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 OPENING BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Mr. Gilmore respectfully requests that the Court hear oral argument in this case, because oral argument would aid the Court in understanding and deciding the issues presented by this case.

I. STATEMENT OF JURISDICTION

The District Court had federal question jurisdiction over Mr. Gilmore's Constitutional claims pursuant to 28 U.S.C. § 1331.

This is an appeal from a final judgment of the District Court disposing of all claims with respect to all parties, and falls within this Court's appellate jurisdiction under 28 U.S.C. § 1291. The District Court entered final judgment on March 24, 2004. Appellant filed a notice of appeal on April 14, 2004, which was timely filed under Fed. R. App. P. 6.3, governing appeals of cases where the United States is a party.

II. ISSUES PRESENTED

1. Does requiring a passenger to show a government-issued proof of identity ("ID") in order to fly violate that passenger's right to travel?

2. Does requiring a passenger to show ID in order to fly violate that passenger's rights of assembly and redress?

3. Does requiring a passenger to show ID in order to fly violate that passenger's rights to be free from unreasonable searches and seizures?

4. Does forcing a passenger to choose between producing ID and being subjected to a more extensive search in order to travel violate the doctrine of unconstitutional conditions?

5. Does the secrecy of the Government's requirement that a passenger show ID in order to fly violate that passenger's right to due process?

6. Does Mr. Gilmore have standing to address the reasons for the ID requirement?

7. Does the District Court have jurisdiction to hear challenges to actions of the Transportation Security Administration and the Federal Aviation Administration as applied?

8. Did the District Court err in denying Mr. Gilmore's October 8, 2003 motion for request for judicial notice?

9. Did the District Court err in denying Mr. Gilmore leave to amend his complaint?

III. STATEMENT OF THE CASE

On July 18, 2002, Mr. Gilmore filed a Complaint for Injunctive and Declaratory Relief against Appellees, who are U.S. government officials responsible for issuing and enforcing laws and regulations related to aviation ("the Government"), Southwest Airlines, Inc. ("Southwest"), and United Airlines, Inc. ("United") (collectively, "the Airlines"). (ER 1).

The Government and Southwest each moved to dismiss the Complaint on November 1, 2002. (ER 102).

United Airlines filed for bankruptcy on December 3, 2002. (ER 66-67).

Mr. Gilmore filed an opposition to these Motions to Dismiss on December 2, 2002. (ER 17). At that time, he also submitted a "new facts" addendum and requested leave to amend the Complaint. (ER 43).

Oral argument was conducted on January 17, 2003. (ER 65).

On October 8, 2003, Mr. Gilmore filed a request for judicial notice, which included a Federal Register publication, to show the unauthorized release of passenger records by JetBlue Airways, Inc. to government officials. (ER 50; 52:1-17; 59-64).

On March 23, 2004, the District Court granted the motions to dismiss, with prejudice, without granting Plaintiff leave to amend the Complaint. (ER 85; 90:1-2). Mr. Gilmore's October 8, 2003 request for judicial notice was also denied. (ER 96:4-5; 104, Item 28).

Mr. Gilmore timely filed his notice of appeal. (ER 97).

IV. STATEMENT OF FACTS

On July 4, 2002, John Gilmore went to Oakland International Airport with a Southwest Airlines ticket to Baltimore in his name. The purpose of his trip was to petition the government for redress of grievances with respect to regulations concerning screening of air travelers. (ER 5:7-10).

At the Southwest check-in line, Mr. Gilmore was asked for his identification. He politely declined. The Southwest clerk told him that he could not fly without producing an ID because of "a[n] FAA security requirement." The clerk then told Mr. Gilmore that if he did not wish to show ID, he could instead be screened at the gate before boarding the aircraft. (ER 5:11-18).

Mr. Gilmore then went through the airport x-ray security and when presenting his boarding pass at the departure gate, Mr. Gilmore was again asked for his ID. Mr. Gilmore declined politely and asked if the requirement was based

on governmental law or airline policy. The Southwest agent at the gate replied that it was a governmental law. Another Southwest employee informed Mr. Gilmore that he had to show a government-issued picture ID or he could not board the plane. (ER 5:20-27). A Southwest customer service supervisor told Mr. Gilmore the requirement was based on Southwest's policy. (ER 6:1-6). As a result, Southwest did not allow Mr. Gilmore to fly. Mr. Gilmore then went to the United Airlines ticket counter at San Francisco airport to purchase a ticket to Washington, D.C. United Airlines displayed a sign titled, "A Notice From the Federal Aviation Administration" which included a statement that "PASSENGERS MUST PRESENT IDENTIFICATION UPON INITIAL CHECK-IN." (ER 6:7-11).

A United agent asked Mr. Gilmore for his ID and Mr. Gilmore again politely declined. The United agent then claimed Mr. Gilmore had to show "federal ID" in order to fly. (ER 6:12-14). United's Customer Service Director told Mr. Gilmore a different "policy." "If you have a ticket on United, you are allowed to travel without ID, but you become selected for secondary screening." (ER 6:23-26). A member of United Security told Mr. Gilmore a *third* version of United's requirements. "If you don't have photo ID, you can have two pieces of non-picture ID, one of which is issued by the government." He also told Mr. Gilmore that a passenger who had only two pieces of non-picture ID would be a "selectee" and searched more intensively. (ER 7:2-4).

The search applied to a selectee involves an intensive search of one's person and one's bags: Going through the magnetometer and being wanded, a light patdown search of one's body, including one's legs. Removal of shoes is required.

Bags put through a CAT-scan machine. Then being searched again at the gate, plus having the bag searched by hand. (ER 7:8-14). Mr. Gilmore would not agree to these conditions, and was told that he could not fly without ID. (ER 7:15-17).

Later, the United Security agent told Mr. Gilmore that there were security directives, but that he could not show them to Mr. Gilmore. He stated that these directives are from TSA to United and that these directives are revised as often as weekly, and are transmitted orally to the airline. United Security also stated that these orally transmitted rules are different in different airports, resulting in varying enforcement and a major training problem, as airline employees are trained in the local procedures in one place and then interact with the public in other locations. (ER 7:18-22).

Mr. Gilmore then walked out of San Francisco International airport. He did not at any time decline to submit to the normal airport security search for weapons and explosives by placing his carry-on baggage on the moving belt of an x-ray machine and walking through metal detectors. (ER 6:20-21).

As Mr. Gilmore is unwilling to show ID, and he is equally unwilling to be the subject of a more intrusive search than travelers who do not insist on maintaining their anonymity, he has been unable to fly since July 4, 2002. As ID is presently required to access all major forms of public long distance transportation, including trains, buses, and ships, Mr. Gilmore's ability to freely travel has been severely restricted. Mr. Gilmore cannot drive due to a medical condition. (ER 7:24-28; 34:12-16; 48:23-49:1; 74:11-16).

The alleged federal law requiring the airlines to request ID from their

passengers is unpublished and secret. Despite the secret nature of the law, the airlines have been mandated by the federal government to advise air travelers that the law requires them to show identification. (ER 2:6-8; 2:15-17; 5:2-5).

Mr. Gilmore was harmed by being unable to travel on July 4, 2002. He has been harmed numerous times since then because he has been chilled from attempting to travel. For example, he missed a family reunion on the East Coast because he understood he would not be permitted to travel without showing ID. He is an investor and a board member of a New York corporation and has been unable to attend board meetings resulting in both a financial loss and a loss of associational rights. He has been invited to speak at several conferences, such as the "Computers, Freedom, and Privacy" conference in New York in 2003, but was unable to attend due to its long distance from California. (ER 28:20-29:3). His acts are chilled by three different aspects of the ID requirement: the physical inability to travel from his home; the possibility that if he were permitted to leave, he would not be physically permitted to return; and the possibility that he would be arrested in an airport for failure to identify himself. Mr. Gilmore was previously arrested in 1996 for failure to identify himself to a police officer at the San Francisco Airport. The decision in *Torbet v. United Airlines*, 298 F.3d 1087 (9th Cir. 2002), suggests that he might well be arrested *again* as he was in 1996, rather than being permitted to leave, if he enters a security checkpoint and is unable to present identity papers. (ER 29:4-6; 45:27-46:3).

