

Judge Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHELLE D. GREEN, et al.,

Plaintiffs,

v.

TRANSPORTATION SAFETY
ADMINISTRATION, et al.,

Defendants

NO. C04-763 Z

**DEFENDANTS' MOTION TO
DISMISS AND MEMORANDUM
OF POINTS AND AUTHORITIES
IN SUPPORT THEREOF**

(Note on Motion Calendar for:
July 16, 2004)

PETER D. KEISLER
Assistant Attorney General

JOHN McKAY
United States Attorney

BRIAN C. KIPNIS
Assistant United States Attorney

SANDRA M. SCHRAIBMAN
JOSEPH W. LOBUE
DIANE KELLEHER
Attorneys
Department of Justice
20 Massachusetts Ave, NW, Room
7300
Washington D.C. 20530

TABLE OF CONTENTS

1

2

3 TABLE OF AUTHORITIES ii

4 INTRODUCTION 2

5 STATUTORY AND REGULATORY BACKGROUND 4

6 PLAINTIFFS' ALLEGATIONS 6

7 ARGUMENT. 9

8 I. THE UNITED STATES COURTS OF APPEALS HAVE

9 EXCLUSIVE JURISDICTION TO REVIEW ORDERS

10 ISSUED BY ADMINISTRATOR OF THE TSA WITH

11 RESPECT TO HIS SECURITY DUTIES AND POWERS 9

12 II. PLAINTIFFS' FOURTH AMENDMENT RIGHTS

13 HAVE NOT BEEN VIOLATED.. 12

14 A. Defendants Did Not Violate The Fourth Amendment in Determining

15 Whether or Not Plaintiffs Were on The No Fly or Selectee Lists.. 13

16 B. Defendants Did Not Violate The Fourth Amendment When

17 They Subjected Plaintiffs to Enhanced Security Screening. 15

18 C. Defendants Did Not Violate The Fourth Amendment

19 When They Subjected Plaintiffs Entering The United

20 States From Abroad to Searches and Interrogations.. 19

21 III. PLAINTIFFS HAVE NOT BEEN UNLAWFULLY DEPRIVED

22 OF ANY INTERESTS PROTECTED BY THE FIFTH AMENDMENT 20

23 CONCLUSION 23

24

25

26

27

28

TABLE OF AUTHORITIES

FEDERAL CASES

Adair v. England,
183 F. Supp. 2d 31 (D.D.C. 2002) 17

Aerosource v. Slater,
142 F.3d 572 (3d Cir. 1998) 10

Almeida-Sanchez v. United States,
413 U.S. 266 (1973) 20

American Manufacturers Mutual Insurance Co. v. Sullivan,
526 U.S. 40 (1999) 20

Atorie Air v. FAA,
942 F.2d 954 (5th Cir. 1991) 10

Attorney General of New York v. Soto-Lopez,
476 U.S. 898 (1986) 21

Board of Regents v. Roth,
408 U.S. 564 (1972) 20

Bradley v. United States,
299 F.3d 197 (3d Cir. 2002) 19, 20

Bureerong v. Uvawas,
922 F. Supp. 1450 (C.D. Cal. 1996) 7

Chowdhury v. Northwest Airlines,
No. 02-2665 (N.D. Cal. Apr. 2, 2004) 12

Clark v. Busey,
959 F.2d 808 (9th Cir. 1992) 9, 12

Crist v. Leippe,
138 F.3d 801 (9th Cir. 1998) 11, 12

Decker v. Advantage Fund, Ltd.,
362 F.3d 593 (9th Cir. 2004) 6

Florida v. Royer,
460 U.S. 491 (1983) 13

Gilmore v. Ashcroft,
No. 02-3444, 2004 WL 603530 (N.D. Cal. Mar. 23, 2004) passim

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Green v. Brantley,
981 F.2d 514 (11th Cir. 1993) 11

INS v. Delgado,
466 U.S. 210 (1984) 13

Jones v. Helms,
452 U.S. 412 (1981) 21

Los Angeles v. FAA,
239 F.3d 1033 (9th Cir. 2001) 11

Mace v. Skinner,
34 F.3d 854 (9th Cir. 1994) passim

Miller v. Reed,
176 F.3d 1202 (9th Cir. 1999) 22

National Black Police Association v. District of Columbia,
108 F.3d 346 (D.C. Cir. 1997) 17

Nevada Airlines v. Bond,
622 F.2d 1017 (9th Cir. 1980) 10

Paul v. Davis,
424 U.S. 693 (1976) 21

Public Citizen v. FAA,
988 F.2d 186 (D.C. Cir. 1993) 12

Puget Sound Traffic Associate v. CAB,
536 F.2d 437 (D.C. Cir. 1976) 10

Saenz v. Roe,
526 U.S. 489 (1999) 21

Siegert v. Gilley,
500 U.S. 226 (1991) 21

Simon v. Eastern Kentucky Welfare Rights Organization,
426 U.S. 26 (1976) 8

State of New York v. FAA,
712 F.2d 806 (2d Cir. 1983) 10

Torbet v. United Air Lines,
298 F.3d 1087 (9th Cir. 2002) passim

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States v. \$124,570 U.S. Currency,
873 F.2d 1240 (9th Cir. 1989) 18

United States v. \$25,000 Currency,
853 F.2d 1501 (9th Cir. 1988) 14

United States v. Davis,
482 F.2d 893 (9th Cir. 1973) passim

United States v. Drayton,
536 U.S. 194 (2002) 13

United States v. Edwards,
498 F.2d 496 (2d Cir. 1974) 17

United States v. Gonzalez-Rincon,
36 F.3d 859 (9th Cir. 1994) 19

United States v. Hartwell,
296 F. Supp. 2d 596 (E.D. Pa. 2003) 18

United States v. Jacobsen,
466 U.S. 109 (1984) 12

United States v. McDowell,
250 F.3d 1354 (11th Cir. 2001) 20

United States v. Miner,
484 F.2d 1075 (9th Cir. 1973) 14

United States v. Montoya de Hernandez,
473 U.S. 531 (1985) 19

United States v. Nates,
831 F.2d 860 (9th Cir. 1987) 20

United States v. Pulido-Baquerizo,
800 F.2d 899 (9th Cir. 1986) 18

United States v. Ramos-Saenz,
36 F.3d 59 (9th Cir. 1994) 19

United States v. Taghizadeh,
41 F.3d 1263 (9th Cir. 1994) 20

United States v. Vigil-Montanel,
753 F.2d 996 (11th Cir. 1985) passim

1 United States v. Wehrli,
2 637 F.2d 408 (11th Cir. 1981) 16

3 Western Mining Council v. Watt,
4 643 F.2d 618 (9th Cir. 1981) 7

5 White v. Lee,
6 227 F.3d 1214 (9th Cir. 2000) 7

7 **FEDERAL STATUTES AND REGULATIONS**

8 28 U.S.C. § 1631 12

9 42 U.S.C. § 46110 passim

10 49 U.S.C. § 114 passim

11 49 U.S.C. §§ 40101-46507 9

12 49 U.S.C. § 44901 passim

13 49 U.S.C. § 44902 passim

14 49 U.S.C. § 44903 6

15 49 U.S.C. § 46502 4

16 49 U.S.C. § 46505 4

17 Federal Rule of Civil Procedure 12 passim

18 Amendment to the Federal Aviation Act of 1958,
19 Pub. L. 93-366, 88 Stat. 409 (Aug. 5, 1974) 4

20 Aviation and Transportation Security Act,
21 Pub. L. 107-71, 115 Stat. 603 (Nov. 19, 2001) 4

22 Aviation and Transportation Security Act,
23 Pub. L. No. 107-71, 115 Stat. 597 (2001) 4

24 FAA Amendments of 1961,
25 Pub. L. No. 87-197, 75 Stat. 466 (Sept. 5, 1961) 4

26 Homeland Security Act of 2002,
27 Pub. L. 107-296, 116 Stat. 2135 (Nov. 25, 2002) 4

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

49 C.F.R. § 1520.5 21
49 C.F.R. § 1520.7 21
49 C.F.R. § 1540.107 passim
49 C.F.R. § 1544.201 passim
49 C.F.R. § 1540.111 5
49 C.F.R. § 1540.5 5
49 C.F.R. § 1544.101 5
49 C.F.R. § 1544.103 5
49 C.F.R. § 1544.201-213 5, 16
49 C.F.R. § 1544.305 passim
69 Fed. Reg. 28066 (May 18, 2004) 12
68 Fed. Reg. 45265 (Aug. 18, 2003) 15
68 Fed. Reg. 49718 (Aug. 19, 2003) 4

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHELLE D. GREEN, et al.,

Plaintiffs,

v.

