HONORABLE THOMAS S. ZILLY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

MICHELLE D. GREEN, et al.,	)	
	)	
Plaintiffs,	)	**NO. C04-763 Z**
	)	
v.	)	**REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS**
	)	
TRANSPORTATION SECURITY ADMINISTRATION, et al.,	)	
	)	(Note on Motion Calendar for: July 23, 2004)
Defendants.	)	

PRELIMINARY STATEMENT

As plaintiffs correctly allege, the Transportation Security Administration (TSA) has issued Security Directives that establish a "No Fly List" consisting of individuals who are prohibited from flying altogether and a "Selectee List" of individuals "selected" for additional security screening. Plaintiffs' Complaint ("Compl."), ¶¶ 17, 21; Declaration of Lee Longmire, ¶ 7. Plaintiffs ask this Court to declare that these Directives are unconstitutional, and to order TSA to "remedy immediately" the alleged constitutional "defects in the maintenance, management, and dissemination of the No-Fly List." Compl. (Prayer for Relief). Under 49 U.S.C. § 46110, however, the courts of appeals have exclusive jurisdiction to modify or set aside "orders" issued by the Administrator of TSA with respect to his security duties and powers. Because the Security Directives at issue here are plainly "orders," this Court lacks jurisdiction to "modify" or "set aside" those Directives.

Plaintiffs' arguments to the contrary are uniformly without merit. Their contention that the term "order" encompasses only adjudicative proceedings relating to a single individual in which "findings of fact" have been made is wholly irreconcilable with the plain language of the statute, and

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has been repeatedly rejected by the Ninth Circuit. Similarly, notwithstanding plaintiffs' attempt to characterize their claims as a "broad constitutional challenge" to practices falling outside the scope of section 46110, their complaint plainly seeks declaratory and injunctive relief modifying and/or setting aside specific Security Directives and the requirements they impose with respect to the No Fly and Selectee Lists. As section 46110 reflects, the courts of appeals alone are authorized to grant such relief, regardless of whether plaintiffs' claims rest on the Constitution.

Plaintiffs' claims also fail on the merits. Plaintiffs argue, at some length, that airport screening procedures constitute a search and/or seizure that is subject to the Fourth Amendment, a point which has been firmly established in this Circuit since *United States v. Davis* was decided thirty years ago, and which defendants have never disputed. However, as the Ninth Circuit has held, airport screening procedures are "administrative" searches designed not to "investigate" crime, but instead to prevent air piracy and protect airline passengers. Screening procedures are permissible even in the absence of "reasonable suspicion," and comply with the Fourth Amendment so long as they are necessary to protect airline passengers and apply only to those who choose to board a flight.

Plaintiffs have also failed to allege a deprivation of any property or liberty interest protected by the Due Process Clause. Contrary to the claims asserted in their brief, plaintiffs have no constitutionally protected liberty or property interest in delay-free air travel nor any right to board an aircraft without a hand-search of their luggage. In the absence of such a constitutionally protected interest, their Complaint fails to state a claim for relief under the Due Process Clause.

ARGUMENT

I. PLAINTIFFS' CLAIMS SHOULD BE DISMISSED FOR LACK OF JURISDICTION

As defendants previously demonstrated, see Defendants' Motion to Dismiss ("Def. Mot.") at 9-12, the courts of appeals have "*exclusive* jurisdiction to affirm, amend, modify or set aside" any part of an "order" by the Administrator of the TSA with respect to "his security duties and powers." 49 U.S.C. § 46110(a) and (c) (emphasis added). The term "order" broadly applies to "an[y] decision which imposes an obligation, denies a right, or fixes some legal relationship." *Mace v. Skinner*, 34 F.3d 854, 857 (9th Cir. 1994). "[I]f the order provides a 'definitive' statement of the agency's position, has a 'direct and immediate' effect on the day-to-day business of the party asserting

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wrongdoing, and envisions 'immediate compliance with its terms,' the order has sufficient finality to warrant the appeal offered by section [46110]." *Id.*

The Directives unquestionably contain a "definitive statement" of TSA's position; indeed, the governing regulations specifically mandate compliance. 49 C.F.R. §§ 1544.305(b) and 1546.105(d). Moreover, as plaintiffs themselves suggest (Pl. Opp. at 2), the Directives impose obligations that have a "direct and immediate" effect on passengers. Thus, the Directives are plainly "orders" under section 46110. *Gilmore v. Ashcroft*, 2004 WL 603530** 2-3 (N.D. Cal. 2004).

