No. 04-15736

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN GILMORE,

Plaintiff-Appellant,

v.

JOHN ASHCROFT,
Attorney General, et al.,

Defendants-Appellees.

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

BRIEF FOR APPELLEES

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JURISDICTIONAL STATEMENT

The district court lacked jurisdiction because under 49 U.S.C. § 46110, plaintiff's claims can be raised only by direct petition for review in the court of appeals; otherwise, the district court had jurisdiction under 28 U.S.C. § 1331. On March 23, 2004, the district court issued a final judgment dismissing with prejudice all of plaintiff's claims against all defendants. Plaintiff filed a timely notice of appeal on April 14, 2004. Aside from the jurisdictional issue just mentioned, this Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether plaintiff has standing to challenge any Government action other than the requirement that passengers present identification or submit to a search of their person and baggage before boarding an airline flight.

2. Whether the district court had jurisdiction over plaintiff's claims.

3. Whether the Government violates plaintiff's constitutional rights by requiring all airline passengers either to present identification before boarding a flight or to submit to a search of their person and baggage.

STATEMENT OF THE CASE

On July 4, 2002, plaintiff sought to fly on two different commercial airlines to travel from California to Washington, D.C. Both times, plaintiff was told by airline personnel that he could not board the airplane unless he either showed identification or submitted to a search. Both times, plaintiff refused either option. Plaintiff was neither arrested nor otherwise punished for his refusal; rather, he was permitted simply to walk away.

Plaintiff then filed a complaint in the United States District Court for the Northern District of California against federal defendants and against the two airlines (Southwest Airlines and United Air Lines) that refused to board him.[1] He claimed that, because the alleged

[1] The federal defendants named in the Complaint are John Ashcroft, in his official capacity as Attorney General of the United States; Robert Mueller, in his official capacity as Director of the Federal Bureau of Investigation ("FBI"); Norm Mineta, in his official capacity as Secretary of Transportation; Jane F. Garvey, in her official capacity as Administrator of the Federal Aviation Administration; John W. Magaw, in his official capacity as Administrator of the Transportation Security Administration; and Tom Ridge, in his official capacity as head of the

identification-or-search requirement is not published by the Federal Government, it violates due process by failing to give adequate notice and by vesting standardless discretion in government officials. Plaintiff also claimed that this requirement violates his Fourth Amendment right to be free from unreasonable searches and seizures; his constitutional right to travel; and his First Amendment rights to associate and to petition the Government for redress of grievances.

The district court dismissed plaintiff's complaint in full with prejudice. The court held that plaintiff lacked standing to challenge anything other than the identification-or-search requirement; that it lacked statutory jurisdiction to review plaintiff's due process challenge; and that plaintiff's remaining constitutional challenges failed to state a claim on which relief could be granted. Plaintiff now appeals.

STATEMENT OF FACTS

I. STATUTORY AND REGULATORY BACKGROUND

Department of Homeland Security. Pursuant to Federal Rule of Civil Procedure 25(d)(1), defendant Marion C. Blakey automatically substituted for Jane F. Garvey, and Admiral James M. Loy substituted for John W. Magaw. See District Court Op. at 2 n.2 (E.R. 87).

Private defendant United Airlines has filed a petition for bankruptcy and claims against it are stayed pursuant to the Bankruptcy Code's automatic stay provision. 11 U.S.C. § 362(a). All parties agreed in the district court to sever all claims against United Air Lines. See District Court Op. at 1 n.1 (E.R. 86).

"The need to prevent airline hijacking is unquestionably grave and urgent." United States v. Davis, 482 F.2d 893, 910 (9th Cir. 1973). The Federal Government protects against airline hijacking and similar threats through a comprehensive statutory and regulatory scheme.[2]

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

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[2] The Government's airline security procedures have existed in some form since at least 1961. See Pub. L. No. 87-197, 75 Stat. 466; see also Davis, 482 F.2d at 897-98 & n.5. The Government, of course, continues to respond to the increasingly urgent issue of airline security. See generally Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 603 (2001).

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

[3] By operation of law, all passengers' tickets are deemed to include an agreement that air transport is conditional on the passengers' consent to such a search. 49 U.S.C. § 44902(c).

Third, Congress has charged the Under Secretary of Transportation for Security, who is the head of the Transportation Security Administration ("TSA"), with overall responsibility for airline security, and has conferred on him authority to carry out that responsibility. 49 U.S.C. § 114(d).[4] Together with the Director of the FBI, the Under Secretary must "assess current and potential threats to the domestic air transportation system," and "decide on and carry out the most effective method for continuous analysis and monitoring of security threats to that system." 49 U.S.C. § 44904(a). The Under Secretary must take "necessary actions to improve domestic air transportation," 49 U.S.C. § 44904(c), which he can carry out under his authority to "prescribe regulations to protect passengers and property on an aircraft . . . against an act of criminal violence or aircraft piracy," 49 U.S.C. § 44903(b).

The Under Secretary must also require each airport operator to "establish [a] security program . . . that is adequate to ensure the safety of passengers," 49 U.S.C. § 44903(c)(1); see also 49 C.F.R. §§ 1544.101(a), 1544.103(a)(1); TSA can amend those security programs,

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[4] The Under Secretary and TSA itself were both originally placed within the Department of Transportation. 49 U.S.C. § 114(a), (b)(1). TSA's functions, as well as the Under Secretary's, were transferred from the Department of Transportation to the Department of Homeland Security ("DHS") pursuant to § 403(2) of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified at 6 U.S.C. § 203(2)). The Under Secretary is now known as the Administrator of the TSA. 49 C.F.R. § 1500.3. Because federal statutes continue to refer to the head of TSA as the "Under Secretary," we do so in this brief as well.

including on an emergency basis, if the public interest requires, 49 C.F.R. § 1544.105. The Under Secretary can also issue "Security Directives" to aircraft operators when he "determines that additional security measures are necessary to respond to a threat assessment." 49 C.F.R. § 1544.305(a). Compliance with those Directives by air transport personnel is mandatory. 49 C.F.R. § 1544.305(b).

The Under Secretary must also ensure that federal agencies "share . . . data on individuals identified . . . who may pose a risk to transportation or national security," "notif[y] . . . airport or airline security officers of the identity of [such] individuals" and "establish policies and procedures requiring air carriers [to] prevent the individual from boarding an aircraft, or take other appropriate action with respect to that individual." 49 U.S.C. § 114(h)(1)-(3). TSA has implemented these provisions through a series of Security Directives and Emergency Amendments to air carrier security programs, which include a list of individuals who are either barred from boarding an aircraft altogether (the "no fly list") or required to undergo additional screening prior to boarding (the "selectee list").

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

particular flight or series of flights," he "shall cancel the flight or series of flights." 49 U.S.C. § 44905(b).

Finally, except in narrowly-defined circumstances, federal law prohibits the disclosure of sensitive security information related to commercial air travel. Notwithstanding the Freedom of Information Act, "the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." 49 U.S.C. § 114(s)(1)(C). See also 49 U.S.C. § 40119(b)(1)(C) (similar authority for Secretary of Transportation).

Pursuant to that authority, the Under Secretary has defined a set of information known as "sensitive security information" or "SSI" (see 49 C.F.R. § 1520.3) and directed that such information shall not be disclosed except in certain limited circumstances not applicable here. 49 C.F.R. § 1520.9(a)(2) ("A covered person must . . . [d]isclose . . . SSI only to covered persons who have a need to know, unless otherwise authorized in writing by TSA.").[5] The Under Secretary has defined SSI to include "[a]ny security program or security contingency plan issued, established, required, received, or approved by DOT or DHS, including . . . [a]ny aircraft

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[5] Covered persons are defined in 49 C.F.R. § 1520.7. Persons with a need to know are defined in 49 C.F.R. § 1520.11. Plaintiff does not argue that he has a need to know within the meaning of this regulation.

Sensitive security information may be disclosed if the TSA provides in writing that it is "in the interest of public safety or in furtherance of transportation security" to do so. 49 C.F.R. § 1520.5(b).

operator or airport operator security program" and "[a]ny Security Directive . . . [i]ssued by TSA." 49 C.F.R. § 1520.5(b)(1)(i), (b)(2)(i). By regulation, aircraft operators must also "[r]estrict the distribution, disclosure, and availability of information contained in the security program to persons with a need-to-know." 49 C.F.R. § 1544.103(b)(4).