TRANSPORTATION SAFETY
ADMINISTRATION, et al.,

Defendants

NO. C04-763 Z

**DEFENDANTS' MOTION TO
DISMISS AND MEMORANDUM
OF POINTS AND AUTHORITIES IN
SUPPORT THEREOF**

(Note on Motion Calendar for:
July 16, 2004)

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendants, the Transportation Security Administration; David M. Stone, Acting Administrator of the Transportation Security Administration; the Department of Homeland Security; and Tom Ridge, Secretary of the Department of Homeland Security, hereby move for their dismissal from this action on the grounds that the Court is without jurisdiction over the subject matter and the Complaint fails to state a claim upon which relief can be granted.

This motion is made and based on the accompanying Memorandum of Points and Authorities, the pleadings, papers and exhibits filed herein, and such oral argument as the Court may decide to entertain.

1 **MEMORANDUM OF SUPPORTING POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 To prevent hijacking and other forms of violence aboard aircraft, federal law requires the
4 Transportation Security Administration ("TSA") to notify local law enforcement agencies and airline
5 security officers of the identity of persons known to pose, or suspected of posing, a threat to aviation
6 safety. This procedure is intended to enable the airlines to take additional precautions as appropriate
7 and, where necessary, to prevent the individuals from boarding an aircraft altogether. In addition, the
8 TSA is required by statute to screen all airline passengers and property for dangerous weapons,
9 explosives, or other destructive substances.

10 In this action, Plaintiffs challenge both of these critical components of the government's effort to
11 protect the public from individuals who seek to achieve political ends by killing innocent airline
12 passengers and destroying passenger aircraft. In substance, Plaintiffs contend that delays of
13 approximately thirty to forty-five minutes needed to verify their identity prior to issuance of a boarding
14 pass (a step designed to ensure that passengers are not individuals who pose a threat to aviation
15 safety), as well as additional delays associated with the passenger screening process, represent an
16 unreasonable search and seizure under the Fourth Amendment and violate the Due Process Clause of
17 the Fifth Amendment.

18 While Plaintiffs' frustration with the delay encountered at airports is understandable and no
19 doubt shared by many other passengers, who like Plaintiffs must arrive at the airport well in advance of
20 their flights, Plaintiffs' constitutional claims are wholly without merit. The courts have long recognized
21 that "[t]he need to prevent airline hijacking is grave and urgent," and "[t]he potential damage to person
22 and property from such acts is enormous." United States v. Davis, 482 F.2d 893, 910 (9th Cir. 1973).
23 The loss of human life on September 11, 2001, demonstrates, in the most striking terms, that there
24 continues to be a compelling need for vigilant efforts to forestall further acts of violence and that tragic
25 consequences may result if those efforts prove to be unsuccessful. Any delays occasioned by the
26 government's efforts to identify and screen those passengers who present a threat to air safety are
27 justified by the necessity for such actions. Further, such delays were not of excessive duration in this
28 case, as evidenced by the fact that none of the named Plaintiffs even claims to have missed a flight.

1 Plaintiffs contend that their names are similar or identical to those on a "No Fly" or "Selectee"
2 List, described herein, which contain the names of persons prohibited from flying or who must undergo
3 additional screening before being permitted to board a plane. When Plaintiffs travel by air, they allege
4 they are mistaken for persons on the No Fly or Selectee List, resulting in delays, inconvenience, feelings
5 of fear and apprehension, and social stigma. Plaintiffs blame Defendants, asserting that Defendants'
6 administration and maintenance of the these lists violates the Fourth and Fifth Amendments. Plaintiffs'
7 claims must be dismissed.

8 As a threshold matter, this Court has no jurisdiction to hear these claims. The No Fly and
9 Selectee Lists, as well as the TSA's instructions regarding the airlines' use of those lists, are
10 incorporated into Security Directives. Such Directives are "orders" issued by the Administrator of the
11 TSA with respect to his security duties and powers within the meaning of 49 U.S.C. § 46110. They
12 are subject to judicial review only by United States Courts of Appeals which, by statute, have exclusive
13 jurisdiction to affirm, modify, or set aside such orders. Plaintiffs seek to make an end-run around this
14 jurisdiction by challenging Defendants' Security Directives in this Court.

15 Plaintiffs have also failed to state a claim for which relief can be granted, even assuming
16 arguendo that this Court has jurisdiction. Verification of Plaintiffs' identities prior to the issuance of a
17 boarding pass does not amount to a "seizure or search" within the meaning of the Fourth Amendment,
18 and even if it did, Defendants' actions in determining whether Plaintiffs' names matched those on the No
19 Fly and Selectee Lists were reasonable. Plaintiffs also consented to the delays inherent in this process
20 by choosing to fly.

21 Likewise, subjecting Plaintiffs to wand searches and pat-downs, and conducting hand-searches
22 of their luggage – which Plaintiffs refer to as "enhanced screening" – is consistent with the Fourth
23 Amendment. Caselaw establishes that such action is no more extensive than necessary to detect the
24 presence of weapons or explosives; is confined in good faith to that purpose; and may be avoided
25 altogether if a passenger elects not to fly. Further, by choosing to fly, and opting to participate in the
26 airport screening process, Plaintiffs consented to the searches of their persons and possessions
27 described in their Complaint. The allegations of interrogations and searches occurring at U.S. borders
28

1 also fail to state a claim because the government's authority to interrogate and search those seeking to
2 enter the United States is far-reaching.

3 Plaintiffs' Due Process claims likewise fail. Defendants' actions have not impermissibly
4 interfered with Plaintiffs' right to travel. Plaintiffs remain free to travel by air under the reasonable
5 conditions imposed by Defendants' regulations, as well as by means other than air. Plaintiffs' remaining
6 allegations do not implicate any liberty or property interests protected by the Fifth Amendment, so
7 those claims must be dismissed as well.

8 STATUTORY AND REGULATORY BACKGROUND

9 Since 1961, Congress has adopted numerous provisions designed to deter and prevent acts of
10 violence aboard aircraft. See, e.g., FAA Amendments of 1961, Pub. L. No. 87-197, 75 Stat. 466
11 (Sept. 5, 1961); Amendment to the Federal Aviation Act of 1958, Pub. L. 93-366, 88 Stat. 409 (Aug.
12 5, 1974); Aviation and Transportation Security Act, Pub. L. 107-71, 115 Stat. 603 (Nov. 19, 2001);
13 Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135 (Nov. 25, 2002). For many years,
14 it has been a federal crime to commit "aircraft piracy," i.e., to seize or exercise control of an aircraft by
15 force or violence or threat of force or violence, 49 U.S.C. § 46502(a)(A), to board or attempt to
16 board an aircraft with a concealed dangerous weapon, id. at § 46505(b)(1), or to place or attempt to
17 place a loaded weapon, or an explosive or other incendiary device, on an aircraft. Id., §§ 46505(b)(2)
18 and (b)(3).

19 Congress ordered the TSA Administrator to "prescribe regulations to protect passengers and
20 property on an aircraft . . . against an act of criminal violence or aircraft piracy." 49 U.S.C.
21 § 44903(b).¹ Pursuant to this authority, the government has promulgated regulations which, with limited
22

23 ¹ Although the statute references the Under Secretary of Transportation for Security, effective
24 August 19, 2003, the TSA amended its regulations, 49 C.F.R. chapter XII, to reflect the title change of
25 the "Under Secretary of Transportation for Security" to the "Administrator of the TSA," as part of its
26 move from the Department of Transportation to the Department of Homeland Security. See TSA
27 Transition to Department of Homeland Security; Technical Amendments Reflecting Organizational
28 Changes, 68 Fed. Reg. 49718 (Aug. 19, 2003).

Likewise, effective February 22, 2003, the TSA assumed much of the responsibility for
aviation security previously held by the Federal Aviation Administration ("FAA"). See Aviation and

1 exceptions, prohibit an individual from having a weapon, explosive, or incendiary device on or about
2 the individual's person or accessible property when the person is aboard, or attempts to board, an
3 aircraft; when a person enters a "sterile area" of an airport (i.e., a portion of an airport that provides
4 passengers access to boarding aircraft); or "[w]hen performance has begun of an inspection of the
5 individual's person or accessible property before entering a sterile area." 49 C.F.R. § 1540.111(a)(1);
6 see also id. at § 1540.5 (defining "sterile area").