The Department of Homeland Security has attempted to institute programs predicated on the use of passenger ID to enhance security. One such program, the

Computer Assisted Passenger Prescreening System II (CAPPS II) would have required every citizen to undergo a background check as a precondition to traveling by a commercial airline. (ER 9:3-13; 10:22-11:11; 44:10-25; 45:18-28). CAPPS II depended on the accuracy of government-issued ID in order to function. (ER 11:12-20; 44:26-45:17). The information contained on the ID would have been cross-checked against a variety of public and private databases, and an individual threat assessment would be generated based on this information. (ER 44:15-25; 45:18-26). In July 2004, the Department of Homeland Security announced that the CAPPS II program is being revised. Mr. Gilmore is informed and believes that key elements of this secret program remain in effect.

Another program operates the Watch-list and No-Fly-list. (ER 7:14-8:2). Airlines are issued these lists by the federal government and are required to request ID from their passengers in order to check them against the lists to determine if they can fly or not: passengers have been harassed based on their political affiliations and have been told that there is no way to be removed from the list. (ER 46:17-47:24). Plaintiff believes that he may be on such a list due to his 1996 arrest for refusing to provide ID at an airport. (ER 47:24-48:3).

All of the government defendants named in this action participate in the Technical Support Working Group (TSWG), an interagency federal group with origins dating back to the early 1980s with a mission of conducting a national interagency research and development group to combat terrorism. The policies being implemented are the work of these government defendants. (ER 8:2-9).

V. SUMMARY OF THE ARGUMENT

This is a case about the free movement of citizens within the United States. The federal government requires every air passenger to provide ID before boarding an airplane within the United States. The Government has issued unpublished security directives that require airlines to request that passengers provide identification, and to deny passage to travelers who do not comply. Such a requirement unconstitutionally imposes the requirement for an "internal passport." Mr. Gilmore's travel has been curtailed because he refuses to produce identity papers and give the government information about his whereabouts and destinations when the government has no reason to suspect him of wrongdoing. He does not possess state-issued ID and is now chilled from and/or physically prevented from traveling.

The Government expanded these directives to include other forms of travel, including bus, train, and ship, after the September 11 attacks. This identification requirement violates Americans' right to travel, to associate, to assemble, to petition the government, and to be free from unreasonable searches and seizures.

Additionally, the unpublished directives violate due process because of their secrecy. The Airlines and the Government tell air travelers that federal law requires them to show ID, yet fail to cite any published rule, order, or statute.

The District Court conducted a cursory analysis of these claims. It declined to even address Mr. Gilmore's due process challenge to actions of the FAA and TSA, holding that the Courts of Appeals have exclusive jurisdiction to hear these matters. This Court should reverse the District Court's order dismissing the case,

reverse the denial of the October 8, 2003 request for judicial notice, and remand for further proceedings, with appropriate instructions.

VI. STANDARD OF REVIEW

An order granting a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) or Fed. R. Civ. P. 12(b)(1) is or reviewed *de novo*. *McNamara-Blad v. Ass'n of Prof'l Flight Attendants*, 275 F.3d 1165, 1169 (9th Cir. 2002) (12 (b)(6)); *FDIC v. Nichols*, 885 F.2d 633, 635 (9th Cir. 1989) (12(b)(1)).

A denial of leave to amend after a responsive pleading has been filed is reviewed for abuse of discretion. *Bowles v. Reade*, 198 F.3d 752, 757 (9th Cir. 1999); *Adam v. State of Hawaii*, 235 F.3d 1160, 1164 (9th Cir. 2000). Because of the strong policy favoring leave to amend, denials of leave to amend are "strictly reviewed." *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d 351, 355 (9th Cir. 1996). "Dismissal without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by amendment." *Adam*, 235 F.3d at 1164.

VII. ARGUMENT

A. Introduction

Two questions lie at the heart of this case: (1) Are domestic travelers presently required to show identification papers on demand? And, if so, (2) Is this requirement constitutional?

Travelers are routinely required to show ID today. In addition to the ID demands of airline personnel and/or government employees before being allowed to board, Amtrak and Greyhound's web pages state that ID is required to board

their trains and buses, and these requirements are being actively applied to passengers. Cruise ship operators also demand ID from domestic passengers.

The issue is whether the above practices "unreasonably burden or restrict this movement." *Saenz v. Roe*, 526 U.S. 486, 499 (1973). Numerous constitutional rights are implicated by ID demands. For example, free movement is intertwined with very fundamental freedoms: "Freedom of movement is kin to the right of assembly and to the right of association." *Aptheker v. Sec'y of State*, 378 U.S. 500, 520 (1964). A demand for identification implicates the Fourth Amendment. *Brown v. Texas*, 443 U.S. 47, 52 (1979); *Lawson v. Kolender*, 658 F.2d 1362 (9th Cir. 1981). Moreover, the "airport exception" to the Fourth Amendment is limited to searches for "weapons or explosives," *United States v. Davis*, 482 F.2d 893, 913 (9th Cir. 1973) and no parallel "train exception," "bus exception," "subway exception," or other mode-of-travel exceptions exist.

While the District Court properly observed that the right to travel is clearly grounded in the Constitution, it erred in ruling that Mr. Gilmore's rights to travel, associate, and petition were not violated because he had other modes of physical movement. The District Court's ruling ignores Mr. Gilmore's well-pleaded assertion that ID is required to travel by air, rail, bus, and ship within the United States, in addition to ID requirements for automobile drivers. The District Court incorrectly applied precedent that found "burdens on a single mode of transportation do not implicate the right to interstate travel" by expanding it to mean that restrictions that don't foreclose all modes of travel are constitutional. *Miller v. Reed*, 176 F.3d 1202, 1205 (9th Cir. 1999). It also misapplied *Miller* to

common carriers, in direct contradiction of the language in *Miller* and the cases upon which it relied. Without any analysis, the District Court then essentially applied this inappropriately expanded rule to Mr. Gilmore's rights of assembly and petition, as well as travel. This result directly contradicts First Amendment precedent that the existence of alternative channels of communication does not legitimize restrictions on individual channels. *Reno v. ACLU*, 521 U.S. 844, 880 (1997).

The right to travel is sufficiently fundamental that laws which restrict it must meet the strict scrutiny analysis used for First Amendment rights and require at a minimum, a compelling state interest, that the least restrictive means be used, and that the result actually be effective. Prior restraint analysis exposing unbridled governmental discretion and requiring proper procedures and objective standards should be applied to laws that burden the right to travel.

ID requirements as a precondition for travel violate Mr. Gilmore's First Amendment rights. Physical travel and the First Amendment are inextricably intertwined. It is impossible for people to "assemble" without physically traveling to the same place. Mr. Gilmore has been prevented from speaking at conferences because he could not travel to their location, and from petitioning the government for the same reason. "[O]ur constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969). The right not to be subjected to compulsory identification has been upheld in many

First Amendment contexts, including press, association, and speech. If the courts were to state that speakers, assemblers, and innocent citizens may not have their identity demanded "except when they are moving," the exception would swallow the rule.

The identification requirement violates Mr. Gilmore's Fourth Amendment rights. Three Fourth Amendment issues are in dispute. The first is whether the Fourth Amendment is implicated when a government "request" for ID triggers a severe penalty, such as loss of free movement. The second is whether the "airport exception" to the Fourth Amendment permits warrantless general searches for identification (rather than merely warrantless general searches for weapons and explosives). The third is whether that exception can be extended to all other forms of travel.

In summary, the government is demanding identification from large numbers of travelers, including Mr. Gilmore. Denying travel rights to those who do not comply with a "request" for ID implicates the Fourth Amendment, and is not authorized by the "airport exception" because it is not confined to searching for weapons and explosives, and not confined to airports. This demand violates the fundamental right to travel and acts as a prior restraint. The inability to travel anonymously infringes the right to speak anonymously, to assemble anonymously, and to associate and petition anonymously. Thus, the requirement that domestic travelers are required to show identification papers upon demand is unconstitutional.