II. FACTUAL AND PROCEDURAL BACKGROUND

1. On July 4, 2002, plaintiff went to the Oakland International Airport with "paper tickets, in his own name, to fly to Baltimore-Washington International Airport." E.R. 5. The purpose of his trip was to "petition the government for redress of grievances – specifically, the requirement for airline travelers to provide identification." E.R. 5.[6]

Plaintiff presented his ticket to representatives at Southwest Airlines, but refused to show any identification when asked to do so by Southwest. Southwest informed plaintiff that he would not be permitted to board the airplane without showing identification, but plaintiff still refused. Plaintiff then left the airport without further incident. E.R. 5-6.

Plaintiff then went to the San Francisco airport to buy a ticket to Washington, D.C. from United Air Lines. E.R. 6. He was again asked to present identification, and he again refused. Plaintiff was told by United personnel that he could not fly without showing identification. He was subsequently informed that he could choose either to show identification or be a "selectee," which meant that he would be subject to an "intense search" of his person and property – a

[6] Because defendants filed a motion to dismiss, the Government assumes the truth of all allegations in plaintiff's complaint.

search more intensive than would otherwise be conducted if plaintiff showed his identification. E.R. 6-7. Plaintiff refused this option as well. E.R. 7. Plaintiff was then told he would not be permitted to fly, E.R. 7, and, once again, he left the airport.

2. On July 18, 2002, Plaintiff filed the instant suit in United States District Court for the Northern District of California against federal defendants, Southwest Airlines, and United Air Lines. Plaintiff claimed that the identification-or-search requirement violates his constitution rights. Specifically, plaintiff alleges that the requirement violates due process because it is unpublished and therefore unconstitutionally vague. E.R. 12. He also contends that the requirement violates his Fourth Amendment right against unreasonable searches and seizures, E.R. 12-13; his right to travel, E.R. 13; and his First Amendment rights to associate and petition the government for redress of grievances, E.R. 13-14.[7]

The federal defendants moved to dismiss plaintiff's complaint under Federal Rule of Civil Procedure 12(b)(1) and (6) for lack of jurisdiction and for failure to state a claim on which relief could be granted. On March 23, 2004, the district court granted the motion.

3. The district court first held that, "to the extent that plaintiff pleads causes of action beyond those stemming from the identification requirement, those causes of action are

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[7] Plaintiff also brought claims alleging violations of his Equal Protection rights and under the Freedom of Information Act. E.R. 14-15. Plaintiff has since withdrawn those claims. See District Court Op. at 2 n.3 (E.R. 87).

DISMISSED for lack of standing." District Court Op. at 5 (E.R. 90). The court noted that plaintiff's Complaint criticized several aspects of TSA's security procedures – including the "no fly list," other "watchlists," and the CAPPS program (an airline passenger screening process) – but plaintiff "fail[ed] to allege that his name was on any of these lists or that he personally suffered any injury or inconvenience as a result." Id. at 4 (E.R. 89). Rather, the only injury alleged by plaintiff resulted from the identification-or-search requirement. Accordingly, the district court held that plaintiff had standing only to challenge that requirement, and not to challenge any other security requirement, procedure, or action.

Next, the district court held that it lacked statutory jurisdiction to entertain plaintiff's due process vagueness challenge. Id. at 5-6 (E.R. 90-91). Because 49 U.S.C. § 46110(a) vests exclusive jurisdiction in the courts of appeals to review an "order issued by the . . . Under Secretary of Transportation for Security," and because plaintiff's due process "claim squarely attacks the orders or regulations issued by the TSA and/or the FAA with respect to airport security," id. at 5 (E.R. 90), the court held that it lacked jurisdiction over this claim.

On the merits, the district court held that "[t]he request for identification, where plaintiff is free to refuse," is neither a search nor a seizure within the meaning of the Fourth Amendment. Id. at 6 (E.R. 91). While a request for identification under threat of an arrest can "implicat[e]" the Fourth Amendment, here plaintiff "was not required to provide identification on pain of criminal or other governmental sanction," and thus did not implicate the Fourth Amendment. Id. at 7 (E.R. 92). As for the request that plaintiff submit to a search of his person and property, the district court upheld that requirement as well. Specifically, because "searches of prospective

passengers are reasonable and . . . necessary as a means for detecting weapons and explosives," and because "[a]t all times plaintiff was free to leave the airport rather than submit to search," the "request that plaintiff consent to search was reasonable and not in violation of the Fourth Amendment." Id. at 8 (E.R. 93).

The district court also rejected plaintiff's right-to-travel argument. It held that the Constitution "does not guarantee the right to travel by any particular form of transportation," and thus the identification-or-search requirement, applicable only to airplane travel, did not violate plaintiff's rights. Id. at 9 (E.R. 94). The district court also rejected that claim because the right to travel only prohibits "unreasonable" burdens on travel, but "the request that plaintiff either submit to search, present identification, or presumably use another mode of transport," is not an unreasonable burden. Id. (E.R. 94). Nor, held the court, does the identification-or-search requirement violate plaintiff's right to associate: the requirement only "indirectly affects associational rights," and to the extent plaintiff sought to associate in Washington, D.C., he "had numerous other methods of reaching Washington." Id. at 9-10 (E.R. 94-95). Finally, the district court dismissed plaintiff's petition-for-redress-of-grievances claim, holding that the right "is only implicated by governmental action that prevents the exercise of such a right," and, while the identification-or-search requirement "may have made it more difficult" for plaintiff to travel to Washington, "he certainly was not altogether prevented from doing so." Id. at 10 (E.R. 95).

4. Before the district court, TSA declined to confirm the existence or the content of the alleged identification-or-search requirement targeted in plaintiff's complaint. It did so for two reasons: first, because the Government filed a motion to dismiss, all the parties and the district

court were required to assume the truth of plaintiff's allegations – including the existence and content of an identification-or-search requirement as set forth in the complaint. Accordingly, it was unnecessary for the Government to comment on whether plaintiff's allegations were, in fact, correct. Second, as noted above (supra at 8-9), TSA security directives are SSI. Therefore, under the applicable federal statute and accompanying regulations, they may not be disclosed in open court, to plaintiff, or to plaintiff's counsel.

Prior to filing this appellate brief, the Government moved for leave to file certain SSI material under seal, for *in camera* and *ex parte* review, so that this Court could examine the actual Government policies and requirements rather than those simply alleged by the plaintiff to exist. An Appellate Commissioner denied that motion. Consequently, in this brief the Government will again follow the procedure it adopted before the district court, namely, to assume the truth of the content of the identification-or-search requirement as alleged in plaintiff's complaint. The sole exception, however, is that TSA has now confirmed the existence of an identification requirement – that "as part of its security rules, TSA requires airlines to ask passengers for identification at check-in." Protection of Sensitive Security Information, 69 Fed. Reg. 28066, 28070-28071 (May 18, 2004).

The Government also notes that, should this Court wish to examine the SSI at issue in this matter, the Government stands ready to provide that material under seal, for *in camera* and *ex parte* review by the Court.

SUMMARY OF ARGUMENT

Millions of people board airplanes every year and routinely show identification before boarding. By checking identification, those responsible for airline security and protecting the public try to determine whether a boarding passenger is on a list of those who have been identified as threats (or suspected threats) to airline security. In the alternative, a passenger can submit to a more extensive search rather than show identification. Plaintiff refuses to do either one, claiming that the Constitution prohibits either option. As the district court held, plaintiff's arguments fail procedurally and on the merits.

Although plaintiff's complaint and brief criticize at length a wide variety of alleged government actions and procedures, the only injury he alleges is an inability to board an airplane. And the only reason he was not permitted to do so was that he refused to either show identification or submit to a search. Consequently, he has standing only to challenge the identification-or-search requirement, and no standing in this case to challenge anything else.

Moreover, the district court lacked statutory jurisdiction to entertain any of plaintiff's claims. A special statutory review provision, 49 U.S.C. § 46110, vests exclusive jurisdiction in the courts of appeals to hear challenges to orders issued by TSA relating to airline security. Because plaintiff's claims all challenge the lawfulness of asserted TSA orders – specifically, a security directive containing the identification-or-search requirement and the order classifying that security directive as non-disclosable SSI – the district court was without jurisdiction to hear plaintiff's claims. Accordingly, this Court can affirm the dismissal of his complaint on that basis alone.