7 In addition, the implementing regulations require each aircraft operator to adopt a "security
8 program" approved by the TSA which must "[p]rovide for the safety of persons and property traveling
9 on flights provided by the aircraft operator against acts of criminal violence and air piracy, and the
10 introduction of explosives, incendiaries, or weapons aboard an aircraft." 49 C.F.R. §§ 1544.101(a)
11 and 1544.103(a)(1). The regulations also provide that the TSA may issue a "Security Directive" when
12 it determines that "additional security measures are necessary to respond to a threat assessment or a
13 specific threat against civil aviation." 49 C.F.R. § 1544.305(a).

14 By statute, the Administrator of the TSA must "provide for the screening of all passengers and
15 property . . . that will be carried aboard a passenger aircraft" 49 U.S.C. § 44901(a) (emphasis
16 added). See 49 C.F.R. §§ 1544.201-1544.213. The Administrator of the TSA is required to
17 prescribe regulations requiring an air carrier to "refuse to transport – [] a passenger who does not
18 consent to a search . . . establishing whether the passenger is carrying unlawfully a dangerous weapon,
19 explosive, or other destructive substance." 49 U.S.C. § 44902(a); see 49 C.F.R. §§ 1540.107 and
20 1544.201(c). By operation of law, "[a]n agreement to carry passengers or property in air
21 transportation . . . is deemed to include an agreement that the passenger or property will not be carried
22 if consent to search for [these] purpose[s] . . . is not given." 49 U.S.C. § 44902(c). Subject to
23 implementing regulations, the statute also permits an air carrier to "refuse to transport a passenger or
24 property the carrier decides is, or might be, inimical to safety." 49 U.S.C. § 44902(b).

25 Congress has also mandated the use of a "passenger prescreening system" to identify
26 passengers who might pose a risk to civil aviation, and to ensure that those identified are adequately

27 _____
28 Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001).

1 screened. The statute requires the government to "ensure that the Computer-Assisted Passenger
2 Prescreening System, or any successor system (i) is used to evaluate all passengers before they board
3 an aircraft; and (ii) includes procedures to ensure that individuals selected by the system and their carry-
4 on and checked baggage are adequately screened." 49 U.S.C. § 44903(j)(2).

5 Finally, the Administrator of the TSA is required to establish procedures for notifying
6 appropriate officials "of the identity of individuals" who are "known to pose, or suspected of posing, a
7 risk of air piracy or terrorism or a threat to airline passenger safety" 49 U.S.C. § 114(h)(2). The
8 Under Secretary (now Administrator) is also charged to establish "policies and procedures" which
9 require air carriers "to identify individuals on passenger lists who may be a threat to civil aviation or
10 national security" and when such an individual is identified, to prevent him or her "from boarding an
11 aircraft" or to "take other appropriate action" Id. at § 114(h)(3). The TSA has implemented
12 these provisions through a series of Security Directives and Emergency Amendments to air carrier
13 security programs which include a list of individuals who are either barred from boarding an aircraft or
14 required to undergo additional screening prior to boarding. See Declaration of Lee Longmire, TSA's
15 Assistant Administrator for Operations Policy, dated June 4, 2004, at ¶¶ 4-9 (attached as Exhibit A)
16 (hereinafter "Longmire Decl."). These Security Directives and Emergency Amendments also include
17 instructions to air carriers of the security procedures to be followed when such individuals are
18 encountered at an airport. Id.

19 **PLAINTIFFS' ALLEGATIONS**

20 Plaintiffs are seven individuals who allege that they are "subject to stigmatization and repeated
21 interrogations, delays, enhanced searches, detentions, and/or other travel impediments" as a result of
22 their association with the "No-Fly List." Compl., ¶ 3. According to the Complaint, the No-Fly List is
23 "circulated to commercial airlines and security personnel with instructions to detain and question any
24 passenger whose name matches or is similar to one on the No-Fly List." Id. at ¶ 1.² It is comprised of

25
26 ² Because Plaintiffs have not stated a claim for which relief can be granted, this case should be
27 disposed of on the pleadings. Defendants presume the well-pled factual allegations in Plaintiffs'
28 Complaint to be true only for purposes of Defendants' motion to dismiss for failure to state a claim on
which relief can be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). See Decker v.

1 two lists, one which includes persons who are prohibited from flying, and another which includes
2 persons who must "go through additional security screening prior to boarding." Id. at ¶ 17.³
3 Defendants "disseminate updated versions of the No Fly List as attachments to security directives and
4 emergency amendments to commercial airlines in the United States." Id. at ¶ 21.

5 Plaintiffs complain that Defendants do not maintain the No-Fly List with "sufficient accuracy,
6 relevance, timeliness, or completeness to ensure that innocent passengers are not incorrectly and
7 unfairly stopped, interrogated, detained, searched or subjected to other travel impediments." Id. at ¶
8 20. Plaintiffs have brought this case as a class action, seeking to represent "all individuals who have
9 been or will be subject to interrogations, delays, enhanced searches, and/or detentions as a result of
10 having a name identical or similar to one on the No-Fly List." Id. at ¶ 95.⁴

11 Notably, the allegations of the seven named Plaintiffs, see id. at ¶¶ 35-94, do not correspond to
12 Plaintiffs' "Factual Allegations," see id. at ¶¶ 17-24. For the most part, the "Factual Allegations" contain
13 assertions regarding injuries allegedly suffered by unnamed third parties which have not actually been
14 shared by the named Plaintiffs themselves. See, e.g., id. at ¶ 27 ("innocent passengers" have "miss[ed]

15
16
17 Advantage Fund, Ltd., 362 F.3d 593, 595 (9th Cir. 2004). Well-pled factual allegations do not
18 include "unreasonable inferences, unwarranted deductions of fact, or conclusory legal allegations cast in
19 the form of factual allegations." Bureerong v. Uvawas, 922 F. Supp. 1450, 1462 (C.D. Cal. 1996);
20 see also Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981).

21 With respect to the argument that the Court lacks jurisdiction over Plaintiffs' claims, Defendants
22 rely on this memorandum and the attached declaration of Lee Longmire, pursuant to Federal Rule of
23 Civil Procedure 12(b)(1). See White v. Lee, 227 F.3d 1214, 1242 (9th Cir. 2000) (jurisdictional
24 challenge under Rule 12(b)(1) may be made either on the face of the pleadings or by presenting
25 extrinsic evidence)

26 ³ Plaintiffs' definition of the "No-Fly List" combines the list of persons barred from airline travel
27 with the list of persons who must be subjected to additional screening before being permitted to board a
28 plane. Their allegations indicate that the two lists do not contain the same information, and none of the
29 Plaintiffs claim they have been prevented from flying altogether by virtue of a "No-Fly" list. The
30 Longmire Declaration explains how the No Fly and Selectee Lists differ. See Longmire Decl., ¶ 7.

⁴ The class definition would appear to include terrorists or others who are on the No-Fly List
because they pose a threat to aviation safety.

1 their flights" and "been forced to pay for a substitute flight out of their own pockets").⁵

2 The named Plaintiffs allege that their Fourth and Fifth Amendment rights have been violated
3 because they: (a) were asked to provide identification or other documents when checking in for their
4 flights;⁶ (b) encountered delays during the check-in process while airline officials sought to determine
5 whether Plaintiffs were, in fact, individuals known or suspected of posing a threat to aviation safety;⁷ (c)
6 were told that their names were identical or similar to those on a "watch list," "FBI list," or "no fly" list;⁸
7 and (d) were subsequently cleared for boarding.⁹ None of the named Plaintiffs claim to have missed
8 flights as a result of these delays. In addition, some Plaintiffs allege that they could not use the airport's
9 curbside check-in or were unable to obtain boarding passes via the Internet or at computerized e-
10 kiosks.¹⁰ Five Plaintiffs allege that they were subject to enhanced security screening,¹¹ and that they
11 were given no or varying explanations for this additional screening.¹² Plaintiffs Fathi and Ibrahim allege
12 that they were subjected to interrogations and intrusive searches while entering the United States from
13 abroad.¹³ Plaintiffs allege that when airline officials or others told them that their names were identical

15 ⁵ Moreover, Plaintiffs lack standing to even assert claims for the injuries suffered by unnamed
16 third parties. The fact that Plaintiffs have filed a class action "adds nothing to the question of standing,
17 for even named plaintiffs who represent a class 'must allege and show that they personally have been
18 injured, not that injury has been suffered by other, unidentified members of the class to which they
19 belong and which they purport to represent.'" Simon v. Eastern Kentucky Welfare Rights Org., 426
20 U.S. 26, 40 n. 20 (1976) (quoting Warth v. Seldin, 422 U.S. 490, 503 (1975)).