The above heart of this case has been obscured by numerous side issues and

procedural roadblocks created by Appellees. There is no published statute or regulation requiring traveler identification and this raises the side issues of secret law, due process, and vagueness. The unpublished "requirement" is alleged by the Government to be a mere "request" which travelers can avoid if they consent to waive their independent Fourth Amendment right against general physical searches, raising the side issue of the unconstitutional conditions doctrine. The Government alleges that the Airlines, not the Government, have made the rules that actually prevent travel by non-identified, non-waiving passengers, raising the side issue of whether the airlines act as government agents. Government signs in airports and common carrier web pages state that "PASSENGERS MUST SHOW IDENTIFICATION," raising the side issue of whether Appellees are deliberately lying to the public about the true rules. The Government also alleges that, unlike most challenges to unconstitutional government practices, 49 U.S.C. § 46110 bars the District Court from examining broad constitutional issues relating to secret agency action, raising the procedural issue of jurisdiction. Appellees also argue that Mr. Gilmore cannot challenge the reasons for the identification requirement, merely the existence of the requirement, raising the procedural issue of standing.

Further complicating this Court's task is that the right to travel, freedom of movement, and the right to physically assemble or petition are poorly explored in the law, providing limited precedents for guidance; and when citizens must identify themselves to the government is both poorly explored and full of muddled decisions.

Mr. Gilmore urges the Court to examine the heart of this case. The

procedural issues can best be addressed after understanding the entire context. Many side issues may be easier to resolve after the Court determines whether Mr. Gilmore has properly stated a claim that his right to travel is being unconstitutionally infringed.

Mr. Gilmore asks the Court of Appeals to declare that the District Court has jurisdiction over the entire case, including the various FAA, TSA, and airline practices and regulations at issue. If, in the alternative, the Court determines that original jurisdiction belongs with the Court of Appeals, Mr. Gilmore asks the Court to address how a record could be created of these secret proceedings for the Court of Appeals to review.

Mr. Gilmore asks the Court to declare that he has alleged injury sufficiently traceable to the No-Fly and Watch lists that motivate the ID requirement, thus giving him standing to challenge them.

Mr. Gilmore asks the Court to instruct the District Court that regulations that unduly burden the right travel must be tested against strict scrutiny and subjected to prior restraint analysis.

Mr. Gilmore also asks the Court for a finding that unpublished laws are by their very nature unconstitutional and unenforceable against the public.

Mr. Gilmore asks the Court to find that his initial five causes of action have been stated adequately and to remand the case for further proceedings such as discovery and summary judgment.

Finally, Mr. Gilmore asks for leave to amend his Complaint if necessary.

B. Requiring Air Travelers to Provide Proof of Identity Impermissibly Burdens Citizens' Constitutional Right to Travel.

1. The Right to Travel is Fundamental.

"[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *United States v. Guest*, 383 U.S. 745, 758 (1966). "[T]he right to migrate is firmly established and has been repeatedly recognized by our cases." *Att'y Gen. of New York v. Soto-Lopez*, 476 U.S. 898, 903 (1986). "That citizens can walk the streets, without explanations or formal papers, is surely among the cherished liberties that distinguish this nation from so many others." *Gomez v. Turner*, 672 F.2d 134, 143 n. 18 (D.C. Cir. 1982). "These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972). The right to travel throughout the United States confers a right to be "uninhibited by statutes, rules and regulations which unreasonably burden or restrict this movement." *Shapiro v. Thompson*, 394 U.S. at 629.

The fundamental nature of this right is not in dispute. The District Court's order to dismiss states: "The Supreme Court has located [the travel right] at times in the Privileges and Immunities Clause of Article IV, the Commerce Clause, the Privileges and Immunities Clause of the Fourteenth Amendment and the 'federal structure of government adopted by our Constitution.'" (ER 94:8-12) (quoting *Soto-Lopez*, 476 U.S. at 902).

As stated in the introduction, Appellees have prevented Mr. Gilmore from

traveling without identification by air, ship, bus, and train. Mr. Gilmore has no state-issued ID. The only way for him to travel long distances is by private means that entail great expense of money and time. Appellees have no right to burden Mr. Gilmore's right to travel in such an extreme fashion.

2. Mr. Gilmore's Right to Travel Was Violated

Mr. Gilmore was prevented from boarding a commercial aircraft because of he would not show ID or be subjected to a heightened level of search because of his unwillingness to show ID. He was prevented from traveling due to a Federal condition placed upon that right.

While the lower Court agreed that the right to travel is clearly grounded in the Constitution, it concluded that Mr. Gilmore's allegation that his right to travel has been violated was insufficient as a matter of law because the Constitution does not guarantee the right to travel by any particular form of transportation. (ER 94).

However, Mr. Gilmore correctly stated in his complaint (ER 7:24-28), in his written opposition to dismissal (ER 34:12-16; 48:23-49:1), and during oral argument (ER 74:12-16) that the identification requirement is in effect a prerequisite to use all commercial long range forms of transport including trains, interstate buses, boats and airplanes and that it is akin to an internal passport to travel for United States citizens. He also informed the court that he had a medical condition and could not drive. (ER 74:11-12). The District Court chose either to ignore this fact or decided, as a mistake of law, to not take Mr. Gilmore's factual allegations as true when granting Appellees' motion to dismiss.

While it is unclear in the text of the order to dismiss, the District Court also

incorrectly applied the *Miller* precedent that found restrictions on one mode of travel are constitutional, by interpreting that to mean restrictions that don't foreclose all modes of travel are constitutional. To argue that Mr. Gilmore's right to travel has not been substantially infringed because he has other modes of interstate transportation ignores reality.

The District Court also ignored Mr. Gilmore's well pleaded assertion that air travel is a necessity and not replaceable by other forms of transportation. "[I]t would work a considerable hardship on many air travelers to be forced to utilize an alternate form of transportation, assuming one exists at all." *United States v. Albarado*, 495 F.2d 799, 807 (2nd Cir. 1974). It is "often a necessity to fly on a commercial airliner, and to force one to choose between that necessity and the exercise of a constitutional right is coercion in the constitutional sense." *Id*. *See also United States v. Kroll*, 481 F.2d 884, 886 (8th Cir. 1973). In *City of Houston v. FAA*, 679 F.2d 1184, 1192 (5th Cir. 1982), the court conceded that a ban on using a particular airport "might well give rise to a constitutional claim." The Ninth Circuit in *United States v. Davis* stated that "a restriction that burdens the right to travel too broadly and too indiscriminately cannot be sustained." 482 F.2d at 912 (quoting *Aptheker v. Sec'y of State*, 378 U.S. at 505). There are growing numbers of air travelers who commute as a necessity on a daily basis. It is no less a necessity for the Mr. Gilmore to visit his family, his company, and his representatives in Congress.

The fact that airline, ship, rail, and bus companies are common carriers is important. *Miller*, a driver's license case, relies on *Berberian v. Petit*, which

distinguished a constitutional denial of a driver's license to a thirteen year-old from unconstitutionally being "prevented from traveling interstate by public transportation, by common carrier." 374 A.2d 791, 794 (1977).

Miller is a poor model for this case. Applying the *Miller* rationale to each mode of travel in turn would allow any arbitrary restriction to be placed on each mode of travel; the eventual result would be to have the exceptions swallow the whole. In this case, virtually identical government restrictions have been placed on many modes of travel simultaneously, and a broader model is needed.

3. Strict Scrutiny Applies to Violations of the Right to Travel

The right to travel is so fundamental that laws that burden the right to travel must satisfy strict scrutiny. *Soto-Lopez*, 476 U.S. at 906. The prevention of hijacking and murder is a compelling state interest. But "[if] there are other, reasonable ways to achieve [a compelling state purpose] with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.'" *Id*. at 909-10 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). Even with a compelling state interest, "that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). In *Waters v. Barry*, the court struck down a curfew – a restriction of free movement – explaining that "when government undertakes to limit these rights in some manner, it must act gingerly … narrowly focused on the harm at hand, as well as sensitive to needless intrusions upon the constitutional interests of the innocent." 711 F. Supp. 1125, 1135

(D.D.C. 1989).