Plaintiff fares no better on the merits of his complaint. The identification-or-search requirement is not unconstitutionally vague. Because the requirement is a law enforcement detection technique designed to ferret out possible violations of the law (as opposed to defining the violation itself), plaintiff has no due process entitlement to advance notice of the details of that requirement. And, even if plaintiff were so entitled, the identification-or-search requirement was adequately conveyed to him by oral instructions. Nor do the relevant airline security laws vest standardless discretion in government officials. To the contrary, this Court has upheld minimal standards – such as fostering "public safety" and "public interest" – against due process challenges, and the standards set forth by Congress for airline security easily pass that test.

Plaintiff's claims that the identification-or-search requirement violates the Fourth Amendment and the right to travel are squarely foreclosed by Circuit precedent. Specifically, in United States v. Davis, 482 F.2d 893 (9th Cir. 1973), this Court upheld airline security procedures against both a Fourth Amendment and right-to-travel challenges, and the present case falls squarely under Davis. As for plaintiff's First Amendment right-to-association and right-to-petition claims, the identification-or-search requirement neither directly targets nor affects those rights in more than a minimal and incidental way. Accordingly, the requirement alleged by plaintiff does not even implicate the First Amendment, let alone violate plaintiff's First Amendment rights.

Thus, this Court can alternatively affirm the district court's dismissal of plaintiff's complaint on the merits, holding that all his arguments fail to state a claim on which relief can be granted.

STANDARD OF REVIEW

The district court's order granting the federal defendants' motion to dismiss is reviewed de novo, whether the dismissal is for failure to state a claim under Rule 12(b)(6), see, e.g., Awabdy v. City of Adelanto, 368 F.3d 1062, 1066 (9th Cir. 2004), or for lack of jurisdiction under Rule 12(b)(1), see, e.g., ONRC Action v. Bureau of Land Mgmt., 150 F.3d 1132, 1135 (9th Cir. 1998). The district court's denial of plaintiff's motion to take judicial notice is reviewed for abuse of discretion. United States v. Daychild, 357 F.3d 1082, 1099 n.26 (9th Cir. 2004). The district court's denial of plaintiff's motion for leave to amend his complaint is reviewed for abuse of discretion, Bowles v. Reade, 198 F.3d 752, 757 (9th Cir. 1999), and this Court will not reverse "[a]bsent a definite and firm conviction that the district court committed a clear error of judgment," Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990).

ARGUMENT

I. AS THE DISTRICT COURT CORRECTLY HELD, PLAINTIFF LACKS STANDING TO CHALLENGE ANYTHING OTHER THAN THE IDENTIFICATION-OR-SEARCH REQUIREMENT

To pursue a claim in federal court, a plaintiff bears the burden to establish standing. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 104 (1998). The requirements for standing are familiar: the plaintiff must demonstrate an "injury in fact"; a "causal connection between the injury and the conduct complained of," that is, that the injury is "fairly traceable to the challenged action"; and that the injury is "likely" to be "redressed by a favorable decision." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (alteration and internal quotation marks omitted). And, furthermore, a plaintiff's standing to challenge one procedure does not confer standing to challenge any other procedure or requirement, because "standing is not dispensed in gross." Lewis v. Casey, 518 U.S. 343, 358 n.6 (1996). Here, plaintiff's alleged injury is "fairly traceable" to one and only one action – the asserted requirement that every airline passenger either show identification or submit to a more extensive search of his person and property. Accordingly, plaintiff has standing only to challenge that identification-or-search requirement.

Plaintiff's Complaint and brief, however, stray well beyond the identification-or-search requirement to levy criticism at a broad swath of other government regulations, procedures or actions: the "No Fly" and "Watch" lists, E.R. 3, 9; Br. at 7, 14, 34, 38; restrictions placed on train and bus travel, E.R. 7; Br. at 8, 9-10, 16, 17, 25, 31; the Government's definition of a "terrorist," E.R. 3, 10; the defendants' participation in the Technical Support Working Group, E.R. 8; Br. at 7; the use of the CAPPS and CAPPS II airline passenger security systems, E.R. 8-

9;[8] Br. at 7, 30, 34, 38; "a generalized 'enemies list,'" E.R. 3, 9; "scrutiniz[ation] by facial-recognition systems," E.R. 11; and "the government's plan to create huge, integrated databases by mingling criminal histories with credit records, previous travel history and much more, in order to create dossiers on every traveling citizen," E.R. 2-3.

Despite the description of these generalized grievances, the only injury alleged in plaintiff's complaint is that he was prevented from boarding two airplanes. And the only alleged reason for this asserted injury is that plaintiff refused to comply with the identification-or-search requirement. None of the other regulations, procedures, or actions at which plaintiff directs his criticism played any role whatsoever in keeping him off the planes. In other words, his alleged injury is fairly traceable only to the identification-or-search requirement and not to anything else. Accordingly, the district court correctly held that plaintiff has standing only to challenge the identification-or-search requirement, but not to challenge any of the many other asserted procedures, requirements, and actions listed in his complaint.

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[8] TSA is developing an aviation security program to replace CAPPS I known as "Secure Flight." See 69 Fed. Reg. 57352-01, 37352 (Sept. 24, 2004)("After a lengthy review of the initial plans for a successor system to Computer Assisted Passenger Prescreening System (CAPPS) . . . the Department of Homeland Security is moving forward with a next generation system of domestic passenger prescreening, called 'Secure Flight.'").

II. THE DISTRICT COURT LACKED JURISDICTION OVER PLAINTIFF'S CLAIMS

A. Under a special statutory review provision, 49 U.S.C. § 46110, this Court is vested with exclusive jurisdiction to review plaintiff's claims, and the district court lacked jurisdiction over those claims. For that reason alone, this Court should affirm the district court's dismissal of plaintiff's complaint.

The relevant statute controlling this case states, in pertinent part:

> [A] person disclosing a substantial interest in an order issued by the . . . Under Secretary of Transportation for Security . . . in whole or in part under this part, part B, or subsection (*l*) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. . . .
>
> [T]he court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order . . . .

49 U.S.C. § 46110 (a), (c). An order falling under the statute is within the exclusive jurisdiction of the courts of appeal, and the district court's jurisdiction is "preempted" by the statute "as to those classes of claims reviewable" under its provisions. Crist v. Leippe, 138 F.3d 801, 803 (9th Cir. 1998). This Court therefore affirms a district court's dismissal of claims for lack of jurisdiction when those claims fall under § 46110. See, e.g., Foster v. Skinner, 70 F.3d 1084, 1087-88 (9th Cir. 1995) (holding that § 46110 "vests exclusive jurisdiction in the court of appeals" and affirming the district court's dismissal of claims falling under that statute).

We emphasize that this Court's exclusive jurisdiction under § 46110 obviously does not mean that judicial review of attacks against TSA orders are precluded – it merely determines the

forum in which that review will occur, and does so to promote "'coherence and economy.'" San Diego Air Sports Ctr. Inc. v. FAA, 887 F.2d 966, 968 (9th Cir. 1989). The suggestion by amici here that dismissal for lack of jurisdiction under § 46110 would "insulate all conduct by [TSA] from judicial review" is thus plainly misplaced. ACLU Amicus Br. at 5; see also EPIC Amicus Br. at 3 (criticizing unreviewable laws).[9]

There is no question that an order not to disclose the TSA security directive is itself an order falling under § 46110. Section 46110 expressly refers to an order by the Under Secretary issued pursuant to 49 U.S.C. § 114(s). Section 114(s)(1)(C), in turn, expressly authorizes the Under Secretary to "prohibi[t] the disclosure of information obtained or developed in carrying out security" when he deems that disclosure would "be detrimental to the security of transportation."

[9] Section 46110's predecessor statute was codified at 49 U.S.C. § 1486. See City of Los Angeles v. FAA, 239 F.3d 1033, 1036 (9th Cir. 2001); Pub. L. No. 103-272 § 1(e), 108 Stat. 1230 (1994) (recodifying statute at § 46110). This Court's cases interpreting § 46110 have cited and relied upon cases interpreting former § 1486. See, e.g., Foster, 70 F.3d at 1087.

The security directive alleged by plaintiff to establish the identification-or-search requirement and challenged by him is also an "order" within the meaning of § 46110.[10] This Court defines an "order," as that term is used in the statute, as follows:

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

Crist v. Leippe, 138 F.3d 801, 804 (9th Cir. 1998) (alterations and citation omitted).