Plaintiffs' arguments to the contrary are wholly without merit. First, plaintiffs suggest, without citation of authority, that section 46110 does not apply to constitutional claims. Pl. Opp. at 4-6. However, both the Ninth Circuit and other circuits have repeatedly held that their exclusive jurisdiction under section 46110 applies to constitutional claims. *E.g.*, *Tur v. FAA*, 104 F.3d 290, 291-292 (9th Cir. 1997) (court of appeals has exclusive jurisdiction over due process challenge to NTSB order); *accord*, *Greenwood v. FAA*, 28 F.3d 971, 975 (9th Cir. 1994); *Southern California Aerial Advertisers v. FAA*, 881 F.2d 672, 676 (9th Cir. 1989); *Green v. Brantley*, 981 F.2d 514, 517 (11th Cir. 1993); *Merritt v. Shuttle, Inc.*, 187 F.3d 263, 270-271 (2d Cir. 1999).

Moreover, the Ninth Circuit has specifically rejected the notion that the court of appeals lacks jurisdiction to review constitutional challenges that have not been presented to the agency. *Gilbert v. NTSB*, 80 F.3d 364 (9th Cir. 1996). In *Gilbert*, the plaintiff alleged that he was "denied due process by the procedures used by the FAA and the NTSB to suspend his [pilot's] license." *Id.* at 366. He sought review under 49 U.S.C. § 1153(a), which provides, in relevant part, that "the court may consider an objection to an order of the Board only if the objection was made in the proceeding conducted by the Board or if there was a reasonable ground for not making the objection in the proceeding." 49 U.S.C. § 1153(b)(4). The court concluded that a "reasonable ground for not making the objection" existed because the NTSB "lacks authority to review [constitutional] claims." *Gilbert*, 80 F.3d at 367. "Thus, in conjunction with a properly appealed adjudicative order from the NTSB, we may consider constitutional claims, regardless of whether the petitioner presented the claims to the NTSB." *Id.* The statute at issue here likewise authorizes review only if an objection was made before the agency or there was "reasonable ground" for not making it. 49 U.S.C. § 46110(d). Since

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the Security Directives were not published for notice and comment, there was clearly a "reasonable ground" here for plaintiffs' failure to make an objection. Thus, as in *Gilbert*, the courts of appeals may consider plaintiffs' claims "regardless of whether [plaintiffs] presented the claims to the [TSA]."

Plaintiffs alternatively argue that section 46110 applies only where the agency has made "findings of fact" in "administrative proceedings in which the aggrieved party had an opportunity to present her claims." Pl. Opp. at 5. In effect, plaintiffs insist that section 46110 applies only where TSA has adjudicated a specific claim presented by a specific individual, and made "findings of fact" to support its decision. *Id.* at 7. However, section 46110, on its face, authorizes judicial review of "orders" issued in non-adjudicatory proceedings. In that regard, the statute authorizes 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). Subsection 114(l) provides, in relevant part, as follows:

> **(l) Regulations. - - (1) In general.** - - The [Administrator of TSA] is authorized to issue, rescind, and revise such regulations as are necessary to carry out the functions of the Administration.
>
> **(2) Emergency Procedures. - - (A) In general.** - - 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 for comment* . . . .

49 U.S.C. § 114(l) (emphasis added). Thus, section 114(l) authorizes the Administrator of the TSA to issue regulations and security directives and, where appropriate, to do so without providing notice and an opportunity for comment. Nothing in this subsection authorizes the type of adjudicatory proceeding described in plaintiffs' brief; yet Congress plainly intended that an "order" issued under section 114(l) would be subject to review in the court of appeals under section 46110. Thus, the statute authorizes judicial review of not only adjudicatory decisions, but also regulations and security directives, including those issued without providing notice and an opportunity for comment.[1]