The Government claims that the ID requirement is optional today - but does not address whether travelers are properly informed of this option. (ER 49:3-4). The abuse of discretion permitted under the current "say one thing, but enforce another" practice can easily be narrowed, by either eliminating the rule or publishing it. A published directive would be less restrictive because it would enable citizens to know what their rights are, and to challenge officials who attempted to deny those rights. Elimination of the ID rules, while focusing strictly on random searches, would also provide a less restrictive means that MIT researchers have shown is more effective in accomplishing the same purpose.

Plausible but less restrictive means to effectively achieve the same objective exist. Armed air marshals are now flying as passengers. Cockpit doors have been strengthened. Physical searches have been intensified. Baggage is scanned for explosives. Passengers and crew are now advised to resist any hostile takeover, and pilots are authorized to be armed. (ER 49:13-15).

Researchers at M.I.T. suggest that relying on ID, rather than truly random searches, as a means of detecting terrorists makes travel even more dangerous. In a paper titled, "Carnival Booth: An Algorithm for Defeating the Computer-Assisted Passenger Screening System," they argue that a simple way to exploit ID-based systems is to send terrorists through security several times, without weapons, to see who's identities trigger enhanced searches and who's do not. After determining which cell members are considered "clean" by the security system, the terrorist cell can readily determine who can most easily smuggle weapons through

security. (ER 46:1-6).

An additional test applied under strict scrutiny in First Amendment cases is that the law applied must be effective, meaning that it does what it is intended to do.

> The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal, for it is important to assure that legitimate speech is not chilled or punished. For that reason, the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve Congress' legitimate interest. Any restriction on speech could be justified under that analysis. Instead, the court should ask whether the challenged regulation is the least restrictive means among available, effective alternatives.

Ashcroft v. ACLU, 124 S. Ct. 2783, 2791 (2004).

The same test should be applied to restrictions on the fundamental right to travel. Ineffective regulations should clearly get no support from a compelling purpose which they do not achieve.

The Government argues that the purpose of the identification requirement to improve national security by preventing terrorists from gaining access to commercial flights. (ER 78, p. 27:11 to p. 31:25). But the identification requirement does not prevent terrorists from gaining access to aircraft, as false identification is readily available and the system only stops so-called 'known terrorists' whose names are on the No-Fly List. To tell whether a false or true name is on the list, the person need only attempt to fly commercially. If he is not singled out for search, he can be reasonably certain that his next attempt to board an aircraft will not be impeded. The system is not effective at achieving its stated

purpose, and therefore fails.

Restrictions on the right to travel are required to meet strict scrutiny, and should also be required to be effective. The government has not met its burden to prove that it meets either of these tests, so the motion to dismiss should be denied.

4. Prior Restraint Analysis Applies to Violations of the Right to Travel

The right to travel should, like First Amendment rights, be protected against prior restraints. The law requiring approved identification to travel fails prior restraint analysis.

Prior restraint of fundamental rights is generally disfavored. "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The doctrine of prior restraint also forbids "licensing schemes" that are applied with a large degree of governmental discretion. Prior restraint works a much greater harm than subsequent punishment, by allowing discretion to eliminate the right at the point of its exercise. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

Prior restraint analysis is usually applied to First Amendment activities, so its application to the right to travel is almost a case of first impression. But in *Nunez v. San Diego*, 114 F.3d 935 (9th Cir. 1997), San Diego's curfew ordinance – a restriction on travel – was subjected to prior restraint analysis. The law restricted access to public forums in the city for minors during certain times of the day. This Court found that the ability to travel freely to public forums was "a necessary

precursor to most public expression—thus qualifying as conduct 'commonly associated with' expression." *Id*. at 950. The Court therefore invalidated the curfew law as an unconstitutional prior restraint because it failed to provide officials with objective standards to limit discretion in implementing the law.

Prior restraint is usually meant metaphorically, as a mental rather than a physical restraint. But here, Mr. Gilmore was essentially physically restrained from traveling, prior to his travel. By specifying no limitations on administrative action, the unpublished prior requirement for identification in airports "readily lends itself to harsh and discriminatory enforcement." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). The numerous different versions airline agents told Mr. Gilmore, not only about the directives but also about which authority promulgated them, illustrate that arbitrary enforcement is being applied.

C. The Government's Requiring Air Travelers to Provide ID Violates the First Amendment By Restricting Citizens' Rights to Petition and to Freely Assemble.

1. Exercise of First Amendment Rights Often Requires Travel

Freedom to physically travel and the free exercise of First Amendment rights are inextricably intertwined. "Freedom of movement is kin to the right of assembly and to the right of association," *Aptheker v. Sec'y of State*, 378 U.S. at 520. It is impossible for people to "assemble" without physically traveling to the same place. Mr. Gilmore has been prevented from speaking at a conference (ER 29:1-3) because he could not travel to its location, from assembling at a reunion of his family (ER 28:28-29:1), and from petitioning the government for the same reason (ER 28:20-21). "It was not by accident or coincidence that the rights to

freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable." *Thomas v. Collins, Sheriff*, 323 U.S. 516, 530 (1945). "[O]ur constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement." *Shapiro v. Thompson*, 394 U.S. at 629. *See also Waters v. Barry*, 711 F. Supp. at 1134 (curfew tramples upon associational liberty interests); *Nunez*, 114 F.3d at 944 (same).

The Government now seeks to condition all major public methods of domestic travel on the production of identification. This condition involves needless intrusions upon the First Amendment rights to petition, to assemble, and anonymity.

2. Anonymity is Protected Under the First Amendment.

The right of anonymity – the right to not to be subjected to compulsory identification – has been upheld in many First Amendment contexts, including press (*McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960)); association (*NAACP v. Alabama*, 357 U.S. 449 (1958)) and speech (*Watchtower Bible, et al. v. Village of Stratton*, 436 U.S. 150 (2002)).

In *Thomas*, a labor organizer from Detroit was arrested after traveling to Texas solely for speaking, because he did not give his name to the state and obtain a Texas ID card beforehand. "As a matter of principle a requirement of

registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly. Lawful public assemblies, involving no element of grave and immediate danger to an interest the State is entitled to protect, are not instruments of harm which require previous identification of the speakers." *Thomas v. Collins, Sheriff*, 323 U.S. at 539.

Even a recent Supreme Court case granting the government some power to compel identification does not grant the police the power to demand identification from a person, such as Mr. Gilmore, who is not suspected of any crime. *See Hiibel v. Sixth Judicial Dist. Court*, 124 S. Ct. 2451 (2004).

If the courts were to state that speakers, assemblers, petitioners, and innocent citizens may not have their identity papers demanded "except when they are moving," the exception would swallow the rule. "If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order." *Thomas*, 323 U.S. at 540.

3. Restrictions on Travel Significantly Affect Mr. Gilmore's First Amendment Rights

The District Court erred when it concluded that the Government's restrictions on Mr. Gilmore's travel do not substantially or significantly affect his right to assemble, associate, or petition. "To the extent that plaintiff alleged plans to exercise his associational rights in Washington, D.C., the Court finds plaintiff's

rights were not violated as plaintiff had numerous other methods of reaching Washington." The only support for this proposition offered by the District Court was *Storm v. Town of Woodstock*, a case holding certain local parking restrictions constitutional. 944 F. Supp. 139, 142 (N.D.N.Y. 1996). *Storm* is inapposite to Mr. Gilmore's situation as the imposition on the right to associate in *Storm* did "not suspend or curtail associational activities." *Id.* at 144.