21 ⁶ See Compl., ¶¶ 36, 45, 46, 55, 57, 62, 67, 68, 71, 72, 76, 81, 86.

22 ⁷ See Compl., ¶¶ 36, 37, 41, 45, 47, 55, 81, 86, 89-91.

23 ⁸ See Compl., ¶¶ 37, 38, 41, 45, 54, 60, 67, 68, 70, 81, 89, 90.

24 ⁹ See Compl., ¶¶ 36, 40, 41, 45, 47, 58, 67, 68, 70, 76, 81, 86, 89, 90.

25 ¹⁰ See Compl., ¶¶ 42, 44, 52, 66, 68, 74, 80, 84, 86, 94.

26 ¹¹ See Compl., ¶¶ 40, 48, 56, 59, 63, 77, 81.

27 ¹² See Compl., ¶¶ 40, 48, 63, 81; *id.* at ¶¶ 56, 59, 77; *id.* at ¶ 58.

28 ¹³ See Compl., ¶¶ 71-73, 83.

1 or similar to those on a "watch list," "FBI list," or "no fly" list, the statements were made in front of other
2 passengers, causing Plaintiffs humiliation and embarrassment.¹⁴ Finally, many of plaintiffs' complaints
3 relate not to actions by Defendants' employees, but by airline employees.¹⁵

4 **ARGUMENT**

5 **I. THE UNITED STATES COURTS OF APPEALS HAVE EXCLUSIVE**
6 **JURISDICTION TO REVIEW ORDERS ISSUED BY ADMINISTRATOR OF THE**
7 **TSA WITH RESPECT TO HIS SECURITY DUTIES AND POWERS**

8 Plaintiffs' Complaint must be dismissed because 49 U.S.C. § 46110(a) vests exclusive
9 jurisdiction over their claims in the United States Courts of Appeals. This section provides, in part, that:

10 a person disclosing a substantial interest in an order issued by the Secretary of
11 Transportation (or the Under Secretary of Transportation for Security with respect to
12 security duties and powers designated to be carried out by the Under Secretary or the
13 Administrator of the Federal Aviation Administration with respect to aviation safety
14 duties and powers designated to be carried out by the Administrator) in whole or in
15 part under this part, part B, or subsection (l) or (s) of section 114 may apply for review
16 of the order by filing a petition for review in the United States Court of Appeals for the
17 District of Columbia Circuit or in the court of appeals of the United States for the circuit
18 in which the person resides or has its principal place of business.

19 49 U.S.C. § 46110(a).¹⁶ The Court of Appeals has "exclusive jurisdiction to affirm, amend, modify, or
20 set aside any part of the order" 42 U.S.C. § 46110(c) (emphasis added). When a claim
21 implicates section 46110(a), the district court's federal question jurisdiction is preempted. See Clark v.
22 Busey, 959 F.2d 808, 811 (9th Cir. 1992).

23 As the Ninth Circuit has explained, section 46110 authorizes appellate review of "orders,"
24 which the court described as follows:

25 _____
26 ¹⁴ See Compl., ¶¶ 37, 41, 45, 54, 60, 67, 68, 72, 81, 83, 86, 89, 90.

27 ¹⁵ See, e.g., Compl., ¶¶ 36, 37, 41, 45, 46, 47, 54, 55, 58, 60, 67, 68, 69, 70, 76, 81, 86,
28 89, 90, 91.

¹⁶ The phrase "this part" in § 46110(a) refers to Part A ("Air Commerce and Safety") of
Subtitle VII of Title 49 ("Aviation Programs"), see 49 U.S.C. §§ 40101-46507. The statutory
provisions requiring the Administrator to provide for the screening of passengers and the use of a
passenger pre-screening system are contained in 49 U.S.C. §§ 44901(a) and 44903(i)(2), which are
encompassed within Part A. Subsection (l) of section 114, which is also cross-referenced in section
46110, authorizes the Secretary to issue regulations and security directives to protect transportation
security. 49 U.S.C. § 114(l)(2).

1 "[O]rder" carries a note of finality, and applies to an[y] agency decision which imposes
2 an obligation, denies a right, or fixes some legal relationship. In other words, [i]f the
3 order provides a "definitive" statement of the agency's position, has a "direct and
4 immediate" effect on the day-to-day business of the party asserting wrongdoing, and
5 envisions "immediate compliance with its terms," the order has sufficient finality to
6 warrant the appeal offered by section [46110].

7 Mace v. Skinner, 34 F.3d 854, 857 (9th Cir. 1994) (internal quotation marks and citations omitted);
8 see also Nevada Airlines v. Bond, 622 F.2d 1017, 1020 & n. 5 (9th Cir. 1980) Aerosource v. Slater,
9 142 F.3d 572, 577 (3d Cir. 1998); Atorie Air v. FAA, 942 F.2d 954, 960 (5th Cir. 1991); State of
10 New York v. FAA, 712 F.2d 806, 808 (2d Cir. 1983); Puget Sound Traffic Assoc. v. CAB, 536
11 F.2d 437, 439 (D.C. Cir. 1976).

12 TSA has implemented the requirement that it "notify[] airline officials of the identity of
13 individuals known to pose, or suspected of posing, a risk of air piracy or terrorism or a threat to airline
14 or passenger safety" (49 U.S.C. § 114(h)(2)) "by issuing a series of Security Directives to regulated
15 aircraft operators and Emergency Amendments to foreign air carriers." Longmire Decl., ¶ 7. These
16 Security Directives "establish two groups of individuals who are identified on separate lists that are
17 appended to the Security Directives based on an assessment of the degree of risk that [the individuals]
18 pose to aviation safety." Id. at ¶ 7. The "No Fly List" consists of "individuals who are prohibited from
19 flying altogether," and the "Selectee List" includes "individuals who must be 'selected' by air carriers for
20 additional screening before they are permitted to fly." Id. The procedures to be followed when an air
21 carrier identifies an individual on either the No Fly or the Selectee List are also outlined in the Security
22 Directives. Id. Both lists, as well as the procedures to be followed, are updated by the TSA from time
23 to time. Id. at ¶ 8.

24 These Security Directives and Emergency Amendments are plainly "orders" within the meaning
25 of section 46110(a). Security Directives are issued when the TSA determines that "additional security
26 measures are necessary to respond to a threat assessment or a specific threat against civil aviation." 49
27 C.F.R. § 1544.305(a); Longmire Decl., ¶ 5. Airlines "must comply with each Security Directive . . .
28 within the time prescribed in the Security Directive for compliance." Id. at § 1544.305(b). Emergency
Amendments are issued when the TSA determines "there is an emergency requiring immediate action
with respect to safety in air transportation" 49 C.F.R. § 1546.105(d); Longmire Decl., ¶ 5.

1 "Compliance by air carriers with both Security Directives and Emergency Amendments is mandatory."
2 Longmire Decl., ¶ 5; see also 49 C.F.R. § 1544.305(b).

3 Security Directives, Emergency Amendments, and their attachments thus constitute "orders"
4 reviewable by a Court of Appeals pursuant to section 46110. They "impose an obligation," provide a
5 "definitive statement of the agency's position," have a "direct and immediate effect" on airlines and airline
6 passengers, and envision "immediate compliance with [their] terms." Mace, 34 F.3d at 857; see also
7 Green v. Brantley, 981 F.2d 514, 519 (11th Cir. 1993). As such, they are covered by section 46110.
8 See Gilmore v. Ashcroft, No. 02-3444, 2004 WL 603530, at *3 (N.D. Cal. Mar. 23, 2004)
9 ("Because this claim squarely attacks the orders or regulations issued by the TSA and/or the FAA with
10 respect to airport security, this Court does not have jurisdiction to hear the challenge."); Los Angeles v.
11 FAA, 239 F.3d 1033, 1036 (9th Cir. 2001) ("§ 46110(a) encompasses orders relating to airline
12 safety").