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[1] The legislative history also reflects that Congress intended to confer exclusive jurisdiction on the court of appeals to review administrative decisions completely divorced from any form of adjudication. The reference to "subsection (l) or (s) of section 114" was added by Pub. L. 108-176, § 228, 117 Stat. 2490, 2532 (Dec. 12, 2003). As part of the same amendment, Congress extended the reach of Section 46110 to encompass orders issued in whole or in part under Part A and Part B of Subtitle VII of Title 49. As the Conference Committee explained,

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Congress' understanding of the scope of the term "order" is fully consistent with the long-standing view of the Ninth Circuit that the exclusive jurisdiction of the court of appeals extends not only to adjudicative determinations, but also to other final agency actions, including "rules":

> The use of the word "order" in section 1486(a) [the predecessor of section 46110] is somewhat problematic. When reviewing administrative action, we are required to differentiate between "orders" and "rules." *Compare* 5 U.S.C. § 553 *with* 5 U.S.C. § 554. Those who deal closely with administrative law have developed labels that include "orders," "rules," "hybrid rules," "policies," and "actions." [citation omitted]. Thus, it would be quite easy to become mired in tautological debate when considering the extent of jurisdiction under section 1486(a).
>
> Several other circuits have had to interpret section 1486(a). The Fourth, Seventh, Eighth, and District of Columbia Circuits have held that section 1486(a) is not to be given a narrow, technical reading; instead, it is to be interpreted expansively. [citations omitted]. We agree with these courts that "the purposes of special review statutes - - coherence and economy - - are best served if courts of appeals exercise their exclusive jurisdiction over *final agency actions*." * * * [W]e hold that section 1486(a) does provide us with jurisdiction over the FAA's final determination. In this case, as discussed below, that final determination constitutes a rule.

San Diego Sports Center, Inc. v. FAA, 887 F.2d 966, 968-969 (9th Cir. 1989) (emphasis by court); *accord*, *Hawaii Helicopter Operators Association v. FAA*, 51 F.3d 212, 213 (9th Cir. 1995) (exercising jurisdiction under section 46110 over petition for review of "special operating rules, procedures and limitations for airplane and helicopter air tour operators").

The Ninth Circuit has also repeatedly rejected the notion advanced by plaintiff here that section 46110 and its predecessor apply only where the agency has made findings of fact after a formal hearing. *San Diego Air Sports Center, Inc., v. FAA*, 887 F.2d at 969 (letter from the FAA that says that parachuting will no longer be allowed in the San Diego Terminal was a final "order" even though "[t]he record in this appeal [] consists of little more than the letter"); *Southern California Aerial Advertisers' Ass'n v. FAA*, 881 F.2d at 676 (letter from the FAA prohibiting fixed wing aircraft from traveling through shoreline area near Los Angeles airport was a final "order" even though the "entire administrative record in this case consists of the [] letter and the FAA's proposal

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this change was intended to "clarify that decisions to take actions authorizing airport development projects are reviewable in the circuit courts of appeals under section 46110, notwithstanding the nature of the petitioner's objections to the decisions." H. Conf. Rpt. 108-334, 108th Cong. 1st Sess. 153, *reprinted at* 2003 U.S.C.C.A.N. 2212, 2255-2256.

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for [Special Federal Aviation Regulation] 51"); *cf. Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 572 (9th Cir. 1998) (court of appeals has jurisdiction under section 46110(a) to review NEPA challenge to "record of decision" implementing Los Angeles airport enhancement project); *see also*, *Atorie Air, Inc., v. FAA*, 942 F.2d 954, 960 (5th Cir. 1991), *quoting in part*, *Nevada Airlines v. Bond*, 622 F.2d 1017, 1020 n.5 (9th Cir. 1980) ("To be deemed 'final,' an order under section 1486(a) need not be the culmination of lengthy administrative proceedings. It need only be an agency decision which 'imposes an obligation, denies a right, or fixes some legal relationship.'").[2]

Citing *Mace v. Skinner*, 34 F.3d 854 (9th Cir. 1994) and *Crist v. Leippe*, 138 F.3d 801 (9th Cir. 1998), plaintiffs next contend that their claims should be viewed as a "broad constitutional challenge" to the practices and procedures of the TSA (rather than any specific "orders"), and therefore fall outside the scope of section 46110. Pl. Opp. at 8-9. However, unlike *Mace* and *Skinner*, plaintiffs here do not seek an award of damages. Instead, they seek declaratory relief and an injunction which would require the agency to modify the requirements of the Security Directives to "remedy immediately" the alleged constitutional deficiencies. As we have shown, the courts of appeals have exclusive jurisdiction to grant such relief.