The District Court ignored Mr. Gilmore's claim that *all* major forms of long distance public transportation have been foreclosed to him due to the Government's ID requirement. The Supreme Court has repeatedly held that the existence of "alternative channels of communication" do not excuse restrictions on individual channels. *See, e.g., Reno v. ACLU*, 521 U.S. at 880 ("The Government's position is equivalent to arguing that a statute could ban leaflets on certain subjects as long as individuals are free to publish books."); *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 163 (1939) ("It is suggested that the … ordinances are valid because their operation is limited to streets and alleys and leaves persons free to distribute printed matter in other public places. But, as we have said, the streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.")

Airports and train stations are natural and proper places for traveling for First Amendment purposes. The State cannot restrict Mr. Gilmore's right to travel to associate or petition in Washington, D.C. by asserting that alternate channels

exist, such as hiring a chauffeur or pilot for an exorbitant sum.

In *Healy v. James*, 408 U.S. 169 (1972), the Supreme Court rejected a similar argument and held that a school's denial of facilities violated a student group's First Amendment rights:

> Respondents [argue] that petitioners still may meet as a group off campus, that they still may distribute written material off campus, and that they still may meet together informally on campus -- as individuals, but not as [a group]. But the Constitution's protection is not limited to direct interference with fundamental rights. [T]he group's possible ability to exist outside the campus community does not ameliorate significantly the disabilities imposed by the President's action. We are not free to disregard the practical realities. Mr. Justice Stewart has made the salient point: Freedoms such as these are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference. ... It is to be remembered that the effect of the College's denial of recognition was a form of prior restraint, denying to petitioners' organization the range of associational activities described above."

Id. at 182-84 (citations omitted).

Here, the Government may not constitutionally restrict Mr. Gilmore's expressive activities by imposing a subtle prior restraint on his travel. The travel that is required in order for him to speak, to assemble, to associate, and to petition cannot be restrained because he declines to identify himself to the government.

D. Collecting Personal Information on Travelers is an Unreasonable Search and Seizure.

Three different Fourth Amendment issues are in dispute. The first is whether the Fourth Amendment protections are implicated when failure to comply with a government "request" for ID triggers a severe penalty. The second is whether the "airport exception" to the Fourth Amendment extends beyond searches

for weapons and explosives to searches using a traveler's identification. The third is whether the imposition of an ID requirement on all other major forms of public transportation violates the Fourth Amendment.

1. The Fourth Amendment is Implicated When the Government Severely Penalizes a Traveler's Refusal to Identify Himself.

The government "request" that a traveler produce ID implicates the Fourth Amendment because the government imposes a severe penalty on citizens who do not comply. The District Court reasoned that Mr. Gilmore "was not required to provide identification on pain of criminal, or other governmental sanction. Identification requests unaccompanied by detention, arrest, or any other penalty, other than the significant inconvenience of being unable to fly, do not amount to a seizure within the meaning of the Fourth Amendment" (ER 92:9-12) therefore "no finding concerning the reasonableness of the identification requirement is required." (ER 93:2-3). This was error. In effect, the District Court engaged in fact finding and concluded that Mr. Gilmore had no apprehension of arrest or detention. In fact, Mr. Gilmore has previously been arrested at an airport for refusing to show identification. (ER 47:27-48:3).

Imposing the severe penalty of arrest triggers Fourth Amendment scrutiny of government "requests" for identification. "[S]tatutes ...which require the production of identification, are in violation of the fourth amendment. The two reasons for this conclusion are that as a result of the demand for identification, the statutes bootstrap the authority to *arrest* on less than probable cause, and the serious intrusion on personal security outweighs the mere possibility that

identification may provide a link leading to arrest." *Lawson v. Kolander*, 658 F.2d at 1366-67 (emphasis added).

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. They leave him, and others with no official identification or who merely seek privacy or anonymity, only his feet and his bicycle for long-distance transportation. Mr. Gilmore has experienced this reality since September 2001.

This Court should agree with other courts that certain forms of travel are in practice irreplaceable – a necessity as opposed to a mere convenience. Airliners compress days of surface travel into a few hours, hop the world's largest oceans with ease, and link geographically separated parts of the United States without touching intervening countries or international waters. "[I]t would work a considerable hardship on many air travelers to be forced to utilize an alternative form of transportation, assuming one exists at all." *United States v. Albarado*, 495 F.2d at 807. It is "often a necessity to fly on a commercial airliner, and to force one to choose between that necessity and the exercise of a constitutional right is coercion in the constitutional sense." *Id.* at 807 n.14. *See also United States v. Kroll*, 481 F.2d 884, 886 n.2 (8th Cir. 1973). The surrender of this necessity goes far beyond what the lower court termed a "significant inconvenience." Mr. Gilmore's Fourth Amendment rights are implicated.

2. An ID Requirement Does Not Meet the Constitutional Test Imposed on Airport Screening

The "airport exception" in the fragile lace of the Fourth Amendment does not permit warrantless general searches for identification. The standard is that the "screening process is no more extensive nor intensive than necessary, in the light of the current technology, 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." *United States v. Davis*, 482 F.2d 893, 913 (9th Cir. 1973). In addition, the procedure instituted to detect hijackers "survives constitutional scrutiny only by its careful adherence to absolute objectivity and neutrality. When elements of discretion and prejudice are interjected it becomes constitutionally impermissible." *United States v. Lopez*, 328 F. Supp. 1077, 1101 (E.D.N.Y. 1971). The government is free to search people in airports outside these standards, but it must have probable cause and/or a warrant.

The identification requirement is not rationally related to the goal of detecting the presence of weapons or explosives. A person's willingness to show ID is unrelated to whether he has a weapon or explosive. Even assuming that every person had an ID and was willing to show it, merely knowing the identity of each passenger does not achieve the only constitutionally acceptable goal. Instead, the Government concedes that the true purpose of the ID requirement is to allow airline security to determine whether the passenger is *among those individuals known*...or *suspected* of posing...a threat. The Government's concession shows that the ID requirement is designed to check whether a person is on a government-created *list of suspects*, two of which are referred to as the No-Fly List and the

Watch List. (ER 7:14-8:2; 46:17-47:24).

The Government is free to make lists of suspects, and even to compare travelers' faces to pictures of suspects' faces. But it cannot constitutionally require travelers to produce documents to prove that they are not on such a list as a condition of traveling. Likewise, the Government cannot compel the surrender of data from passengers to confirm their identity. It became public that the Government has done this by ordering JetBlue Airways, Inc. to turn over passenger data to Torch Concepts, Inc., a military contractor, who found "that for 40% of the passengers, the following demographic information could be extracted: 1. Gender. 2. Home specifics – owner / renter. 3. Years at residence. 4. Economic status - income. 5. Number of children. 6. Social Security Number. 7. Number of adults. 8. Occupation. 9. Vehicles." (ER 58; 52:1-17; 59-64). Mr. Gilmore requested the District Court to take judicial notice of this fact, and of the Federal Register excerpt noticing the testing of the CAPPS II program, but his request was denied. This Court is respectfully requested to reverse that ruling as the information is both admissible and relevant. Fed. R. Evid. 201; 902(5) (official publication); 901(b)(1) (testimony of witness with knowledge).

Such a demand for proof could certainly not meet the government's burden of proving its "absolute objectivity and neutrality," *Lopez* at 1098, without detailed information about how people get on and off these lists. The government has not offered any such information. A No-Fly rule directed at a specific group of people is equivalent to a bill of attainder unless with each person there is an associated judicial warrant or conviction. Yet judicial involvement in maintaining the lists is

highly unlikely, and has not even been alleged by the government. Unless each of thousands of warrants had been individually sealed by thousands of courts, the entire lists would not have to be kept secret.

The procedures for getting on and off the lists are secret and the airport security screening procedure has become a dragnet for law enforcement *to find and detain particular people.* An ID requirement for the government-conceded purpose of checking travelers against lists of suspects is not confined in good faith to detecting the presence of weapons or explosives, and thus fails the first two prongs of *Davis*. Therefore, searches for identification are not permitted by the "airport exception."