13 Moreover, Plaintiffs are seeking injunctive relief from these orders, which a Court of Appeals
14 has the exclusive jurisdiction to award under 49 U.S.C. § 46110(c). See 49 U.S.C. § 46110(c)
15 (Court of Appeals has "exclusive jurisdiction to affirm, amend, modify or set aside any part of the
16 order" and may require "further proceedings").

17 Plaintiffs' claims are not saved by the exception to section 46110's exclusive jurisdiction
18 articulated in Crist v. Leippe, 138 F.3d 801, 804 (9th Cir. 1998), for "broad challenges to the
19 constitutionality of agency practices and procedures." In Crist, plaintiff claimed that FAA investigators
20 had destroyed evidence while their investigation of his pilot's certification was pending. Id. at 802-03
21 & n. 3. Here, while Plaintiffs have based their claims on the Fourth and Fifth Amendments of the
22 Constitution, they are challenging the "Defendants' actions in administering and maintaining the No-Fly
23 List." Compl., ¶¶ 104, 105, 106 [sic]. The No-Fly and Selectee Lists are administered and maintained
24 through Security Directives and Emergency Amendments issued by the TSA. See Longmire Decl., ¶¶
25 7-8. The Court cannot address Plaintiffs' claims without inquiring into the procedures and merits of
26 those Security Directives and Emergency Amendments. Plaintiffs' claims thus fall within the scope of
27 section 46110, which vests exclusive jurisdiction in the Courts of Appeals.

1 Further, in Crist, the plaintiff sought damages, which he could not have obtained from the Court
2 of Appeals. 138 F.3d at 804; see also Mace, 34 F.3d at 858 ("Mace is seeking to recover damages, a
3 remedy not found among the possibilities" in § 46110). Finally, in Crist, the court found that section
4 46110(a) did not bar plaintiff's claims because the agency's action was "not a final order on the merits
5 of [plaintiff's] claim" but was instead "a threshold determination that further inquiry was warranted."
6 138 F.3d at 804 (internal quotation marks and citation omitted).

7 Here, in contrast, Plaintiffs ask the Court "set aside" or "modify" the requirements of TSA's
8 Security Directives governing the No Fly and Selectee Lists. Plaintiffs' claims are thus "inescapably
9 intertwined with a review of the procedures and merits" of these Security Directives, triggering section
10 46110(a). Mace, 34 F.3d at 858 (quoting Green, 981 F.2d at 521). This Court, therefore, lacks
11 jurisdiction.¹⁷ Under Federal Rule of Civil Procedure 12(b)(1), the Complaint must be dismissed or, in
12 the alternative, transferred to the United States Court of Appeals, pursuant to 28 U.S.C. § 1631.

13 **II. PLAINTIFFS' FOURTH AMENDMENT RIGHTS HAVE NOT BEEN VIOLATED**

14 The Fourth Amendment protects against "unreasonable searches and seizures." "A 'search'
15 occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A
16 'seizure' of property occurs when there is some meaningful interference with an individual's possessory
17 interests in that property." United States v. Jacobsen, 466 U.S. 109, 113, (1984). A seizure of a
18

19 ¹⁷ This Court also lacks jurisdiction over Plaintiffs' claims regarding the lack of published
20 information about the No-Fly List. See, e.g., Compl., ¶¶ 18-19. The Court of Appeals has exclusive
21 jurisdiction to review the Security Directives implicated by Plaintiffs' Complaint, so "its jurisdiction to
22 review at that time any procedural irregularities . . . is also exclusive." Clark, 959 F.2d at 811.

23 To the degree that Plaintiffs contend that the TSA is required to publish the contents of its
24 Security Directives, their claims are wholly without merit. The TSA is explicitly required to prohibit
25 disclosure of information obtained or developed in carrying out security under the Aviation and
26 Transportation Security Act as well as Chapter 449 of Title 49. See 49 U.S.C. § 114(s); Chowdhury
27 v. Northwest Airlines, No. 02-2665, slip op. at 5-11 (N.D. Cal. Apr. 2, 2004) (attached as Exhibit B);
28 see generally Public Citizen v. FAA, 988 F.2d 186, 194-195 (D.C. Cir. 1993) (construing
predecessor of § 114(s)). Pursuant to these provisions, TSA has promulgated regulations specifically
prohibiting disclosure of Security Directives and Emergency Amendments, such as those at issue here.
69 Fed. Reg. 28066, 28083 (May 18, 2004) (§§ 1520.5(b)(1), (b)(2), and (b)(9)(i)); Longmire Decl.,
¶ 9.

1 person occurs when a reasonable person would not feel free to decline a request or otherwise terminate
2 an encounter. See United States v. Drayton, 536 U.S. 194, 201-02 (2002). As explained below, the
3 delay associated with checking to determine whether Plaintiffs are on the No Fly or Selectee Lists and
4 the "enhanced screening" of Plaintiffs and their luggage do not infringe upon Plaintiffs' Fourth
5 Amendment rights.

6 **A. Defendants Did Not Violate The Fourth Amendment in Determining**
7 **Whether or Not Plaintiffs Were on The No Fly or Selectee Lists**

8 The No Fly and Selectee Lists identify individuals who "may be a threat to civil aviation or
9 national security" or those who are "known to pose, or suspected of posing, a risk of air piracy or
10 terrorism or a threat to airline passenger safety . . ." 49 U.S.C. §§ 114(h)(3), (h)(2). A comparison of
11 the names of passengers to those on these lists ensures that individuals who have been identified as
12 posing a threat to aviation safety are either not cleared to board an aircraft or adequately screened prior
13 to boarding. To make these comparisons, airline officials must be able to verify every passenger's
14 identity. When a passenger's name is similar or identical to a name on the No Fly or Selectee List, the
15 comparison may require additional time, resulting in a delay for the passenger. No Fourth Amendment
16 violations occurred when Plaintiffs were delayed while their names and other identifying information
17 were compared to those on the No Fly and/or Selectee Lists.¹⁸

18 First, a request for identification, or interrogation related to identification, is not a "seizure"
19 within the meaning of the Fourth Amendment. See INS v. Delgado, 466 U.S. 210, 216 (1984)
20 ("interrogation relating to one's identity or a request for identification by the police, does not, by itself,
21 constitute a Fourth Amendment seizure"). Nor does a seizure occur when the request for identification
22 is accompanied by a request for an airline ticket or other travel documents. See Florida v. Royer, 460
23

24 ¹⁸ Common sense requires that passengers' identities be verified each time they travel by air.
25 Verification ensures that passengers are not among those who pose a threat to aviation safety. Even if
26 Plaintiffs were cleared by the screening process for one flight, screening would nevertheless be
27 necessary for later flights to ensure that persons posing a threat to passenger safety did not attempt to
28 utilize the names or identities of those who had been previously "cleared" for airline travel. Without the
consistent use of the screening process, Defendants could not adequately fulfill their obligation to
provide for the safety of persons and property traveling on flights.

1 U.S. 491, 501 (1983) (police officers' requests for defendant's airline ticket and driver's license were
2 "permissible in themselves"); United States v. \$25,000 Currency, 853 F.2d 1501, 1505 (9th Cir. 1988)
3 (plaintiff was not seized for purposes of the Fourth Amendment "at the time he was asked for his airline
4 ticket and identification"); Gilmore, 2004 WL 603530 at *4.

5 Second, even if the temporary retention of a Plaintiffs' identification could amount to a detention
6 within the meaning of the Fourth Amendment, any such detention was lawful. Retaining identification or
7 other travel-related documents for the brief period required for passengers' names and other identifying
8 information to be compared to that contained on the No Fly and Selectee List permits the airlines to
9 prevent known terrorists or hijackers from boarding an aircraft. See 49 U.S.C. § 114(h)(2) and (3).
10 Defendants' efforts to screen airline passengers for this purpose are plainly reasonable, and they fully
11 comply with the Fourth Amendment. See United States v. Vigil-Montanel, 753 F.2d 996, 998 & n. 4
12 (11th Cir. 1985) ("[T]he courts have consistently held airport security measures constitutionally justified
13 as a limited and relatively insignificant intrusion of privacy balanced against the need to protect aircraft
14 and its passengers Airport security measures are reasonable, therefore, insofar as they permit
15 government agents to determine whether a suspect presents an immediate danger to air commerce.")
16 (internal quotation marks and citation omitted); Gilmore, 2004 WL 603530 at *5.