Moreover, in contrast to *Mace*, plaintiffs here specifically challenge the constitutionality of the security procedures that TSA requires airlines to follow with respect to TSA's No Fly List. Pl. Opp. at 15 ("Plaintiffs allege that the government mandates the treatment that these parties [airline employees] must impose on individuals identified by the No Fly Lists."). As plaintiffs allege, the No Fly Lists to which plaintiffs object are disseminated "as attachments to security directives and emergency amendments to commercial airlines in the United States." Compl., ¶ 21, see also *id.*, ¶ 17 (describing No Fly and Selectee lists). The Assistant Administrator for Operations Policy of the TSA has likewise confirmed that the No Fly List and Selectee List in question are appended to Security Directives which "prescribe the procedures to be followed and the specific security

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[2] Plaintiffs' reliance on *Morris v. Helms*, 681 F.2d 1162 (9th Cir. 1982), for a contrary rule, *see* Pl. Opp. at 6, is misplaced. *Morris* rested on a specific statute that required, in relevant part, that "every order . . . shall set forth the findings of fact upon which it is based." 681 F.2d at 1163. Section 114(l) does not contain such a requirement. 49 U.S.C. § 114(l); *see* p. 4, *supra*.

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measures to be taken by air carriers when individuals identified on the No Fly or Selectee Lists seek to board an aircraft." Longmire Declar., ¶ 7. Thus, plaintiffs' constitutional challenge is directed not at a broad array of TSA policies and procedures, but instead at the requirements imposed on airlines in specific Security Directives that are plainly "orders" within the meaning of section 46110.[3]

II. DEFENDANTS HAVE FULLY COMPLIED WITH THE FOURTH AMENDMENT

Plaintiffs argue that passenger screening procedures employed at an airport constitute a "search" and/or "seizure" that is subject to the requirements of the Fourth Amendment. Pl. Opp. at 15-18. Defendants agree that "[a]irport security screening procedures must comply with the Fourth Amendment." *Torbet v. United Airlines*, 298 F.3d 1087, 1089 (9th Cir. 2002). "The procedures must therefore be reasonable." *Id.* It does not follow, however, that a passenger seeking to board an aircraft cannot be questioned, or otherwise delayed or detained, in the absence of "articulable reasonable suspicion of criminal activity" that satisfies the standards for "investigative stops," as

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[3] Plaintiffs' suggestion that the Court may not consider material outside of the pleadings on a Rule 12(b)(1) motion is simply erroneous, and conflicts with established law. *See e.g.*, *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000); *Coalition for Underground Expansion v. Mineta*, 333 F.3d 193, 198 (D.C. Cir. 2003). Plaintiffs also seek discovery regarding a variety of matters that are either undisputed or wholly immaterial to the jurisdictional question before the Court. *See* Declaration of Reginald T. Shuford, ¶ 3. For example, the "authorship" of the Security Directives (*id.*) is completely immaterial. Moreover, defendants concede that plaintiffs were not given notice and an opportunity to be heard before the Security Directives were adopted. Defendants also acknowledge that there is no procedure available for plaintiffs to file constitutional challenges administratively and, for purposes of defendants' Rule 12(b)(1) motion, the Court may assume that the Security Directives are constitutionally deficient and do not adequately "address the problems plaintiffs have raised." For the reasons stated in the text, none of this information has any bearing on the Court's jurisdiction. Finally, while the Security Directives themselves *are* pertinent to the Court's jurisdiction, federal law prohibits disclosure of the Directives to plaintiffs in discovery. 49 U.S.C. § 114(s); 69 Fed. Reg. 28066, 28083 (May 18, 2004) (sections 1520.5(b)(1), (b)(2), and (b)(9)(i)); see Longmire Declar., ¶ 9; *see generally Chowdhury v. Northwest Airlines*, No. 02-2665 (N.D. Cal. 2004) (Slip Op. at 4) (attached as Ex. B to Defendants' Motion to Dismiss) ("The statute commands the TSA to adopt regulations prohibiting disclosure of information which would be 'detrimental to the security of transportation' if disclosed. 49 U.S.C. § [114](s). The statute does not make an exception for civil litigation."). Nonetheless, if the Court's resolution of this case would be aided by a review of the Security Directives in question, defendants are prepared, at the Court's direction, to submit a copy of the Directives for review by the Court *ex parte* and *in camera*.