For this Court to add an "ID exception" to the well-thought-out *Davis* standard would be a radical expansion of the exceptions to Fourth Amendment protections in airports, deserving much more judicial attention than simply granting a motion to dismiss. No discovery, testimony, or evidence has yet been permitted in this case. To extend the *Davis* standard on this record would be imprudent.

3. An ID Requirement to Use All Other Major Forms of Public Transportation Violates the Fourth Amendment

The Government's policy of warrantless searches of identification has been expanded beyond the airport to train stations, buses stations, and cruise ship terminals in the absence of any court decision extending the "airport exception" for warrantless searches for weapons or explosives to other forms of travel. Identification demands of innocents outside of airports can point to no precedent

justifying this exception to Fourth Amendment protections. Each method of travel has unique characteristics; for example, a train cannot be hijacked to Cuba, or aimed into a building. Searches for identification at these locations, unsupported by either probable cause or reasonable suspicion, directly violate the Fourth Amendment.

E. The Hobson's Choice Between Producing ID and Submitting to a More Extensive Search in Order to Travel Violates the Unconstitutional Conditions Doctrine.

United gave Mr. Gilmore the choice either to show ID or to submit to a "more extensive search" in order to fly. (ER 7:2-16). Appellees argue that they do not "require" ID because travelers may consent to a more intrusive search. (ER 2:19-22; 5:12-18; 48:9-14). Mr. Gilmore declined to "voluntarily" give up his Fourth Amendment right to be free from unreasonable warrantless searches, and was therefore denied passage.

"If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all." *Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 594 (1926). "[T]he government (cannot) properly argue that it can condition the exercise of the defendant's constitutional right to travel on the voluntary relinquishment of his Fourth Amendment rights. Implied consent under such circumstances would be inherently coercive." *United States v. Lopez*, 328 F. Supp. at 1093; *accord United States v. Meulener*, 351 F. Supp. 1284, 1288 (C.D. Cal. 1972) (quoting *Lopez*).

The *Lopez* decision follows the reasoning of a long line of Supreme Court decisions, reversing earlier doctrines that had led to serious abuses of fundamental

rights. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (coerced consent violates the doctrine of unconstitutional conditions; the Government cannot condition the receipt of a governmental benefit on waiver of a constitutionally protected right); *Speiser v. Randall*, 357 U.S. 513, 529 (1958), (veterans' tax benefit may not be conditioned on taking a loyalty oath) and *Frost Trucking*, 271 U.S. at 594 ("it is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.")

Neither the Government nor an Airline can condition travel without ID on "consent" to a "more intrusive search" than the search required of ordinary passengers. Passengers who do not consent to waive their Fourth Amendment rights must still retain their full fundamental right to travel. They can be subjected to the limited search that *Davis* has determined does not violate the Fourth Amendment – and to no other search. "[T]he legality of the search does not rest on a 'consent' theory, but rather on the reasonableness of the total circumstances." *United States v. Albarado*, 495 F.2d at 808.

To the extent that Appellees argue that they have the power to subject *every* passenger to a "more intrusive search," that would also be unconstitutional. They cannot determine the subject's willingness to waive constitutional rights. The test is reasonableness, and there is no rational relationship between possession of weapons and willingness to show ID.

F. The Government's Issuance of Secret Directives Regulating Domestic Travel Deprives Travelers of Due Process and Violates Separation of Powers.

The Fifth Amendment states that no person shall be deprived life, liberty, or property without due process of the law. The administration's secret consideration, adoption, implementation, and non-publication of a law that affects a multitude of the protected rights of every citizen clearly violates due process. The Government claims that the use of secrecy is necessary to protect security. The effect is to avoid judicial review by denying Mr. Gilmore access to the courts.

49 U.S.C. § 40119(b) provides that the FAA Administrator may prescribe secret regulations as considered necessary to prohibit disclosure of any information obtained or developed in conduct of security or research development activities if (s)he concludes that disclosure would be detrimental to safety of persons traveling in transportation. 49 U.S.C. § 114 provides that the Administrator may provide procedures for the management of those individuals believed to be a "threat to civil aviation", with to notice and comment period for regulations or security directives. 49 U.S.C. § 44902(b) provides that an air carrier can refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety.

These statutes are the apparent authority for the security directives and secret regulations that created the "demand for ID" such as SD 96-05 ("airlines required to request ID") (ER 8:26-9:2), as well as CAPPS (ER 8:10-15; 9:3-13; 10:22-11:11; 44:1-46:8), the No-Fly List, and the Watch List. (ER 9:14-9:27; 46:10-48:7).

The ID requirement violates Mr. Gilmore's right to due process. He has

adequately stated injuries that are traceable to the secret law as well as the security programs mentioned.

1. Appellant Has Protected Due Process Interests in Litigating the Constitutionality of the Secret Directive.

Mr. Gilmore's due process interest in challenging the ID requirement on constitutional grounds has at least two foundations. First, a cause of action is a species of "property" for purposes of the due process clauses. *Logan v. Zimmerman Brush Co*., 455 U.S. 422, 428-29 (1982) (plaintiff's state law claim was "property"); *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971) (holding that states may not deny potential litigants the use of established adjudicatory procedures if such action would be "the equivalent of denying them an opportunity to be heard upon their claimed right….").

Mr. Gilmore also has a First Amendment liberty interest in litigating his constitutional claims. *See NAACP v. Button*, 371 U.S. 415, 428-431 (1963); *In re Primus*, 436 U.S. 412, 427, 432 (1978). In *Button*, the Supreme Court upheld the right to engage in constitutional litigation holding that litigation is, itself, "a form of political expression" and explains "litigation may well be the sole practicable avenue open . . . to petition for redress of grievances." 371 U.S. at 429-30.

Importantly, Mr. Gilmore's claims that the Government's and Airlines' actions violate his rights to travel, to associate, and to be free from unreasonable search and seizure, are constitutional. Constitutional litigation "comes within the generous zone of the First Amendment protection reserved for associational freedoms" and "communicat[es] useful information to the public." *Primus*, 424.

Like the NAACP in *Button* and the ACLU in *Primus*, Mr. Gilmore here engages in contrarian speech: through this litigation, he expressed the view that the government cannot constitutionally abridge civil liberties, including privacy, because of fear of terrorism. *See Primus*, 436 U.S. at 428 (listing "unpopular" subjects such as "political dissent, juvenile rights, prisoners' rights, military law, amnesty, and *privacy*") (emphasis added). Under either the property or the First Amendment analyses, Mr. Gilmore's due process claims in this case clearly qualify as protected interests that would be deprived by secret issuance of the secret security directive.

2. Secret Law Violates the *Matthews* Due Process Test

Secret law is an abomination. *See Hawkes v. IRS*, 467 F.2d 787, 795 (1972) (disclosure of agency policy serves the goals of law enforcement by encouraging knowledgeable and voluntary compliance); *Stokes v. Brennan*, 476 F.2d 699, 702 (5th Cir. 1973) (holding agency training manual not exempt from disclosure); *Caplan v. BATF*, 587 F.2d 544, 548 (2nd Cir. 1978) (same). While Mr. Gilmore accepts the need, for national security, to protect certain secrets, the Government's actions serve no need and violate his right of due process.

History provides us with numerous instances where courts have prevented Executive attempts to deprive citizens of life, liberty, or property without due process of the law. For instance, Supreme Court Justice Burton stated, "[t]he doctrine of administrative construction never has been carried so far as to permit administrative discretion to run riot." *Joint Anti-Fascist Refugee Comm'n v. McGrath*, 341 U.S. 123, 138 (1951). Justice Frankfurter explained, "Fairness of

procedure … is ingrained in our national traditions and is designed to maintain them." *Id*. at 161 (Frankfurter, J., concurring).

Indeed, the Supreme Court has fervently rejected the notion that "administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in due process of law as understood at the time of the adoption of the Constitution." *The Japanese Immigrant Case*, 189 U.S. 86, 100 (1903). A state "may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 682 (1930).

Where the government infringes on a liberty or property interest, courts generally conduct a balancing test to determine what process is due to protect individuals from arbitrary deprivations. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (requiring courts to weigh three factors when determining what procedural protections are constitutionally necessary: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of that interest through the procedures used; and (3) the government's interests).