17 Moreover, Plaintiffs consented to any such "detentions" by choosing to check-in for their flights.
18 See United States v. Miner, 484 F.2d 1075, 1076 (9th Cir. 1973) ("We think that, as suggested in
19 Davis, Miner's approaching the counter with the obvious intention of boarding a plane amounted to an
20 implied 'consent' within the meaning of Davis"). Plaintiffs were asked for their identification as part of
21 that process, and they provided it.¹⁹ Had Plaintiffs wished to avoid the screening process altogether,
22 and ensure that they would not be "detained," they should not have elected to begin the check-in
23 process at all. See Gilmore, 2004 WL 603530 at *1 (plaintiff opted out of screening process when he
24 refused to give his identification and left the airport).²⁰

25
26 ¹⁹ See Compl., ¶¶ 36, 45, 46, 55, 57, 62, 67, 68, 71, 72, 76, 81, 86.

27 ²⁰ Finally, while Plaintiffs complain about the inefficiencies associated with Defendants'
28 administration of the No-Fly List, few have availed themselves of the "Passenger Identity Verification

1 Accordingly, Plaintiffs' allegations that the Defendants violated their Fourth and Fifth
2 Amendment rights in verifying their identities during the check-in process must be dismissed.

3 **B. Defendants Did Not Violate The Fourth Amendment When**
4 **They Subjected Plaintiffs to Enhanced Security Screening**

5 Federal law requires that passengers and their belongings be screened before they are
6 permitted to board an aircraft. See 49 U.S.C. § 44901 (requiring that "screening of all passengers and
7 property that will be carried in a cabin of an aircraft . . . must take place before boarding"). Federal
8 regulations require air carriers to "refuse to transport – [] a passenger who does not consent to a
9 search . . . establishing whether the passenger is carrying unlawfully a dangerous weapon, explosive, or
10 other destructive substance." 49 U.S.C. § 44902(a); see 49 C.F.R. §§ 1540.107 and 1544.201(c).
11 A passenger's consent to search is part of air travel itself: "An agreement to carry passengers or
12 property in air transportation . . . is deemed to include an agreement that the passenger or property will
13 not be carried if consent to search for [these] purpose[s] . . . is not given." 49 U.S.C. § 44902(c).

14 The Ninth Circuit has long held that "a screening of passengers and of the articles that will be
15 accessible to them in flight does not exceed constitutional limitations" if it (1) is "no more extensive nor
16 intensive than necessary, in the light of current technology, to detect the presence of weapons or
17 explosives;" (2) is "confined in good faith to that purpose;" and (3) may be avoided by "potential
18 passengers" who elect "not to fly." United States v. Davis, 482 F.2d 893, 913 (9th Cir. 1973).

19 _____
20 Form" process offered by Defendants. This process is designed to minimize – if appropriate – the
21 delays and inconveniences encountered by those with names similar or identical to those on the No-Fly
22 List. See Compl., ¶¶ 33-34. Only three of the seven named Plaintiffs have completed this process.
23 See Compl., ¶ 50 (Shaw); ¶ 65 (Fathi); ¶ 92 (Hay). While the process does not guarantee that
24 Plaintiffs will never be subjected to any screening delays while traveling, it does appear to have
25 improved the situation for some Plaintiffs. See id. at ¶¶ 51-52 (no allegations of delays or enhanced
26 searches following Shaw's completion of the "Passenger Identity Verification Form" process); id. at ¶¶
27 93-94 (no allegations of delays or enhanced searches following Hay's completion of the "Passenger
28 Identity Verification Form" process). Moreover, the TSA recently issued a Federal Register notice in
which it indicated its intent to establish a "new version" of the Computer Assisted Passenger
Prescreening System, in part, "to avoid the kind of miscommunication and improper identification that
has, on occasion, occurred under the systems currently in use." 68 Fed. Reg. 45265, 45267-68 (Aug.
18, 2003). Until a new system is in place, however, Defendants must continue to screen all passengers
and luggage to ensure the safety of the flying public.

1 The "secondary" or "enhanced" screening of Plaintiffs – involving wand searches, physical pat-
2 downs, and luggage hand searches – conforms to the requirements outlined in Davis and does not
3 violate the Fourth Amendment.²¹ Caselaw establishes that these precise procedures, when used as part
4 of a screening process, are no more extensive or intensive than necessary, in light of current technology,
5 to detect weapons or explosives. Detailed screening of passengers and their luggage is justified in light
6 of the many ways in which dangerous items may be brought on board an aircraft. See, e.g., Torbet v.
7 United Air Lines, 298 F.3d 1087, 1089 (9th Cir. 2002) ("Firearms and explosives can be small and
8 easily concealed.") (internal quotation marks and citation omitted); United States v. Wehrli, 637 F.2d
9 408, 410 (11th Cir. 1981) ("Given the myriad of devices which threaten air safety, anything less than a
10 thorough search of Wehrli's bag would have been dangerously incomplete."). The Ninth Circuit has
11 already concluded that "a random post-x-ray search of passengers' bags for weapons or explosives
12 does not violate the Fourth Amendment" even if an x-ray scan has not revealed "anything suspicious."
13 Torbet, 298 F.3d at 1089-1090.²²

14 The descriptions in the Complaint demonstrate that the enhanced screening was confined to the
15 search for weapons and explosives. See also 49 U.S.C. §§ 44901(a), 44902(a)(1); 49 C.F.R. §§
16 1544.201-1544.213. Plaintiffs' generalized speculation that other reasons may have motivated the
17 enhanced screening (e.g., Compl., ¶¶ 19, 27) does not save their claims.²³ The specific allegations for
18

19 ²¹ See Compl., ¶¶ 40, 48, 56, 58, 59, 63, 77, 81. But even these five named Plaintiffs –
20 Green, Shaw, Fathi, Syed, and Ibrahim – were not subjected to enhanced screening every time they
21 flew. See id. at ¶ 41 (Green), ¶ 45 (Shaw), ¶ 67 (Fathi), ¶ 68 (Fathi). Other named Plaintiffs were not
22 subjected to any enhanced screening at all. See id. at ¶ 86 (Nelson), ¶¶ 89, 90 (Hay).

23 ²² Nor did any of the delays Plaintiffs endured while undergoing security screening (see
24 Compl., ¶¶ 40, 48, 56, 58, 59, 77, 81) constitute detentions. See Vigil-Montanel, 753 F.2d at 998
25 ("When a prospective airline passenger is delayed in boarding a plane while going through the security
26 search procedure, that delay does not amount to the passenger's being detained or placed in custody so
27 as to require that Miranda warnings be given before any questioning occurs."). And, as described
28 above, even if such delays were viewed as "detentions," they were in accordance with the screening of
air passengers permitted by Davis.

²³ Plaintiffs offer this Court no well-pled allegations to support an inference that Defendants' motive in subjecting Plaintiffs to enhanced screening was improper, and the Court should decline

1 the named Plaintiffs either offer no explanation for the screening – see id. at ¶ 40 (Green), ¶ 48 (Shaw);
2 ¶ 63 (Fathi); ¶ 81 (Ibrahim); allege that the screening was "random," (id. at ¶ 58), which is consistent
3 with Torbet; or link the screening to an "*S*" mark on the Plaintiffs' boarding passes – id. at ¶¶ 56, 59
4 (Fathi), ¶ 77 (Syed).

5 To the degree that airline security officials place an "*S*" on a boarding pass because they are
6 uncertain about whether a particular passenger may pose a threat to aviation safety, it is plainly
7 reasonable for those officials to take precautionary steps (such as some form of enhanced screening) to
8 ensure the safety of both other passengers and the public at large before allowing that passenger to
9 board an aircraft. In this case, uncertainty about the particular risks posed by Plaintiffs was, in and of
10 itself, a sufficient basis for Defendants' use of enhanced screening to ensure aviation safety. See Torbet,
11 298 F.3d at 1089 ("x-ray scan may be deemed inconclusive, justifying further search, even when it
12 doesn't affirmatively reveal anything suspicious").²⁴

13 Plaintiffs were also free to avoid the "enhanced screening" process by electing not to fly. See
14 United States v. Edwards, 498 F.2d 496, 500 (2d Cir. 1974) (a passenger may avoid such searches
15 "by choosing not to travel by air") (internal quotation marks and citation omitted). All of the named
16 Plaintiffs chose to travel by air, though they could have opted not to. Indeed, Plaintiffs consented to the
17 enhanced screening process.²⁵ The enhanced screening occurred after they "elect[ed]" to board their

18 _____
19 Plaintiffs' invitation to assume such motives were present. See National Black Police Ass'n v. District
20 of Columbia, 108 F.3d 346, 353 (D.C. Cir. 1997) ("the courts accord the executive branch the same
21 presumption of legitimate motive as is given the legislative branch"); Adair v. England, 183 F. Supp. 2d
22 31, 60 (D.D.C. 2002) ("government officials are presumed to act in good faith.... [p]laintiff must
23 present 'well- nigh irrefragable proof' of bad faith or bias on the part of governmental officials in order
24 to overcome this presumption") (internal quotation marks and citation omitted). Moreover, the
25 Complaint on its face fails to show any basis for claiming discrimination of any sort. The named
26 Plaintiffs include two women and five men; from different parts of the country; of different nationalities;
27 with different occupations.