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plaintiffs urge here. Pl. Opp. at 18-19. In fact, the "reasonable suspicion" standard established in the Supreme Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny is "inapposite to the validity of pre-boarding screening searches of passengers and luggage." *United States v. Davis*, 482 F.2d 893, 905 (9th Cir. 1973). As the Ninth Circuit explained in *Davis*, under *Terry*, a police officer's right to search an individual "depends upon the officer's possession of specific, articulable facts sufficient to satisfy a reasonably prudent person that a particular individual is in fact armed and dangerous." 482 F.2d at 906. In contrast, airport screening procedures may be, and typically are, employed without any basis for suspicion. Indeed, in *Davis*, the court upheld the constitutional validity of an airport search even though it found that the airport security officer had "no individualized basis for the search at all, much less specific and articulable facts that would justify a reasonably prudent man in believing that appellant was about to commit a crime or that he was carrying a weapon." *Id.* at 907. Thus, plaintiffs' contention that the No Fly Lists fail to establish "reasonable suspicion" (Pl. Opp. at 18-19) has no constitutional significance.

Instead, as the court in *Davis* concluded, "[t]he appropriate standards for evaluating the airport search program under the Fourth Amendment are found in a series of Supreme Court cases relating to 'administrative' searches." *Id.* at 908. The "essence" of these cases is "that searches conducted as part of a general regulatory scheme in furtherance of an administrative purpose, rather than as part of a criminal investigation to secure evidence of a crime, may be permissible under the Fourth Amendment though not supported by a showing of probable cause directed to a particular place or person to be searched." *Id.* The "administrative purpose," in the case of airport screening programs is "to prevent the carrying of weapons and explosives aboard aircraft, and thereby to prevent hijackings." *Id.* at 908. "To pass constitutional muster, an administrative search must meet the Fourth Amendment's standard of reasonableness," *id.* at 910, which, in this context, "requires a balancing of an individual's right to be free of intrusive searches with society's interest in safe air travel." *United States v. Pulido-Baquerizo*, 800 F.2d 899, 901 (9th Cir. 1986).

Here, plaintiffs allege that airline officials requested and obtained documents identifying plaintiffs, and retained those documents for twenty to forty-five minutes to check whether plaintiffs were amongst those individuals "known to pose, or suspected of posing, a risk of air piracy or

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terrorism or a threat to airline or passenger safety."[4] 49 U.S.C. § 114(h)(2). This process is required not just for plaintiffs, but for *all* passengers. *Id.*, § 114(h)(3). It is not unreasonable under the Fourth Amendment merely because more time is required to make this determination in circumstances where a passenger, such as plaintiffs here, has a name that is "similar or identical to names on the No-Fly List." Compl., ¶¶ 3, 95. Plaintiffs do not allege that the officials in question retained their identification for any purpose other than the administrative purposes identified in the statute, and the twenty to forty-five minute delays experienced by plaintiffs are not so "intrusive" as to outweigh the "grave and urgent" need to "prevent airline hijacking." *Davis*, 482 F.2d at 910. Similarly, neither the "wanding" procedure nor the hand search of plaintiffs' carry-on baggage is unreasonable given the threat of airline terrorism. *Pulido-Baquerizo*, 800 F.2d at 901-902 ("visual inspection and limited hand search of luggage . . . is a privacy intrusion we believe free society is willing to tolerate").[5] For all of these reasons, plaintiffs have failed to state a claim for relief under the Fourth Amendment.[6]

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[4] Plaintiffs assert in their brief that "the conduct specified in the Complaint may last up to three hours." Pl. Opp. at 18. In support of this allegation, plaintiffs cite paragraph 25 of the Complaint which alleges, in relevant part, that the "interrogation" of unidentified "innocent passengers" has taken "up to three hours." Compl., ¶ 25. However, as plaintiffs acknowledge, the named plaintiffs *in this case* allege that the identification procedure "may last up to forty-five minutes." Pl. Opp. at 17; see Compl., ¶¶ 36-37, 41, 45, 47, 55, 81, 86, 89-91.