The Supreme Court has recently reiterated the importance of procedural due process guarantees in a case involving national security interests. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2635 (2004). Despite "the weighty and sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States," the Supreme Court in *Hamdi* ultimately held that "a citizen-detainee seeking to challenge his

classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." *Id.* at 2648. The due process calculus must:

> not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.

Id.

Here, the *Mathews* analysis for procedural due process safeguards is far easier than in *Hamdi*. Mr. Gilmore's interest is in a fair and meaningful opportunity to litigate his First and Fourth Amendment and other constitutional concerns about the secret security directive and use of his personal information. This interest is significant.

The second *Mathews* factor considers the possibility of erroneous deprivations of Mr. Gilmore's rights. *See id.* at 2646. The likelihood of error and abuse in the Airlines' implementation of the Government's ever-changing secret directives in conducting air passenger screening is significant. The public record shows that the administration of air passenger screening poses many threats to civil liberties and has a total lack of articulated standards: use of a dragnet procedure, beginning testing of CAPPS II, inclusion of people on lists, unauthorized disclosure of passenger data from the airlines to the government, and no system to prevent improper dissemination of passenger records.

The third stage of the *Mathews* analysis is the simplest as, other than concealing the flaws of their policy from the American public, the government has not articulated a substantial interest in keeping secret the text of the law.

The Government claims that all of these directives are for security purposes. (ER 78, p. 27:11 to p. 31:25). Executive use of secrecy is presently losing its credibility. For example, in a FOIA appeal concerning airline passenger data surrendered to the TSA, United States District Judge Charles R. Breyer on June 15, 2004, ordered:

> The Court's preliminary review of the voluminous material demonstrates that in many instances the government has not come close to meeting its burden, and, in some instances, has made frivolous claims of exemption. The appropriate remedy is to have defendants review all of the withheld material to determine whether they believe in good faith that the material is in fact exempt and, if defendants contend it is exempt, to provide a detailed affidavit that explains why the particular material is exempt. General statements that, for example, the information is sensitive security information, are inadequate to satisfy the government's burden.

Gordon v. Federal Bureau of Invest., No. 03-01779 CRB (N.D. Cal. June 15 2004) (Order following *in camera* review).

Any governmental interest in secrecy can be addressed in the merits phase of the case. Here, the District Court simply did not apply the *Matthews* analysis because it held it lacked jurisdiction. Based on the significant private and public interests of access to the courts for redress, and that those interests would be greatly affected by Appellees' unsupportable use of secret law, the *Mathews v. Eldridge* factors plainly weigh against Appellees and in favor of Mr. Gilmore.

3. The Regulation Violates Due Process Because it is Void for Vagueness

Mr. Gilmore was penalized for failing to comply with a law he has yet to see. An agency cannot penalize a private party for violating a rule without first giving adequate notice of the substance of the rule. "Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule." *Satellite Broad. Co., Inc. v. F.C.C.*, 824 F.2d 1, 3 (D.C. Cir. 1987). The airline employees could not articulate which forms of ID were required, the consequences of non-compliance, or its source. The realities of non-compliance include intrusive searches, detention, interrogation, denial of the right to travel, and potential arrest.

In contrast, when the issue to deny passage is based on a passenger's outward behavior, the standard imposed upon the airline is whether it exercised its discretion reasonably based on all the information available when the decision was made. *See Cordero v. Cia Mexicana de Aviacion, S.A.*, 681 F.2d 669, 672 (9th Cir. 1982) (protester wrongfully labeled as "violent" and not allowed to fly).

In striking down a law that required people to show "credible and reliable" ID on demand, the Supreme Court held that void for vagueness doctrine requires that a law be drafted "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); *Delaware v. Prouse*, 440 U.S. 648, 662-63 (1979) (no right for police to conduct random or arbitrary seizures to check a motorist's ID, as "to allow this

action would create a 'grave danger' of abuse of discretion."); *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 499 (1982) (vagueness test is more stringent in First Amendment cases).

The *Kolender* court held that a legislature must establish minimal guidelines to govern law enforcement. Otherwise, a law may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Kolender*, 461 U.S. at 358. There is no published regulation here that provides any standards.

4. Absolute Discretion in a Government Agency is an Intolerable Invitation to Abuse.

The Government's secret policy seems to delegate to individual airline personnel the decision of how intrusive a search of a particular prospective passenger may be. Airline security guards are hardly in a position to apply the Fourth Amendment. Absolute discretion in a government agency is "an intolerable invitation to abuse." *Holmes v. New York City Hous. Auth.*, 398 F.2d 262, 265 (2nd Cir. 1968). The *Holmes* court rejected a New York City public housing allocation plan based on a "scoring system," and noted that it would discriminate if "some applicants, but not others, are secretly rejected by the Authority, are not thereafter informed of their ineligibility, and are thereby deprived of the opportunity to seek review of the Authority's decision." *Id*. at 265, n.4.

Travelers such as Mr. Gilmore face a similar predicament. The system selects some travelers "randomly" for intrusive searches. The "random" selectee provides cover for any non-random searches ordered by officials with unbridled

discretion. Such a program is unconstitutional unless it adheres to "absolute objectivity and neutrality" and avoids "elements of discretion and prejudice." *United States v. Lopez*, 328 F. Supp 1077, 1101 (E.D.N.Y. 1971). An ID requirement based on vague and secret "security directives" makes it impossible to know whether any guidelines to law enforcement exist.

5. The Power of the Judiciary to Review Regulations is Being Undermined by Administrative Secrecy.

At oral argument, the court asked the Justice Department attorney, "What is the rule, if at all, concerning identification?" The eventual response was "If you're asking me to disclose what's in the security directives, I can't do it." (ER 80; 31:12-25). The court found that the government "refused to concede whether a written order or directive requiring identification exists, or if it does, who issued it or what it says. (ER 90:11-12).

Rules that have the effect of impairing the advocacy of constitutional claims distort the process of constitutional adjudication. "An informed, independent judiciary presumes an informed, independent bar. . . . By seeking to prohibit the analysis of certain legal issues and to truncate presentation to the courts, the enactment under review prohibits speech and expression upon which courts must depend for the proper exercise of the judicial power." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001).

The secrecy of government security directives similarly distorts constitutional litigation regarding the secret directive's effects on civil liberties. Secrecy makes it much harder for Mr. Gilmore to litigate his claims. It is

fundamentally unfair to force Mr. Gilmore to litigate his claim without being able to read the administrative order he seeks to challenge. He can only extrapolate the nature of the secret orders from the confusing and contradictory statements of airline employees and Justice Department arguments.

G. Mr. Gilmore Has Standing to Challenge the Security Programs Because They Are Predicated on the ID Requirement.

Mr. Gilmore has standing to challenge the reasons for the ID requirement. For standing, a litigant must show: [1] that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the Appellee . . .[2] that the injury "fairly can be traced to the challenged action" and [3] [that the injury] "is likely to be redressed by a favorable decision." *Simon v. Eastern Kentucky Welfare Rights Org*., 426 U.S. 26, 38, 41 (1976). Appellees argued that Mr. Gilmore has standing in this action only insofar as he challenges an alleged federally-imposed requirement that airlines request identification as part of the screening process at airports, (ER 70; 11:23-13:24) but also argued that the logic behind the ID requirement is to determine a traveler's true name, to see if it matches a name on the No-Fly List or Watch List, as well as for a CAPPS profile. (ER 78, p. 27:11-28:24).

Mr. Gilmore's suit is a broad constitutional challenge against both the ID requirement and the programs predicated upon it: the No-Fly and Watch lists, CAPPS II, and all other agency actions that seek to mandate the identification of passengers, including the actions of DOJ, DOT, FBI, and DHS in aiding the FAA and TSA. (ER 3:23-4:21; 8:2-9).

Mr. Gilmore asserts multiple discrete injuries, with his relationships to his family, friends, and companies, caused by the application of the ID requirement to him. His injury is continuing as long as the policy is in effect and redressable by a court holding it unconstitutional.

