. A parallel analogy illustrating its failing would be a suggestion that laws against murder are notice of a requirement that every citizen must surrender their identity to the police regardless of suspicion.

Defendants attempt to avoid due process analysis altogether by terming the ID requirement a "law-enforcement-identification-technique." (RB 34.) This does not preclude its examination for the violation of constitutional rights. "The fact that the purpose of [stops]… is said to be administrative is of limited relevance in weighing their intrusiveness on one's right to travel." *Martinez-Fuerte*, 428 U.S. at 560.

Law enforcement techniques are subject to constitutional restraints. "The notion that law enforcement needs alone justify … intrusions was put to rest by the majority in *Almeida:* ... 'The needs of law enforcement stand in constant tension

with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.'" *United States v. Martinez-Fuerte*, 514 F.2d 308, 318 (9th Cir. 1975) (quoting *Almeida-Sanchez v. United States* 413 U.S. 266, 273 (1973)).

Further, "the effectiveness of a law-enforcement technique is not proof of its constitutionality." *Florida v. Bostick* 501 U.S. 429, 440 (1991) (Marshall, J., dissenting) "This Court, as the dissent correctly observes, is not empowered to suspend constitutional guarantees so that the Government may more effectively wage a "war" [here on drugs]. If that war is to be fought, those who fight it must respect the rights of the individuals...." *Id.* at 439 (majority opinion)

Information which merely enables an individual to conform his actions to an agency's understanding of the law applied by the agency does not impede law enforcement…." *Stokes v. Brennan*, 476 F.2d 699, 701 (5th Cir. 1973). Further, "disclosure of the information clarifying an agency's substantive or procedural law serves the very goals of enforcement by encouraging knowledgeable and voluntary compliance with the law." *Id.*

The ID requirement is more like a licensing scheme than a "law-enforcement-technique." Passengers must now receive permission from Defendants to travel domestically by air. Defendants' decision to issue or withhold

this license depends on whether the passenger allows himself to be subjected to surrendering his ID (or, now we are told, being subjected to and passing some undefined "heightened" level of suspicionless physical search) and whether that identification document passes unknown requirements. In contrast is the permissible law enforcement technique where the names and addresses of felons residing in a certain community are compiled and furnished to the police. *See Lambert v. California*, 355 U.S. 225 (1957). Defendants contend that they do not compile data to record passengers' travel habits but rather check passengers' names against a list of those vaguely termed "dangerous to aviation safety." As such, the ID requirement is part of the granting of permission to travel, a licensing scheme, and less like a law enforcement technique.

However you categorize it, something that "makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Staub v. Baxley*, 355 U.S. 313, 322 (1958).

III. CONCLUSION

The free movement of citizens is at risk in this case, as is their ability to see the laws that affect their exercise of the rights to travel, speak, associate, and

assemble. Sobering questions are before us as to whether Defendants are deliberately misleading to the public regarding the true rules, their existence, force or effect, and constitutionality.

Government Defendants now claim that travelers can elect to be subjected to a "heightened" level of search instead of showing ID. This tardy revelation by Defendants of the substance of the law comes with jurisdictional and standing challenges motivated to foreclose *any* meaningful judicial review of the TSA, regardless of circumstance.

Plaintiff asks this Court to remember that this is an appeal of a District Court order granting Defendants' Motions to Dismiss with prejudice. Plaintiff does not seek to have his case transferred to the Court of Appeals but rather to have the District Court's dismissal reviewed *de novo* using the appellate record. This Court has already ruled this record may not be expanded on appeal and Defendants' repeated efforts to do so should be denied.

If this Court denies Plaintiff's appeal, he asks leave to amend and cure potential deficiencies in his pleadings such as by adding plaintiffs that have experienced the ID requirement in every form of short and long distance transportation.

Plaintiff asks the Court to find that his initial five causes of action have been stated adequately to survive Defendants' Motion to Dismiss and to

remand this case to the District Court for further proceedings such as discovery and summary judgment or for the amendment of his Complaint if necessary.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,882 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 SP1 in Times New Roman, 14-point font.

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CERTIFICATE OF SERVICE

I certify that on November 1, 2004, an original and fifteen (15) copies of Appellant John Gilmore's Reply Brief were sent, via hand delivery, to the Clerk of the United States Court of Appeals for the Ninth Circuit, 95 Seventh Street, San Francisco, California 94110-3939, and two (2) copies were sent, via United States mail, postage prepaid to:

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