B. The security directive alleged by plaintiff manifestly meets this definition of "order." Without question, such a security directive "imposes an obligation," namely, the obligation of all airline passengers to present identification or submit to a search before they may board an airplane. Indeed, it is precisely the imposition of that obligation to which plaintiff objects. And the identification-or-search requirement certainly has a "direct and immediate effect on the day-

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[10] Section 46110's phrase "this part" refers to the United States Code, Title 49, Subtitle VII, Part A, which encompasses 49 U.S.C. §§ 40101-46507. The Under Secretary's requirement to provide for passenger screening is found within Part A (in §§ 44901-44902). Likewise, the Under Secretary's authority "to prescribe regulations to protect passengers and property on an aircraft," is also found in Part A (at § 44903(b)), and pursuant to that authority the Under Secretary promulgated a regulation (49 C.F.R. § 1544.305(a)) authorizing him to issue security directives such as the one challenged by plaintiff in this case.

to-day business of the party asserting wrongdoing." Immediate compliance with the security directive is mandatory, 49 C.F.R. § 1544.305(b), and as plaintiff admits, it affects air travelers on a "daily basis," Br. at 17. Likewise, all of the actions taken pursuant to the asserted security directive – the request for identification, the alternative of a more extensive search, and the refusal to permit plaintiff to board the plane without compliance – are "inescapably intertwined" with the order itself, which means that challenges to those actions are also within the exclusive jurisdiction of this Court. Crist, 138 F.3d at 803; see also Foster, 70 F.3d at 1087.

Finally, just as "orders" and actions that are "inescapably intertwined" with those orders are reviewable only by a direct petition to the court of appeals, so too are "intermediate agency actions" leading up to and bound up with the order including, for example, decisions on whether and to what extent to publish materials relating to the order. Clark v. Busey, 959 F.2d 808, 811 (9th Cir. 1992). Accordingly, all of plaintiff's claims were outside the district court's jurisdiction because they challenge an "order" within the meaning of § 46110.

C. Plaintiff argues that, under this Court's precedents, "broad constitutional challenges" to orders otherwise subject to § 46110 may be brought in the district court. Br. at 47. That contention is incorrect and is plainly incompatible with this Court's general rule that all challenges to orders, and to actions "inescapably intertwined" with such orders, must be brought by a direct petition for review in the court of appeals. In Tur v. FAA, 104 F.3d 290, 292 (9th Cir. 1997), this Court explained that, while "a facial challenge to the constitutionality of certain agency actions" may be brought in district court, a constitutional challenge based on a "specific individual claim" must be brought in a court of appeals. See also Mace v. Skinner, 34 F.3d 854,

859 & n.4 (9th Cir. 1994) (distinguishing a "broad challenge to . . . allegedly unconstitutional agency actions" from a constitutional claim "arising out of the facts of [a plaintiff's] individual case," and noting that the former may be brought in district court but the latter must be brought in a court of appeals).

This narrow exception created by this Court for facial constitutional challenges to orders does not help plaintiff, because all his claims here are as-applied challenges, not facial challenges. Plaintiff opens his brief by declaring that the jurisdictional question presented is whether "the District Court has jurisdiction to hear challenges" to TSA and FAA actions "as applied" to him. Br. at 2 (emphasis added). Moreover, plaintiff's brief makes clear that his constitutional claims are not facial challenges, but depend on the facts as applied to him. For instance, his right-to-travel claim depends (in his view) on a unique medical condition that keeps him from being able to drive a car. Br. at 5. Likewise, his Fourth Amendment argument hinges (again, in his own view) on the fact he was arrested in an airport eight years ago and therefore supposedly faces a threat of arrest today. Br. at 27. Finally, plaintiff believes that his due process vagueness challenge turns on the fact that (in his view) he personally was told three inconsistent stories by airline personnel about what TSA security directives require. Br. at 4, 19.

Accordingly, plaintiff's constitutional claims all depend – by his own arguments – on facts particular to him, and he contends that the identification-or-search requirement as applied to him is unconstitutional. Any exception this Court has applied permitting facial constitutional

challenges to agency orders to be brought in district court thus provides no avoidance for plaintiff from this Court's exclusive jurisdiction under § 46110.[11]

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[11] The distinction between a "facial challenge to agency action" and a challenge based on a "specific individual claim," was set forth by this Court in Tur v. FAA, 104 F.3d 290, 292 (9th Cir. 1997). Tur's distinction, in turn, grew out of Mace v. Skinner, 34 F.3d 854, 859 & n.4 (9th Cir. 1994), which interpreted § 46110 (then former § 1486) and distinguished claims "arising out of the facts of [a plaintiff's] individual case" (which can be brought only in the court of appeals) from claims that "constitute a broad challenge to allegedly unconstitutional [agency] practices" (which can be brought in the district court). Mace, in turn, relied heavily on McNary v. Haitian Refugee Center, Inc., 498 U.S. 479 (1991). McNary held that a statute vesting exclusive jurisdiction in the court of appeals to review claims relating to certain immigration applications applied only to "individual denials" and not to "general collateral challenges to unconstitutional practices and policies" respecting those applications. Id. at 492. Mace applied that individual- versus general-challenge distinction to § 46110, and that distinction eventually

became the as-applied versus facial challenge distinction set forth in Tur.

We note though, that McNary relied upon the specific language of the statutory review provision at issue, see 498 U.S. at 492, and that language has no parallel in § 46110. Accordingly, we believe that the facial versus as-applied distinction in Tur, originating as it does in Mace's mistaken application of McNary to § 46110, is incorrect. Rather, § 46110 should apply to all challenges to "orders" (whether facial or as applied) and, as noted above, to challenges to actions "inescapably intertwined" with an "order" (again, whether facial or as applied). Nevertheless, this Court developed a "heuristic distinction," Crist, 138 F.3d at 803, between "a facial challenge to the constitutionality of certain agency actions" and a "specific individual claim" against agency action, Tur, 104 F.3d at 292, and in this brief we follow what we understand that distinction to be.

D. Plaintiff also contends that there can be no order "[w]ithout an administrative proceeding and a fully developed administrative record," for without them "there is nothing for the circuit court to review." Br. at 44. This argument is also wrong.

First, there is an administrative record, namely, the TSA security directive alleged by plaintiff. The administrative record need not be voluminous – in fact, even a single letter suffices. San Diego Air Sports Ctr., Inc. v. FAA, 887 F.2d 966, 969 (9th Cir. 1989). While the Government has not to date filed that record with this Court for the reasons explained above, see supra at 14, that fact does not negate its existence.

Furthermore, the presence of an administrative record is not required for § 46110 to apply. In Nevada Airlines, Inc. v. Bond, 622 F.2d 1017, 1020 (9th Cir. 1980), this Court held that the absence of an administrative record did not preclude review under § 46110; rather, it simply means that the scope of the Court's review would be correspondingly narrow: "Without an administrative record or agency hearing at this stage of the proceedings . . . we limit our review to determining whether the [order] was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." Of course, that is all plaintiff seeks here – a determination of whether the identification-or-search requirement is "in accordance with law" or whether it violates his constitutional rights in one respect or another. Under Nevada Airlines, no administrative record or hearing is required for that kind of review.

Nor does the absence of an administrative record foreclose the court of appeal's exclusive jurisdiction to review plaintiff's procedural challenges to the order, such as his due process vagueness challenge. See San Diego Air Sports Ctr. v. FAA, 887 F.2d 966, 969 (9th Cir. 1989)

(where administrative record is limited, court is "limited [to] review [of] procedural questions").

Even if the administrative record were inadequate to permit court of appeals review, it does not follow that the district court has jurisdiction. Rather, in that situation the "proper course" would be for the challenging party "to seek reconsideration by the agency" to permit either a re-opened matter that provides a reviewable agency record, or the denial of reconsideration which itself would be reviewable by the court of appeals. City of Rochester v. Bond, 603 F.2d 927, 938 (D.C. Cir. 1979). Or, if the administrative record is inadequate, the matter can be remanded to the agency, id., or the Government might file supplemental declarations in court in order to more fully explain the rationale for its administrative action, see Camp v. Pitts, 411 U.S. 138, 142-43 (1973) (expressly authorizing such a procedure). Either way, an inadequate administrative record does not mean (as plaintiff supposes) that the district court could properly exercise jurisdiction. Rather, a challenging party must still file a petition for direct review in the court of appeals and then pursue one of the options just noted. Plaintiff, however, did not follow that course but filed a complaint in the district court, which lacked jurisdiction over his claims; this Court should therefore affirm the dismissal of his complaint.