[5] The minimally intrusive procedures allegedly followed here are not even remotely analogous to the repeated arrest at gunpoint and imprisonment of innocent civilians found to be unconstitutional in *United States v. Mackey*, 387 F. Supp. 1121 (D. Nev. 1975), and in *Rogan v. City of Los Angeles*, 668 F. Supp. 1384, 1395 (C.D. Cal. 1987). In any event, as discussed in the text, the standards applicable to airport passenger screening differ substantially from those applicable in other contexts. Consequently, plaintiffs' reliance on the reasoning of *Mackey* and *Rogan* to support their Fourth Amendment claims here (Pl. Opp. at 20-21) is misplaced.

[6] Plaintiffs suggest that they did not consent to "non-routine" searches of their baggage. Pl. Opp. at 22-23. In addition, one of the plaintiffs alleges that, *after* he "proceeded through security," he was told by a TSA employee that, if he refused "secondary screening," "we'll let the police handle it." Compl., ¶ 56. Based on this allegation, plaintiffs insist that consent was not provided. As the Ninth Circuit held in *Pulido-Baquerizo*, however, "[t]he requirement in *Davis* of allowing passengers to avoid the search by electing not to fly does not extend to a passenger who has already submitted his luggage for an x-ray scan." 800 F.2d at 902. Thus, "[t]o avoid search, a passenger must elect not to fly before placing his bag on the x-ray belt." *Torbet v.*

III. PLAINTIFFS HAVE NOT ALLEGED A DEPRIVATION OF ANY PROPERTY OR LIBERTY INTEREST PROTECTED BY THE DUE PROCESS CLAUSE

"The first inquiry in every due process challenge is whether plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *American Manufacturers Mutual Insurance Company*, 526 U.S. 40, 59 (1999). "Only after finding the deprivation of a protected interest do we look to see if the [Government's] procedures comport with due process." *Id.* Because plaintiffs have not met this threshold requirement, their Fifth Amendment claims must be dismissed as a matter of law.

"[I]njury to reputation alone is not sufficient to establish a deprivation of a liberty interest protected by the Constitution." *Ulrich*, 308 F.3d 968, 982 (9th Cir. 2002). Thus, even assuming plaintiffs can be "stigmatized" merely because they share a name with someone on a No Fly List, reputation harm alone is not actionable under the Fifth Amendment. Instead, they must demonstrate "the denial of 'some more tangible interest such as employment,' or the alteration of a *right* or *status* recognized under state law." *Id.* Under the "stigma-plus" test, there must be a "deprivation of liberty or property by the state that directly affects the plaintiffs' *rights*." *Miller v. California*, 355 F.3d 1172, 1178 (9th Cir. 2004). In *Miller*, for example, the plaintiff did not have a "substantive due process right to family integrity or association as noncustodial grandparents of children who are dependents of the court, nor of a liberty interest in visiting their grandchildren . . . ." *Id.* at 1176. Consequently, even if he had been "falsely named as a suspected child abuser on an official government index," the court held "there is no 'plus' here on account of an asserted substantive due process right to family integrity or association, or on account of a liberty interest in visitation as a de facto parent." *Id.* at 1178; *accord*, *Cooper v. Dupnik*, 924 F.2d 1520, 1536 (9th Cir. 1991), *aff'd in relevant part on rehg.* 963 F.2d 1220, 1235 n. 6 (9th Cir.) (*en banc*), *cert. denied* 506 U.S. 953 (1992) (defamation not actionable unless "coupled with the denial of one of the provisions of the Bill

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United Airlines, 298 F.3d at 1089. Moreover, "an x-ray scan may be deemed inconclusive, justifying further search, even when it doesn't reveal anything suspicious." *Id.* This same plaintiff alleges that he was compelled to provide his social security number upon his return to the United States from Tanzania. Compl. ¶ 73. As defendants previously explained, the Government is empowered to interrogate persons, and to conduct routine searches and seizures at the border, with or without the consent of the individuals involved. Def. Mot. at 19-20.