H. The District Court Has Jurisdiction to Hear This Case in Total.

1. Security Directives Do Not Constitute "Orders" Within the Meaning of 49 U.S.C. § 46110, as There is No Administrative Record Nor Any Evidence of Any Final Agency Action

49 U.S.C. § 46110 insulates agency conduct from District Court review only when that conduct is embodied in an "order", as that term is used in the provision. When there is no "order", § 46110 plays no role. *Morris v. Helms*, 681 F.2d 1162, 1163-64 (9th Cir. 1982). The Court below accepted the Government's argument that the security directives for the ID requirement and other FAA & TSA regulations, to which the plaintiff lacks access, constitute "orders" within the meaning of § 46110.

The District Court held that "because this (due process) claim squarely attacks the orders or regulations issued by the TSA and/or the FAA with respect to airport security, this court does not have jurisdiction to hear the challenge." (ER 90:25-26). Section 46110 permits direct review by the courts of appeals over agency decisions only where the plaintiffs had an opportunity to raise their claims at the agency level, the agency considered those claims in an administrative proceeding, and the agency issued an order based on a fully developed record. Without an administrative proceeding and a fully developed administrative record, there is nothing for the circuit court to review. Where the agency does not identify

specific findings of fact on which it has relied, courts of appeals are ill-equipped to fill in the gap and conduct the fact-finding necessary to evaluate the decision. The district court is the correct forum for a case like this, one that requires discovery, a fact-finding trial, and an initial judgment that can be reviewed, if necessary, by the Courts of Appeals. But here, the Government "refuse[s] to concede whether a written order or directive requiring identification exists, or if it does, who issued it or what it says." (ER 90:11-12). Because the Government refused or failed to identify any agency order embodying the ID requirement, the District Court had no basis to determine that any of the Government's secret security directives is a final agency "order." As there is no administrative record of any of the actions regarding the identification requirement, or the uses to which data collected by airlines will be put, it cannot be determined whether there is any final agency action, nor whether any such action constitutes an "order" pursuant to 49 U.S.C. § 46110.

Under § 46110, an "order" describes an agency action that results from an administrative decision and is based on findings of fact contained in an administrative record. *Morris v. Helms*, 681 F.2d at 1163-64. The existence of an agency proceeding with a reviewable administrative record determines whether an action is an "order" within the meaning of this provision, rather than the agency's own characterization. *Sierra Club v. Skinner*, 885 F.2d 591, 592-93 (9th Cir. 1989). *See Southern California Aerial Advertisers' Assoc. v. F.A.A.*, 881 F.2d 672, 676 (9th Cir. 1989) ("we hold that under section 1486(a) we may review a petitioner's claims regarding final agency action other than formal rulemaking so

long as an administrative record adequate to permit evaluation of those claims exists"); *Crist v. Leippe*, 138 F.3d 801, 804 (9th Cir. 1998) (remanding case to district court in part because "claim may not be based on the merits of the appealed order and additional record development may be necessary; (agency) did not come close to developing a record permitting informed judicial evaluation of his challenge."); *Suburban O'Hare Comm'n v. Dole*, 787 F.2d 186, 193 (7th Cir. 1986) ("The existence of a reviewable administrative record is the determinative element in defining an FAA decision as an 'order' for purposes of Section 1486.") Here, the Government can point to no such record.

Nor can the Government point to the existence of any "final agency action," which requires definitive statements of the agency's position, as their actions are secret. *See Air California v. United States Dep't of Transp.*, 654 F.2d 616, 620 (9th Cir. 1981); *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967).

Concededly, 49 U.S.C. § 46110 has recently been amended (Dec. 12, 2003) to authorize the courts of appeals to review an "order" issued "in whole or in part under ...subsection (l) or (s) of section 114..." 49 U.S.C. § 46110(a). 49 U.S.C. 114(l)(2) states that "notwithstanding any other provision of law...if the Under Secretary determines that a regulation or security directive must be issued immediately in order to protect transportation security, the Under Secretary shall issue the regulation or security *directive without providing notice or an opportunity to comment*... ." This does not mean that such a directive is an "order" that is exclusively reviewed by the Appellate Court and exempt from judicial review in the District Court.

It remains impossible to imagine how any Court of Appeal could review any regulation or security directive that was created without any administrative record at all, or any knowledge about whether or not a security directive that mandated the airlines to request ID was actually issued or not. Not only is there no record, but the Government has not shown that any agency took a "final agency action" regarding mandatory passenger identification requirements. For these reasons, any attempt to characterize these security directives as "orders" must fail. This Court should send this case back to the District Court with instructions to review all relevant regulations and security directives in camera.

2. The District Court Has Jurisdiction to Hear Mr. Gilmore's Broad Constitutional Challenges to Administrative Actions

Even if the Government conduct challenged here was embodied in an order, the District Court would have jurisdiction over the First and Fourth Amendment claims in the complaint.

The District Court has jurisdiction over "general collateral challenges to unconstitutional practices or policies." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 492 (1991). The Ninth Circuit has held that broad constitutional challenges to agency actions belong in the District Courts "because the Federal Aviation Act, 49 U.S.C. §§ 40101-49105 (1995), provides no remedy for such claims." *Foster v. Skinner*, 70 F.3d 1084, 1088 (9th Cir. 1995). Neither the FAA nor the TSA could reach the issue of Mr. Gilmore's constitutional rights, as neither agency has the statutory authority and expertise to make such findings. *See Mace v. Skinner*, 34 F.3d 854, 859 (9th Cir. 1994) (stating that the FAA had neither

statutory authority nor the institutional competence as the appropriate forum to review such claims). There is no reason to believe that the newly-formed TSA possesses any special expertise that the FAA lacks.

The only exception to this rule is when the claim is "inescapably intertwined with a review of the procedures and merits surrounding the FAA's order." *Mace*, 34 F.3d at 858. In this case, there is no record of the procedures or evaluation of the merits surrounding any decision that the TSA or the FAA might have made to intertwine with Mr. Gilmore's constitutional challenges. The District Court has jurisdiction review the constitutional claims in this case. This Court should remand with instructions to decide these claims.

I. Appellant Deserves an Opportunity to Amend His Complaint

A ruling that Mr. Gilmore has failed to state a claim under 12(b)(6) may be granted only in extraordinary circumstances. *United States v. City of Redwood City*, 640 F.2d 963, 966 (9th Cir. 1981). An "outright refusal" of leave to amend "without any justifying reason appearing for the denial is not an exercise of discretion." *Foman v. Davis*, 371 U.S. 178, 182 (1962) (emphasis added); *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 691 (9th Cir. 1993).

Thus, denial of leave to amend is likely to be reversed on appeal where the record fails to indicate clearly (e.g., by written findings) the District Court's reasons. *Bowles v. Reade*, 198 F.3d 752, 758-759 (9th Cir. 1999). The District Court's order in this case states no reasons why the court dismissed the case "with prejudice."

VIII. CONCLUSION

The government demands identification from large numbers of travelers, including Mr. Gilmore. Searching those who do not comply with a "request" for ID violates the Fourth Amendment, and is not authorized by the "airport exception" because it is not confined to searching for weapons and explosives. Requiring a traveler to give up either his First Amendment right to anonymity or his Fourth Amendment right to be free from unreasonable searches, to board a plane, violates the fundamental right to travel, and acts as a prior restraint. Denial of the ability to travel anonymously infringes the right to speak anonymously, to assemble anonymously, and to associate and petition anonymously. The Government has not shown that this burden is necessary to effect a compelling state interest. Thus, the requirement that domestic travelers are required to show identification papers upon demand is unconstitutional.

This Court should reverse the District Court's dismissal and remand with instructions to permit Mr. Gilmore to conduct discovery to develop a full record on which the District Court can rule on the Constitutional claims raised in the Complaint.

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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 13,045 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 August 16, 2004, an original and fifteen (15) copies of Appellant John Gilmore's Opening 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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