28 ²⁴ Plaintiffs do not allege that Defendants were searching for evidence of illegal activity.

²⁵ See 49 U.S.C. § 44902(c) ("An agreement to carry passengers or property in air
transportation . . . is deemed to include an agreement that the passenger or property will not be carried
if consent to search for [these] purpose[s] . . . is not given."); 49 U.S.C. § 44902(a) (air carriers must

1 flights. Davis, 482 F.2d at 911. They received boarding passes, arrived at the security checkpoint,
2 and "plac[ed] [their] bag[s] on the x-ray conveyor belt." Torbet, 298 F.3d at 1089. Because they had
3 decided to board their flights, they consented to the enhanced screening which followed. See Davis,
4 482 F.2d at 913 (when a passenger "chooses to proceed" with "boarding" process, it "is essentially a
5 'consent,' granting the government a license to do what it would otherwise be barred from doing by the
6 Fourth Amendment."); United States v. Pulido-Baquerizo, 800 F.2d 899, 902 (9th Cir. 1986) ("Thus,
7 if a potential passenger chooses to avoid a search, he must elect not to fly before placing his baggage
8 on the x-ray machine's conveyor belt.") (internal citations omitted).²⁶

9 Preflight screening of passengers and luggage – including the enhanced screening about which
10 Plaintiffs complain here – is a common feature of airline travel in the United States, particularly since
11 September 11, 2001, and is in line with travelers' expectations. See Torbet, 298 F.3d at 1089;
12 \$124,570 U.S. Currency, 873 F.2d at 1242 ("Americans submit to metal detectors and x-ray devices
13 without a second thought" at airports); United States v. Hartwell, 296 F. Supp. 2d 596, 605 (E.D. Pa.
14 2003) ("Indeed, after the events of September 11, 2001, any claims by defendant that he did not know
15 of the screening requirements would be implausible."). Accordingly, by choosing to fly, and "electing"
16 to board their flights, Plaintiffs consented to the enhanced screening process employed by Defendants.²⁷

17 _____
18 "refuse to transport – [] a passenger who does not consent to a search . . . establishing whether the
19 passenger is carrying unlawfully a dangerous weapon, explosive, or other destructive substance."); see
20 also 49 C.F.R. §§ 1540.107 and 1544.201(c).

21 ²⁶ See United States v. \$124,570 U.S. Currency, 873 F.2d 1240, 1247 (9th Cir. 1989)
22 ("Passengers rushing to board a plane can fairly be said to have consented to a search for weapons and
23 explosives; any such devices found in their possession are fair game for seizure.").

24 ²⁷ Consenting to the airport screening process does not unlawfully condition the exercise of
25 Plaintiffs' right to travel "upon the relinquishment" of the Fourth Amendment right to be free from
26 unreasonable search. See \$124,570 U.S. Currency, 873 F.2d at 1247 n. 8. The enhanced screening
27 to which Plaintiffs were subjected was consistent with the Fourth Amendment. Indeed, they have no
28 right to be free from airport searches, so they have not been forced to relinquish anything to which they
were even entitled. The searches were consistent with those upheld in Davis, which the Ninth Circuit
has already concluded do not unlawfully burden the right to travel. 482 F.2d at 913. Finally, as
explained in the text, the enhanced screening also corresponds to the expectations of American air

1 **C. Defendants Did Not Violate The Fourth Amendment**
2 **When They Subjected Plaintiffs Entering The United**
3 **States From Abroad to Searches and Interrogations**

4 Persons seeking to enter the United States from abroad are subject to screening at the border
5 because the government has an obligation "to regulate the collection of duties and to prevent the
6 introduction of contraband into this country." United States v. Montoya de Hernandez, 473 U.S. 531,
7 537 (1985). Border searches also involve security concerns. See Bradley v. United States, 299 F.3d
8 197, 202 (3d Cir. 2002) ("the events of September 11, 2001, only emphasize the heightened need to
9 conduct searches' at our borders") (quoting United States v. Yang, 286 F.3d 940, 944 n. 1 (7th Cir.
10 2002)). As a result, the government's authority to search and interrogate persons at the border is very
11 broad. See, e.g., Montoya de Hernandez, 473 U.S. at 537 ("Since the founding of our Republic,
12 Congress has granted the Executive plenary authority to conduct routine searches and seizures at the
13 border, without probable cause or a warrant, in order to regulate the collection of duties and to prevent
14 the introduction of contraband into this country."). Little justification is required for the government to
15 search or detain persons at the border. See United States v. Ramos-Saenz, 36 F.3d 59, 61 (9th Cir.
16 1994) ("Routine searches at a United States international border require no objective justification,
17 probable cause or warrant."); United States v. Gonzalez-Rincon, 36 F.3d 859, 864 (9th Cir. 1994)
18 ("Thus, at the border one's expectation of privacy is less than in the interior and the Fourth Amendment
19 balance between the government's interests and the traveler's privacy rights is 'struck much more
20 favorably to the Government.'") (quoting Montoya de Hernandez, 473 U.S. at 539-40).

21 Two of the named Plaintiffs, Fathi and Ibrahim, allege that the Defendants acted unlawfully by
22 subjecting them to searches and interrogations when they were entering the United States from
23 abroad.²⁸ These actions took place in airports where Plaintiffs were deplaning from international flights,
24 _____
25 travelers.

26 ²⁸ Plaintiff Fathi alleges that after arriving from an international flight, he was interrogated by
27 customs officials who "would not let him leave," threatened him with arrest when he would not provide
28 his Social Security Number, and searched his luggage. Compl., ¶¶ 72-73. Plaintiff Ibrahim alleges
that upon his return to the United States from Cairo, he was delayed while waiting for customs officials,
who then searched his bags, by going "through all of [his] personal belongings." Id. at ¶ 83. The

1 where the airport serves as the functional equivalent of the border. See Almeida-Sanchez v. United
2 States, 413 U.S. 266, 273 (1973) (example of St. Louis airport); United States v. Nates, 831 F.2d
3 860, 861-62 (9th Cir. 1987) (Los Angeles International Airport).

4 Fathi and Ibrahim were traveling by air, arrived at U.S. border, and sought to enter the United
5 States. On that basis alone, customs and immigration officials were justified in interrogating the two
6 men and in searching their luggage. See Bradley, 299 F.3d at 203 (discussing "routine . . . patdown"
7 border search at immigration checkpoint at Newark Airport); United States v. McDowell, 250 F.3d
8 1354, 1362 (11th Cir. 2001) (some "degree of questioning and delay is necessary and to be expected
9 at entry points into the United States" in light of the "sovereign's responsibility" to control the border)
10 (internal quotation marks and citation omitted); United States v. Taghizadeh, 41 F.3d 1263, 1266 (9th
11 Cir. 1994) (customs officials have "unlimited discretion" to search incoming international packages). In
12 contrast to the screening process for domestic flights, searches at the border are not designed simply to
13 reveal "weapons and explosives," but are aimed at the discovery of "contraband," and more generally,
14 to protect the nation's security after passengers have disembarked from international flights.
15 Accordingly, Plaintiffs' claims that Defendants acted unlawfully at the border are without merit.

16 **III. PLAINTIFFS HAVE NOT BEEN UNLAWFULLY DEPRIVED OF ANY**
17 **INTERESTS PROTECTED BY THE FIFTH AMENDMENT**

18 Plaintiffs contend that Defendants have deprived them of "liberty and property interests
19 protected by the Fifth Amendment." Compl., ¶ 105. To make out a claim under the Due Process
20 Clause, Plaintiffs must show the existence of a "liberty or property interest" protected by the
21 Constitution or other law, and a deprivation of that interest. See American Mfrs. Mut. Ins. Co. v.
22 Sullivan, 526 U.S. 40, 59 (1999); Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972).