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of Rights or the extinguishment of a right previously recognized by state law").

Plaintiffs' claim here rests entirely on their contention that the Government has "stigmatized" them by identifying them on the No Fly List and, in so doing, "altered a right or status recognized by state law." Pl. Opp. at 10 (quoting *Ulrich*, 308 F.3d at 982).[7] They suggest that their status has been "altered" because they "must submit to significant delays and clearance procedures before obtaining their boarding passes," and are subjected to non-routine "enhanced searches." Pl. Opp. at 12. However, as the Ninth Circuit explained in *Miller* and *Cooper*, such a claim would be viable only if plaintiffs had a "right" under state or federal law to board an aircraft without "significant" (*i.e.*, 20-45 minute) "delays and clearance procedures" and without "enhanced searches" (*i.e.*, wanding and a hand search of their baggage). As defendants established in Point II above, however, no such right exists. Because plaintiffs have no right to delay-free air travel, the delays alleged here cannot establish a deprivation of a liberty or property interest protected by the Due Process Clause.[8]

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[7] Plaintiffs have failed to identify any "property" interest of which they have been deprived. Although plaintiffs suggest that they can "imagine" "far-reaching repercussions in their personal and professional lives," Pl. Opp. at 13, none of the plaintiffs allege that *they* have experienced such imagined "repercussions." Moreover, it is undisputed that plaintiffs have failed to allege any infringement of their right to travel, Def. Mot. at 20-23; Pl. Opp. at 10, and, as explained in Point II above, the screening procedures to which plaintiffs object are fully consistent with the requirements of the Fourth Amendment.

[8] None of the other cases relied upon by plaintiffs (see Pl. Opp. at 11-13) are inconsistent with the Ninth Circuit's holding in *Miller*. As the Supreme Court has explained, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), upon which plaintiffs rely here, involved "governmental action [that] deprived the individual of a right previously held under state law, the right to purchase or obtain liquor in common with the rest of the citizenry." *Paul v. Davis*, 424 U.S. 693, 708 (1976) (discussing the court's prior opinion in *Constantineau*). Similarly, *Cooper v. Dupnik* involved defamatory statements that were "intertwined with" the plaintiff's "unconstitutional arrest (in violation of the Fourth Amendment)," 924 F.2d at 1534, and, as plaintiffs acknowledge, *Stevens v. Rifkin*, 608 F. Supp. 710, 727 (N.D. Cal. 1984), involved a violation of the plaintiff's constitutional right to an impartial jury. Two other cases involved a loss of employment, *Ulrich*, 308 F.3d at 983 (decision not to rehire an employee); *Vanelli v. Reynolds School District No. 7*, 667 F.2d 773, 778 (9th Cir. 1982) ("mid-year dismissal" from employment); and the remaining case involved the deprivation of property interests explicitly protected by a California statute. *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1316 (9th Cir. 1989) (plaintiff deprived of "business goodwill" which California statute defines as "property").

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Even if plaintiffs had alleged a deprivation of a protected liberty or property interest, the procedural protections afforded by the Government fully conform with due process requirements. As plaintiffs' Complaint reflects, each of the plaintiffs were specifically offered an opportunity to establish that they were not on the No Fly List and did not pose a threat to civil aviation simply by presenting appropriate forms of identification at the airport. Each of the named plaintiffs took advantage of these procedural protections, and were successful in securing a boarding pass within a short period of time (*i.e.*, 20-45 minutes). In addition, as plaintiffs acknowledge, the TSA has established specific procedures designed to minimize any delays encountered at the airport where an individual's name is similar or identical to those of individuals on the No Fly List, and several of the plaintiffs have taken advantage of those procedures. Compl., ¶¶ 50, 65, 67, 92. Consequently, plaintiffs' suggestion that the government has failed to provide "adequate procedural protections" to "guard against a mistaken deprivation" (Pl. Opp. at 9) is groundless.

CONCLUSION

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

Respectfully submitted,

Dated: July 22, 2004

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I certify that, on July 22, 2004, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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