E. Plaintiff also contends that there can be no order within the meaning of § 46110 because there was no agency administrative review or consideration of his claims. Br. at 44. But "petitioner's failure to pursue administrative review . . . is not relevant to a determination of whether we have authority to review [the agency's] decision under § 1486(a)." Southern Cal. Aerial Advertisers' Ass'n v FAA, 881 F.2d 672, 675 n.3 (9th Cir. 1989). The statute itself

makes this perfectly clear. Among the orders over which a court of appeals has exclusive jurisdiction are orders issued under 49 U.S.C. § 114(*l*). That subsection grants the Under Secretary authority to issue certain emergency procedures "without providing notice or an opportunity for comment," 49 U.S.C. § 114(*l*)(2)(A). Thus, contrary to plaintiff's argument, § 46110 expressly contemplates a petition for direct review in the court of appeals even in situations where there has been no opportunity for a challenging party to obtain administrative review of his claims.

For these reasons, this Court should affirm the district court's dismissal of plaintiff's complaint on the ground that the district court lacked jurisdiction over all his claims.

III. PLAINTIFF'S CONSTITUTIONAL CLAIMS ARE MERITLESS IN ANY EVENT

Even if plaintiff had filed his action in this Court, as the law required, those claims that the identification-or-search requirement, as applied to him, abridges his constitutional rights fail on the merits. We address here the merits of plaintiff's claims because this Court could conceivably decide to treat plaintiff's appeal as if it were a transfer of the action from the district court under 28 U.S.C. § 1631, and therefore properly before this Court on a petition for direct review under 49 U.S.C. § 46110. See, e.g., City of Alameda v. FAA, 285 F.3d 1143, 1144 (9th Cir. 2002). (If the Court adopts this course, it might wish to accept our offer to submit the relevant TSA material under seal for *ex parte* and *in camera* review.)

A. Due Process

Under 49 U.S.C. § 114(s)(1)(C), "the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security . . . if the

Under Secretary decides that disclosing the information would . . . be detrimental to the security of transportation." Pursuant to that authority, the Under Secretary has defined a set of information known as "SSI" or "sensitive security information" (see 49 C.F.R. § 1520.3), and has directed that such information shall not be disclosed except in certain narrowly-defined circumstances not applicable here. See, e.g., 49 C.F.R. § 1520.9(a)(2) ("A covered person must . . . [d]isclose . . . SSI only to covered persons who have a need to know, unless otherwise authorized in writing by TSA."). By regulation, aircraft operators must also "[r]estrict the distribution, disclosure, and availability of information contained in the security program to persons with a need-to-know." 49 C.F.R. § 1544.103(b)(4). The Under Secretary has defined SSI to include "[a]ny aircraft operator or airport operator security program" and "[a]ny Security Directive or order . . . [i]ssued by TSA." 49 C.F.R. § 1520.5(b)(1)(i), (b)(2)(i).

Plaintiff responds by contending that, because the entire asserted identification-or-search requirement has not been disclosed to him, it is "in violation of the Due Process Clause of the Fifth Amendment because it is vague, being unpublished, and thus provides no way for ordinary people . . . to conclusively determine what is legal." E.R. 12. Similarly, plaintiff argues that "such a scheme vests standardless discretion in the hands of its enforcers" because the "legal authority for the scheme is secret." Id. Neither objection is well taken.

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983). Thus, the doctrine focuses on "actual notice" of

the law and on its "arbitrary enforcement." Id. at 358. "The degree of vagueness that the Constitution tolerates, and the level of judicial scrutiny applied to a vagueness challenge, depend upon the nature of the enactment. The courts are more tolerant of possible vagueness in laws that impose civil rather than criminal penalties." Go Leasing v. National Transp. Safety Bd., 800 F.2d 1514, 1525 (9th Cir. 1986).

Plaintiff first contends that the asserted identification-or-search requirement, because it is unpublished, fails to provide him with adequate notice of what the law requires. But the law is quite clear: a passenger may not commit aircraft piracy, 49 U.S.C. § 46502(b), may not physically assault or threaten a member of a flight or cabin crew or take any action that poses an imminent threat to the safety of the aircraft or other individuals on board, 49 U.S.C. § 46318, and may not have a concealed weapon, loaded firearm, or explosive device on one's person or in one's property while on board, or attempting to board, an aircraft, 49 U.S.C. § 46505(b). Plaintiff, of course, is entitled to notice of those laws, so that he may "understand what conduct is prohibited," Kolender, 461 U.S. at 357, and he in fact has full notice of those laws as they are published in the United States Code.

What plaintiff seeks, however, is not notice of the laws but notice of the law enforcement detection techniques that the Government might use to detect or deter violations of the law. The identification-or-search requirement is simply a technique used to detect possible violations of the law, such as the prohibition on carrying a weapon or explosive onto the plane, 49 U.S.C. § 46505(b). While passengers have a right to know the law (that they cannot bring weapons

onboard), they have no due process entitlement to advance notice of how the Government might attempt to discover whether the law is being broken.

For instance, citizens have the right to know in advance that trafficking in illegal drugs is a crime, but they have no due process right to advance notice of a drug trafficking profile that the Government might use to identify potential criminals. This Court recognizes the "distinction between law-enforcement materials, which involve enforcement methods, and administrative materials, which define violations of the laws," Dirksen v. Department of Health and Human Servs., 803 F.2d 1456, 1458 (9th Cir. 1986); see also Hardy v. Bureau of Alcohol, Tobacco and Firearms, 631 F.2d 653, 657 (9th Cir. 1980), because disclosure of "techniques for apprehending those who engage in breaking the law," rather than the actual law itself, "would not promote lawful behavior; it would only facilitate law evasion." Caplan v. Bureau of Alcohol, Tobacco and Firearms, 587 F.2d 544, 548 (2d Cir. 1978). That principle applies here as well: plaintiff has a due process right to know what the law is so that he may conform his actions to it, but he has no corollary due process right to know the details of how the Government intends to detect violations. As explained earlier, plaintiff is in no way punished for attempting to board an airplane while refusing to show identification or submit to a search.

Even if plaintiff were entitled to notice of the content of the identification-or-search requirement, he received exactly that. As stated in his complaint, plaintiff was told precisely what he had to do in order to comply with the asserted security directive – plaintiff simply chose not to do so. See E.R. 5-7. According to his own complaint, plaintiff was told by airline personnel that he could either show identification or submit to a search of his person or

property. Id. He does not allege that he would have been barred from boarding if he had followed the instructions given to him. Plaintiff's claim therefore reduces to the proposition that due process entitles him to have these instructions written down – rather than communicated orally – but he cites no case supporting that proposition. See Goss v. Lopez, 419 U.S. 565, 581 (1975) (due process requires "oral or written notice"); Hufford v. McEnaney, 249 F.3d 1142, 1151 (9th Cir. 2001) (same); see also Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("The notice must be of such a nature as reasonably to convey the required information."). And the oral instructions given to plaintiff by airline personnel were not inconsistent, as he contends. Br. at 4, 19. Rather, they explained to him that the identification-or-search requirement could be satisfied in alternative ways.

Nor is there any "standardless discretion" in violation of due process. The vagueness doctrine requires that statutes "establish minimal guidelines to govern law enforcement," Kolender, 461 U.S. at 358, and invalidates statutes not when they have an "imprecise but comprehensible normative standard," but only when there is "no standard of conduct . . . specified at all," Village of Hoffman Estates v. Flipside Hoffman Estates, Inc., 455 U.S. 489, 495 n.7 (1982) (internal quotation marks omitted). Airline security requirements easily satisfy that test.

The Under Secretary must "provide for the screening of all passengers and property," 49 U.S.C. § 44901(a) (emphasis added), in order to "establish whether the passenger is carrying unlawfully a dangerous weapon, explosive, or other destructive substance," and the Under Secretary must prescribe regulations requiring airlines to "refuse to transport" passengers who do

not consent to such screening, 49 U.S.C. § 44902(a). The Under Secretary must also "carry out the most effective method for . . . monitoring . . . security threats" to the domestic air transportation system, and take "necessary actions to improve domestic air transportation." 49 U.S.C. § 44904(a), (c). Furthermore, the Under Secretary must also identify individuals "who may pose a risk to transportation or national security" and "establish policies and procedures requiring air carriers [to] prevent [those] individual[s] from boarding an aircraft, or take other appropriate actions with respect to th[ose] individual[s]." 49 U.S.C. § 114(h)(1)-(3). Finally, the Under Secretary may "prescribe regulations to protect passengers and property on an aircraft . . . against an act of criminal violence or aircraft piracy." 49 U.S.C. § 44903(b).