23 Plaintiffs do not specify the particular interests of which they were allegedly deprived. Their
24 claims would appear to involve their right to travel, which is a constitutionally protected liberty interest.

25 customs officials conducting the search "opened personal letters, and went through all his documents
26 and papers." Id.

27 Ibrahim also alleges that he was delayed and searched by Egyptian officials during a layover in
28 Cairo. Id. at ¶ 82. There is no allegation in the Complaint that Defendants were responsible for the
conduct of the Egyptian police officers.

1 See Jones v. Helms, 452 U.S. 412, 417-18 (1981). However, Defendants' actions do not amount to a
2 deprivation of that right. Similarly, as discussed in Point II above, Defendants' actions did not violate
3 Plaintiffs' liberty interests in their Fourth Amendment rights.²⁹

4 The right to travel is regarded as a fundamental right. See, e.g., Attorney General of New
5 York v. Soto-Lopez, 476 U.S. 898, 902-03 (1986) ("Whatever its origin, the right to migrate is firmly
6 established and has been repeatedly recognized by our cases."). Plaintiffs have the right to travel
7 throughout the United States "uninhibited by statutes, rules and regulations which unreasonably burden
8 or restrict this movement." Saenz v. Roe, 526 U.S. 489, 499 (1999) (quoting Shapiro v. Thompson,
9 394 U.S. 618, 629 (1969)) (emphasis added).³⁰

11 ²⁹ Plaintiffs also allege that airline personnel or others made statements that they were on a
12 security list "within full view of other passengers," causing them embarrassment and humiliation. See
13 Compl., ¶¶ 37, 41, 45, 54, 60, 67, 68, 72, 81, 83, 89, 90. Access to information about persons on
14 the No Fly and Selectee List is restricted to persons "with an operational need to know." See 49
15 C.F.R. §§ 1520.5(b), 1520.7. This does not include members of the public. But if an airline employee
16 decided to share such information, notwithstanding the applicable legal restrictions, such disclosure
17 would not deprive Plaintiffs of a protected liberty or property interest. Nor would such action be
18 attributable to Defendants.

17 Plaintiffs' generalized interest in their "good names" is not protected by the Due Process
18 Clause. Reputation is not a liberty or property interest protected by the Fifth Amendment. See Paul v.
19 Davis, 424 U.S. 693, 712 (1976) ("[W]e hold that the interest in reputation asserted in this case is
20 neither 'liberty' nor 'property' guaranteed against state deprivation without due process of law"); Siegert
21 v. Gilley, 500 U.S. 226, 233 (1991) ("Defamation, by itself, is a tort actionable under the laws of most
22 States, but not a constitutional deprivation."). Plaintiffs do not allege that "a right or status previously
23 recognized by state law was distinctly altered or extinguished" as a result of the allegedly defamatory
24 disclosures. Paul, 424 U.S. at 711, 702-711. While plaintiff Green alleges that she was "embarrassed"
25 when an airline "ticket agent" announced that she "needed to be cleared from 'the list'" in front of her
26 supervisor, Green does not allege that she suffered any adverse employment consequences as a result
27 of the ticket agent's actions. See Compl., ¶ 41.

25 ³⁰ The right to travel, however, does not encompass a right to obtain a boarding pass "on the
26 internet or at a computerized e-kiosk." Nor does it require that air passengers be able to check-in at
27 the airport curbside, rather than inside the airport terminal. Neither method of checking in for a flight is
28 recognized as a liberty or property interest protected by the Due Process Clause of the Fifth
29 Amendment. Moreover, even if these traveling conveniences were protected by the Due Process
30 Clause, the alleged similarities between Plaintiffs' names and those on the No Fly and Selectee Lists,

1 Here, Plaintiffs do not contend that they have been prevented from traveling; instead, they
2 assert that they have encountered delays when traveling by air. However, "burdens on a single mode of
3 transportation do not implicate the right to interstate travel." Miller v. Reed, 176 F.3d 1202, 1205 (9th
4 Cir. 1999); see also Gilmore, 2004 WL 603350 at *6. A claim to the "most convenient form of travel"
5 . . . finds no support whatsoever in [the Supreme Court's right of interstate travel jurisprudence] or in
6 the airlines' own schedules." Miller, 176 F.3d at 1206 (quoting City of Houston v. FAA, 679 F.2d
7 1184, 1198 (5th Cir. 1982)). While Plaintiffs may favor air travel for personal or business reasons,
8 they do not have a right to their preferred mode of travel, much less a constitutional right to delay-free
9 travel.

10 Even if Plaintiffs' claims implicate the right to travel, Defendants' actions have not unlawfully
11 deprived them of that right. Verifying passengers' identities so that their names may be compared to
12 those on the No Fly and Selectee Lists ensures that potential hijackers or known terrorists are not
13 allowed to board a plane and threaten hundreds of innocent passengers. It is a reasonable inquiry that
14 helps to ensure passenger safety; it does not "unreasonably burden" Plaintiffs' right to travel. See Vigil-
15 Montanel, 753 F.2d at 998 & n. 4; Gilmore, 2004 WL 603530 at *5. If airline security officials are
16 uncertain about whether a passenger poses a threat to aviation safety, it is entirely reasonable for those
17 officials to take precautionary steps (such as some form of enhanced screening) to ensure the safety of
18 both other passengers and the public at large before allowing that passenger to board an aircraft. See
19 Torbet, 298 F.3d at 1089-90. Overall, the screening process "is a governmental effort to protect
20 freedom of travel from private interference, rather than to impede the individual's right to travel." Davis,
21 482 F.2d at 913, n. 59.

22 Moreover, Defendants did not impose any significant burdens on Plaintiffs' right to travel. None
23 of the Plaintiffs missed a flight as a result of Defendants' actions, and they apparently did not spend
24 significantly more time at the airport than they would have anyway. See id. ("[F]or the vast majority
25 such a search entails at most a slight delay; it does not bar their intended flight."). By implementing
26

27 _____
28 which triggered the need for further information, establish why these conveniences were not made
available to Plaintiffs.

1 reasonable measures that are no more extensive than necessary to prevent air piracy and to detect the
2 presence of weapons and explosives, the government does not "unreasonably burden or restrict" the
3 right to travel. Id.; Gilmore, 2004 WL 603530 at *6-7.

4 **CONCLUSION**

5 For the foregoing reasons, Defendants' Motion to Dismiss should be granted.

6 Dated: June 7, 2004

PETER D. KEISLER
Assistant Attorney General

8 JOHN MCKAY
United States Attorney

9 BRIAN C. KIPNIS
Civil Chief
United States Attorney's Office

11
12 s/ Diane Kelleher

13 AMY A. RUGGERI
Assistant Chief Counsel

14 CARLA J. MARTIN
Senior Attorney

15
16 Transportation Security Administration
17 Department of Homeland Security
601 S. 12th Street
18 Arlington, VA 22202

SANDRA M. SCHRAIBMAN
D.C. Bar # 188599
JOSEPH W. LOBUE, D.C. Bar # 293514
DIANE KELLEHER, N.Y. Bar
U.S. Department of Justice
20 Massachusetts Avenue, N.W., Rm. 7300
Washington, D.C. 20530

Telephone: (202) 514-4640
Fax: (202) 616-8470

Attorneys for Defendants

27
28 Defendants' Motion to Dismiss and
Memorandum of Points and
Authorities in Support Thereof
Green v. TSA, CV 04-0763Z

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

1 **CERTIFICATE OF SERVICE**

2 I certify that, on June 7, 2004, I electronically filed the foregoing with the Clerk of the Court
3 using the CM/ECF system which will send notification of such filing to the following:

4 Reginald T. Shuford
5 Catherine Y. Kim
6 ACLU
7 125 Broad Street, 18th Floor
8 New York, NY 10013

9 Aaron Kaplan
10 ACLU of Washington
11 705 Second Avenue, Suite 300
12 Seattle, Washington 98104

13 Michael E. Kipling
14 Summit Law Group PLLC
15 315 Fifth Avenue South, Suite 1000
16 Seattle, Washington 98104

17 s/ Diane Kelleher
18 DIANE KELLEHER

19
20
21
22
23
24
25
26
27
28 Defendants' Motion to Dismiss and
Memorandum of Points and
Authorities in Support Thereof
Green v. TSA, CV 04-0763Z

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