Those provisions are not "standardless"; rather, they specifically apply to "all passengers," 49 U.S.C. § 44901(a) (emphasis added), and they establish criteria that are more than adequate for guiding the Under Secretary's discretion consistent with due process. Compare Go Leasing, 800 F.2d at 1523 (statutory standards of "public safety" and "public interest" are "sufficiently definite to satisfy due process").

In short, plaintiff's due process claim fails on the merits. He is not entitled to advance notice of the entire identification-or-search requirement because it is a law enforcement detection technique. And even if he were entitled to notice, he received adequate oral instruction on how to comply with the requirement. Nor do the relevant statutory or regulatory provisions vest standardless discretion in government officials. To the contrary, the statutes and regulations plainly "'establish minimal guidelines to govern law enforcement.'" Kolender, 461 U.S. at 358.

B. Fourth Amendment

Plaintiff incorrectly contends that his Fourth Amendment rights were violated when he was asked to show identification or submit to a more extensive search of his person and property. His claim is squarely foreclosed by Circuit precedent in which this Court upheld airline search procedures against a Fourth Amendment challenge. United States v. Davis, 482 F.2d 893 (9th Cir. 1973).

1. Plaintiff was certainly not "seized" within the meaning of the Fourth Amendment. Merely asking for identification is not a seizure. INS v. Delgado, 466 U.S. 210, 216 (1984); United States v. Cirimele, 853 F.2d 1501, 1504-05 (9th Cir. 1988). Rather, a seizure occurs when police officers display a show of authority such that a reasonable person in the surrounding circumstances would not believe he was free to leave and that person yields to the show of authority. California v. Hodari D., 499 U.S. 621, 624-29 (1991); United States v. Santamaria-Hernandez, 968 F.2d 980, 983 (9th Cir. 1992). There is no seizure, by contrast, where a person is "free to disregard the police and go about his business." Hodari D., 499 U.S. at 628. Here, plaintiff was asked by airline personnel to show identification or, in the alternative, to submit to a search – but he was always free to leave if he wanted to. In fact, plaintiff did leave – twice. See E.R. 5-7. And, moreover, no reasonable person in the surrounding circumstances would believe that he was not free to leave after being told that he could. Accordingly, the district court correctly held that plaintiff was not "seized" within the meaning of the Fourth Amendment. See E.R. at 92.

Because plaintiff was free to leave at all times, his citation of arrest cases (Br. at 10, 24, 27-28) are inapposite. Equally unavailing is plaintiff's discussion of his arrest in 1996 (Br. at 6,

27), which, by his own description, was not pursuant to any part of the identification-or-search requirement at issue in this case; rather, he was arrested for delaying a police officer in the discharge of his duty, under a California statute. See E.R. at 47-48. In any event, the constitutionally relevant question is whether an objectively reasonable person in the surrounding circumstances would feel free to leave, and plaintiff's lone arrest eight years ago under a state statute hardly changes the answer to that question.

Nor is that analysis altered by Torbet v. United Airlines, 298 F.3d 1087 (9th Cir. 2002). See Br. at 6. Torbet does not hold that a person can be arrested for failing to submit to an airline security search; it holds only that, once a passenger does consent to an x-ray search of his bag, he is not free to leave if the x-ray scan alerts officials to a threat or is inconclusive and thus justifies a further search. Id. at 1089-90.

2. Not only was plaintiff not subject to a "seizure," but he was also not asked to submit to any unconstitutional search. The Fourth Amendment provides that the Federal Government shall not violate "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., Amend. IV. Accordingly, the "ultimate measure of the constitutionality of a governmental search is 'reasonableness.'" Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995).

While searches supported either by a warrant, probable cause, or reasonable suspicion are ordinarily considered reasonable, a "measure of individualized suspicion" is not an "indispensable component of reasonableness in every circumstance." National Treasury Employees Union v.

Von Raab, 489 U.S. 656, 665 (1989). Rather, "where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement," suspicionless searches are constitutional, particularly where "it is impractical to require a warrant or some level of individualized suspicion in the particular context." Id. at 665-66. For example, the Supreme Court has "upheld suspicionless searches and seizures to conduct drug testing of railroad personnel involved in train accidents; to conduct random drug testing of federal customs officers who carry arms or are involved in drug interdiction; and to maintain automobile checkpoints looking for illegal immigrants and contraband, and drunk drivers." Vernonia Sch. Dist., 515 U.S. at 653-54 (citations omitted). The Supreme Court has also approved "searches for certain administrative purposes without particularized suspicion of misconduct," such as inspection of "closely regulated" businesses, the inspection of fire-damaged premises to determine the cause of the fire, and searches to ensure compliance with city housing codes. City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000). The "essence" of these and similar cases "is that searches conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of crime, may be permissible under the Fourth Amendment though not supported by a showing of probable cause directed to a particular place or person to be searched." United States v. Davis, 482 F.2d 893, 908 (9th Cir. 1973).

Applying that analysis, this Court held in Davis that "airport screening searches of the persons and immediate possessions of potential passengers for weapons and explosives are reasonable under the Fourth Amendment." Id. at 912. Because airport searches "are conducted

as part of a general regulatory scheme in furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings," id. at 908, because the Government's interest in preventing hijackings is sufficiently "urgent," id. at 910, and because requiring a warrant in every case would "frustrate the governmental purpose behind the search," id., such suspicionless searches are constitutionally permitted. The Davis Court noted, however, that the search "must be limited in its intrusiveness" by "recogniz[ing] the right of a person to avoid search by electing not to board the aircraft," id. at 910-11, and screening must be limited to that which is necessary "to detect the presence of weapons or explosives," id. at 913.

This Court's sister circuits have reached the same or similar conclusion. See United States v. Allman, 336 F.3d 555, 556 (7th Cir. 2003) ("[A]ll persons, with all their belongings, who travel by air are subject to search without a warrant."); United States v. Edwards, 498 F.2d 496 (2d Cir. 1974) (suspicionless search of all passengers by magnetometer is constitutional); United States v. Skipwith, 482 F.2d 1272, 1275-76 (5th Cir. 1973) ("[W]e hold that those who actually present themselves for boarding on an air carrier . . . are subject to a search . . . unsupported [by] suspicion."); United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972) (magnetometer search of all passengers does not violate Fourth Amendment); United States v. Epperson, 454 F.2d 769, 771 (4th Cir. 1972) (magnetometer search of all passengers boarding an airline is constitutional even absent a warrant, because "[t]he danger is so well known, the governmental interest so overwhelming, and the invasion of privacy so minimal"); see also United

States v. Doe, 61 F.3d 107, 109-10 (1st Cir. 1995) (assuming without deciding that warrantless and suspicionless searches of airline passengers is constitutional).

The Supreme Court has also repeatedly endorsed the constitutionality of suspicionless searches of all boarding airline passengers. See Edmond, 531 U.S. at 47-48 ("Our holding does not affect the validity of . . . searches at places like airports . . . where the need for such measures to ensure public safety can be particularly acute."); Chandler v. Miller, 520 U.S. 305, 323 (1997) ("We reiterate, too, that where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable' – for example, searches now routine at airports . . . ."); Von Raab, 489 U.S. at 675 n.3 ("The point [of valid suspicionless searches] is well illustrated also by the Federal Government's practice of requiring the search of all passengers seeking to board commercial airliners . . . without any basis for suspecting any particular passenger of an untoward motive.") (citing Davis). Accordingly, plaintiff's Fourth Amendment claim is squarely foreclosed by Davis. Plaintiff (Br. at 13, 17, 28, 32-33) confuses the issue by arguing that the Government relies on a passenger's consent, and contending that such consent is inherently coercive. But consent is not the issue, nor is it the basis of the Government's argument. The search is not justified based on a passenger's consent, but on the reasonableness (and hence constitutionality) of the search. A passenger's right to avoid the search by electing not to board is an aspect of the search's reasonableness, but it does not alone justify the search.

Plaintiff also attempts to evade Davis by contending that "[t]he identification requirement is not rationally related to the goal of detecting the presence of weapons or explosives." Br. at

29. That claim is incorrect. As discussed above, supra at 7, in addition to screening all passengers and their accessible property for weapons and explosives, the Under Secretary must ensure that federal agencies "share . . . data on individuals identified . . . who may pose a risk to transportation or national security," "notif[y] . . . airport or airline security officers of the identity of [such] individuals," and "establish policies and procedures requiring air carriers [to] prevent the individual from boarding an aircraft, or take other appropriate action with respect to that individual." 49 U.S.C. § 114(h)(1)-(3). To implement that requirement, the Government maintains "no fly" and "selectee" lists of persons who are known to be, or suspected to be, threats to airline security. And that threat, in turn, could take the form of attempting to bring a weapon or explosive on board. Accordingly, the request for identification is directly linked to the threat of weapons or explosives because it seeks to identify whether a boarding passenger is someone likely to pose such a threat.

Nor is plaintiff correct in suggesting (Br. at 19-21) that the identification requirement is ineffectual. It is "self-evident" that security procedures designed to prevent those who pose a threat to airline security from boarding a plane is furthered by determining whether a passenger is on a list of persons known or believed to be a threat. Compare Vernonia Sch. Dist., 515 U.S. at 663 (it is "self-evident" that a drug test is an efficacious manner of mitigating the harm of drugs). Likewise, plaintiff's suggestion that the identification-or-search requirement will not catch many dangerous individuals misses the mark: where the Government seeks to deter such threats before they happen, the fact that only a few people are caught is evidence of the search's efficacy,

rather than the other way around. Von Raab, 489 U.S. at 675 n.3 ("Nor [do] we think, in view of the obvious deterrent purpose of these searches, that the validity of the Government's airport screening program necessarily turns on whether significant numbers of putative air pirates are actually discovered by the searches conducted under the program. . . . When the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success."). And even if the identification-or-search requirement is not foolproof, nothing in the Constitution requires it to be. In fact, in Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 454 (1990), the Supreme Court rejected the proposition that a court should undertake a "searching examination of 'effectiveness'" of an administrative search such as a sobriety checkpoint. The Supreme Court made clear in Sitz that its cases were "not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger." 496 U.S. at 453.

Plaintiff also asserts that the identification-or-search requirement is unconstitutional unless it employs the least restrictive means possible. Br. at 18-19. The Supreme Court, however, has rejected precisely that argument. Vernonia Sch. Dist., 515 U.S. at 663 ("We have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment.").

Finally, even if plaintiff were correct that a request for identification is unconstitutional under Davis, a search of his person and property was squarely upheld in that case, and plaintiff

(by his own account) was offered this alternative option. Plaintiff argues that he cannot be compelled to give up his right to travel on the condition that he submit to an unconstitutional search. Br. at 32. But Davis holds that such a search of a passenger and his or her property is constitutional. Accordingly, had plaintiff chosen that option, he would have been subjected to a perfectly constitutional search.

C. Right to Travel

The identification-or-search requirement also does not violate plaintiff's right to travel. No one, including plaintiff, is barred from traveling under the requirement. Compare Br. at 22 (claiming that plaintiff was "physically restrained from traveling"). Rather, the requirement simply regulates the manner of travel. Moreover, it regulates only one method of traveling (airplanes), without imposing any restriction on other means of travel. Finally, the identification-or-search requirement satisfies even the strict scrutiny that plaintiff would apply to it.

The identification-or-search requirement is not a ban on travel, nor even a ban on one particular form of travel. Thus, plaintiff's cite (Br. at 17) to dicta in City of Houston v. FAA, 679 F.2d 1184, 1192 (5th Cir. 1982) (an attempt to "completely . . . bar travelers" to fly to a particular airport "might well give rise to a constitutional claim") is entirely inapt. Rather, the identification-or-search requirement is merely a regulation of airline travel, and an eminently reasonable one at that. It is for that reason that this Court has already upheld minimal security regulations as a condition of air travel. Just as this Court in Davis squarely upheld airline security searches against a Fourth Amendment challenge, it also rejected the argument that such searches violate the right to travel. 482 F.2d at 912-13. This Court noted that "the right to travel

is not absolute," and that only "unreasonable governmental restriction[s]" are unconstitutional. Id. at 912 (emphasis added); see also Saenz v. Roe, 526 U.S. 489, 499 (1999) (discussing right to travel "uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement") (emphasis added); Cramer v. Skinner, 931 F.2d 1020, 1031 (5th Cir. 1991) ("Minor restrictions on travel simply do not amount to the denial of a fundamental right."). Davis then held that, because "the screening process is no more extensive nor intensive than necessary . . . to detect the presence of weapons or explosives, that it is confined in good faith to that purpose, and that potential passengers may avoid the search by electing not to fly," such searches are fully compatible with the constitutional right to travel. Id. at 913. As demonstrated above, the identification-or-search requirement alleged by plaintiff and at issue in this case fits well within the type of searches upheld in Davis. Accordingly, plaintiff's right to travel claim is likewise squarely foreclosed by Davis.

Moreover, as the district court held, the identification-or-search requirement is a restriction on only one form of travel, namely, travel by airplane. E.R. at 94. And as this Court has held, "burdens on a single mode of transportation do not implicate the right to interstate travel." Miller v. Reed, 176 F.3d 1202, 1205 (9th Cir. 1999). Plaintiff argues that Miller does not apply to common carriers such as airlines. Br. at 10-11. But Miller cites Monarch Travel Servs., Inc. v. Associated Cultural Clubs, Inc., 466 F.2d 552 (9th Cir. 1972), a case involving restrictions on airline travel. Plaintiff also contends that the identification-or-search requirement extends to other modes of transportation as well, such as on a bus or train, and alleges that the district court simply "ignore[d] this fact." See Br. at 16. But as noted above (supra at 19-21),

plaintiff's alleged injury only involves his denial of airplane travel; his injury has nothing to do with any other mode of transportation, and therefore he lacks standing to challenge any identification-or-search requirement as it might apply to them. Thus, the district court did not ignore his argument, but held that "[t]he only injury alleged by plaintiff was his inability to board a plane as a result of the identification requirement." District Court Op. at 4 (E.R. 89) (emphasis added).

Plaintiff further argues (Br. at 18) that, where the Government places the identical burden on all forms of transportation, that action must violate the right to travel. This assertion is obviously incorrect. What matters is not whether the burdens are identical, but whether the burdens are unreasonable. For instance, a small, costs-based tax on all forms of transportation is perfectly constitutional because the tax is reasonable; it is not unconstitutional, as plaintiff would argue, simply because the tax is identical and broadly imposed. See Evansville-Vanderburgh Airport Authority District v. Delta Airlines, 405 U.S. 707, 711-15 (1972) (upholding reasonable tax on airline passengers against a right-to-travel argument and noting that such taxes are permissible as well for other means of transportation such as driving or bus travel);[12] Interstate Busses Corp. v. Blodgett, 276 U.S. 245 (1928) (upholding tax on bus transportation against a constitutional challenge).

[12] The result in Evansville was overruled by statute, see Northwest Airlines v. County of Kent, 510 U.S. 355, 363 (1994), but that statutory action plainly does not overrule the Evansville Court's constitutional holding.

Plaintiff's quixotic suggestion (Br. at 21-22) that the First Amendment "prior restraint" doctrine be applied in the right to travel context is without any support in any case anywhere. Plaintiff's lone cite to Nunez v. San Diego, 114 F.3d 935 (9th Cir. 1997), provides no support. The case does not even contain the phrase "prior restraint" and the cited passage (id. at 950) concerns only the application of the First Amendment overbreadth doctrine to a city's curfew for minors. And, moreover, this Court expressly stated that it did not consider the overbreadth challenge to be based on the plaintiffs' right to travel. Id. at 949 n.11.

Finally, plaintiff argues (Br. at 18) that strict scrutiny applies, citing Attorney General of New York v. Soto-Lopez, 476 U.S. 898, 909-10 (1986), and that the identification-or-search requirement fails that test. But that decision was simply a plurality, and even the plurality conceded that strict scrutiny does not necessarily apply. Id. at 904; see also id. at 921 (O'Connor, J., dissenting) ("As the plurality implicitly recognizes, it is fair to infer that something more than a negligible or minimal impact on the right to travel is required before strict scrutiny is applied."). And even if the identification-or-search requirement were subject to strict scrutiny, it would satisfy that standard. As plaintiff himself concedes (Br. at 18), such a requirement serves a compelling state interest in preventing air piracy and related crimes. Plaintiff's only argument is that such a purpose can be served by less restrictive means, but his suggestions do not withstand scrutiny.

For instance, plaintiff suggests alternatives that are even more restrictive than the identification-or-search requirement, such as subjecting passengers to "random searches" or more "intensified" "[p]hysical searches." Br. at 19. Other suggested alternatives simply do not

achieve the same goal as the identification-or-search requirement. For example, plaintiff suggests (Br. at 19) that armed air marshals and stronger cockpit doors would equally further security, but those suggestions are post-boarding measures, designed to stop a security threat if a weapon or explosive should somehow get on board. The identification-or-search requirement, by contrast, prevents and deters such threats before they happen. The right to travel does not demand that the Government chose between prevention and interdiction after the fact.

Finally, plaintiff offers (Br. at 19) an alternative that has nothing whatsoever to do with the restrictiveness of the identification requirement: publication of the asserted TSA security directive. He does not explain, however, how written publication would make the showing of identification or the search of one's person and property any less restrictive.

D. Right to Associate and Petition

The district court correctly dismissed plaintiff's contention that the identification-or-search requirement violates his First Amendment rights to assembly and petition the Government for redress of grievances. E.R. 94-95. The requirement does not prohibit, or even regulate, a person's right to assemble or to petition the Government. Nor does it impose a penalty or deny a benefit because of membership in a group or because of a person's petition, or interfere with the internal organization, affairs, or membership of a group. Compare Roberts v. United States Jaycees, 468 U.S. 609, 622-23 (1984). The requirement simply obligates a person who wants to travel on an airplane to either present identification or submit to a search before boarding. That regulation has nothing whatsoever to do with assembly or petitioning the Government.

Plaintiff, however, contends that, because he is unwilling to comply with the identification requirement he cannot fly. And because he cannot fly, it makes it harder for him to assemble with others and fly to Washington, D.C. in order to petition the Government. But where a regulation does not target the exercise of a protected First Amendment right, and has only a minor, incidental effect on the exercise of that right, the regulation does not implicate the First Amendment at all. See Arcara v. Cloud Books, 478 U.S. 697, 706-07 (1986) ("[W]e have subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place, . . . or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity."); id. at 708 (O'Connor, J., concurring) ("Any other conclusion would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment."); Fighting Finest, Inc. v. Bratton, 95 F.3d 224, 228 (2d Cir. 1996) ("[C]onsonant with the First Amendment, [the] government may engage in some conduct that incidentally inhibits protected forms of association. . . . Though such inhibiting conduct might make it more difficult for individuals to exercise their freedom of association, this consequence does not, without more, result in a violation of the First Amendment. To be cognizable, the interference with associational rights must be 'direct and substantial' or 'significant.'"). That is precisely the case here: the identification-or-search requirement is aimed at preventing and deterring security threats to airline transportation; it is not aimed directly or indirectly at assembly or petitioning

the Government. Nor is the requirement's effect on First Amendment rights anything more than incidental.

Tellingly, plaintiff is unable to cite even a single authority from any court holding that airport security requirements implicate a person's right to assembly or to petition the Government. Indeed, quite the opposite is true. See Cramer v. Skinner, 931 F.2d 1020, 1032-33 (5th Cir. 1991) (statute limiting flights at certain airport does not violate right of free association).

Plaintiff's citation (Br. at 23) to cases involving anonymity do not further his argument. Those cases involve government restrictions that directly target First Amendment interests. For instance, in McIntyre v. Ohio Elections Comm'n, 514 U.S. 334 (1995), the Court struck down a state statute prohibiting anonymous campaign literature. While noting that anonymity "is an aspect of the freedom of speech," id. at 342, the Court invalidated the statute because it was a "direct regulation of the content of speech" in which "the category of covered documents is defined by their content," id. at 345.[13] As noted above, however, the identification-or-search requirement simply does not target a person's freedom of speech, freedom of association, or freedom to petition the Government. Accordingly, McIntyre and similar cases involving direct

[13] See also Watchtower Bible & Tract Soc'y v. Village of Stratton, 536 U.S. 150, 153 (2002) (village ordinance directly regulating political speech and the distribution of handbills); Talley v. California, 362 U.S. 60, 60-61 (1960) (city ordinance directly regulating distribution of handbills).

regulation of First Amendment rights are inapplicable. The district court therefore correctly dismissed plaintiff's assembly and petition claims.

Even if the identification-or-search requirement had directly targeted associational rights, it would not be unconstitutional unless it imposed a "serious burden[]," Roberts v. United States Jaycees, 468 U.S. 609, 626 (1984), or affected in a "significant way," Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987), a person's associational rights. See also NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958) (regulation must be a "substantial restraint" on associational rights). The identification-or-search requirement clearly falls short of such a "serious," "significant" or "substantial" burden on plaintiff's associational rights. And, moreover, any burden imposed by the identification-or-search requirement would be constitutionally permissible because the Government's compelling interest in airline security outweighs any burden imposed by a person's disclosure of his or her identity or a person's submission to a search. Compare NAACP, 357 U.S. at 462 ("Petitioner has made an uncontroverted showing that on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility), with Buckley v. Valeo, 424 U.S. 1, 70-72 (1976) (rejecting right to associate claim "where . . . any serious infringement on First Amendment rights brought about by the compelled disclosure of contributors is highly speculative" and where "the substantial public interest in disclosure . . . outweighs the harm generally alleged").

* * * *

Because plaintiff's constitutional claims are all meritless – indeed, his Fourth Amendment and right-to-travel claims are squarely foreclosed by Circuit precedent – this Court can affirm the district court's dismissal of plaintiff's complaint on this alternative ground.[14]

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[14] Plaintiff contends the district court erred in denying his motion for judicial notice of certain facts. Br. at 30. But the proffered facts (E.R. at 50-52) relate to the CAPPS II program, and, as noted above (supra at 19-21), plaintiff lacks standing to challenge that program because his sole alleged injury results from the identification-or-search requirement, not CAPPS II. Accordingly, the district court did not abuse its discretion in declining to take judicial notice of irrelevant facts.

Plaintiff further contends that the district court erred in denying his motion to amend his complaint. But plaintiff's offhand request to do so (E.R. 42) provided no explanation whatsoever as to what plaintiff would amend and what defect his amendment would supposedly cure. Plaintiff notably fails to provide any explanation in his appellate brief. Br. at 48. In the absence of any such explanation, the district court did not abuse its discretion in denying the motion.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's dismissal of plaintiff's claims.

Respectfully submitted,

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SEPTEMBER 2004

STATUTORY ADDENDUM

49 U.S.C. § 46110.

(a) Filing and venue.--Except for an order related to a foreign air carrier subject to disapproval by the President under section 41307 or 41509(f) of this title, a person disclosing a substantial interest in an order issued by the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation duties and powers designated to be carried out by the Administrator) in whole or in part under this part, part B, or subsection (l) or (s) of section 114 may apply for review of the order by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals of the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not later than 60 days after the order is issued. The court may allow the petition to be filed after the 60th day only if there are reasonable grounds for not filing by the 60th day.

(b) Judicial procedures.--When a petition is filed under subsection (a) of this section, the clerk of the court immediately shall send a copy of the petition to the Secretary, Under Secretary, or Administrator, as appropriate. The Secretary, Under Secretary, or Administrator shall file with the court a record of any proceeding in which the order was issued, as provided in section 2112 of title 28.

(c) Authority of court.--When the petition is sent to the Secretary, Under Secretary, or Administrator, the court has exclusive jurisdiction to affirm, amend, modify, or set aside any part of the order and may order the Secretary, Under Secretary, or Administrator to conduct further proceedings. After reasonable notice to the Secretary, Under Secretary, or Administrator, the court may grant interim relief by staying the order or taking other appropriate action when good cause for its action exists. Findings of fact by the Secretary, Under Secretary, or Administrator, if supported by substantial evidence, are conclusive.

(d) Requirement for prior objection.--In reviewing an order under this section, the court may consider an objection to an order of the Secretary, Under Secretary, or Administrator only if the objection was made in the proceeding conducted by the Secretary, Under Secretary, or Administrator or if there was a reasonable ground for not making the objection in the proceeding.

(e) Supreme Court review.--A decision by a court under this section may be reviewed only by the Supreme Court under section 1254 of title 28.

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(C)
AND NINTH CIRCUIT RULE 32-1

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached Brief for Appellees is monospaced, has 10.5 or fewer characters per inch and contains 12,890 words.

_____

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 2004, I served two copies of the foregoing Brief for Appellees by causing them to be sent by Federal Express overnight delivery to:

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I also hereby certify, pursuant to Fed. R. App. P. 25(d)(2) and 31(b), and pursuant to Ninth Circuit Rule 31-1, that on September 29, 2004, I filed an original and 15 copies of the foregoing Brief for Appellees by causing them to be sent by Federal Express overnight delivery to:

MS. CATHY CATTERSON
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_____

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, I hereby certify that there are no known related cases in this Court.

_____

JOSHUA WALDMAN
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